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The New Jersey School Boards Association, a federation of boards of education, provides training, advocacy and support to advance public education and promote the achievement of all students through effective governance.

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United States Supreme Court

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3rd Circuit Court of Appeals

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New Jersey District Court

Civil Rights – Religious Discrimination

District Court determined that former teacher failed to assert facts sufficient to find that the mayor engaged in a conspiracy to limit school district employees to a specific religion. ***El-Hewie v. Paterson Pub. Sch. Dist.***, No. 13-5820 (D.N.J. Sept. 16, 2014)

Conscientious Employee Protection Act

District Court denied Board's motion to dismiss for failure to state a claim despite employee's supervisory role, which included disclosing and objecting to the activities of subordinates. Employee had reasonable belief that Board's alleged refusal to discipline the relative of a board member was in violation of law, rule, or regulation. ***Bergland v. Gray,*** Dkt. No. 14-1972; (D.N.J. Oct. 17, 2014)

Conspiracy

District court determined that non-tenured principal, who alleged that the board and other officials used their public positions to punish the principal and manufactured false disciplinary charges against her, supported the allegations with sufficient facts to defeat a motion to dismiss. ***Yuli v. Lakewood Bd. of Educ.***, Dkt. No. 13-4617; (D.N.J. Oct. 16, 2014)

In determining board's motion to dismiss, the district court found no indication that, in allegedly diverting public funds to private religious schools or discriminating against women, neither the superintendent, president, nor board attorney acted in their official capacity so as to engender the protection of the "intracorporate conspiracy doctrine." The doctrine bars claims that are related to a defendant's actions that made in an official capacity. ***Yuli v. Lakewood Bd. of Educ,*** Dkt. No. 13-4617; (D.N.J. Oct. 16, 2014)

Due process

Substitute teacher who was arrested based on allegation of physical assault upon a student and

ultimately acquitted of all charges, was afforded due process despite the fact that the arresting officer failed to interview all potential witnesses. ***Jenkins v. Orange Police Dept.,*** Dkt. No. 2:11-1555; (D.N.J. Sept. 29, 2014)

Equal Protection

Non-tenured principal demonstrated sufficient facts to defeat a motion to dismiss file by the board where the principal alleged that the board allegedly orchestrated false disciplinary proceedings, refused to provide necessary funding, and intentionally understaffed the high school and otherwise treated her and other female staff members negatively because of gender. ***Yuli v. Lakewood Bd. of Educ.***, Dkt. No. 13-4617; (D.N.J. Oct. 16, 2014)

False Arrest

District Court dismissed complaint by substitute teacher alleging false arrest and violation of due process. Teacher was arrested and charged with aggravated assault after physically removing a disruptive student from his classroom, allegedly via headlock. School administrators did not arrest or detain the teacher. However, the arresting officer had sufficient probable cause to believe a crime had been committed, despite the teacher's eventual acquittal. ***Jenkins v. Orange Police Dept.,*** Dkt. No. 2:11-1555; (D.N.J. Sept. 29, 2014)

First Amendment

District court declined to dismiss principal's claim of retaliatory discharge based on a violation of her 1st Amendment rights. Because the complaint and responsive motions to dismiss both failed to indicate whether principal spoke as a public employee or private citizen, questions of fact remained as to the context of the contested comments accordingly, dismissal would be premature. ***Yuli v. Lakewood Bd. of Educ.***, Dkt. No. 13-4617; (D.N.J. Oct. 16, 2014)

Statements of a non-tenured principal that school officials diverted public funds to private religious institutions, when combined with allegations of several retaliatory employment actions were sufficient to forma a causal nexus in order to defeat motion to dismiss. ***Yuli v. Lakewood Bd. of Educ***, Dkt. No. 13-4617; (D.N.J. Oct. 16, 2014)

Jurisdiction

District court determined that claimed loss of stipend was not a matter that was more properly brought before the Commissioner of Education where no law requires that such claim be brought before the Commissioner and exhaustion of remedies is not a prerequisite for a 42 *U.S.C.* §1983 claim. ***Bergland v. Gray***, Dkt. No.: Civ No. 14-1972; (D.N.J. Oct. 16, 2014)

New Jersey Law Against Discrimination

Substitute teacher failed to establish that he performed up to the district's legitimate employment expectations so as to establish a *prima facie* case of discrimination where he allegedly placed a disruptive student in a headlock while physically removing the student from the classroom. In addition, the district demonstrated a legitimate non-discriminatory basis for the employment action of removing the teacher from the employment rolls. ***Jenkins v. Orange Police Dept.,*** Dkt. No. 2:11-1555; (D.N.J. Sept. 29, 2014)

NJLAD – Aiding and Abetting

In determining board's motion to dismiss, the district court found sufficient facts to support the allegation that the board attorney, superintendent, and board president actively and passively encouraged discriminatory acts while performing in a supervisory capacity. Officials allegedly orchestrated false disciplinary proceedings, refused to provide necessary funding, and intentionally understaffed the high

school as reprisals for non-tenured principal's whistle-blowing activities. ***Yuli v. Lakewood Bd. of Educ.***, Dkt. No. 13-4617; (D.N.J. Oct. 17, 2014)

NJLAD – Discrimination

District court found evidence of discriminatory intent in board's transfer of non-tenured high school principal to elementary school and replacement with a lesser qualified male that was sufficient to defeat board's motion to dismiss where board failed to offer legitimate reason for transfer or preference for lesser qualified male. ***Yuli v. Lakewood Bd. of Educ.***, Dkt. No. 13-4617; (D.N.J. Oct. 17, 2014)

NJLAD - Hostile Work Environment

In deciding board's motion to dismisss, the district court credited allegations that board and administration intentionally interfered with the performance of non-tenured principal's duties by forcing her to defend false allegations of misconduct and publicly criticized and demoted her. ***Yuli v. Lakewood Bd. of Educ.***, Dkt. No. 13-4617; (D.N.J. Oct. 17, 2014)

NJLAD – Retaliation

District denied motion to dismiss where non-tenured principal pleaded sufficient facts showing that transfer from high school to elementary school was a demotion; no need to show financial hardship. ***Yuli v. Lakewood Bd. of Educ.***, Dkt. No. 13-4617; (D.N.J. Oct. 17, 2014)

Political Affiliation Discrimination

Plaintiff's amended complaint, grounded in 42 *U.S.C.* §1983, alleging discrimination based on political association contained sufficient factual support to survive a motion to dismiss under Rule 12(b)(1) for failure to state a claim where the amended complaint averred employment in a position that did not require political affiliation, that plaintiff was politically affiliated, and that defendants sought to remove plaintiff due to those affiliations. ***Bergland v. Gray***, (Dkt. No.: Civ No. 14-1972; (D.N.J. Oct. 17, 2014)

Procedural Rules – Exhaustion of Remedies

Despite the fact that disabled student brought claims under both Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, plaintiff's failure to utilize the administrative remedies available under the Individuals with Disabilities Education Act, required administrative dismissal for failure to exhaust the IDEA's administrative remedies. ***S.B. v. Trenton Bd. of Educ.***, Dkt. No. 13-0949; (D.N.J. Oct. 9, 2014)

Where plaintiff alleged futility because the disabled student sought only monetary damages, which are unavailable under the Individuals with Disabilities Education Act ("IDEA"), the District Court determined that the theory underlying the damages alleged in the complaint serves as the basis for a remedy, even where the relief demanded is unavailable under the IDEA. The fact that plaintiff sough a remedy in addition to the remedies available under the IDEA does not excuse the exhaustion requirement. Accordingly, futility was unavailable to excuse the exhaustion of remedies requirement. ***S.B. v. Trenton Bd. of Educ.***, Dkt. No. 13-0949; (D.N.J. Oct. 9, 2014)

Procedural Rules

District Court determined that fees should not be awarded because plaintiff parents failed to name the Department of Education as an indispensable party; DOE was an "innocent intervenor". ***J.M. v. Wall Twp. Bd. of Educ.***, Dkt. No. 3:13-cv-4505; (D.N.J. Sept. 23, 2014)

Procedural Rules – IDEA Statute of Limitations

While neither Section 504 of the Rehabilitation Act nor the Americans with Disabilities Act contain a statute of limitations, the 3rd Circuit has determined that the IDEA's two year statute of limitation is

applicable to educational claims made under either statute. ***S.B. v. Trenton Bd. of Educ,*** Dkt. No. 13-0949; (D.N.J. Oct. 9, 2014)

Waiver of the IDEA's two year statute of limitation for the local educational agency's failure provide pertinent information to parents is inapplicable to educational claims made against state educational agencies. Claims older than two years are barred. ***S.B. v. Trenton Bd. of Educ.***, Dkt. No. 13-0949; (D.N.J. Oct. 9, 2014)

Procedural Rules – Jurisdiction

District Court determined that it had jurisdiction over plaintiff's appeal seeking to seal the record, despite the pending appeal to the Circuit Court where the motion to seal was not designated as issue before the Circuit Court. ***Kirschling v. Atlantic City Bd. of Educ***., 10 F. Supp. 3d 587 (2014); Oct. 16, 2014

District Court granted remand of special education matter to superior court for lack of subject-matter jurisdiction finding that mere reference to the IDEA was insufficient to invoke federal jurisdiction. *Delgado v. Edison Twp. Bd. of Educ.*, Dkt. No. 14-1757; (D.N.J. Sept. 17, 2014)

Procedural Rules – Motion to Seal

In denying plaintiff's motion to seal the record without prejudice, the District Court acknowledged litigant's right to privacy, but determined that the public possessed a right to obtain information about judicial proceedings. Plaintiff failed to demonstrate that disclosure would cause a "clearly defined and serious injury." Similarly, plaintiff failed to demonstrate that less restrictive alternatives were unavailable. ***Kirschling v. Atlantic City Bd. of Educ***., 10 F. Supp. 3d 587 (2014); Oct. 16, 2014

Qualified Immunity

District court denied qualified immunity for board members where plaintiff alleged that he was the removed from his position based on his political affiliation. Plaintiff also alleged conduct by board members that could subject each of them to individual liability. ***Bergland v. Gray***, 2014:Oct. 17. Dkt. No.: Civ No. 14-1972; (D.N.J. Oct. 17, 2014)

Rice Notice

District court found allegation of a violation of employee's right to confidentiality was sufficient to survive motion to dismiss. Public motion was made to discuss the employee without prior notice to that employee. Violation found although no action taken on the motion during that meeting. ***Bergland v. Gray,*** Dkt. No.: Civ No. 14-1972; (D.N.J. Oct. 17, 2014)

Special Education – Attorneys Fees

In granting motion for summary judgment, the district court determined that the parents' application for attorneys fees was time-barred because it was filed more than 30-days after the order granting prevailing party status was entered. ***J.M. v. Wall Twp. Bd. of Educ.,*** Dkt. No. 3:13-cv-4505; (D.N.J. Sept. 23, 2014)

Special Education – Emergent Relief

District Court determined that the five-day rule was applicable to emergent relief hearing scheduled 18 days after petition was filed so as to require prior notice of witnesses called to testify by ALJ, who effectively merged emergent relief hearing into a due process hearing. ALJ improperly relied on student's non-compliance instead of conducting emergent relief analysis. ***B.G. v. Ocean City Bd. of Educ.***, Dkt. No. 13-5166; (D.N.J. Sept. 26, 2014)

Special Education - Procedural Due Process

District Court determined that procedural deficiencies prejudiced student's right to FAPE so as to require remand to Office of Administrative Law where ALJ called a fact witness without proper notice to student. ***B.G. v. Ocean City Bd. of Educ***., Dkt. No. Civ. 13-5166; (D.N.J. Sept. 26, 2014)

Special Education – Transitional Services

District Court determined that student's non-compliance with attendance and curricular requirements contained in her IEP did not excuse the district from ensuring that appropriate transitional services were provided. Record failed to indicate whether student's non-compliance resulted from deficiencies in the delivery of services pursuant to her IEP. Matter remanded to OAL for full due process hearing. ***B.G. v. Ocean City Bd. of Educ***. Dkt. No. Civ. 13-5166; (D.N.J. Sept. 26, 2014)

Statute of Limitations

Court dismissed several asserted causes of action alleging violations of 42 *U.S.C.* 1983 and remanded several state claims to superior court. Complainant failed to file within the two year statute of limitations. Allegations of retaliation are personal injury claims that are subject to the two year statute of limitations contained in the New Jersey Civil Rights Act. Each alleged act was a discrete incident giving rise to a separate cause of action and could not be considered as a continuing course of conduct. ***Borello v. Elizabeth Bd. of Educ.,*** Dkt. No. Civ. No. 14-3687 (D.N.J. Oct. 22, 2014)

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Commissioner of Education

Ethics

Commissioner accepts SEC and ALJ's recommended penalty of reprimand. SEC had accepted the ALJ's findings of fact and the conclusions of law that the respondent violated *N.J.S.A.* 18A:12-24(b) of the Act and *N.J.S.A.* 18A:12-24.1(f) of the Code of Ethics for School Board Members. By using her position on the Board, the respondent was able to gain access to a forum for her son that was not afforded to other such candidates, who had to endure the conventional application and vetting processes, thereby violating *N.J.S.A.* 18A:12-24(b). Respondent's actions also violated *N.J.S.A.* 18A:12-24.1(f), which prohibits a Board member from "using the schools for personal gain or the gain of friends" and ceding the member's independent judgment "for the gain of friends." The respondent sought gain for her son, "surely within the group contemplated as 'friends.'" But for the respondent's position as a board member, her son would not have been able to avail himself of the benefits offered under this "internship." It is of no moment that the "unwarranted privilege" was not obtained. It is enough that the respondent sought to benefit her son. ***IMO Barbara Garrity, Commissioner, 2014: October 14.*** See also ***IMO Barbara Garrity, Holmdel Board of Education, Monmouth County,* C24-13, SEC, 2014: August 26**

HIB

Petitioner sought, a declaratory ruling directing the respondent Board to issue a written decision stating that it rejected its superintendent's decision affirming a finding that the petitioner was in violation of the Anti-Bullying Bill of Rights Act (Act), *N.J.S.A.* 18A:37-13 *et seq*. Superintendent found that parent violated the Act when she allegedly accused several students of smoking marijuana off-campus during the summer. Petitioner was effectively granted the relief she sought when the Board rejected the superintendent's finding that petitioner had violated the Act, and notified both the petitioner and the parent who had initiated the HIB complaint of its decision, in writing, on September 19 and October 7, 2013, respectively. Commissioner concurred with the ALJ that the matter was appropriately dismissed as moot. ***Morency v. Bd. of Ed. of the Twp. of Hamilton, Commissioner, 2014: October 29***

90-Day Rule

Petition dismissed as untimely. Toms River Regional School District alleged that Central Regional school district was responsible for tuition for 11 students from Seaside Park identified as homeless as a result of Super Storm Sandy, who were residing with relatives in Toms River. Prior to Sandy, these students were attending Toms River schools as "parent paid" tuition students; initial attendance was unrelated to Sandy. On December 4, 2013, the Ocean County ECS advised that the parents were responsible for tuition for the 2012-2013 school year and Central was not. Petition was filed on April 30, 2014 and was out of time. Petition was dismissed. ***Toms River Regional Bd. of Ed. v. Central Regional Bd. of Ed., Commissioner, 2014: October 14***

Residency

Commissioner upheld board determination that T.B. and K.B. were not entitled to a free public education in Hunterdon Central Regional High School (HCRHS) during the 2011-2012 and 2012-2013 school years. Children were domiciled during the period in question in Martinsville, which is outside of the HCRHS district. Commissioner found that: petitioner's move to Martinsville in 2010 gave every indication of being a voluntary domicile change; petitioner claimed that she intended to move back to her former home in respondent's district, but her actions suggest otherwise; petitioner bore the burden of proving that her children were entitled to a free public education in HCRHS, but failed to do so. Parent alleged that the Board ignored various extenuating circumstances, but the ALJ found no merit to that claim. Summary decision was granted to the respondent, and petitioner was ordered to pay the Board tuition in the amount of $63,182. The petition was dismissed. ***K.F. o/b/o T.B. and K.B., Commissioner, 2014: October 2***

On July 18, 2014, Commissioner granted summary decision in favor of the Board for the cost of tuition

pertinent to the period of ineligible attendance of C.J. and C.J. in the public schools of the Hamilton Township School District from September 5, 2012 to June 20, 2013; $ 24,408.00. Respondent failed to comply with his decision. Board requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Respondent offered no reasons why the judgment against her should not be so docketed, although given an opportunity by this agency to do so. Commissioner ordered that, pursuant to *N.J.S.A.* 2A:58-10, M.J. is now subject to entry of a judgment by the court in the amount of $24,408.00, which represents the payment ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law. ***Board of Education of the Twp. of Hamilton v. M.J. o/b/o C.J. and C.J., Commissioner, 2014: October 7***

On August 8, 2014, Commissioner granted summary decision in favor of the Board for the cost of tuition pertinent to the period of ineligible attendance of C.B. in the public schools of the Hamilton Township School District from October 1, 2012 to June 20, 2013; $ 12,204.00. Respondent failed to comply with his decision. Board requested that the Commissioner seek entry of the assessment on the judgment docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10. Respondent offered no reasons why the judgment against her should not be so docketed, although given an opportunity by this agency to do so. Commissioner ordered that, pursuant to *N.J.S.A.* 2A:58-10, M.J. is now subject to entry of a judgment by the court in the amount of $12,204.00, which represents the payment ordered at the conclusion of the contested case before the Commissioner, with interest to accrue as provided by law. ***Board of Education of the Twp. of Hamilton v. S.B. o/b/o C.B, Commissioner, 2014: October 7***

Commissioner granted board's motion and dismissed parent's residency appeal with prejudice. Parent had failed to respond to the board's discovery requests, failed to appear at a scheduled hearing, failed to contact the OAL and failed to provide an explanation for his non-appearance. Board had determined that his son was not entitled to a free public education in the Township of Hainesport schools. Parent asserted that student had attended school in Hainesport for ten years, and that custody of his son has recently been shared between the parents, who are separated. Father owns a house in Hainesport, and mother rents a condo in Mount Laurel, with the student's time being divided between the two households. ***R.P. o/b/o A.P v. Bd. of Ed. of the Twp. of Hainesport, Commissioner, 2014: October 23***

Commissioner upheld board determination that student was not eligible for a free public education in the Union Township school district. District investigation concluded that students were not living with parent's brother and sister-in-law in Union. While parent claimed that she lived at her brother's home in Union because of heating problems in her East Orange apartment, there was no documentation to support her claim and the landlord, who lived on the property, testified that he had never seen either the parent or the child. Parent failed to sustain her burden of proof that she lived in Union Township. Commissioner ordered parent to pay tuition to the board for the period of ineligible attendance; $ 13,625 for the 2013-2014 school year plus $ 77.58 per day for each day of ineligible enrollment in the 2014-2015 school year. ***N.J. o/b/o J.J v. Bd. of Ed. of the Twp. of Union, Commissioner, 2014: October 27***

Commissioner determined that parent failed to prosecute his residency appeal and dismissed the appeal. Parent could not be reached for a pre-hearing conference and failed to appear for a hearing. Board's residency investigation showed that on at least 15 occasions between March 26 and April 29, 2014, parent was observed driving to the West Orange address where she purported to be domiciled, and then walking her daughter to school. Parent's car was observed parked in front of an apartment building in Orange. Commissioner upheld the board's determination that the student was not domiciled in West Orange and granted the Board's application for tuition reimbursement for the period of ineligible attendance in the 2013-2014 year in the amount of $6,207.84. ***K.G. o/b/o M.K.E v. Bd. of ed. of the Twp. of West Orange, Commissioner, 2014: October 29***

State Board of Examiners

Commissioner concurs with State Board of Examiners that Appellant's actions during the 2012 NJASK administration violated the NJASK testing policy protocols. Teacher assisted three special education students, giving them clues beyond what were appropriate accommodations under their IEP. Teacher reworded passages, clarified portions of the test and read aloud portions of the Language Arts portion of the test. Such action constituted unbecoming conduct and warranted the suspension of his teaching certificate for one year. ***Evans, Commissioner, 2014: September 30***

Commissioner affirms State Board of Examiners decision revoking teacher's certificate. Teacher demonstrated a pattern of highly inappropriate and unprofessional behavior with serious and repeated lapses in judgment. Commissioner has long held that teachers serve as role models for their students. Teacher's conduct amply demonstrated that he misunderstood his position as a role model. The record was replete with instances of behavior in which no teacher or any adult supervising children should engage. Teacher's choice not to report students smoking marijuana or drinking proved his lack of judgment. His sexually explicit conversations with female students and his feeding of test question answers to certain students was further evidence that he crossed the fundamental boundaries that should exist between teacher and student. The only appropriate response to teacher's breach was the revocation of his certificate. ***Norton, Commissioner, 2014: September 26***

Commissioner upheld decision of the State Board of Examiners that petitioner failed to meet the requirements for issuance of a certificate of eligibility (CE) for the position of school principal. The SBE contended that petitioner failed to complete five years of successful educational experience under a valid provisional or standard New Jersey or equivalent out-of-state certificate pursuant to *N.J.A.C.* 6A:9-12.5(a). Petitioner worked for approximately eight years as a teacher in two private schools in Westchester County, New York, but did not hold a teaching certificate during that period. Petitioner has worked under a provisional teaching certificate for four years at Wayne Valley High School. ALJ determined and Commissioner affirmed that petitioner had not fulfilled the requirements for a Principal CE as he did not have the five years of teaching experience under an appropriate certificate. ***Mignanelli v. New Jersey State Board of Examiners, Commissioner, 2014: October 29***

Superintendent of Schools

Commissioner determined that the Interim Executive County Superintendent correctly denied board of education request to include long-term care insurance for the superintendent and spouse in the superintendent's 2013-2014 contract. Long-term care insurance is a form of supplemental health insurance. Pursuant to *N.J.A.C.* 6A:23A-3.1(e) (6), no superintendent contract shall include benefits that supplement or duplicate benefits that are otherwise available to an employee in the district. Since the superintendent is covered by the same group health insurance policy that covers other employees, long-term care insurance cannot be offered to the superintendent. It is a form of supplemental health care insurance and prohibited under *N.J.A.C.* 6A:23A-3.1(e) (6). Petition was dismissed. ***New Milford Bd. of Ed. v. NJSDOE, Commissioner, 2014: October 14***

Tenure Dismissal

Board filed tenure charges of excessive absenteeism and conduct unbecoming a teaching staff member against tenured teacher. Teacher was absent for all of the 2010-2011 and 2011-2012 school years, utilizing her sick time. During the 2012-2013 school year, teacher reported to the Educator Without Placement Site for four days, and thereafter was Absent Without Leave (AWOL) for the remainder of the 2012-2013 school year and all of the 2013-2014 school year. No response to the charges was forthcoming. Charges were deemed to be admitted and were sufficient to warrant termination of the teacher from her tenured position. ***DeSouza-Alves, Commissioner, 2014: September 17***

State superintendent certified tenure charges of chronic and excessive absenteeism against tenured teacher. Teacher resigned from the district making the matter moot. Matter was dismissed. ***Brown, Commissioner, 2014: September 25***

Commissioner upheld tenure charges of inefficiency against tenured teacher. Board charged that teacher failed to implement curricular goals and objective(s), failed to design coherent instruction, failed to assess student learning, failed to create an environment of respect and rapport, failed to manage student behavior, failed to manage classroom procedures, failed to establish a culture of learning, failed to communicate clearly and accurately, failed to use questioning and discussion techniques with flexibility and responsiveness, failed to engage students in learning, failed to provide feedback to students, failed to attain student achievement that meets or exceeds performance benchmarks, failed to reflect on teaching, failed to contribute to the School and District, failed to grow and develop professionally and failed to demonstrate promptness and attendance. Neither teacher nor any attorney acting on his behalf responded to the board's charges. Commissioner deemed charges to be admitted, dismissed teacher from his tenured position and forwarded a copy of the decision to the State Board of Examiners for review and action. ***I/M/O Tenure Hearing of Newton, Commissioner, 2014: October 28***

Transportation

Commissioner denies emergent relief and remands for an adjudication on the disputed material facts and the merits. Petitioner AAA School, LLC (AAA), alleged that the route specifications of the Passaic County Educational Services Commission, which required 16-passenger yellow school buses, rather than seven-passenger mini-vans, discriminated against the company as it only owned seven-passenger minivans and did not own any 16-passenger yellow school buses. Petitioner urges that the 16-passenger yellow school bus requirement is an unnecessary and prejudicial impediment to its ability to compete. Petitioner failed to show the presence of any of the four standards for emergent relief – *i.e.,* that the petitioner will suffer irreparable harm if relief is not granted, the legal right underlying petitioner's claim is settled, the petitioner has a likelihood of prevailing on the merits of the underlying claim, and when the equities and interests of the parties are balanced, the petitioner will suffer greater harm than the respondent if relief is not granted. The Commissioner stressed that the burden of proof is on the petitioner to identify specific statutes and/or regulations which he contends have been contravened by respondent. ***AAA School, LLC and El Sayed Eldesouky v. Passaic County Educational Service Commission, Commissioner, 2014: October 16.***

Workers' Compensation

Speech therapist contended that the Board improperly docked her sick leave bank and placed her on unpaid leave following a work–related injury, in contravention of *N.J.S.A.* 18:30-2.1. Petitioner was injured on March 1, 2013. The injury was determined to be work-related and compensable under Workers' Compensation. Commissioner agreed with ALJ that speech therapist was disabled until October 1, 2013; her injuries were compensable until that date. The extent and duration of the speech therapist's disability remains in contention before the Division of Workers' Compensation. The Commissioner is without jurisdiction until the Division makes its final determination in this matter, making the petition filing premature; matter dismissed without prejudice. ***Weiss, Commissioner, 2014: September 4***

Petitioner failed to appear at hearing in matter involving challenge to board of education charging accumulated sick leave for work-related injury. No explanation for non-appearance was provided by petitioner. Matter was deemed to no longer be a contested case before the Commissioner and was dismissed. ***Gadsden, Commissioner, 2014: September 22***

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Tenure Arbitration Cases "TeachNJ"

Tenure charges for inefficiency not sustained. Evaluations used in 2012 – 13 cannot be used to support

charges of inefficiency where regulations were not yet in place governing such evaluations. District claim that if charges for inefficiency are rejected, it can then proceed under the TEACH NJ's more general procedures for tenure charges that do not implicate inefficiency fails. Teacher reinstated with back pay and other emoluments. ***Arbitration of Cheatham,*** Arb: 2014: Oct. 16

District failed to employ progressive discipline when punishing teacher for unbecoming conduct for using district technology equipment and systems to distribute nude photos and inappropriate e-mails in violation of district policies. Arbitrator dismissed claims of harassment against female employees. Dismissal sought by district was modified to 120 day suspension without pay. ***Arbitratiion of Ciripompa,*** Arb: 2014: Oct. 20

*Click here to access **Arbitrator TEACHNJ** decisions.*

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School Ethics Commission

Board member alleged to have improperly participated in closed session discussions regarding negotiations while employed as a teacher in another school district. Complaint was filed 429 days after the alleged incident, outside the 180 day filing deadline. SEC dismissed the complaint as it was filed out of time. ***Fankhauser & Smith v. Cerretani, Howell Twp. Board of Education, C23-14, SEC 2014: September 23.***

SEC determined that complaint alleging respondent improperly attended executive session discussions regarding collective negotiations was time-barred where the subject of the charge properly disclosed employment in a nearby school district and membership in NJEA in her annual disclosure statements. ***Fankhauser & Smith v. Cerretani, Howell Twp. Board of Education, C23-14, SEC 2014: September 23.***

Ethics complaint against a board member alleged that she publicly criticized the superintendent's personnel recommendations. Because the hiring recommendation involved employees who had previously been the focus of the board member's public criticism, the SEC determined that the public could reasonably perceive that she used her public position for personal reasons. The Commissioner concluded that a prior settlement agreement was sufficient notice to the board member of her conflict in future employment actions involving these employees. ***In the Matter of Bembry, Hackensack Board of Education,*** C49-12, SEC 2014:October 28.

The School Ethics Commission found that the board member sought to exert influence over district hiring practices by implying that the director of buildings and grounds should invite a particular applicant to an interview for an open custodial position. The Commission determined that the board member attempted to use her office to secure unwarranted privileges for another in violation of the School Ethics Act. ***In the Matter of Bembry, Hackensack Board of Education***, C49-12, SEC 2014:October 28.

SEC determined that board member failed to confine his actions to policy-making, planning, or appraisal in violation of *N.J.S.A.* 18A:12-24.1(c), when he discussed the employment terms of interim superintendent of schools with three board members elect and the assistant superintendent of schools. *Persi v. Woska*, (**C03-14 (C25-08 On Remand**)) SEC 2014:October 28.

SEC determined that board member did not administer the schools when he involved the assistant superintendent of schools in his plan to replace the interim superintendent, assistant superintendent willingly cooperated in the plan and was not ordered to do so. No violation of *N.J.S.A.* 18A:12-24.1(d). *Persi v. Woska*, (**C03-14 (C25-08 On Remand**)) SEC 2014:October 28.

SEC reaffirmed that board member took private action, in violation of *N.J.S.A.* 18A:12-24.1(e), which was beyond the scope of his authority when he unilaterally directed the issuance of a Rice Notice to the

interim superintendent of schools. Violation also found where board member solicited three board members-elect in discussions about the interim superintendent's continued employment. *Persi v. Woska*, (**C03-14 (C25-08 On Remand)**) SEC 2014:October 28.

(**C04-14**) SEC accepted complainant's withdrawal, with prejudice, but cautioned that respondent's integrity was called into question without being provided the opportunity to respond to the allegation; complainant advised that casting future ethical allegations without allowing a response could be tantamount to an abuse of process. *Rimal v. Donray*, C04-14, SEC 2014:October 28.

(**C14-14**) SEC determined that board member took private action that had the potential to compromise the board and breached her duty of confidentiality when she contacted potential superintendent candidates to determine their continued interest in the vacant superintendent's position. *Lisinski v. Smallwood*, C14-14, SEC 2014:October 28.

(**C18-14**) SEC dismissed complaint as untimely where it was filed 441 days after alleged incidents involving disclosure of student name on Facebook. According to *N.J.A.C.* 6A: 28-6.5(a) complaints must be filed within 180 days of notice of the events which form the basis of the alleged violations. A complainant is deemed to be notified of events which form the basis of the alleged violations when the complainant knew of such events or when such events were made public so that one using reasonable diligence would know or should have known. *Tallahsea v. Vitagliaro*, C18-14, SEC 2014:October 28.

*Click here for **School Ethics Commission** decisions.*

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SEC Advisory Opinions

At this time, there are no related decisions reported for September/October 2014.

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State Board of Examiners

State Board of Examiners suspended teacher's Teacher of Physical Education Certificate and Teacher of Spanish Certificate for one and one half years. While not admitting to the allegations set forth in the Order to Show Cause, teacher offered to agree a one and one half year suspension of his certificates. After reviewing the proposal, the State Board of Examiners voted to accept the offer. ***IMO the Certificates of Juan Davies, Exam, 2014: September 14***

State Board of Examiners ordered revocation of teacher's Teacher of Elementary School and Principal Certificates of Eligibility and his Teacher of Elementary School Certificate. In June 2010, the teacher surrendered his teaching certificates in New York after the Special Commissioner of Investigation for the New York City School District substantiated that he had engaged in an inappropriate relationship with a 15 year-old student, which included sexual comments and sexual contact. The New York Commissioner also found that he had had an inappropriate relationship with a 16 year old student. The teacher was also found to have harassed both students. Teacher did not admit to any of the allegations and failed to appear at his New Jersey hearing; the charges were deemed to be admitted. The Commissioner has long held that teachers serve as role models for their students. The teacher's conduct in engaging in an inappropriate relationship with two female students demonstrates behavior that falls short of the role model status expected of teachers. The teacher's inappropriate conduct with not one, but two, different students merits the strongest possible condemnation. The Board therefore believed that the only appropriate sanction in this case is the revocation of his certificates. ***IMO the Certificates of Walter V. Davis, Exam, 2014: September 19***

State Board of Examiners accepted teacher's relinquishment of his Teacher of Health and Physical

Education Certificate of Eligibility with Advanced Standing, Teacher of Health and Physical Education Certificate of Eligibility With Advanced Standing, Teacher of Health and Physical Education certificate, and Teacher of Driver Education certificate with the full force and effect of a revocation pursuant to *N.J.A.C.* 6A:9B-4.8 Teacher had pled guilty to two counts of Aggravated Assault-Bodily Injury, was sentenced to 364 days in county jail, three years' probation and was fined. ***IMO Certificates of Danny Del Valle, Exam. 2014: September 19***

State Board of Examiners ordered revocation of teacher's Teacher of Elementary School Certificate of Eligibility With Advanced Standing and her Teacher of Elementary School and Teacher of English as a Second Language certificates. Teacher had pled guilty in federal court in Pennsylvania to Possession of a Controlled Dangerous Substance and was sentenced to two years' probation and eight months of home detention with electronic monitoring. The CHRU notified the SBE that, as a result of the conviction, teacher was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as Possession of a Controlled Dangerous Substance fall squarely within in this category. The strong legislative policy statement is also in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. "Teachers… are professional employees to whom the people have entrusted the care and custody of … school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Moreover, unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). Teacher's conviction for Possession of a Controlled Dangerous Substance demonstrates behavior that falls far short of a role model. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold himself out as a teacher. The SBE believes that the only appropriate sanction in this case is the revocation of her certificates. ***IMO the Certificates of Kim Innocenti, Exam. 2014: September 19***

State Board of Examiners ordered revocation of teacher's Teacher of Elementary School and Teacher of Mathematics Certificates of Eligibility, and his Teacher of Elementary School and Teacher of Mathematics certificates. Teacher pled guilty to seven counts of Conspiracy to Possess CDS, two counts of Official Misconduct, one count of Conspiracy to Manufacture and Distribute CDS and one count of Conspiracy to Distribute and Possess CDS in a School Zone, was sentenced to five years' imprisonment and was fined. The court also ordered the teacher to forfeit his teaching certificates and not reapply for them even if granted an expungement. The CHRU notified the SBE that, as a result of the conviction, teacher was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* Since teacher did not file a response or appear at the hearing the charges were deemed admitted.In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as Conspiracy to Possess CDS, Official Misconduct, Conspiracy to Manufacture and Distribute CDS and Conspiracy to Distribute and Possess CDS in a School Zone fall squarely within in this category. The strong legislative policy statement is also in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. "Teachers… are professional employees to whom the people have entrusted the care and custody of … school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Moreover, unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). Teacher's conviction for Conspiracy to Possess CDS, Official Misconduct, Conspiracy to Manufacture and Distribute CDS and Conspiracy to Distribute and Possess CDS in a School Zone demonstrates behavior that falls far short of a role model. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service.

Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold himself out as a teacher. The SBE believes that the only appropriate sanction in this case is the revocation of his certificates. ***IMO the Certificates of Kevin Kane, Exam. 2014: September 19***

State Board of Examiners ordered revocation of teacher's Teacher of English Certificate. Teacher pled guilty to Possession of Marijuana/Hash Under 50 Grams, using a 17-yearold student to obtain drugs for her. Teacher was sentenced to one year of probation and ordered to forfeit her public employment. Pursuant to *N.J.S.A*. 2C:51-2d, she was also forever disqualified from holding any office or position of honor, trust or profit under this State or any of its administrative or political subdivisions. The CHRU notified the SBE that, as a result of the conviction, teacher was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* Since teacher did not file a response or appear at the hearing the charges were deemed admitted.In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986*,* the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as Possession of Marijuana/Hash Under 50 Grams falls squarely within in this category. The strong legislative policy statement is also in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. "Teachers… are professional employees to whom the people have entrusted the care and custody of … school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Moreover, unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). Teacher's conviction for Possession of Marijuana/Hash Under 50 Grams, demonstrates behavior that falls far short of a role model. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold himself out as a teacher. The SBE believes that the only appropriate sanction in this case is the revocation of his certificates. ***IMO the Certificates of Robyn Z. Kent, Exam. 2014: September 19***

State Board of Examiners accepted teacher's relinquishment of her Teacher of English Certificate of Eligibility With Advanced Standing and Teacher of English Certificate with the full force and effect of a revocation pursuant to *N.J.A.C.* 6A:9B-4.8. Teacher pled guilty to two counts of Sexual Assault-Victim 16-18, was sentenced to four years in prison, ordered to forfeit her teaching certificates and subject to Megan's Law and parole supervision for life. ***IMO the Certificates of Jaclyn P. Melillo, Exam. 2014: September 19***

State Board of Examiners ordered revocation of teacher's Substitute Credential. Teacher pled guilty to Endangering the Welfare of a Child, involving the distribution of child pornography. The CHRU notified the SBE that, as a result of the conviction, teacher was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* Since teacher did not file a response or appear at the hearing the charges were deemed admitted.In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986*,* the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as Endangering the Welfare of a Child, involving the distribution of child pornography falls squarely within in this category. The strong legislative policy statement is also in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. "Teachers… are professional employees to whom the people have entrusted the care and custody of … school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Moreover, unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). Teacher's conviction for Endangering the Welfare of a Child, involving the distribution of child pornography, demonstrates behavior that falls far short of a role model. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted

to retain the certificate that authorizes such service. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold himself out as a teacher. The SBE believes that the only appropriate sanction in this case is the revocation of his substitute credential. ***IMO the credential of Tray K. Barnard, Exam. 2014: October 23***

State Board of Examiners ordered suspension of teacher's Teacher of Elementary School Certificate of Eligibility With Advanced Standing and Teacher of Elementary School Certificate. Teacher was indicted on charges of Endangering the Welfare of a Child, Sexual Assault and Aggravated Sexual Assault. If convicted, he would be disqualified from public employment pursuant to *N.J.S.A*. 18A:6-7.1 *et seq*. Since teacher did not file a response or appear at the hearing the charges were deemed admitted.In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986*,* the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as Endangering the Welfare of a Child, Sexual Assault and Aggravated Sexual Assault falls squarely within in this category. The strong legislative policy statement is also in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. "Teachers… are professional employees to whom the people have entrusted the care and custody of … school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Moreover, unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). Teacher has an indictment for a crime that directly involved danger to children. Accordingly, the State Board of Examiners finds that Fennes' potential disqualification from service in the public schools of this State because of his indictment on charges of Endangering the Welfare of a Child, Sexual Assault and Aggravated Sexual Assault provides just cause to take action against his certificates. The SBE voted to suspend teacher's certificates pending resolution of the criminal proceedings against him. If the charges are resolved in his favor, he shall notify the SBE for appropriate action regarding the suspension order. ***IMO the Certificates of Jason B. Fennes, Exam. 2014: October 23***

State Board of Examiners ordered revocation of teacher's Teacher of Biological Science Certificate of Eligibility With Advanced Standing and his Teacher of Biological Science Certificate. Teacher was convicted of Official Misconduct and Attempting to Lure or Entice a Child. The CHRU notified the SBE that, as a result of his conviction, he was also disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* Since teacher did not file a response or appear at the hearing the charges were deemed admitted.In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986*,* the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as Official Misconduct and Attempting to Lure or Entice a Child falls squarely within in this category. The strong legislative policy statement is also in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. "Teachers… are professional employees to whom the people have entrusted the care and custody of … school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Moreover, unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). Teacher's conviction for Official Misconduct and Attempting to Lure or Entice a Child, demonstrates behavior that falls far short of a role model. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold himself out as a teacher. The SBE believes that the only appropriate sanction in this case is the revocation of his certificates. ***IMO the Certificates of Michael Furey, Exam. 2014: October 23***

State Board of Examiners ordered revocation of teacher's Teacher of Elementary School Certificate of Eligibility With Advanced Standing, Substance Awareness Coordinator Certificate of Eligibility, and Teacher of Elementary School, Teacher of the Handicapped and Learning Disabilities Teacher-

Consultant certificates. OFAC concluded that, during the administration of the 2009 and the 2010 NJ ASK tests, the teacher, a resource teacher and test proctor, influenced student examinees' responses through verbal and non-verbal communication. According to witness accounts, the teacher verbally stated that specific answers were incorrect, pointed to specific answers indicating their correctness or placed a check mark next to a correct answer. One witness stated that the teacher would tell students that an answer they had on the test was wrong. At other times she would draw an imaginary "X" through an answer with her finger, indicating the answer was wrong and then point to the correct answer. OFAC also concluded that the teacher breached test security by interfering with the independent work of students, coaching students during testing and failing to follow the test administration directions that were specified in the 2009 and 2010 Test Coordinator Manuals.Since teacher did not file a response or appear at the hearing the charges were deemed admitted. "Teachers… are professional employees to whom the people have entrusted the care and custody of … school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Moreover, unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 *N.J.L.* 369, 371 (1943), *aff'd*, 131 *N.J.L.* 326 (E & A 1944). In this matter, the teacher's conduct in influencing students' answers on standardized tests and breaching NJ ASK test security protocols is not merely inappropriate, it is egregious. Her actions undermine the public's trust in its teachers and demonstrate behavior that falls so far short of a role model that the SBE believes that the only appropriate sanction in this case is the revocation of her certificates. ***IMO the Certificates of Christine Krzeminski, Exam., 2014: October 23***

State Board of Examiners voted to suspend teacher's Teacher of Elementary School Certificate of Eligibility With Advanced Standing and her Teacher of Elementary School certificate for a period of one year. Teacher had resigned from her tenured position following allegations that she and others had posted inappropriate comments on Facebook about a student in her class. Since teacher did not file a response or appear at the hearing the charges were deemed admitted."Teachers… are professional employees to whom the people have entrusted the care and custody of … school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Teacher had posted comments on her Facebook page ridiculing a child's name. Regardless of whether or not she intended her comments to be made public, her conduct was immature and hurtful and falls below the "role model" status that is expected of teachers. Teacher's sincere sense of remorse coupled with her long and unblemished record and her cogent explanation of what transpired in her life during that time period, militate against the revocation of her certificates. Thus, the SBE believes that the appropriate sanction in this case is the suspension of the teacher's certificates. ***IMO the Certificates of Yvette Nichols, Exam. 2014: October 23***

State Board of Examiners voted to suspend teacher's Teacher of Elementary School in Grades K-5 and Teacher of Elementary School With Subject Matter Specialization: Mathematics in Grades 5-8 Certificates of Eligibility, and his Teacher of Elementary School in Grades K-5 and Teacher of Elementary School With Subject Matter Specialization: Mathematics in Grades 5-8 certificates for two years. Teacher had altered an employment experience letter to increase the length of his employment and signed an individual's name to the letter on two occasions without authorization. The Commissioner has long held that teachers serve as role models for their students. The Board does agree with the ALJ that, although teacher's fraud does not comport with "role model" behavior, the mitigating factors in this case militate against the harsher penalty of revocation, which this Board has imposed when an individual has submitted a fraudulent certificate to gain employment."Teachers… are professional employees to whom the people have entrusted the care and custody of … school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. However, teacher 's acts of forging his former employer's name on his employment verification letter on two occasions and altering his employment end date at Pride in order to gain an additional year of experience, call for something more than a one-year suspension of his certificates. Teacher's conduct was not de minimis in nature and should not be treated as such. The Board believes that the appropriate response is a two-year suspension of his

certificates. ***IMO the Certificates of Darryl T. Powell, Exam. 2014: October 23***

*Click here to access **State Board of Examiners** decisions.*

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New Jersey Council on Local Mandates

At this time, there are no related decisions reported for September/October 2014.

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New Jersey Division on Civil Rights

Settlement agreement entered into by the district awarded $75,000 to an African-American victim of bullying and allocated $2,500 to the creation of an anti-bullying awareness program to be used in the 2014-15 school year. The allegations of bullying included race-based name calling that lasted from 3rd through 6th grades. The Division opined that responding to individual incidents of harassment may not be sufficient where district administrators are aware of an overall pattern of harassment. ***Franklin Parent/Guardian o/b/o/ Minor v. Franklin Township Bd. of Educ.***, DCR 2014:August 11.

*Click here to access **New Jersey Division on Civil Rights** decisions.*

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Election Law Enforcement Commission

At this time, there are no related decisions reported for September/October 2014.

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Government Records Council

Records custodian was not obligated to provide copies of work-assignment records of private "for-profit" entities that are contracted to provide services to the district; such records are not "personnel records" under the Open Public Records Act. ***Owoh v. West Windsor-Plainsboro School District***, (Nos. 2014-16, 2014-62 and 2014-81) GRC 2014:September 30

Where records custodian timely provided personnel information extracted from personnel records, the Council determined that the records custodian was not obligated to provide the names of the individuals who compiled the district's response to the OPRA request, nor was custodian required to provide the records from which the responsive personnel information was obtained. ***Owoh v. West Windsor-Plainsboro School District***, (Nos. 2014-15, 2014-61, 2014-105) GRC 2014:September 30

Request for resume from school district dismissed where custodian properly denied request because the record did not exist and the requestor offered nothing in support of their assertion that it did. *Tomlinson v. Beach Haven Board of Education 2014-104*, GRC 2014: Oct. 28

No unlawful denial of access to the requested employee information of private, for-profit businesses. Custodian was not obligated to obtain personnel information from those businesses and provide same to the Complainant because that information does not meet the definition of a "government record"

under OPRA. Personnel records of private, for-profit companies are not "government records" subject to access under OPRA. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee. *Owoh v. West Windsor Plainsboro School District 2014-16, 2014-62 and 2014-81*, GRC 2014: Sept. 30

Custodian timely disclosed all responsive personnel information to the Complainant and thus, no unlawful denial of access occurred. Therefore, the Complainant is not a prevailing party entitled to an award of a reasonable attorney's fee in dispute of personnel information. *Owoh v. West Windsor Plainsboro School District Nos. 2014-15, 2014-61 and 2014-105*, GRC 2014: Sept. 30

OPRA requests all seeking "information" or the "motion" approving the UCBOE's meeting minutes from a particular date and session invalid. The Council has previously considered five (5) nearly identical requests made by the Complainant and, in each case, determined that such requests are invalid owing to their insufficient specificity and requirement that the Custodian to perform research. Complaints should be dismissed as frivolous. *Valdes v. Union City Board of Education, Nos. 2013-147, 2013-201, 2013-298 & 2013-301*, GRC 2014: Sept. 30

OPRA request seeking information presented to board on residency of student properly denied because records sought were student records. *See*, *N.J.A.C.* 6A:32-7.5; *Popkin*, GRC 2011-263. *Inzelbuch v. Lakewood Board of Education, No. 2014-92*, GRC 2014: Sept. 30

Custodian failed to timely respond to OPRA request seeking Child study team e-mails. However, custodian did provide requested records, albeit after the statutory requirement. *Inzelbuch v. Lakewood Board of Education, No. 2014-79*, GRC 2014: Sept. 30

*Click here to access **Government Records Council** decisions.*

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New Legislation

P.L.2014, c.52 (C.18A:64A-25.13), pertaining to public purchasing by county colleges, was amended to provide for free, open and competitive bidding by prescribing specific elements for specifications, contracts and agreements. Enacted 9/10/14

P.L.2014, c.55 (C.18A:71B-85), pertaining to the NJSTARS scholarship program, was amended to clarify that student's performance must place within the fifteenth percentile at the completion of the student's 11th or 12th grade year. Enacted 9/10/14

P.L.2014, c.58 (C.19:44A-16), pertaining the filing of election forms, was amended to eliminate the duplicate filing of the campaign treasurer's report with the county clerk of the county in which the candidate resides. This information is required to be filed with the Election Law Enforcement Commission (ELEC) and is available on the ELEC website. Enacted 9/10/14

P.L.2014, c.61 (C.18A:36C-3), pertaining to the Urban Hope Act, is amended to expand the definition of a Renaissance School project and the time for which to apply for funding under the Act. Enacted 10/6/14

P.L.2014, c.61, extends application period for certain urban hope projects and permits reconstructed facilities as part of projects. Enacted 10/6/14

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New Regulation/Executive Orders

At this time, there are no related decisions reported for September/October 2014.

Proposed Regulations

N.J.A.C. 6A:25, Qualified Zone Academy Bond Program – State Board of Education proposed to expand the definitions to include charter schools; update the terms of the program to match federal free and reduced lunch standards; and clarified the requirements of the comprehensive educational plan that schools must design.

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The New Jersey School Boards Association, a federation of boards of education, provides training, advocacy and support to advance public education and promote the achievement of all students through effective governance.

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NJSBA

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United States Supreme Court

At this time, there are no related decisions reported for July/August 2014.

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3rd Circuit Court of Appeals

Employment

Plaintiff complaints did not rise to the level of wrongdoing under the Whistleblower Law, 43 Pa. Cons. Stat. § 1422, because the Pennsylvania School Code was too vague and subjective to serve as the basis for a valid whistleblower complaint. ***Anderson v. Bd. of Sch. Dirs. of the Millcreek Twp. Sch. Dist.***, Nos. 13-2116 and 13-4161 (3d Cir. Pa. 2014)

Plaintiff appeals from an order of the District Court granting summary judgment to School District on his complaint of age discrimination in violation of federal law. Plaintiff established a prima facie case of age discrimination. School District offered a legitimate, nondiscriminatory reason for declining to hire him. Plaintiff failed to rebut the School District's proffered reason for not hiring him, and thus summary judgment for the School District was appropriate. ***Landmesser v. Hazleton Area Sch. Dist.*, No. 14-1188 (3d Cir. Pa. 2014)**

Special Education

Parents' suit alleging retaliation in violation of the IDEA, ADA, and the Rehabilitation Act, properly dismissed for lack of subject matter jurisdiction because these claims had be to exhausted under the IDEA before the court could assert subject matter jurisdiction as the claims related to the enforcement of IDEA rights. Claims were not exempt from exhaustion. The implementation exception to exhaustion did not apply as the claims challenged more than the implementation of the student's IEP. The school district's alleged past failure to implement the student's IEP was an insufficient basis to excuse exhaustion, and thus, the futility exception to exhaustion did not apply***. Batchelor v. Rose Tree Media Sch. Dist.*, 759 F.3d 266 (3d Cir. Pa. 2014)**

Student's Americans with Disability Act and Rehabilitation Act claims dismissed. IDEA claims are remanded for determination of compensatory education.
***D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260 (3d Cir. Pa. 2014)**

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New Jersey District Court

Discrimination

Default order vacated where there was delay in sending paperwork to insurance carrier and where

defendants have meritorious defense in case alleging race discrimination. ***Nash v. S. Orange Maplewood Bd. of Educ.*, No. 14-3718 (D.N.J. Aug. 14, 2014)**

Employment

Motions to dismiss granted in part and denied in part in suit by former principal against district alleging retaliation and fraudulent misrepresentation, among other claims. ***Rotante v. Franklin Lakes Bd. of Educ.*, No. 13-3380 (D.N.J. July 31, 2014)**

Case dismissed alleging wrongful discharge, retaliatory discharge, intentional infliction of emotional distress, and breach of contract without prejudice. ***Borrello v. Elizabeth Bd. of Educ.*, No. 14-3687 (D.N.J. July 17, 2014)**

Plaintiff's claims alleging violation of First amendment rights, NJLAD withstand summary judgment in employment claim. ***Giles v. Lower Cape May Reg'l Sch. Dist. Bd. of Educ.*, No. 12-05688 (D.N.J. Aug. 1, 2014)**

Special Education

District upholds ALJ finding that parents entitled to reimbursement for unilateral placement in private school for students with disabilities where IEP failed to provide student with FAPE. ***Millburn Twp. Bd. of Educ. v. J.S.O.*, No. 13-1208 (D.N.J. July 21, 2014)**

Although a school district may lawfully utilize a severe discrepancy approach to determine whether a child has an Specific Learning Disability, and employ a statically sound formula to measure whether a child has a severe discrepancy between aptitude and actual achievement, that formula may not be the sole determinant of whether a child has a SLD. Rather, a school district must base its determination on all of its assessments of the child, N.J.A.C. 6A:14-3.5(c), and on careful, documented consideration of parent input, teacher input, test results, and information concerning the child's health and background. District in this case did not base its decision on all available information. ***V.M. ex rel. B.M. v. Sparta Twp. Bd. of Educ.*, No. 12-892 (D.N.J. July 3, 2014)**

Reimbursement for Unilateral placement denied where IEP was designed to provide FAPE; where parents failed to provide 10 day notice of intent to enroll student in private school and failed to express concerns about IEP at most recent IEP meeting. *K.S. & M.S. v. Summit Bd. of Educ.*, No. 12-7202 (D.N.J. July 25, 2014)

Student to continue receiving the mainstreaming education dictated by her IEP in accordance with stay-put provision of IDEA at unapproved private school for student with disabilites, pending outcome of litigation. ***D.M. v. N.J. Dep't of Educ.*, No. 14-4620 (D.N.J. Aug. 28, 2014)**

Student Discipline

School board did not violate a former student's due process rights by refusing to grant a third adjournment of the student's expulsion hearing or by offering to adjourn on the condition that the student waive his right to file a civil suit, nor did the superintendent's recommendation of expulsion after previously recommending either suspension or expulsion violate due process; A hostile educational environment claim under the New Jersey Law Against Discrimination survived summary judgment because the student testified that he was subjected to racist bullying and a jury could have found that a vice principal had actual or constructive knowledge of the harassment and that the school's response was not reasonable. ***George v. Bd. of Educ.*, No. 2:11-cv-00043 (D.N.J. July 23, 2014)**

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New Jersey Supreme Court

At this time, there are no related decisions reported for July/August 2014.

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New Jersey Superior Court, Appellate Division

Employment

Court finds sufficient credible evidence in the record to support Board's finding that physical education teacher did not qualify for ordinary disability retirement. ***Wunder v. Teachers' Pension & Annuity Fund*, No. A-4527-12 (App. Div. July 17, 2014)**

Unpaid leave of absence under FMLA constitutes continued employment for purposes of tenure accrual. The FMLA seeks to return the employee to the same position that he or she was in before the leave, treating the leave itself not as a cessation, but instead as a temporary pause in the ongoing working relationship. To therefore punish an employee by denying her tenure she had earned over three years of continuous employment and satisfactory evaluations simply because she took the leave that her employer granted her, would not serve the purpose of the FMLA. Matter remanded to Commissioner for determination of seniority rights and any entitlement to relief. ***Kolodziej v. Board of Educ. of S. Reg'l High Sch. Dist.*, 436 *N.J. Super*. 546 (App. Div. 2014)**

Indemnification

Appellate Division affirms Commissioner determination that district was required to reimburse teacher for defense and indemnification costs incurred to defend a suit filed by a student who alleged an assault by teacher. Under *N.J.S.A.* 18A:16-6 two criteria set forth in the statute must be satisfied: the conduct triggering the legal action against teacher must have 1) arisen out of the performance of the individual's duties, and 2) occurred in the course of performing those duties. Both criteria satisfied. Case was settled that included no admission of wrongdoing. ***Matthews v. Board of Educ. of the Union County Voc. Tech. Sch.*, No. A-1181-12 (App. Div. Aug. 6, 2014)**

Insurance

Minivan, used to transport special education students, was an "automobile" as defined by *N.J.S.A.* 39:6A-2(a) and may not serve as a basis for insurance company to deny PIP benefits to driver involved in accident. ***Taveras v. Roman*, No. A-0593-13T4 (App. Div. July 16, 2014)**

Liability

Student sued for injuries he sustained when he pushed his hand through a wired glass door panel. The motion judge granted defendants' motion for summary judgment and dismissed the complaint with prejudice, ruling that plaintiff did not meet the requirements of the New Jersey Tort Claims Act. ***Rodriguez v. Livingston Twp. Bd. of Educ.*, No. A-4036-12T3 (App. Div. July 30, 2014)**

District immune from suit under Tort Claims Act due to slip and fall due to alleged failure to remove snow. ***Guerrero v. Toms River Reg'l Schs. Bd. of Educ.*, No. A-0358-13 (App. Div. Aug. 8, 2014)**

Bus driver neglected four-year-old student by leaving him unattended on a bus for one hour thereby failing to exercise a minimum degree of care as required by *N.J.S.A.* 9:6-8.21(c)(4)(b). She failed to conduct the post-route walkthrough or take any equivalent steps to assure that no children were on the bus when she parked. *N.J. Dep't of Children & Families v. M.H.*, 2014 *N.J. Super*. Unpub. LEXIS 1778 (App. Div. July 21, 2014)

RIF/Nonrenewal

Appellate Division upholds Commissioner's determination that district properly eliminated school nurse position and contracted for shared nursing services with another district. District had legal authority to implement the shared services agreement for certified school nurse services and the corresponding reduction in force for reason of economy. Such authority is consistent with the Uniform Shared Services and Consolidation Act and *N.J.S.A.* 18A:40-3.3. ***Prezioso v. Board of Educ. of the Polytech Career Acad.*, No. A-4644-12 (App. Div. Aug. 27, 2014)**

Person tenured as vice-principal and removed from position as principal entitled to vice-principal salary despite being returned to former position of teacher. Issue raised by district of NJDOE backdating of certificates not properly before Appellate Division in this appeal. ***Silviera-Francisco v. Bd. of Educ. of Elizabeth*, No. A-4418-12 (App. Div. Aug. 7, 2014)**

Tenure Dismissal

Tenure dismissal against special education teacher upheld where Commissioner issued well-reasoned decision supported by the evidence that showed that teacher hit student with computer cord, leaving welt on back. Teacher's assertion that he was defending himself is not supported by video record. Further, describing his students as "murderers, attempted murderers [and] . . . gang members" are expected sentiments to be uttered by a tired and frustrated Corrections Officer after completing an extra-long tour of duty inside a maximum security prison, but not for an educator charged with the responsibility of teaching our most vulnerable children. Appellant's reference to working "in the hood," as an attempt to explain why his use of corporal punishment against the student is an acceptable means of maintaining discipline in a middle school connotes a bigoted, stereotypical image of school children in urban areas as dangerous street-thugs, who can only be controlled through the use of physical force. Appellant's actions are not an aberration. ***In re Tenure Hearing of Goodwater v. Camden Board of Educ.*, No. A-4909-11 (App. Div. Aug. 20, 2014)**

Commissioner decision dismissing tenured teacher from position upheld. Teacher failed to satisfactorily complete coursework in pedagogy as required, despite being given a year-long extension to do so. ***E. Windsor Reg'l Sch. Dist. Bd. of Educ. v. Geurds*, No. A-3696-12 (App. Div. July 11, 2014)**

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New Jersey Superior Court, Trial Division

OPMA

Board ordered to take corrective and remedial action by proceeding de novo at a public meeting held in conformity with the OPMA, following suit alleging several violations including: violated *N.J.S.A.* 10:4-13 because it entered closed session without first apprising the public of the "general nature" of the closed session discussion and the time when and the circumstances under which the confidential discussion could "be disclosed to the public." Further, Board discussed matters that should have properly been addressed at the public session. Defendants do not dispute that, the Board's discussion's regarding: (1) the solar panel project; (2) the Board's goal regarding shared superintendence; (3) the "possibility of having K,1,2, self-contained classroom for the upcoming 2012-12 school [*15] year"; (4) Mrs. Fuhring's "progress on her goals for the 2011-12 year"; (5) the possibility of having "a volunteer to assist in picking teacher of the year"; (6) the announcement that Joe Pasiment would now oversee Ocean, Monmouth, and Middlesex counties; (7) the Board's intentions to do "trainings the last week of school"; (8) tuition rates; (9) the Choice School application; (10) the naming of the Board's multi-purpose room; (11) a conflict concerning meeting dates; (12) calendar changes to half days; (13) NJSBA Board training; (14) the dates of the school band concert; (15) the "dedication for Mr. CZ"; (16) the Quality Single

Accounting Continuum or "QSAC"; (17) the science curriculum; (18) textbooks; (19) Mrs. Fuhring's "progress on the teacher evaluation system"; Mrs. Brendel's success in obtaining insurance funds for a new gym floor; (20) building repairs and lighting; (21) "a new sign with PTO"; (22) the fact that the Spanish teacher began teaching; (23) the Board's efforts to bring art to the grade school; and (24) the need to focus on Language Arts. ***N.J. Found. for Open Gov't v. Island Heights Bd. of Educ.*, No. OCN-L-703-14 (Law Div. Aug. 26, 2014)**

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New Jersey Superior Court, Law/Chancery Division

At this time, there are no related decisions reported for July/August 2014.

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Commissioner of Education

Certification

Commissioner ordered the suspension of teacher's certificate for one year, pursuant to *N.J.S.A*. 18A:26-10 for failure to provide the proper contractual notice when the teacher resigned from the school district with only 11days notice. ***IMO Suspension of the Teaching Certificate of Lawanna McClease*, Commissioner, 2014: July 16**

Commissioner affirmed the State Board of Examiners (SBE) determination that petitioner had not met the requirements for certificates of eligibility (CE) for the School Administrator and Principal endorsements. Petitioner had not completed the required 300 hour intern experience for a CE as principal. Commissioner determined that the SBE determination was neither arbitrary, capricious nor unreasonable. ***Waale*, Commissioner 2014: July 14**

Commissioner affirmed the State Board of Examiners (SBE) determination that petitioner had not met the requirements for the Teacher of Students with Disabilities endorsement to his Instructional Certificate. Petitioner had not completed the requisite number of credits needed for issuance of the certification. Commissioner determined that the SBE determination was neither arbitrary, capricious nor unreasonable. ***Hart*, Commissioner, 2014: July 29**

Commissioner affirmed the State Board of Examiners (SBE) determination revoking teaching staff member's School Social Worker Certificate. SBE had modified the ALJ's recommended two year suspension to a full revocation. SBE revoked the appellant's certificate based on the ALJ finding that the appellant exposed his penis to a coworker on school grounds, and made other unwelcomed comments to four other female staff members. Notwithstanding the appellant's positive interactions with the students, the SBE determined that, on balance, his inappropriate conduct with other staff members warrants the revocation of his certificate. Commissioner determined that the SBE determination was not arbitrary, capricious or unreasonable.
***Holloway*, Commissioner, 2014: August 5**

Choice Schools

Commissioner upheld board of education determination to reject student application for admission into Upper Freehold Regional's Advanced Mathematics and Algebra Academy (Academy), an Interdistrict Public School Choice Program. Board, after previously accepting student, rejected the application based on a series of factors, including the late notice of necessary accommodations and the financial and administrative burden that the district would have to assume if it were to accept the student. By the time the district was provided with the student's complete IEP in May 2013 and had the opportunity to review

it, the district's budget for the upcoming school year had been set and there was limited time to secure a qualified instructor. A district may reject the application of a classified student if that student's IEP would create an undue financial or administrative burden on the district. The Board's decision to reject the application was not unreasonable.
***R.N. o/b/o A.N.*, Commissioner, 2014: August 14**

Criminal Background Checks

Former teacher challenged Criminal History Review Unit's determination that he was permanently disqualified from employment in New Jersey schools due to his criminal convictions in Pennsylvania on two counts of recklessly endangering another person (REAP), one count of possessing instruments of crime, one count of disorderly conduct, and two counts of simple assault. Convictions stemmed from a criminal complaint that petitioner fired a rifle toward two teenagers on his property. Rejecting the initial decision of the ALJ, Commissioner determined that, given the facts and circumstances, petitioner's Pennsylvania conviction for REAP (recklessly endangering another person) constituted a crime involving the use of force or threat of force to or upon a person as contemplated in *N.J.S.A.* 18A:6-7.l(c)(1). Petition was dismissed. ***Kelly*, Commissioner, 2014: August 21**

Discrimination

Petitioner claimed that the Board engaged in systematic racial discrimination by placing Hispanic and minority children in inclusion classes that were conducted with less academic rigor than non-inclusion classes. No evidence presented to show that disruption occurred in the classroom due to disabled or inclusion students. No evidence presented regarding contention that respondents engaged in systematic racial discrimination by placement of students in inclusion classes. Petitioner failed to present sufficient evidence to permit this matter to go to a hearing; petition dismissed.
***M.R. o/b/o B.R.*, Commissioner 2014: July 11**

Increment Withholding

Commissioner denied teacher's request for restoration of increment. Teacher argued that Commissioner penalty pursuant to tenure proceedings, which included loss of increment for one year, beginning January 1, 2013, required restoration of the increment after the expiration of one year, January 1, 2014. Increment not restored. Teacher entitled to receive any increment that he would have received on January 2, 2013 commencing January 15, 2014, and – going forward – will advance one step behind his regular step. Teacher will remain a step behind his peers due to the continuing effect of the increment withholding previously ordered by the Commissioner. Petition dismissed.
***Calandriello,* Commissioner 2014: July 17**

90-Day Rule

Petitioner appealed imposition of two-day Saturday detention regarding possession of stolen cell phone found in bathroom. Student's suspension was for violating student code of conduct by not immediately to the office and turning the cell phone over to school officials. Incident occurred on October 3, 2013; petition filed January 12, 2014, well beyond the 90 day filing period. Petition dismissed for failure to file in a timely manner.
***M.P. o/b/o K.K.*, Commissioner, 2014: July 29**

Petitioner, AAA, challenged the failure of the Passaic County Educational Services Commission (Commission) to award it contracts for transportation routes in August 2012 and August/September 2013. Petition was not filed until April 24, 2014 – approximately eight months after AAA's 2013 bid was rejected, and approximately one year and eight months after its 2012 bid was rejected, well beyond the 90 day filing deadline. AAA's prior unsuccessful attempts to bring these claims in Superior Court did not alter this conclusion; no compelling matters of public interest were involved in this case so as to justify relaxation of the 90 day rule. Petition was dismissed. ***AAA School*, Commissioner, 2014: August 4**

Private Schools for the Handicapped

Commissioner determined that Office of Fiscal Accountability and Compliance determination that expenses associated with two four day/three night out-of-state field trips (Spring Trips) to Baltimore, Maryland and Hershey, Pennsylvania could not be included in its tuition charges was arbitrary, capricious and unreasonable. The trips were relevant and necessary educational and transitional opportunities, consistent with the students' IEPs; the cost of these trips was carefully calculated and was reasonable. Commissioner ordered that these costs be included in the tuition rate for the 2009-2010 school year. ***Passaic County Elks Cerebral Palsy Center*, Commissioner, 2014: August 14**

Public School Contracts

Transportation company, AAA, challenged school district's bid specifications for various school bus routes, alleging discrimination. Petitioner contended that the requirement in bid specifications that vendors provide 16-passenger yellow school buses showed prejudice against his company, which neither owns nor uses same, and sought a change in the specifications so that AAA could bid on the contract. Commissioner held that petitioner failed to meet the standards for emergent relief. The only remedy available to petitioner was the right to challenge the board of education's award of contracts based on the June 14 bid specifications; to which petitioner availed itself. Any allegations concerning the legality of the bid specifications or contract awards will be addressed in that challenge. ***AAA School LLC*, Commissioner, 2014: August 25**

Residency

Commissioner rendered a determination as to where petitioners' children should attend school and which school district should be financially responsible for the children's educations. Petitioners were evicted, via foreclosure, from their longtime home in Cresskill in 2011, lived with grandparents in Little Ferry for a year, were forced to leave the grandparents' home in Little Ferry due to flooding from Hurricane Sandy, lived with relative in Paramus and Queens for a little over six months and returned to Little Ferry. Commissioner determined that the children were deemed homeless after the foreclosure and remain homeless. Commissioner granted the petitioner's request continuing the children's education in Cresskill, ordered that Little Ferry remain financially responsible for the education until the parents establish a permanent residence or are deemed domiciled in another jurisdiction. Commissioner disagreed with ALJ's determination that children were no longer homeless and should be enrolled in the Little Ferry schools.
***M.O'K. and S.O'K. o/b/o K.O'K., A.O'K. and C.O'K.*, Commissioner 2014: August 12**

Sending – Receiving

Commissioner approves the severance of Interlaken's send-receive relationship with Asbury Park and establishment of a sending relationship with the West Long Branch and Shore Regional school districts. The feasibility study and accompanying certifications and exhibits demonstrated that petitioners satisfied all of the statutory elements required for severance; the demographic enrollment in Asbury Park schools will not change if severance is granted; dissolution of the sending/receiving relationship and creation of the new relationships will have no negative impact upon the education of students in any of the implicated school districts; and the proposed changes to Interlaken's sending/receiving relationship will have little financial impact on any of the districts involved, with the exception of a possible tax increase for Interlaken residents. ***Interlaken v. Asbury Park, West Long Branch and Shore Regional*, Commissioner 2014: July 17**

Superintendent of Schools

Commissioner affirmed action of Executive County Superintendent denying board of education application for a waiver of the maximum salary amount for superintendents established pursuant to *N.J.A.C.* 6A:23A-1.2 and *N.J.S.A.* 18A:17-24.1. The ECS determined that the Learning Center – a magnet school program operated by the Board and overseen by the district superintendent – did not

constitute “an additional school district” within the intent of applicable regulations and did not qualify for an additional $ 10,000 in salary. Statutory and regulatory scheme provided no leeway to grant the salary increment sought. ***Ridgefield*, Commissioner, 2014: August 8**

Tenure Acquisition

Teacher who held a standard instructional certificate with endorsements for Teacher of Students with Disabilities (TOSD) and Elementary School Teacher in Grades K-5 – was employed as a special education teacher at Indian Hills High School from 2005 until 2012; worked as an in-class support teacher, supporting special education students in the regular classroom setting, and as a teacher in the resource center, teaching a variety of subject areas. The TOSD endorsement authorizes teaching students with disabilities, when the teacher has an instructional certificate with the corresponding endorsement for the grade level or subject area in which they are assigned to teach. Teacher did not possess the appropriate grade level or subject area endorsements. Since the teacher was not properly certified to teach the high school subject matter areas, no time was earned toward tenure in the school district. No tenure or seniority rights were violated when the board terminated him in 2012. Teacher was primarily responsible for ensuring possession of the required certification. ***Andrews*, Commissioner, 2014: August 21**

Tenure Dismissal

Board filed tenure charges of excessive absenteeism and conduct unbecoming a teaching staff member against tenured teacher. Teacher was absent for all of the 2010-2011 and 2011-2012 school years, utilizing her sick time. During the 2012-2013 school year, teacher reported to the Educator Without Placement Site for four days, and thereafter was Absent Without Leave (AWOL) for the remainder of the 2012-2013 school year and all of the 2013-2014 school year. No response to the charges was forthcoming. Charges were deemed to be admitted and were sufficient to warrant termination of the teacher from her tenured position. ***DeSouza-Alves*, Commissioner, 2014: September 17**

Workers’ Compensation

Speech therapist contended that the Board improperly docked her sick leave bank and placed her on unpaid leave following a work–related injury, in contravention of *N.J.S.A.* 18:30-2.1. Petitioner was injured on March 1, 2013. The injury was determined to be work-related and compensable under Workers’ Compensation. Commissioner agreed with ALJ that speech therapist was disabled until October 1, 2013; her injuries were compensable until that date. The extent and duration of the speech therapist’s disability remains in contention before the Division of Workers’ Compensation. The Commissioner is without jurisdiction until the Division makes its final determination in this matter, making the petition filing premature; matter dismissed without prejudice. ***Weiss*, Commissioner, 2014: September 4**

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Tenure Arbitration Cases “TeachNJ”

Tenure charges dismissed against theatre teacher who utilized a "Can of Squirms" lesson plan that supposedly asked about certain adolescent behaviors and attitudes without parent consent in violation of state statute. Additionally, by asking these questions in class, teacher also allegedly violated HIB law. No evidence presented that any student felt harassed, intimidated or bullied. No evidence that students were subjected to a survey in participating in lesson. Arbitrator found that lesson plan was fully approved by administration for several years. Questions asked were exaggerated in the charges presented. Arbitrator does not opine as to whether the lesson, as presented, is appropriate for the eighth grade level. ***In Re Tenure Arbitration of Priano-Keyser*, 2014: July 4**

Teacher left his classroom unattended to argue with another teacher, demonstrating poor judgment. Teacher admitted same and appeared to be remorseful. Appropriate penalty is reinstatement with no backpay. Additionally, the teacher must remain in treatment for decision-making and anger management until the counselor determines that his participation in such counseling is no longer needed. ***Arbitration of Foca-Rodi*, 2014:July 9.**

Employee's resignation from tenured position moots district's tenure charges against him. ***Arbitration of Higgins*, 2014: July 17.**

One-month suspension without pay appropriate penalty where teacher improperly involved a union representative in a conference call with a parent without disclosure, resulting in an ethical breach on the part of the teacher, compromising the privacy of the student and parent. ***Arbitration of Mignone*, 2014: July 28.**

Tenure dismissal upheld by arbitrator after it was proven that teacher assisted students in finding the right answers on standardized tests; encouraged other staff members to give incomplete information in an OFAC investigation; as a result of inflated scores on standardized tests, certain students were denied remedial help they needed; as a result of teacher's misconduct, district had to expend funds to correct testing results. ***Arbitration of Radzik*, 2014: August 4**

Teacher engaged in unbecoming conduct when he violated district policy concerning computer usage; engaged in inappropriate text messages with recently graduated students, and failed to report arrest to district. ***Arbitration of Clune*, 2014: August 18**

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School Ethics Commission

SEC dismisses complaint with prejudice for failure to prosecute. Complainant, who alleged various violations of the Code of Ethics for School Board Members, failed to appear at the hearing without good cause and provided no explanation for her non-appearance. No communication was made to the SEC either by letter, email or telephone. ***Verdi v. Bauer, Manasquan Board of Education, Monmouth County*, C36-13, SEC 2014: July 22**

SEC accepts the ALJ's findings of fact and the conclusions of law that the respondent violated *N.J.S.A.* 18A:12-24(b) of the Act and *N.J.S.A.* 18A:12-24.1(f) of the Code of Ethics for School Board Members. By using her position on the Board, the respondent was able to gain access to a forum for her son that was not afforded to other such candidates, who had to endure the conventional application and vetting processes, thereby violating *N.J.S.A.* 18A:12-24(b). Respondent's actions also violated *N.J.S.A.* 18A:12-24.1(f), which prohibits a Board member from "using the schools for personal gain or the gain of friends" and ceding the member's independent judgment "for the gain of friends." The respondent sought gain for her son, "surely within the group contemplated as 'friends.'" But for the respondent's position as a board member, her son would not have been able to avail himself of the benefits offered under this "internship." It is of no moment that the "unwarranted privilege" was not obtained. It is enough that the respondent sought to benefit her son. SEC further adopts the ALJ's recommended penalty of reprimand. ***IMO Barbara Garrity, Holmdel Board of Education, Monmouth County*, C24-13, SEC, 2014: August 26**

SEC finds no cause to credit the allegations that respondents violated *N.J.S.A.* 18A:12-24(b). Allegation was that board members pulled an item from the agenda regarding intermittent family leave and authorized an investigation by a law firm into a matter which had already been concluded. No showing that either board member that respondents used their respective official positions to secure unwarranted privileges, advantages or employment for themselves, members of their immediate families or others in

either situation. ***Bailey v. Page and Bey-Blocker, Pleasantville Board of Education, Atlantic County*, C37-13, SEC, 2014: August 26**

Board member alleged to have improperly participated in closed session discussions regarding negotiations while employed as a teacher in another school district. Complaint was filed 429 days after the alleged incident, outside the 180 day filing deadline. SEC dismissed the complaint as it was filed out of time. ***Fankhauser & Smith v. Cerretani, Howell Twp. Board of Education*, C23-14, SEC 2014: September 23.**

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State Board of Examiners

Board may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. *N.J.A.C.* 6A:9-17.5. "Teachers… are professional employees to whom the people have entrusted the care and custody of … school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Moreover, unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 N.J.L. 369, 371 (1943), aff'd, 131 N.J.L. 326 (E & A 1944). ***Benson*, 2014 Exam, July 15**.

Teacher of the Handicapped certificate revoked where teacher relinquished her certificate as a condition of entering pre-trial intervention program. ***Boss*, 2014 Exam, July 15.**

Teacher of Elementary School Certificate of Eligibility With Advanced Standing and Teacher of Elementary School With Subject Matter Specialization: Science in Grades 5-8 Certificate of Eligibility revoked following convictions for multiple counts of Statutory rape, Indecent Liberties with Child, Sex Offense Student, Sexual Exploitation of a Minor and Solicit Child By Computer in another state. The Board may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. *N.J.A.C.* 6A:9-17.5. "Teachers… are professional employees to whom the people have entrusted the care and custody of … school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." *Tenure of Sammons*, 1972 *S.L.D.* 302, 321. Moreover, unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. *Redcay v. State Bd. of Educ.*, 130 N.J.L. 369, 371 (1943), aff'd, 131 N.J.L. 326 (E & A 1944). ***Canally*, 2014 Exam, July 15**.

School Business Administrator Certificate of Eligibility, issued in January 1995 and a School Business Administrator certificate revoked following resignation of school business administrator who allegedly violated public bidding laws and then later trying to conceal his malfeasance by having the contractor submit multiple backdated quotes. ***Cerra*, 2014 Exam, July 15.**

Teacher of Music Certificate of Eligibility With Advanced Standing revoked following conviction in Pennsylvania for on two counts of Corruption of Minors. ***Dinkins*, 2014 Exam, July 15**.

Principal certificate revoked following after he pled guilty to Contributing to the Delinquency of a Minor in another State. ***Feltz*, 2014 Exam, July 15**.

Teacher of English certificate revoked following disqualification from public school employment as a result of her 2008 conviction for Burglary. ***Finnigan*, 2014 Exam, July 15**.

Teacher of English certificate revoked following entrance into PTI program following allegations that

teacher hit several students. ***Franklin*, 2014 Exam, July 15**.

Teacher of Spanish Certificate of Eligibility With Advanced Standing and a Teacher of Spanish certificate revoked following plea of guilty to Endangering the Welfare of a Child. ***Gross*, 2014 Exam, July 15**.

Teacher of Music Certificate of Eligibility With Advanced Standing revoked following guilty plea for Sexual Assault, Aggravated Sexual Assault-Victim Helpless or Incapacitated, and Abuse of Child-Cruelty, Neglect. ***Holmgren*, 2014 Exam, July 15**.

Teacher of Elementary School Certificate of Eligibility with Advanced Standing revoked following conviction for Endangering the Welfare of a Child. ***Johnson*, 2014 Exam, July 15**

Teacher of Spanish Certificate of Eligibility and Teacher of Spanish certificate revoked following plea of guilty to Endangering the Welfare of a Child. ***Morales*, 2014 Exam, July 15**

Teacher of the Handicapped certificate, a Student Personnel Services certificate, issued in April 1980 and a Principal certificate, suspended for two and a half years. ***Oberwanowicz*, 2014 Exam, July 15**

Teacher of Social Studies Certificate of Eligibility revoked following substantiated claims of sexual abuse of student by Department of Children and Families. ***Wright*, 2014 Exam, July 15**

Teacher of Mathematics certificate revoked following guilty plea in Pennsylvania to Homicide by Vehicle and Accidents Involving Death or Personal Injury. ***Angney*, 2014 Exam, July 15**

Teacher agreed to relinquish her Teacher of Elementary School in Grades K-5 and Teacher of Students With Disabilities Certificates of Eligibility With Advanced Standing, and a Teacher of Students With Disabilities certificates with the force and effect of a revocation and all attendant consequences following a plea of guilty to Endangering the Welfare of a Child. ***Conroy*, 2014 Exam, July 15**

Teacher of Elementary School in Grades K-5 Certificate of Eligibility With Advanced Standing, and Teacher of Elementary School in Grades K-5 certificate revoked following plea of guilty to Endangering the Welfare of a Child for driving under the influence with two young children in her car. Notwithstanding contentions of rehabilitation, this is not the proper context for such considerations. The purpose of this proceeding is to permit the individual certificate holder to demonstrate circumstances or facts to counter the charges set forth in the Order to Show Cause, not to afford an opportunity to show rehabilitation. ***Donaldson (Zappile)*, 2014 Exam, July 15.**

Teacher of Preschool Through Grade 3 Certificate of Eligibility With Advanced Standing and a Teacher of Preschool Through Grade 3 certificate revoked where teacher used the social security number of another to obtain her certificates. ***Ferreira*, 2014 Exam, July 15.**

Teacher of Elementary School in Grades K-5 Certificate of Eligibility With Advanced Standing revoked following failure of teacher to reveal that his license had been suspended in another state for accessing inappropriate websites on a classroom computer. ***Hurd*, 2014 Exam, July 15**

Teacher of Elementary School certificate relinquished voluntarily with the force and effect of a revocation. ***Johnson*, 2014 Exam, July 15**

Teacher of Elementary School, Teacher of Data Processing, and Teacher of Computer Science Technology Certificates of Eligibility, and his Teacher of Elementary School, Teacher of Data Processing, Teacher of Computer Science Technology and Teacher of Law Enforcement certificates revoked following actions of inappropriately touching a student's leg and putting his hand up her skirt, exchanging sexually explicit texts with her, allowing her to rest her head on his shoulder on numerous occasions, and allowing her to enter his hotel room while on school field trips. ***Moreno*, 2014 Exam, July 15.**

Substitute Credential revoked where holder pled guilty to Disturbing the Peace, a local ordinance violation, after being charged with Child Abuse for allegedly leaving a four year old child unattended in her car on a hot day for over an hour. ***Morsindi*, 2014 Exam, July 15**

Teacher's Teacher of Physical Education Certificate of Eligibility and Teacher of Physical Education certificate suspended for a period of two years, following conviction in New York for Burglary-Illegal Entry of a Dwelling, Burglary-Causing Physical Injury, Criminal Mischief and Criminal Contempt.These convictions were vacated by the Appellate Division of the New York Supreme Court and reduced to Criminal Trespass. ***Rumley*, 2014 Exam, July 15**

Teacher of Elementary School certificate and a Teacher of Spanish certificate revoked in New Jersey following determination by the state of Florida that teacher had placed tape on one student's mouth and told another student to place tape on his mouth; in another incident, the teacher pulled a student's hair In another incident the teacher inappropriately disciplined a student by pulling her by the hair and jerking her head back; in another series pushed and grabbed students, threatened them and forced them to stand for extended periods of time with book bags on their heads. ***Wagensommer*, 2014 Exam, July 15.**

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New Jersey Council on Local Mandates

At this time, there are no related decisions reported for May/June 2014.

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New Jersey Division on Civil Rights

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Election Law Enforcement Commission

At this time, there are no related decisions reported for March/April 2014.

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Government Records Council

Custodian of Records failed to produce all requested records within statutory time frame amounting to a denial of a records request. However, complainant failed to delineate the records that were denied or the reasons why records that were timely provided rose to the level of an unlawful denial. Accordingly, the custodian did not unlawfully deny access to the requested records. ***Inzelbuch v. Lakewood Bd. of Educ. Custodian of Records*, 2014 July 29**.

Custodian of Records timely complied with interim order of the Government Records Council where he

made responsive records available to complainant within the time extension granted by the Council. ***Blay v. Lakewood Bd. of Educ. Custodian of Records*: 2014 July 29**.

Custodian of Records unlawfully denied access to public transportation contracts based on his concern over the pendency of an FBI subpoena. Custodian's concern mitigates against a finding of a knowing and willful violation. ***Blay v. Lakewood Bd. of Educ. Custodian of Records*: 2014 July 29**.

Custodian of Records failed to timely comply with interim order but the late submission was fully responsive to the complainant's request. Custodian's actions did not rise to the level of a knowing and willful violation. ***Scheeler v. NJ Dept. of Educ. Custodian of Records*: 2014 July 29.**

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Election Law Enforcement Commission

At this time, there are no related decisions reported for July/August 2014.

New Legislation

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United States Supreme Court

At this time, there are no related decisions reported for May/June 2014.

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3rd Circuit Court of Appeals

Special Education

In IDEA matter, Third Circuit affirms district court determination that the school district established promissory estoppel. The district established promissory estoppel because, the mother agreed to the terms of a settlement agreement, wherein she promised to release all claims against the district in exchange for money that would be used to home-school the student, she should have reasonably expected that her promise would induce action or forbearance on the part of the district, and the district relied on the mother's promise to home-school the student and refrained from initiating truancy proceedings. ***B.K. v. Haverford Sch. Dist. (In re I.K.)*, No. 13-3797(3d Cir. May 21, 2014)**

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New Jersey District Court

Special Education

Plaintiff sought reimbursement for unilateral placement for placing student in private school for the disabled after plaintiff claimed that student not receiving FAPE. The IEP need not "maximize the potential" of the disabled student. Instead, all that is required to provide a disabled student with a FAPE is an IEP that is 'reasonably calculated' to enable the child to receive 'meaningful educational benefits in light of the student's 'intellectual potential.' District Court's review of record found that student made meaningful progress. Plaintiff's motion for summary judgment denied. Motion to Supplement the record denied. ***C.P. v. Fair Lawn Bd. of Educ.***, No. 12-cv-05694 (D.N.J. May 1, 2014)

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New Jersey Supreme Court

At this time, there are no related decisions reported for May/June 2014.

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New Jersey Superior Court, Appellate Division

Conscientious Employees Protection Act

Disciplined employee's CEPA claims dismissed. No evidence that the actions taken by defendants were motivated by plaintiff's asbestos or other complaints, or retaliatory as a result thereof. Plaintiff's contentions are fraught with hearsay, speculation, self-serving assertions or unsubstantiated conjecture. Plaintiff's suggestion that the various disciplinary actions, work assignments, or comments to him resulted from retaliation for his whistleblowing activity, rather than being exactly what they purport to be -- an attempt to appropriately discipline an employee who is resistant to authority -- lacks material basis. An objective reading of the evidential record reflects plaintiff was appropriately disciplined for real infractions, and that plaintiff overreacted to perceived slights. Adverse employment actions do not qualify as retaliation under CEPA 'merely because they result in a bruised ego or injured pride on the part of the employee.' ***Kownacki v. Saddle Brook Bd. of Educ.***, No. A-5548-11T4 (App. Div. May 8, 2014)

Appellate Division affirms jury's rejection of CEPA claim where transportation coordinator alleged that firing was because of problems she discovered with district busses, reverse the entry of JNOV on the tortious interference claim against the other defendants. The case is consequently remanded for a trial on damages. On remand, the trial court shall give further consideration to the affirmative defense of non-mitigation, viewed in the fuller context of evaluating plaintiff's overall efforts to secure and maintain other employment up through the time of the forthcoming damages trial. ***Warrick v. Parsippany-Troy Hills Bd. of Educ.*, No. A-6035-11T2 (App. Div. June 9, 2014)**

Employment Discrimination

Case alleging violation of Americans with Disabilities Act dismissed where plaintiff failed to prove all required elements. To plead a claim under Title I of the ADA, Plaintiff must allege facts making it plausible that he (1) has a 'disability,' (2) is a 'qualified individual,' and (3) has suffered an adverse employment action because of that disability. Even if Plaintiff has a disability, Plaintiff's Complaint does not allege the latter two elements. To plead a claim under Title II of the ADA, Plaintiff must allege facts suggesting that (1) he is a qualified individual; (2) with a disability; (3) he was excluded from participation in or denied the benefits of the services, programs, or activities of a public entity, or was subjected to discrimination by any such entity; (4) by reason of his disability." Plaintiff's Complaint does not allege facts suggesting that he is a qualified individual nor does it allege that the Board refused to certify him as a substitute teacher by reason of his disability. As such, Plaintiff's Title II ADA claim does not satisfy the above first and fourth elements. Accordingly, the Court dismisses claim without prejudice. ***Mboya v. N.J. Dep't of Educ.*, State Bd. of Exam'rs, No. 14-853 (D.N.J. June 2, 2014)**

Nonrenewal

Nonrenewal of non-tenured custodian following excessive absenteeism upheld. The express terms of the CNA discerns no ambiguity or doubt that the Board did not agree to arbitrate nonrenewals. The Board retained the right to decide whom to employ, which includes its exercised discretion to determine whom not to employ. *N.J.S.A.* 18A:27-4.1. In Article III of the CNA, the Board agreed to "be limited only by the specific and express terms" of the agreement. No provision in the CNA allows nonrenewals to be reviewed in arbitration. Interpretation of the CNA is guided by *N.J.S.A.* 18A:27-4.1, which we conclude is not inconsistent with the Legislature's pronouncement favoring arbitration, set forth in *N.J.S.A.* 34:13A-5.3. In fact, the amendment to *N.J.S.A.* 34:13A-5.3 did not alter prior precedent that held: absent specific mention in the CNA, nonrenewal of an expired fixed-term contract of a nontenured employee is not subject to arbitration. ***Glassboro Bd. of Educ. v. Glassboro Educ. Support Professionals Ass'n*, No. A-5276-12T1 (App. Div. June 11, 2014)**

Pensions and Benefits

In challenge to Chapter 78 that suspended the payment of cost of living increases (COLAs) to current

and future retirees receiving pensions from each of the State's public pension funds. The trial court dismissed the complaints on summary judgment. Court affirms the grant of summary judgment in *DeLucia v. State of New Jersey*, A-0632-12. Court reverses the grant of summary judgment in *Berg and New Jersey Education Association v. Christie (Berg)*, A-5973-11 and A-6002-11, and Court remands Berg to the trial court for further proceedings required to address plaintiffs' Contract Clause claims under the New Jersey Constitution. ***Berg v. Christie*, 436 N.J. Super. 220 (App. Div. 2014)**

Court affirms denial of Teachers' Pension and Annuity Fund denial of nontenured chemistry teacher's application for ordinary disability retirement benefits. TPAF determined that Santangelo did not establish that she was permanently unable to perform her regular duties as a teacher. ALJ fully considered all of teacher's conditions, but found that, both individually and in the aggregate, her conditions did not create a total and permanent disability. Court must give appropriate deference to the ALJ's and the Board's findings where, as here, those findings are based on sufficient credible evidence in the record. ***Santangelo v. State Teachers' Pension & Annuity Fund*, No. A-2184-12T1 (App. Div. June 9, 2014)**

School Finance

Defendant, Borough of Seaside Park appeals from the June 7, 2012 order directing it to: (1) forward all future tax payments to plaintiff, Central Regional School District Board of Education to make such payments until and unless the Superior Court, Appellate Division, or the Commissioner, New Jersey Department of Education (DOE), determines otherwise regarding such payments; and (3) dismiss all remaining claims asserted by the Borough. Funds collected under *N.J.S.A.* 54:4-75 are trust funds, and that the local municipality is "merely the collection agent for the county and the school district of these funds as to which its relationship is basically custodial." Borough lacks the discretion to decline to remit the collected funds. To permit the exercise of such discretion would "result in a serious potential for grievous interference with a continuous and efficient school operation and for the creation of intolerable crisis and chaos throughout the school year." ***Central Reg'l Sch. Dist. Bd. of Educ. v. Borough of Seaside Park*, No. A-5729-11T3 (App. Div. June 19, 2014)**

Tenure Dismissal

Following certification of tenure charges against special education teacher where she was found to have committed conduct unbecoming a teacher by: (1) exhibiting abusive behavior towards students, improperly restraining students, and otherwise using improper physical contact with students; and (2) failing to follow procedures set forth by the Department of Education for security during APA testing, and breaching the security measures as provided by the Department of Education. Appellate Division reverses and remands to Commissioner of Education.
Appellate Division upholds tenure dismissal of special education teacher who told students their behavior was "stupid" and that they were "acting like monkeys," cursed at students, grabbed one student and hit another, snapped a rubber band at another saying student “deserved it,” told a staff member that she was going to “flatten” two students. Findings made by the ALJ that were adopted and relied upon by the Commissioner were sufficiently supported by substantial credible evidence in the record and warranted imposition of a sanction. ***In re Tenure Hearing of Courtney Watson***, No. A-3650-12T1 (App. Div. June 4, 2014)

Commissioner provided no reasons for rejecting the ALJ's recommended penalty, and failed to conduct a Fulcomer analysis or consider mitigating factors and the proportionality of the penalty. An administrative agency must conduct an independent evaluation of all relevant evidence and legal arguments presented in support of and in opposition to proposed administrative agency action. ***In re Eisenhour*, No. A-3403-12T4 (App. Div. June 18, 2014)**

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New Jersey Superior Court, Law/Chancery Division

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Commissioner of Education

Board Authority

Commissioner, on remand from Appellate division, directs that the authority to issue *Rice* notice to the CSA rests with the board president, or with a majority of the full board membership pursuant to a petition, similar to the procedure for calling a special meeting. ***Persi v. Woska,* Commissioner 2014:June 17.**

Board Policy

Board's Option II policy for physical education does not violate *N.J.S.A.* 18A:26-2. Use of grading information received from non-physical education certificated coaches as the essential source of grades for students participating in "Option II" violated the law. ***Bernards Twp. Ed Ass'n.*, Commissioner 2014:May 5.**

Certification Acquisition/Revocation/Suspension

Music teacher appeals revocation of her certificates ofTeacher of Music Certificate of Eligibility and Teacher of Music Certificate, arguing that Commissioner should reject the Board's decision revoking her certificates and impose the two year suspension of her certificates that was recommended by the Administrative Law Judge. Request denied as appellant received due process and the Board's decision is supported by sufficient credible evidence in the record and is not arbitrary, capricious, or unreasonable. ***In Matter of Certificates of P.S.,* Commissioner 2014:May 2**

Where teacher resigned on inadequate notice, and she did not deny allegation, her certificate was properly suspended for a period of one year from the date of the filing of this decision. ***Matter of Suspension of Certificate of August-Washington,* Commissioner 2014:May 13.**

Certificate suspended where teacher failed to provide adequate notice of resignation and failed to answer order to show cause; allegations deemed admitted; certificate suspended for a period of one year from the date of the filing of this decision. ***Matter of Suspension of Certificate of Norward,* Commissioner 2014:June 6.**

Commissioner will not disturb action by State Board of Examiners in revoking certificates; rejects arguments a video recording of the incident at issue in this case should not have been admitted into evidence because it was not properly authenticated or that the Commissioner should reject the Board's decision revoking his certificates and impose a two year suspension of his certificates. Affirms. ***Matter of the Certificates of Salaam,* Commissioner 2014:June 6.**

Commissioner suspends respondent's teaching certificate for a year for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 and *N.J.A.C.* 6A:9-17.9 for resigning his position without giving the notice required by his contract with petitioner. ***McNair*, Commissioner 2014:June 6.**

Teacher ask DOE to remove from its website the decisions revoking her substitute certificate in 1998 due to criminal matter which had since been expunged; she had recently been reissued a teaching credential and wanted her prior history deleted; Commissioner denies her request; the Board of

Examiners' action denying her request was not arbitrary, capricious or contrary to law; moreover, the Board of Examiners made a good faith effort to accommodate her by removing from the decision any references to the "specifics" of the 1994 incident which precipitated the revocation of her substitute teaching credential. ***Gaba,* Commissioner 2014:June 10._**

Commissioner upholds the decision of the State Board of Examiners to deny teacher's application for certification as a Learning Disabilities Teacher-Consultant. Refusal to substitute her experience as a private school teacher for the requisite standard instructional certification was arbitrary, capricious and unreasonable. The Examiners argued that petitioner has never participated in the Provisional Teacher Program, successful completion of which is required pursuant to *N.J.A.C.* 6A:9-8.3 *et seq.* in order to obtain standard certification in New Jersey. **Marcinek v. Examiners, Commissioner 2014:June 25.**

Charter Schools

Commissioner finds that Assistant Commissioner had the authority to deny charter school its request to expand from serving elementary children in grades K-5 to providing programs for both elementary and middle school students in grades K-8; Assistant Commissioner was Commissioner's authorized designee, and proper appeal is not to the OAL but to the appellate division; emergent relief denied. ***Hatikvah International Academy Charter,* Commissioner 2014:May 13.**

Commissioner denies emergent appeal from Assistant Commissioner's determination denying charter's renewal application and request for stay pending final determination to keep the school open. Commissioner finds that Assistant Commissioner had the authority to deny renewal; Assistant Commissioner was Commissioner's authorized designee, and proper appeal is not to the OAL but to the appellate division. ***D.U.E. Season Charter,* Commissioner 2014: May 13.**

Charter challenged NJDOE denial of additional "planning year" in which to secure final approval to operate a Hebrew immersion charter school, contending that the Department treated it differently from other charter school applicants, and that its decision to deny the additional planning year was arbitrary and capricious. Commissioner finds that there was ample factual support for DOE's determination that Shalom lacked the capacity to successfully operate a charter school; was a thoughtful and thorough judgment of the merits of Shalom's application. Schools that were successful in obtaining an additional year recognized on their own that they were unready to receive students prior to DOE's site visit, *or* were partnered with a recognized organization that had previously been successful in opening and operating a charter school, *or* were located in an underserved community; none of these factors applied to Shalom Academy. ***Shalom Academy Charter,* Commissioner 2014:May 19.**

Ninety-day rule

Commissioner finds that tenured teacher failed to file her challenge to her termination in a timely fashion and dismisses; she unequivocally learned that her employment was terminated on March 15, 2013 – her last day of work in the district; her appeal should have been filed at the latest within ninety days of March 15, 2013; it was filed on August 14, 2013, but not perfected until August 27, 2013. No facts are present to warrant relaxation of the 90 day rule. **Johnson-Deen, Commissioner 2014:May 5 (Newark)**

Non-renewal

Commissioner rejects assistant principal's claim that Board's determination not to renew his contract after employment in that position for 3 years was arbitrary, capricious and unreasonable and that board violated procedures during his performance evaluations; boards of education have an almost complete right to terminate the services of a non-tenured employee and here the Board based its decision upon input from administrators with personal knowledge of petitioner's work performance, including the Superintendent of Schools, as well as parental complaints regarding petitioner's administrative style and abilities; despite his allegation that the Board's non-renewal decision included retaliation for the filing of

a discrimination complaint by his former principal, petitioner failed to raise a material question of fact as to other bona fide reasons for the Board's non-renewal action. ***Schempp,* Commissioner 2014:May 12 (Clayton).**

Commissioner dismisses petition of high school teacher with general business endorsement, who claimed she had tenure when she was non-renewed; courses teacher had been assigned to teach during seven of her eight years of her service in district required a technology education endorsement, which she did not possess; general business endorsement would have authorized her to teach any "educational technology" course, but not any "technology education" course; the courses petitioner taught that are at issue here are Imaging Technology and Computer Aided Design, both of which currently require a technology education endorsement. By 2006 she was aware that her credentials were not adequate and was advised by DOE in 2007 that she could not qualify for the technology education endorsement without taking additional coursework, which she chose not to complete. ***Lopac,* Commissioner 2014:May 27 (Manville)**

Board's decision not to renew petitioner's teaching contract was not arbitrary, capricious or unreasonable. ***Lacik,* Commissioner 2014:May 27 (Edison)**

Regional School Districts

Commissioner dismisses petition by River Dell for more equitable apportionment, and rejects OAL Report, finding that this case is neither constitutionally nor equitably similar to the situation in *North Haledon* and that *North Haledon* cannot be interpreted as establishing a blanket rule that the Commissioner has the authority to perform the function of *N.J.S.A.* 18A:13-23. Further, ALJ's proposed 80% per pupil/20 % property valuation formula appears not to have taken into account that property values, not per pupil counts, have been regarded by the Supreme Court as the most equitable basis for school funding. Extraordinary relief such as petitioner sought herein might be desirable in more compelling circumstances. ***In re: Petition for Equitable Modification of Cost Apportionment for River Dell Reg.,* Commissioner 2014:June 2.**

RIF/Tenure Entitlements

Guidance counselor did not earn tenure as a teacher and was not entitled to teaching assignments during the period of the RIF, nor to any back pay, where she was hired as a guidance counselor and while she often prepared lesson plans outlining her character development program she was not required to do so and her lessons presented were solely guidance-related, she never taught core curriculum subjects, and she was employed under her educational services certificate as a guidance counselor. She was tenured exclusively as a guidance counselor. ***Rutledge v. Board of Education,* Commissioner 2014:June 19.**

When during a RIF the position of the tenured Supervisor of Visual and Performing Arts was eliminated and he was reassigned to a teaching position at a reduced salary, the board improperly applied seniority regulations, rather than tenure principles, as non-tenured supervisors with greater knowledge and expertise were permitted to remain in supervisory positions in the district. Commissioner notes that, irrespective of content expertise, a certified supervisor with tenure should be preferred over one who is non-tenured (as per *Duva*); and, although there is no statutory right to the salary held prior to a RIF, award of differences in salary was an appropriate remedy when a petitioner's tenure rights are violated as a result of a RIF. ***Annecchino v. Irvington Bd.,* Commissioner 2014:June 24.**

School Ethics

Commissioner finds that the decision of the School Ethics Commission as to a determination of a violation of *N.J.S.A.* 18A:12-24.1(e) and *N.J.S.A.* 18A:12-24.1(g) is supported by sufficient credible evidence that the board member breached the confidentiality of the Board's deliberation during the executive session by sharing her recording of the closed meeting with two individuals who would not have been permitted to attend the executive session—notwithstanding her argument that sharing her

recording with her attorneys did not have the potential to compromise the Board because her attorneys had a professional obligation not to violate the Board's right to confidentiality and fact that the contents of the recording were never shared with the public. Upholds reprimand. ***Messner and Condo,* Commissioner 2014:June 9**

Sending-Receiving

Commissioner grants Longport's application for severance of its send-receive relationship with Atlantic City subject to its entering into a new agreement with Ocean City for a minimum of five years; agrees with ALJ that there would be no substantial negative impact upon the educational and financial condition of the districts, but disagreed with the ALJ's extreme notion that the current racial balance of the receiving district is dispositive of whether a substantial negative impact will result from severance; insufficient evidence of aggravating circumstances in the record to support a finding that the otherwise *de minimis* 4% proportional change represents a "substantial negative impact" on the racial composition of ACHS; under all of the instant circumstances, severance will not have a substantial negative impact on the highly diverse racial composition of ACHS. ***Longport Bd. of Ed.,* Commissioner 2014:June 5.**

Standing

Resident/taxpayer lacked standing to challenge district's decision to administer quarterly assessments designed to measure its students' readiness for college and careers, but to exempt from the testing those students who are taking AP courses. Petitioner claimed that the exemption disparately impacts African-American children since the majority of Montclair's AP students are white. However, petitioner does not currently have children in respondent's schools, and will therefore suffer no direct personal harm or inconvenience from the actions which respondent has decided to undertake. Further, while petitioner is a resident and taxpayer in Montclair, he has alleged no personal financial ramifications from respondent's testing plan. Thus, petitioner does not qualify as an "interested person" under the regulations governing disputes before the Commissioner, *see, N.J.A.C.* 6A:3-1.2. Nor is petitioner in a position adverse to other parties, have a palpable stake in the outcome of the litigation, or likely to suffer harm in the event of an unfavorable decision. His advocacy efforts are commendable, but they do not add up to the concrete, personal stake in respondent's current actions which standing contemplates. ***Herron,* Commissioner 2014:June 2 (Montclair)**

Student Residency

Grandmother who was court-ordered residential custodian of child did not prove that child was entitled to a free public education in Burlington schools; surveillance showed that child resides with his mother in Philadelphia and in such cases, where the facts in evidence are discrepant with the terms of a custody order, the Commissioner will look behind the terms of the order, find that the child is not domiciled in the subject district. As mother is not a party to this case, tuition may not be assessed against her. Commissioner rejects ALJ's determination that grandmother is not liable for tuition, finding that she was in fact her grandson's guardian as defined in *N.J.A.C.* 6A:22-1.2; Commissioner dismissed grandmother's petition and assessed tuition in the amount of $18,381.34. ***A.B., o/b/o L.M.D-R,* Commissioner 2014:May 2 (Burlington)**

Commissioner rules in favor of Hawthorn Bd. in its appeal of the interim Executive County Superintendent's determination that Hawthorne was the district responsible for the cost of educating a child who allegedly became homeless prior to enrolling in the Prospect Park School District between January 2013 and April 2013. Finds that the parent voluntarily left her apartment to move back to Prospect Park as part of the process of moving to Florida, which occurred a few months later; thus, no crisis of immediacy displaced the family, and the family's circumstances are clearly distinguishable from cases where a family becomes transient due to an emergency. ***Hawthorne Bd. of Ed. v. Prospect Park Bd. of Ed.,* Commissioner 2013:May 12.**

Commissioner orders back tuition for period of illegal attendance in the amount of $19,619.76 after

evidence showed that parents shared custody of student, that student moves frequently between Hamilton address and Trenton address but spends far more time in Trenton with mother than with father's cousin in Hamilton, and mother retains financial responsibility for her son; after leaving in the morning from his mother's Trenton address, he attended school in Hamilton; father's cousin has not assumed guardianship nor is she responsible for his support and maintenance; father has not been physically present since incarcerated in September 2012; I.J. intended to make her custody permanent by filing for a change in custody status in Superior Court in February 2014. As of September 2012 child was considered domiciled with mother in Trenton. **I.J., o/b/o Q.J., Commissioner 2014:May 2 (Hamilton)**

Where residency investigation confirmed that mother had moved from Ocean City and was domiciled at the home purchased in Marmora in May 2013; and where mother receives her important mail at the Marmora address, and keeps two pets there full-time and failed to credibly establish that the other addresses she identified during the hearing were legitimate Ocean City residential locations during the period in question, Commissioner agrees with ALJ that mother and daughter were domiciled in Marmora for the 2013-2014 school year. However, the ALJ also concluded that child must remain in the Ocean City Intermediate school for the balance of the school year, unless mother opts to remove her, as changing schools this late in the school year would be too disruptive; petitioner's appeal is denied; she must pay the Ocean City School District tuition for the period of G.H.'s ineligible attendance. Remanded to determine amount of tuition. ***E.H., o/b/o G.H.,* Commissioner 2014:May 16. (Ocean City)**

Domicile of child was unclear due to conflicting evidence and parent failed to bear his burden to show that child was entitled to a free public education in Ewing schools. Accordingly, the petition was dismissed and parent was ordered to reimburse the school district tuition for the period of ineligible attendance in the amount of $13,013.36, representing 188 days at a daily tuition rate of $69.22. ***J.L., o/b/o J.L.-C.,* Commissioner 2014:May 19 (Ewing)**

Board denies residency appeal of parent who failed to appear and prosecute; testimony of the school district's investigation showed that children live in Trenton with their mother; no evidence was presented to refute the Board's proofs; and the Board's Attendance Officer testified that the total amount of tuition due and owing for the ineligible attendance of petitioner's children is $35,394. ***W.H. III,* Commissioner 2014:June 6. (Ewing)**

Residency petition and counterclaim for tuition reimbursement are dismissed. Failure to prosecute and board waived its counterclaim. ***D.B., on behalf of minor child, E.B.*, Commissioner 2014:June 25.**

Tenure Dismissal

Commissioner affirms ALJ's dismissal of tenure dismissal matter, not because of respondent's failure to appear at conference dates but because the matter was rendered moot upon respondent's retirement in 2006. Accordingly, the petition was dismissed. ***Matter of Tenure Hearing of Williams,* Commissioner 2014:June 6.**

Workers Compensation

Commissioner dismisses matter for failure to prosecute matter in which board charged her accumulated sick leave for absences related to a work-related injury, which matter had been the subject of a pending Worker's Compensation case that was repeatedly placed on the inactive list between 1999 and 2013, and then scheduled for a hearing where neither party appeared. ***Longo-Sare,* Commissioner 2014:June 10.**

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*Click here to access **Commissioner of Education** decisions.*

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Tenure Arbitration Cases "TeachNJ"

Arbitrator determined that school district proved charges of unbecoming conduct against intermediate school physical education teacher, but failed to demonstrate that the unbecoming conduct was sufficient to support the termination of the teacher. Teacher had engaged in unauthorized "cookie party" with six sixth-grade girls, for which an increment was withheld. Teacher had also engaged in "play fighting" with a student, slapping the student and leaving a red mark on the student's face. Termination went beyond the limits of fairness contemplated by the for-cause standard. Teacher's record over his ten year period of service was unblemished, except for the "cookie party' incident, for which an increment had been withheld. Teacher had not been given notice as to the circumstances under which teachers may touch students and what, if anything, be the consequences if a teacher has physical contact with a student. Teacher ordered reinstated to his position, suspended for 60 days without pay and made whole for all losses of salary and benefits except for the 60 day suspension. ***Tenure Hearing of Vitelli*, Arb, 2014:May 2 (Flemington-Raritan) (Brown, Arbitrator)**

Arbitrator determined that school district proved charges of unbecoming conduct against tenured student Assistance Counselor (SAC) who directed that an exchange of marijuana and money occur between two students who were in her presence, permitted the students to leave her presence, did not report to school administration that the student who received the marijuana in her presence was in possession of marijuana on school premises, was not truthful with school administration regarding the incident and did not notify school administration in a timely manner. The SAC's behavior was such an egregious display of poor judgment and obfuscation that dismissal was the only appropriate remedy, notwithstanding her prior record. Her abject lack of acceptance of responsibility without a scintilla of contrition elevated this event to that of a cardinal violation for which progressive discipline is not appropriate. ***Tenure Hearing of Young*, Arb, 2014:May 2 (Hamilton Township) (Pecklers, Arbitrator)**

Arbitrator determined that school district proved charges of unbecoming conduct against tenured custodian; charges of inappropriate physical conduct with students including pulling female students' hair, punching them in the back and pulling their arms. Students felt uncomfortable. Matter was referred to the Division of Children and Families, which, after an investigation found no sexual abuse or substantial risk of sexual injury occurred. No corrective action was required by DCF. The concept of progressive discipline was not a necessary prerequisite in this case because of the seriousness of the matter. Custodian engaged in wholly inappropriate conduct involving the touching of several female elementary students and did not appear to understand the severity of his conduct. Custodian's conduct violated a central tenet of the school district's fiduciary responsibility with respect to its students and violated the trust of the student's parents. Dismissal was appropriate. ***Tenure Hearing of Davis*, Arb, 2014:May 15 (Asbury Park) (Symonette, Arbitrator)**

Arbitrator determined that school district did not prove charges of unbecoming conduct against tenured kindergarten teacher who allegedly dismissed six year old student at the end of the day in violation of school district policy and procedures without a parent, guardian or other designated escort accompanying the student. Teacher allegedly lied to the superintendent regarding the incident. Arbitrator was not convinced that teacher willfully and deliberately violated board policies and procedures, placing the student in harm's way. Record was insufficient to justify a finding that the teacher should be dismissed. Teacher is returned to work without back pay and will receive full seniority credit from the time of her suspension until the time she returns to work. ***Tenure Hearing of Sacchiero*, Arb, 2014:May 21 (Belleville) (Restaino, Arbitrator)**

Arbitrator determined that school district proved some but not all of the charges of unbecoming conduct against tenured Science teacher. Teacher, among other charges, stored and removed food from a classroom refrigerator while class was in session, interrupting the class, frequently admonished other staff members for acting in a manner above what was required under the collective bargaining agreement, was loud and intemperate with other staff members, often banging the table, interrupting

others and turning red, was disruptive at faculty meetings, used profanity in the classroom with students, used sarcasm to demean students, describing students as "failures" if they did not do their work. Arbitrator determined that while a significant penalty was necessary, dismissal was not. Given the teacher's angry, abusive and demeaning behavior, the arbitrator ordered suspension without pay for one-half of the 2014-2015 school year, ordered a psychiatric examination prior to return to duty by February 2015. Failure to do so or a report that he is unfit for duty shall result in his dismissal from service. ***Tenure Hearing of Vincenti*, Arb, 2014:June 11 (Paterson) (Edelman, Arbitrator)**

Arbitrator determined that school district did not prove charges of unbecoming conduct against tenured teacher for failure to properly supervise kindergarten students in her care. While students who had completed testing were watching a movie under the teacher's supervision, two students, a boy and a girl, left the classroom area and entered the classroom's single bathroom together. While in the bathroom for a period of approximately five minutes the two students removed their clothes and touched each others "private parts." The matter was referred to the Institutional Abuse Investigation Unit of DYFS, which found that neglect/inadequate supervision was not established, corrective action was not required. While termination was not warranted, teacher was culpable for failure to properly supervise her students. Teacher received a 10 school day unpaid suspension. ***Tenure Hearing of Mascio*, Arb, 2014:June 20 (Mullica)(Brent, Arbitrator)**

Arbitrator determined that school district proved charges against tenured secretary of excessive absenteeism and tardiness, failure to use reporting procedures, personal telephone/cellular phone calls during the day, repeatedly returning late from lunch, arriving at work late, leaving early, improperly using sick days, was rude and disrespectful behavior to parents. Actions demonstrated a pattern of misconduct over an extended period of time constituting conduct inappropriate for a public school secretarial staff member. Secretary was terminated from her position of secretary. ***Tenure Hearing of Wheeler*, Arb, 2014:June 23 (Elizabeth)(Lovitt, Arbitrator)**

Arbitrator determined that school district proved, by a preponderance of the evidence, charges of inefficiency against tenured teacher. Teacher allowed students to sleep in class, did not follow lesson plans, failed to use measurable objectives, failed to comply with directives, did not post or use focus activities correctly, did not prepare effective lesson plans, did not use class time effectively, failed to use closure activities, failed to provide lesson plans when absent and failed to post grades in a timely manner. Her performance as a teacher was unacceptable and the education of students in her classroom suffered. Teacher has a long history of unsatisfactory evaluations, a denial of increment and two consecutive 90 day improvement plans, none of which caused her performance to improve. Tenure charges were sustained. ***Tenure Hearing of Cuff*, Arb, 2014:June 26 (Cumberland Regional) (Gerber, Arbitrator)**

Arbitrator determined that Department of Corrections met its burden of proving insubordination and neglect of duty; intentional disobedience or refusal to accept order, assaulting or resisting authority, disrespect or use of insulting or abusive language to supervisor, conduct unbecoming an employee and violation of a rule, regulation, policy, procedure, order or administrative decision. Teacher's failure to communicate her valid safety concerns to her supervisor was insubordinate and evidence of neglect of duty. Arbitrator found that appropriate discipline to be major discipline – a suspension for ten working days. ***Tenure Hearing of Thompson*, Arb, 2014:June 30 (Dept. of Corrections, AC Wagner Youth Correctional Facility)(Laskin, Arbitrator**)

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School Ethics Commission

SEC grants summary judgment dismissing complaint against board member alleged to have voted to pay her company when she voted to accept the Food Services Report. The Report acknowledged and

memorialized all payments to cafeteria vendors, which had been approved and paid earlier by the Food Services Director and the School Business Administrator and so she never had the opportunity to vote for payment because the vendors' invoices never came before the Board for a vote. Had she actually voted on the payment to her business, then she would have violated the Act, and it would be of no moment that the vendors were not identified or if the Board member forgets or was not mindful enough when she votes and receives a benefit. It is incumbent upon the Board member to question and be vigilant, particularly if there is a contract extant with the Board, whereby he or she receives some advantage, benefit or privilege. However, that is not the case here. There was no payment to this vendor or any other vendor attached to the Food Services Report and the respondent did not benefit from her vote. ***IMO Moiso*, SEC 2014:May 27**

Complainant failed to sustain burden of proof that Board President violated the Code of Ethics, specifically *N.J.S.A.* 18A:12-24.1(e) and (j), as a result of actions taken by him when he authorized, in consultation with chief school administrator and attorney, issuance of letter by board attorney outside of Board meetings with respect to the candidacy of a member of the public for the Board. ***Molica v. Sayre*, SEC 2014:June 24.**

Complainant bore the burden of proof. She failed to appear at the hearing without good cause, the Commission hereby grants the respondent's Motion to Dismiss the allegation that respondent violated *N.J.S.A.* 18A:12- 24.1(e), (g) and (j) of the Code of Ethics for School Board Members for complainant's failure to prosecute. ***Green v. Conlon*, SEC 2014:June 24.**

Board Member violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act when he voted to reappoint the auditing firm for the Elizabeth Board of Education when his business partner is a principal in that firm and recommends the penalty of reprimand. Finally it is of no moment that the respondent did not intend to vote for the firm. The Commission has determined that it is the responsibility of a Board member to know the items to be voted on in any given meeting and to recuse himself from any vote in which he has a conflict at the time of the vote. ***Monteiro*, SEC 2014:June 24**

*Click here for **School Ethics Commission** decisions.*

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State Board of Examiners

Board of Examiners voted to revoke Burden's Teacher of Health and Physical Education Certificate of Eligibility With Advanced Standing Teacher of Health and Physical Education Certificate of Eligibility With Advanced Standing, in matter where Maine police informed the Board that Burden pled guilty to Assault in 2009 after being charged with Assault and Unlawful Sexual Contact and pled guilty to Loitering for the Purpose of Engaging in Prostitution in September 2013 when he answered an ad placed by an undercover police officer on Craigslist offering sexual favors in exchange for cash. ***Certificate of Burden,* Exam May 22, 2014.**

Principal Certificate of Eligibility, s Teacher of the Handicapped, Supervisor and Principal certificates are suspended for a period of three years, effective immediately where as a

condition

of his entrance into a Pretrial Intervention Program, holder of certificates agreed to the suspension of his teaching certificates for a period of three years. ***Certificates of Houser*, Exam May 22, 2014.**

Principal Certificate of Eligibility, School Administrator Certificate of Eligibility, and Supervisor and Principal certificates are hereby SUSPENDED for a period of five years, effective immediately. ***Certificates of Leon,* Exam May 22, 2014.**

Lopez agreed to relinquish and Board voted to accept relinquishment of his Teacher of Elementary

School in Grades K-5 Certificate of Eligibility, and a Teacher of Elementary School in Grades K-5 Provisional certificate, as a condition of his entrance into a Pretrial Intervention Program, with the force and effect of a revocation and all attendant consequences in his affidavit to that effect to the Board. ***Certificates of Lopez,* Exam May 22, 2014.**

Board voted to revoke Maria Malanga's Principal Certificate of Eligibility and her Teacher of Elementary School, Supervisor and Principal certificates where she had pled guilty to Assault and Criminal Mischief-Damage Property and had been sentenced to two years' probation for which she was disqualified from public school employment pursuant to *N.J.S.A.*18A:6-7.1 *et seq.* Certificates revoked despite her claim that at the time of the incident leading to her arrest, unbeknownst to her, she was bi-polar and where she claimed that the charges were filed by her youngest sister who was suffering from severe depression and tried to kill her. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. ***Certificates of Malanga,* Exam May 22, 2014.**

Board voted to accept Miller's relinquishment of Teacher of Earth Science Certificate of Eligibility, 2007 and Teacher of Students With Disabilities Certificate of Eligibility, with the force and effect of a revocation pursuant to *N.J.A.C.* 6A:9-17.8, after he pled guilty to Endangering the Welfare of a Child. ***Certificates of Miller,* Exam May 22, 2014.**

Given the totality of circumstances, and taking into consideration teacher's 20 year unblemished record, the appropriate sanction was a two-year suspension of Painter's Teacher of Health and Physical Education and Driver Ed certificates, after teacher pled guilty to Obstructing the Administration of Law and was sentenced to one year of probation and community service after speaking to a student about her statements during an ongoing police investigation involving allegations that the student had had an inappropriate relationship with a teacher. However, the fact that the court did not believe her offense warranted the forfeiture of her public position had no bearing on this matter. ***Certificates of Painter,* Exam May 22, 2014.**

Examiners orders revocation of Teacher of Art Certificate of Eligibility With Advanced Standing and his Teacher of Art certificate where teacher agreed that they be relinquished after he pled guilty to Official Misconduct and Endangering the Welfare of a Child. ***Certificates of Reilly,* Exam May 22, 2014.**

Examiners accepts s relinquishment of Teacher of Art Certificate of Eligibility With Advanced Standing and Teacher of Art certificate, with the force and effect of a revocation where he was convicted of Criminal Sexual Contact and Tampering with a Witness; demonstrates behavior that falls far short of a role model, and one whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate nor be permitted to continue to hold himself out as a teacher. ***Matter of the Certificates of Rubinetti,* Exam May 22, 2014.**

Where teacher had been removed on tenure charges for engaging in corporal punishment due to an incident where she admitted that she slapped a student after he had drawn on another student's project with a red marker although she immediately realized she had acted inappropriately and tried to apologize. Examiner finds that while her conduct merits a strong rebuke, her immediate abject remorse, swift entry into in-patient treatment for mental health issues and the exigent personal circumstances with which she was contending in the days before the incident, lead the Board to believe that suspension for one year, not revocation, of her Teacher of Speech Arts and Dramatics Certificate of Eligibility and her Teacher of Speech Arts and Dramatics certificate is appropriate; no indication that she could not function successfully as a teacher elsewhere. ***Matter of the Certificates of Sugarman,* Exam May 22, 2014.**

Teacher agreed to relinquish Teacher of English, Teacher-Librarian, Teacher of Mathematics and Student Personnel Services certificates; will be revoked effective immediately. ***Matter of Certificates of Yacabonis*, Exam May 22, 2014.**

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New Jersey Council on Local Mandates

At this time, there are no related decisions reported for May/June 2014.

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New Jersey Division on Civil Rights

At this time, there are no related decisions reported for May/June 2014.

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Election Law Enforcement Commission

At this time, there are no related decisions reported for March/April 2014.

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Government Records Council

GRC determined that complaint was materially defective and must be dismissed. Complaint was filed only two days after OPRA request for W-2 forms. As W-2 forms are not immediate access government records, complaint was filed before the statutory time for access (7 days) had expired. ***Frank L. Cahill v. Township of Parsippany-Troy Hills*, No. 2014-226 (GRC June 24, 2014)**

GRC determined that emails between Complainant and Custodian did not constitute an OPRA request. ***Caren Matayckas v. NJ Department of Children and Families,* No. 2013-316 (GRC June 24, 2014)**

Redacting information "not related to" a request is not a lawful basis to deny access to records under OPRA. Unless expressly identified for redaction, everything in the record shall be disclosed. Entries marked "not related to shared services" improperly redacted. Complainant had asked for electronic, via e-mail, of unredacted copies of all records in the Township's possession including, but not limited to, correspondence, reports, e-mails, telephone logs and minutes of the executive session of any committee meeting that reflect, refer or relate to discussions of any Shared Service Agreement with any other township for January 1, 2011 to December 1, 2011, including any materials prepared by any member of the Township Committee, Custodian, Chief Financial Officer, Tax Collector, Road Supervisor and Township attorney. ***John Hyland v. Township of Lebanon and Township of Tewksbury,* No. 2012-227, 228 (GRC June 24, 1024)**

Board president's response on behalf of Custodian was insufficient as he failed to provide a date certain as to when Custodian would reply to Complainant. Custodian unlawfully denied access of transportation contracts, invoices, bills and purchase orders for 2009-2010 and 2010-2011, because the evidence of record indicates that same were not part of the FBI's investigation and therefore were not exempt from access at the time of the Complainant's OPRA request. Complainant requested Inspection and/or

copies of all transportation contracts, invoices, bills and purchase orders for public and non-public school bus routes servicing Lakewood students living in Somerset Walk during the 2009-2010, 2010-2011, 2011-2012 and 2012-2013 school years. ***Joyce Blay v. Lakewood Board of Education,* No. 2013-150 (GRC June 24, 2014)**

Although the Division of Elections may have instituted a policy of not allowing requestors to submit OPRA requests via e-mail, the Custodian improperly required that the Complainant must submit his OPRA request using ““. . . the proper form . . .” Complainant’s request at issue here was appropriately filed and the Custodian should have responded to same specifically advising of Elections’ policy change regarding the methods by which the Complainant could submit a request. While a custodian is not permitted to deny a request for records under OPRA simply because it is not on the agency’s form, an agency does have the authority to dictate the methods by which a requestor can transmit an OPRA request. ***David J. Roundtree v. NJ Department of State, Division of Elections,* No. 2013-258 (GRC June 24, 2014)**

Because the Custodian certified that the requested report contains a detailed analysis of the court buildings’ security systems, to include surveillance capability, and that disclosure of the report could jeopardize the safety of those working in the building as well as visitors to the buildings, the Custodian lawfully denied access to the requested report as “…security information or procedures for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein.” ***Jose R. Gonzalez v. Hudson County’s Sheriff’s Office,* No. 2013-370 (GRC June 24, 2014)**

Notwithstanding the existence of reimbursement payments made pursuant to a possible ethics violation, such records are not disclosable under OPRA because disciplinary actions are not specifically identified as personnel information subject to disclosure under OPRA. Custodian lawfully denied access to the requested reimbursements, which may or may not exist within employee’s personnel file. Allegation was that employee had misused University property at a cost of $ 20,000. ***Luis F. Rodriguez v. Kean University,* No. 2013-296 (GRC June 24, 2014)**

Because the Complainant’s OPRA request seeks a class of various documents, rather than a request for specifically named or identifiable records, the request is invalid under OPRA. Custodian is not required to conduct research to locate documents responsive to the Complainant’s request. ***Maurice Torian v. NJ State Parole Board,* No. 2013-245 (GRC June 24, 2014)**

New Jersey Department of State’s policy not to accept OPRA requests via e-mail does not impose an unreasonable obstacle to the transmission of a request for a government record because the Department accepts requests via mail, hand-delivery and OPRA Central. Custodian has not violated OPRA. ***David J. Roundtree v. NJ Department of State,* No. 2013-260 (GRC June 24, 2014)**

GRC finds that the Custodian lawfully denied access to the requested records because NJ Shares does not sufficiently possess the characteristics required to be considered an instrumentality of the state, or a political subdivision thereof, and thus a “public agency” subject to OPRA.
***Rafael L. Martinez v. NJ Shares,* No. 2013-286 (GRC June 24, 2014)**

Custodian violated *N.J.S.A.* 47:1A-5(e) by failing to provide immediate access or to provide an immediate response to the Complainant’s OPRA requests for timesheets, payroll, and/or overtime records. ***Stacie Percella v. City of Bayonne,* No. 2013-217 (GRC June 24, 2014)**

Although the Division of Elections may have instituted a policy of not allowing requestors to submit OPRA requests via e-mail, the Custodian improperly required that the Complainant must submit his OPRA requests using “. . . the proper form . . .” Custodian should have responded to same specifically advising of Elections’ policy change regarding the methods by which the Complainant could submit a request. While a custodian is not permitted to deny a request for records under OPRA simply because it is not on the agency’s form, an agency does have the authority to dictate the methods by which a requestor can transmit an OPRA request. ***David J. Roundtree v. NJ Department of State, Division of***

***Elections,* No. 2013-259 (GRC June 24, 2014)**

Although the Division of Elections may have instituted a policy of not allowing requestors to submit OPRA requests via e-mail, the Custodian improperly required that the Complainant must submit his OPRA requests using ". . . the proper form . . ." Custodian should have responded to same specifically advising of Elections' policy change regarding the methods by which the Complainant could submit a request. While a custodian is not permitted to deny a request for records under OPRA simply because it is not on the agency's form, an agency does have the authority to dictate the methods by which a requestor can transmit an OPRA request. ***David J. Roundtree v. NJ Department of State, Division of Elections,* No. 2013-257 (GRC June 24, 2014)**

The potential for harm stemming from non-consensual disclosure, coupled with teacher's reasonable expectation of privacy, warrants non-disclosure of the full address. However, these concerns do not extend to the limited disclosure of just the town of residence. Custodian has failed to bear her burden of proving that disclosure of the town of residence listed on teacher's application for a teaching license would violate her reasonable expectation of privacy of. Custodian shall disclose the responsive record, making all other appropriate redactions, but listing the town of residence.
***Harry B. Scheeler, Jr. v. NJ Department of Education,* No. 2013-191 (GRC June 24, 2014)**

Custodian improperly required the Complainant to complete an official OPRA request form. Notwithstanding the Custodian's "deemed" denial, the responsive documents to the Complainant's OPRA request are exempt from disclosure as the Complainant seeks records containing information regarding the victim of his crimes. Custodian's denial of access is proper because the Complainant seeks records regarding relatives of his victim. ***Brian Killion v. Hammonton Police Department,* No. 2013-228 (GRC June 24, 2014)**

Custodian bore his burden that did not unlawfully deny access to the Complainant's request for all e-mails pertaining to city business from former mayor. Complainant's request for emails pertaining to "city business" is overly broad and invalid. Custodian bore his burden that he did not unlawfully deny access to the Complainant's request for all text messages and Facebook messages pertaining to city business from former mayor. Complainant's request for text messages and Facebook messages pertaining to "city business" is overly broad and invalid. ***Jason Todd Alt v. City of Vineland,* No. 2013-205 (GRC June, 24, 2014)**

Custodian lawfully denied access to the requested appraisal. Disclosure of the appraisal would have provided an advantage to bidders and competitors vying with the Township for ownership of the subject property. ***Larry A. Kohn v. Township of Livingston,* No. 2013-308 (GRC June 24, 2014)**

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Election Law Enforcement Commission

At this time, there are no related decisions reported for May/June 2014.

New Legislation

P.L.2014, c.10 , 06/19/2014 Provides that school districts must ensure that students with disabilities have opportunities to participate in athletic activities equal to those of other students.

P.L.2014, c.14. -see S2015 Appropriates $32,537,765,000 in State funds and $15,013,691,000 in federal funds for the State budget for fiscal year 2014-2015.
Approved 6/30/2014

P.L.2014, c.15 , 06/30/2014, Reinserts in FY 2015 Appropriations Act language that was omitted due to a technical problem.

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New Regulation/Executive Orders

46 N.J.R. 1360(a), *N.J.A.C.* 6A:2-2.4, Organization of the Department, Reporting Responsibilities, Adopted: May 8, 2014

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United States Supreme Court

At this time, there are no related decisions reported for March/April 2014.

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3rd Circuit Court of Appeals

Criminal

Former Mayor was convicted of Hobbs Act extortion and Travel Act bribery for accepting money from an insurance broker in exchange for agreeing to influence members of the board of education to refrain from putting the school district's insurance contract up for competitive bidding. ***United States v. Bencivengo***, No. 13-1836 (3d Cir. April 23, 2014) ‘

Special Education

In a case in which a special needs student claimed that a school district violated the IDEA by refusing to provide in-class support services at the middle school located closest to her home, the appellate court concluded that the case was moot; the student could not raise a claim for compensatory education after she expressly waived that claim before the administrative law judge and did not discuss that claim in the district court or in the appellate court in her brief. The appeal was dismissed as moot, and the matter was remanded to the district court.
J.T. v. Newark Bd. of Educ., No. 13-2299 (3d Cir. April 28, 2014) (not precedential)

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New Jersey District Court

Discrimination

Court declines to dismiss claims of discrimination brought by former employee who claimed district discriminated against him because of his Puerto Rican/Dominican background under Title VII and retaliation under Title VII and CEPA; court grants motion to dismiss claims alleging County Local Finance Board and New Jersey School Ethics Act violations, as well as all claims against named individuals. ***Gonzalez v. Bergen County Tech. Schs***, Civil Action No. 2:12-00615 (WJM) (D.N.J. 2014) (April 11, 2014)

In matter affirming enforceability of a settlement agreement entered into to resolve a wrongful termination and discrimination matter, court denies motion for reconsideration of the Memorandum Opinion. ***Daponte v. Barnegat Twp. Sch. Dist***., Civil Action No. 12-4016 (MAS) (D.N.J. April 2, 2014) not for publication

The court denied motion to reopen a case after de novo review of all papers, trial and telephone status

conference transcripts, court opinion; the parties entered into an enforceable Settlement Agreement in this matter. ***Daponte v. Barnegat Twp. Sch. Dist***, Civil Action No. 12-4016 (MAS) (DEA) (D.N.J. March 31, 2014) not for publication

Two years after his employment by the Board ended, former Assistant Superintendent alleges that the Board violated NJLAD when it constructively discharged him because of his Caucasian race to ensure the hiring of African-Americans in the district, and replaced him with an African-American woman. Court grants board's motion for summary judgment; plaintiff failed to identify specific admissible facts and affirmative evidence creating a genuine issue for trial with respect to the first element of his prima facie case - that the Board is the unusual employer that discriminates against the majority. Nor was he constructively discharged. ***Kirschling v. Atl. City Bd. of Educ***., Civil Action No. 11-4479 (NLH/JS) (D.N.J. March 31, 2014).

Court grants board's motion for summary judgment, where Education Enforcement Officer brought claims of reverse employment discrimination on account of race for defendants' failure to rehire him after he was terminated following a RIF; no evidence shows that failure to hire him was motivated by his race and without such evidence, plaintiff cannot overcome defendants' legitimate reasons for hiring the two highest ranked candidates. Further, EEO's spoliation sanctions are denied; although defendants are at fault for not being able to locate their notes, plaintiff presented no evidence to prove that defendants intentionally destroyed the interview notes, and is not seriously prejudiced by the lack of notes since he was able to depose the interviewers. ***Thompson v. Bridgeton Bd. of Educ.,*** Civil Action No. 12-6864 (NLH-JS) (D.N.J. March 27, 2014)

Employment Litigation

School principal files claims against board and Superintendent, of fraudulent inducement to sever employment relationship, breach of contract, tortious interference with contractual relations and prospective economic advantage, tenure law violation, and First Amendment retaliation, based on allegations that the Superintendent falsely claimed to have filed a grievance against him and forced his retirement in retaliation for the principal's comments about the superintendent that were allegedly made in confidence to the board during a closed meeting, and apparently leaked. Claims seeking purely equitable relief such as reinstatement do not require a notice of claim and will not be dismissed on that basis; however, many claims are dismissed for failure to file notice of claim, vague allegations, etc. Retaliation count permitted to proceed. Plaintiff may file amended complaint where indicated. Motion to Dismiss is granted in part and denied in part, the Board's Motion to Dismiss is granted in part and denied in part, Plaintiff's Cross-Motion for Leave to File a Notice of Claim is denied, and Plaintiff's Motion to Amend/Correct Complaint is granted in part and denied in part. ***Rotante v. Franklin Lakes Bd. of Educ.***Civil Action No. 13-3380 (JLL) (D.N.J. March 26, 2014) not for publication

Court dismisses complaints involving a series of terminations of employment and denials of applications for employment; plaintiff alleged that some two dozen defendants violated his rights under Title VII, ADEA; handicap discrimination in violation of the Rehabilitation Act; and equal-access protections. ***El-Hewie v. Paterson Pub. Sch. Dist.***, Civil Action No. 13-5820 (KM) (D.N.J. March 24, 2014)

Search and Seizure

District's motion for judgment on the pleadings is denied, in matter where student claims that board had no reasonable basis to conclude that he had taken steroids based on one student's misinterpretation of an Advil given to him by his father. Court refuses to dismiss claims for (1) Section 1983 claims for illegal search and seizure (and violation of the rights to procedural and substantive due process) (2) retaliation (3) violation of *N.J.S.A*. 18A:40A-12, *N.J.A.C*. 6A:16-4, *N.J.A.C*. 6:29-6.1, and the board's own policies and procedures; (4) negligence; (5) the district's negligent training and supervision of the CSA; court could not find as a matter of law, at this stage of the litigation, that Defendants are entitled to statutory immunity; more facts are needed to ensure that Defendants exercised the requisite skill and care in handling Plaintiff's situation, specifically because the report of his drug use came from another student,

allegedly antagonistic to Plaintiff, rather than an educator or administrator. ***A.V. v. Pennsgrove/Carneys Point Reg'l Sch. Dist.***, Civil Action No. 13-1598 (D.N.J. March 27, 2014

Section 1983

Pro se parent who alleged their son was bullied by track team coach over one year and that coach denied the student the right to speak at practice with his father, brings declaratory judgment under Section 1983 for violations of their First and Fourteenth Amendment rights, and under Title VI and IX. Court holds that while claims brought pursuant to § 1983 and for violations of Title VI and IX do not require exhaustion of administrative remedies; and although there is no constitutionally protected right to play sports, all claims are dismissed with prejudice, except that First Amendment claim is dismissed without prejudice, and Title VI claim is dismissed without prejudice against the Board, but with prejudice as to the individual defendants. ***Mears v. Sterling Reg. Bd. of Ed.***, Civil Action No. 13-3154 (NLH-JS) (D.N.J. March 31, 2014)

Special Education

Court dismisses parent's request for injunctive relief, and rejects argument that the district committed numerous procedural and substantive violations of the IDEA over a period spanning several years. Noting that the action **was filed** initially to return the student to school after a suspension and to prevent him from graduating, it has since that time evolved into a referendum on his entire experience in the Township's schools; however, the IDEA has a defined, limited retrospective reach, and its exhaustion provisions required the Court to review only those matters that were squarely presented. At this point, any "emergency" has long passed, the student has graduated and his placement has changed. ***D.C. v. Mount Olive Twp. Bd. of Educ***., Civil Action No. 12-5592 (KSH) (D.N.J. March 31, 2014) not for publication

Parents of autistic son seek review of two administrative determinations upholding district's proposed new placement; issues involved (1) whether district violated IDEA or Section 504 by not reevaluating student prior to proposing a change in his placement; (2) whether the District gave adequate notice of the proposed change in placement; and (3) whether district should have convened an IFP team meeting before specifying classroom placement. Court denies motions for preliminary injunction and leave to file amended complaint, finding that district provided FAPE. ***M.A. v. Jersey City Bd. of Educ.,* Civil Action No. 2:13-06946 (WJM)** (D.N.J. March 18, 2014)

District sought out of district placement for student with frequent behavior problems such as spitting, hitting, toileting issues; ALJ found that District had denied FAPE by procedural violations, namely "for making a predetermined placement and failing to develop an IEP to justify the out-of-district placement." Court finds that the ALJ erred in determining that a procedural violation occurred, both as to the face of the IEP and predetermination of the IEP, and also misapplied the law, as a school district's failure to comply with the procedural requirements of IDEA will constitute a denial of a FAPE only if such violation caused substantive harm to the child or his parents. Under *Rowley*, second prong of inquiry is whether IEP confers a meaningful educational benefit. Only after the issue of the IEP's appropriateness was established, should the least restrictive environment be considered. Court grants Board's motion in part and denies the motion of Defendants and remands for reconsideration. ***Alloway Twp. Bd. of Educ. v. C.Q.,*** Civil Action No. 12-6812 (RMB/AMD) (D.N.J. March 14, 2014)

Court grants district a temporary restraining order barring multiply-handicapped eighteen-year-old who injured another student from returning its high school, and a preliminary injunction placing him in the alternative educational setting during the pendency of his disciplinary proceedings. Board had removed him for a period of 45 days for carrying a knife. After this removal, the school held a disciplinary hearing, at which point O.R. was given the one-year suspension at issue. His actions were not a manifestation of his disabilities and thus stay put provisions did not apply. Therefore, it appears that his then current setting would be the alternative setting. ***Ocean Twp. Bd. of Educ. v. E.R. ex rel. O.R.,*** Civil Action No. 13-1436 (D.N.J. March 10, 2014) not for publication

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New Jersey Supreme Court

Petition for Certification

Petition for certification is denied. *Raritan Educ. Ass'n v. Board of Educ. of the Bridgewater-Raritan Sch. Dist.*, 217 *N.J.* 304 (2014) (April 1, 2014)

Petition for certification is denied. *Surety Mech. Servs. v. Bridgeton Bd. of Educ.,* 217 *N.J*. 295 (2014) (April 1, 2014)

Petition for certification is denied. *Lovett v. Flemington-Raritan Reg'l Bd. of Educ*., 217 *N.J.* 295 (2014) (April 1, 2014)

Petition for certification is denied. *In re Tenure Hearing of Parezo*, 2014 N.J. LEXIS 264 (2014) (March 31, 2014)

Petition for certification is denied. *P.J. Smith Elec. Contrs. v. North Plainfield Bd. of Educ*., 217 *N.J*. 293 (2014) (March 18, 2014)

Tort

Court reverses appellate ruling and holds that under the circumstances of the case, a school principal owed no duty of care to a third party who decided to use school property after hours for personal purposes and was injured by a stray animal that is neither owned nor controlled by school personnel. Disagrees with appellate division's finding that a jury could find that the school principal had a duty to take measures to prevent entry of a known dangerous dog onto school property, and that a jury could find that the school principal breached that duty.
Robinson v. Vivirito, 217 *N.J.* 199 (2014) (March 26, 2014)

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New Jersey Superior Court, Appellate Division

Appeal Dismissal

Appeal is dismissed with prejudice and without costs. ***M.W. v. Board of Educ.*** No. A-1036-12T3 (App. Div. March 24, 2014) (not for publication)

Charter Schools

In a suit brought by public schools challenging the Commissioner's grant of charters to two new schools, the court affirms the grants the new schools were not online internet schools but used a blended teaching methodology that combined in-person, face-to-face teaching and online instruction by means of internet materials; also, while the legislature may not have contemplated the use of internet-based teaching when the Charter School Act was passed, the Act cannot be read narrowly as only allowing methods that were in existence at its inception; the Legislature intended to include advances in technology. ***In re Grant of a Charter to the Merit Preparatory Charter Sch. of Newark,*** 435 *N.J. Super*. 273 (April 9, 2014)

Condemnation

Court affirms in part, reverses in part, and remands for further proceedings, in condemnees' appeals of several aspects of the Law Division's refusal to award what they claim are sufficient damages and expenses that they allegedly incurred when plaintiff Board of Education was forced to terminate its initial attempt to acquire a unique condominium property in Newark. *Essex* ***County Voc. Schs. Bd. of Educ. v. New United Corp.,*** No. A-1873-12T2 (App. Div. April 8, 2014)

Tenure Dismissal

Court affirms tenure dismissal of physical education teacher for conduct unbecoming, including, at various times beginning in or about 2003 to the present," of engaging "in deceptive and untruthful conduct; acting "in an inappropriate, defiant and insubordinate manner, and repeatedly demonstrating a blatant disregard for and open defiance of administrative directives despite numerous warnings and admonitions, including alleged non-compliance with, and open defiance of, a ninety-day action plan designed to correct his behavior. ***In re Harriman***, No. A-1386-12T3 (App. Div. March 12, 2014) (not for publication)

Torts

Court affirms grant of summary judgment in favor of defendant Hauser Refrigeration, Inc. dismissing complaint of food service kitchen manager for personal injuries when she fell in a walk-in freezer at the School; she failed to establish negligence; no evidence or expert opinion showing that Hauser's prior repairs to the freezer exacerbated, caused or contributed to the defect that caused water and ice to accumulate on the floor, or that the defect pre-existed Hauser's last service on the freezer. ***Westcott v. Board of Educ and Hauser Refrigeration***, No. A-2774-12T4 (App. Div. March 14, 2014) (not for publication)

Unemployment

Court affirms final decision of the Board of Review that affirmed an appeal tribunal's determination that a former employee who initially received benefits was in fact ineligible for unemployment benefits, in accordance with *N.J.S.A*. 43:21-5(a), because he was discharged from his employment for gross misconduct connected with the work. Court finds that Delaware Valley Regional High School Board of Education did not lack good cause for filing its appeal five days late. The delay in filing the appeal was neither foreseeable nor within the employer's control. ***Walsh v. Board of Review, DOL and Delaware Reg. Bd. of Ed.***, No. A-4993-11T4 (App Div. March 26, 2014) (not for publication)

Court rejects school district's argument that lower court judge erred by finding the terms of the collective bargaining agreement were sufficiently broad to vest the arbitration Panel with authority to decide an issue of "substantive arbitrability" *i.e.,* whether the union had the right to arbitrate these or any grievance because the Agreement had expired; district had argued that the judge, not the panel, should have decided that issue and that because the Agreement expired, CASA had no right to arbitration. Court found that the Agreement includes a clear expression of the parties' intent to have the Panel, not the court, interpret the Agreement. ***Newark Pub. Sch. Dist. v. City Ass'n of Supervisors***, No. A-1087-12T2 (App. Div. March 14, 2014)

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New Jersey Superior Court, Law/Chancery Division

Public Records

Court finds that with respect to request for minutes of closed session, court finds that the board did not satisfy its duty under OPRA to record nonpublic meeting minutes in a reasonably comprehensible

manner and to make those minutes publicly available; if any of those minutes reflected discussions regarding items so "unusual" that even "minimal disclosure" would cause "great harm to the public interest," the board had to give specific reasons for redacting them. Court directs board to provide the court with unredacted minutes for the requested closed sessions for an *in camera* review by the court. Court declines to find that board's response to OPRA request was untimely given snowstorm and fact that plaintiff gave the board an extension of time to respond. Court does not address common law access issues, as these will be addressed after further arguments. ***New Jersey Foundation for Open Gov't v. Island Heights Bd. of Educ.,***

No. OCN L-703-14 (Law Div. Ocean County April 25, 2014) (not for publication)

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Commissioner of Education

Certification

Learning Disabilities Teaching Consultant's teaching certificate was suspended for one year for unprofessional conduct in accordance with *N.J.S.A.* 18A:26-10 for failure to honor the terms of her employment agreement with the district. LDTC resigned her position six weeks after she began working in the district without the district's consent and without the proper 60 day notice. The purpose of *N.J.S.A.* 18A:26-10 is to provide notice to the school district that a member of its teaching staff will not complete the terms of his or her teaching agreement, thereby allowing the district time to arrange for a suitable replacement without adversely impacting students. The ALJ concluded that this action constituted unprofessional conduct warranting a one-year suspension of respondent's teaching certificate. Commissioner concurred. ***IMO Suspension of the Teaching Certificate of Monica Schvanberg,* Commissioner 2014: March 5**

Charter Schools

Commissioner rejected OFAC investigation conclusion that Executive Director of charter school acted without charter school's knowledge and tried to thwart OFAC's investigation. While Executive Director worked in two public school districts and three charter schools, all positions were part-time. Commissioner cautioned charter school to improve its business practices and administrative oversight, ensure its contracts are properly memorialized and that all records are secure and accessible. Commissioner expressed his concern that Executive Director may have contracted with more employers than she could properly serve. ***Vineland Public Charter School,* Commissioner 2014: April 4**

Conflict of Interest

Board member had impermissible conflict of interest as either an owner or employee of a company that has provided vehicle maintenance services to the Board since at least 2004. Disqualifying conflict of interest was cured and mooted when the conflict with the Truck Center was terminated on June 30, 2013. Board member not required to forfeit his seat on the board.
***Westwood Regional School District,* Commissioner 2014: April 7**

Ethics

Board member found to have violated *N.J.S.A.* 18A:12-24(b) of the School Ethics Act and *N.J.S.A.* 18A:12-24.1(d) of the Code of Ethics for School Board Members through a series of events that occurred between October 2011 and February 2012 wherein he used his official position to secure unwarranted privileges for himself and his son, a student in one of the Board's schools. SEC determined that, by virtue of his failure to appear, respondent admitted the factual allegations underlying the claims transmitted to the OAL for hearing. SEC further determined that such admissions supported a finding

that the respondent had violated *N.J.S.A.* 18A:12-24(b) of the School Ethics Act and *N.J.S.A.* 18A:12-24.1(d), and recommended a penalty of reprimand. Commissioner concurred. ***IMO Waterman,* Commissioner 2014: March 14**

HIB

Board determined that eighth grade student participated in an act of harassment intimidation and bullying (HIB) when he was among a group of boys who chanted "kool-aid" to tease and taunt an African American classmate in the hallways and locker room. Use of the word "kool-aid" was directed at a fellow student because of his race, thereby insulting and demeaning him. Commissioner concurred with the Administrative Law Judge that the Board's decision to impose a one-day suspension on K.H. for violating *N.J.S.A.* 18A:37-14 and the Board's Harassment, Intimidation and Bullying policy was not arbitrary, capricious or unreasonable. Parent's argument that K.H.'s action did not constitute HIB because it was a single incident dismissed as it ignored the plain language of the statute. ***G.H. and E.H. o/b/o K.H.*, Commissioner 2014: April 10**

Indemnification

Teacher charged with criminal defense arising out of his duties as a teacher. Teacher charged with making improper sexual advances toward student during class. Charges were dismissed, entitling teacher to indemnification under *N.J.S.A*. 18A:16-6.1. IAIU investigation was an integral part of the successful defense against the criminal charges. Board directed to reimburse teacher for legal fees as follows: 1) expenses of $694.01; 2) investigator fees of $676.78; and, 3) 47.8 hours of attorney work at the hourly rate of $250. Fact that NJEA Legal Services financed the appeal does not prevent indemnification. ***Greene,* Commissioner 2014: March 20**

Non-Renewal

Commissioner reverses board's non-renewal of teacher of mathematics. Teacher acquired tenure when he became a citizen as teacher's service under Non-Citizen Certificate counts toward tenure acquisition once teacher became a citizen. Standard Certificate for Non-Citizens is an appropriate certificate for tenure acquisition. Petitioner was employed for the requisite period of time under an appropriate certificate and acquired tenure. ***Bleah,* Commissioner 2014: March 24**

Nursing Services

Parent Choice Act, *N.J.S.A.* 18A:40-3.3(b), governs the employment of nursing personnel for medically fragile students, and provides that the parents or legal guardian shall have the option to choose a provider to render clinical nursing services so long as the cost to the school district remains neutral. Parents want Loving Care Agency (LCA) to continue to provide the medically necessary clinical nursing services required by A.A. while she attends school in the Trenton school district. Cost for LCA's services would be the same as home nursing service currently used by the school district. Commissioner determines that parents of AA be allowed to choose LCA as the provider of medically necessary clinical nursing services for their daughter. ***Loving Care Agency, Inc. and K.S. and K.A. o/b/o A.A.*, Commissioner 2014: April 7**

Private Schools for the Handicapped

Commissioner upholds disallowance of $ 36,498 from Pineland Learning Center's tuition audit regarding compensation paid to teacher of the handicapped who was not properly certified. Teacher argued that delay in obtaining certificate was due to DOE Office of Licensure and Credentials. Commissioner determined that doctrine of substantial compliance was not applicable in this case. ***Pinelands Learning Center,* Commissioner 2014: March 24**

Commissioner upholds disallowance from private school for the handicapped tuition calculation, cost of health insurance premiums for school nurse while on unpaid leave of absence and portion of teacher

salary which exceeded maximum salary permitted for vocational teachers. Subsequent presentation of contradictory documentary and/or testimonial evidence as to teacher's salary at an administrative hearing before the OAL does not render earlier determination arbitrary or capricious. Commissioner finds respondent's initial determination, as to vocational teacher's salary, reasonable in light of the documentation and information petitioner submitted for respondent's desk review. ***Chancellor Academy*, Commissioner 2014: April 24**

Reduction in Force

Commissioner upholds RIF of non-tenured Supervisor of Special Education for reasons of economy. Supervisor, who was employed for three consecutive years, asserted that she was not properly terminated as no vote of the school board occurred, in violation of *N.J.S.A.* 18A:27-4.1 and she was never given a formal statement of reasons for her termination. ALJ found that petitioner's arguments were overly simplistic and that, given the unique circumstances within the district, which was under partial State intervention, the process used was proper. Mid-year termination for reasons of economy was properly effected as control over personnel matters had not been returned to the board; the state operated superintendent had control over all personnel matters; no board vote was required to appoint, transfer or remove personnel. ***Jiminez,* Commissioner 2014:March 4**

Residency

Commissioner adopts ALJ's recommendation that petitioner resided in the school district during the time in question. Credible evidence indicated that petitioner lived in a sublet department after being evicted from his former apartment in the school district. Student entitled to a free public education in the school district. Board's claim for tuition dismissed. ***E.H. o/b/o E.H. and J.H.,* Commissioner 2014: April 7**

Sending – Receiving

Interlaken, a non-operating school district, sought to sever its sending-receiving relationship with Asbury Park and enter into sending receiving relationships with West Long Branch and Shore Regional. After review of Interlaken's feasibility study and withdrawal of Asbury Park's opposition to severance, Administrative Law Judge determined that there was no substantial negative impact on the districts under *N.J.S.A.* 18A:38-13, and recommended granting Interlaken's request to sever its current relationship with Asbury Park and enter into a new send-receive relationship with West Long Branch and Shore Regional. Because of the lack of any adversarial perspective, each of the district boards of education must follow the process set forth in *N.J.A.C.* 6A:3-6.1 before Interlaken's application to sever its current relationship with Asbury Park and enter into a new send-receive relationship with West Long Branch and Shore Regional can be granted. ***Interlaken, West Long Branch and Shore Regional,* Commissioner 2014: April 21**

State Board of Examiners

Commissioner determined that the record adequately supported the State Board of Examiners decision. There was nothing in the record to suggest that the SBE's decision was arbitrary, capricious or unreasonable. The Commissioner found no basis upon which to disturb the decision of the Board of Examiners. ***IMO Certificates of Forsell,* Commissioner Appeal Decision 2014: March 5**

Student Discipline

Commissioner adopts ALJ recommendation that any document referencing a long-term suspension between December 20, 2011 and January 25, 2012 be expunged from student's school records. Student not afforded due process rights attendant to a long term suspension; formal hearing, decision by the board, home instruction after 5 days. Request for compensatory education dismissed. Commissioner of Education does not have jurisdiction to adjudicate challenges to the IDEA, nor may he award remedies designed to compensate students for IDEA violations. ***A.K. o/b/o L.K.,* Commissioner 2014: March 21**

Tenure Acquisition

Vice principal did not acquire tenure prior to school district RIF and his reassignment to a teaching position. Vice principal served for only 13 months under his provisional administrative certificate and did not complete his two year residency requirement. Earlier service as an "acting" vice principal and vice principal prior to his obtaining his provisional administrative certificate did not count towards tenure acquisition. ***Jackson,* Commissioner 2014: April 10**

Tenure Dismissal

Board did not prove charges of unbecoming conduct against superintendent of schools. Board failed to prove that superintendent engaged in either retaliation or dishonesty as charged. Administrative assistant never filed a complaint against superintendent and suffered no adverse employment consequences. Tenure charges dismissed and superintendent restored to his tenured position with back pay and all emoluments. ***IMO Tenure Hearing of Costanzo*, Commissioner 2014: April 4**

Tenure matter dismissed as moot. Respondent pled guilty to Criminal Sexual Contact and agreed to relinquish, with the force and effect of revocation, the teaching certificates issued by the State Board of Examiners. Examiners' decision to revoke certificates rendered tenure matter moot as teacher prohibited by law from continuing his tenured employment with the board or with any other public school in New Jersey. ***IMO Tenure Hearing of Greco*, Commissioner 2014: April 24**

Board certified tenure charges of incapacity, conduct unbecoming, and neglect of duty against tenured teacher. Teacher had been chronically and excessively absent from his duties as a teacher, resulting in an adverse impact on the continuity of the educational process for the students of petitioner's district. Teacher's failure to respond rendered allegations deemed to be admitted Commissioner found that petitioner's charges of incapacity, unbecoming conduct, and neglect have been proven and warrant respondent's dismissal. ***IMO Tenure Hearing of Dazz*, Commissioner 2014: April 28**

Tuition

Board challenged constitutionality of the State Facilities Education Act, *N.J.S.A.* 18A:7B-1 *et seq.* as applied to the school district, arguing that other wealthier school districts and the Department of Education had greater resources. Commissioner of Education lacked jurisdiction to determine the issue. Matter dismissed. ***Boonton,* Commissioner 2014: April 10**

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Tenure Arbitration Cases "TeachNJ"

Tenure charges for Inefficiency and Unbecoming Conduct, sustained. Administrator failed to conduct self-assessment or timely evaluations of others. Unnecessary force used in dragging 9 year old student across playground by shirt collar to principal's office. Charges related to excessive lateness dismissed. ***Tenure Hearing of Hawkins*, Arb 2014: March 10 (Laskin, Arbitrator)**

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School Ethics Commission

A22-13 (3/7/14) A board member would violate *N.J.S.A.* 18A:12-24(b) and (c) if he were to participate in negotiations with the local education association when his father-in-law is a custodian in the district and the board member lives with the father-in-law and co-owns his home with the father-in-law. Although

"father-in-law" is not considered a "relative" under the Act, it is considered to be an "other" within the meaning of *N.J.S.A*. 18A:12-24(b), and as such, the public may view your participation in negotiations as an attempt to secure unwarranted privileges or advantages for him in violation of the public trust.

The fact that the board member and his father-in-law co-own and reside in the same house, creates a "personal involvement." A school official shall not participate in a matter in which he has a "personal involvement" that is or creates some benefit to the school official or member of his immediate family. While the father-in-law is not a part of the board member's immediate family under the definition set forth at N.J.S.A. 18A:12-23, co-owning a home and sharing a close familial bond establishes a sufficient dual nexus to suggest that there is a personal as well as financial benefit to the Board member. Such a relationship prohibits the Board member from negotiating a collective bargaining agreement when his father-in-law is a member of the district union because the personal involvement might reasonably be expected to impair his objectivity.

Moreover, participation in employment discussions involving the Superintendent may also create a justifiable perception that the public trust has been violated. Since the Superintendent evaluates and makes recommendations about the father-in-law's continued employment, the School Ethics Commission determined that the board member's participation would be in violation of the Act and foster the perception that the public's trust has been violated as some privilege, advantage or continued employment may inure to him.

A06-14 (4/23/14) A board member who is employed in a regional school district may participate in discussions involving the superintendent's contract and vote in the election of a new board president in a local constituent district where the member's direct employment supervisor is also a member of the local constituent board. No benefit would inure to either board member, as his employment evaluations are performed by other school officials. In the future, should the facts change creating a benefit to the board member or his supervisor, either member may have to recuse himself or herself from such involvement.

A07-14 (4/23/14) A board member would violate *N.J.S.A.* 18A:12-24(c) if he were to participate in the negotiation of the local collective bargaining agreement when he is a secretary in another district who is subject to a local union contract because the two unions are NJEA affiliates, despite the fact that the board member is not a member of the union and only pays a representation fee.

A08-14 (4/23/14) A board member would violate *N.J.S.A.* 18A:12-24(b) if he were to participate in the interview and selection process for a new chief school administrator when a stepdaughter, stepdaughter-in-law and nephew are employed by the district as certified teachers. Although not considered "relatives" under the Act, these members of the board member's family are considered an "other" within the meaning of this subsection, and as such, the public may view your action as an attempt to secure unwarranted privileges or advantages for them in violation of the public trust.

A09-14 (4/23/14) A board member would violate *N.J.S.A.* 18A:12-24(c) if he were to negotiate or be involved in discussions with the local New Jersey Education Association (NJEA) affiliate when the board member is employed in a different district and represented by the American Federation of Teachers (AFT), even though it is a different statewide teachers union. The two unions share common traits and common goals in their efforts to negotiate a contract. Moreover, they often share the same personnel, the same strategies, negotiators, and labor relations officials.

A10-14 (4/23/14) A board member must limit certain board activity when the member's spouse is the mayor of the local municipality or the board member's cousin is employed by the school district. The board member would violate *N.J.S.A.* 18A:12-24(b) if he were to participate in the pre-hire and post-hire board functions in selecting and discussing personnel matters involving the Superintendent. The official actions of this board member may be seen as an attempt to secure unwarranted privileges or employment for her cousin, an "other" under this section. Such participation in employment discussion involving the superintendent, who supervises the principals or the agreement, that sets salary guides,

benefits and other emoluments, may also create a justifiable perception that the public trust has been violated. The conduct is a potential violation of *N.J.S.A.*18A:12-24(b), (c) and (f).

A11-14 (4/23/14) - Four non-conflicted Board members are sufficient to conduct an evaluation of the Superintendent. Use of the doctrine of necessity is unnecessary in this situation.

A13-14 (4/23/14) - A board member, who is a freelance journalist, would not violate *N.J.S.A.* 18A:12-24(f) as long as the member does not report on board of education discussions or issues. Additionally, the board member must ensure that no information is disclosed through the freelance reporting to the public on matters solely discussed in board executive sessions.

A16-14 (4/23/14) A board member, who is aware he has conflicts, is directed to the *Martinez v. Abolino* (C45-11) decision, which prohibits the board member's participation in pre- and post-employment decisions involving the superintendent and other administrators. *Martinez* held that where a board member who has an immediate family member (as defined in *N.J.S.A*. 18A:12-23) or a relative (as defined in *N.J.S.A*. 18A:12-23) employed in the district, the board member may not participate in the search, selection and/or the vote for a new superintendent, irrespective of whether there is an in-house candidate being considered for the position because the School Ethics Commission maintains that the board member's involvement in the search, discussion and/or vote for a new superintendent under such circumstances would constitute a violation of *N.J.S.A.* 18A:12-24(c). He retains the rights of the public, however, and may attend the public session of board meetings where those matters are discussed.

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State Board of Examiners

State Board of Examiners ordered revocation of teacher's Substitute Credential. Substitute teacher's action of calling a student at her home, picking her up in his car and kissing her crossed a boundary that should exist between teacher and student. While substitute teacher claimed that student was infatuated with him as evidenced by the two notes she gave him, his failure to turn them in to school authorities undermined his credibility. Board of Examiners defers to ALJ's determination of witness credibility. ***IMO the Credential of Bell,* Exam. 2014: April 4**

State Board of Examiners ordered revocation of teacher's Substitute Credential. Teacher was convicted of Lewdness and was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq*. Teacher agreed to relinquish his Substitute Credential with the force and effect of a revocation and all attendant consequences. ***IMO the Credential of Egles,* Exam. 2014: April 4**

Teacher's New York certificates were revoked because of inappropriate interactions with students as well as negligence in exercising her duties as a teacher. New York allegations included that she had engaged in inappropriate behavior with students, including improper personal, physical and/or intimate contact, improper communications and failing to assist a student in obtaining medical assistance after the student was injured. Teacher failed to respond to correspondence from the State Board of Examiners so that allegations were deemed admitted. Board is not restricted to behavior that takes place in New Jersey. ***IMO the Certificate of Elie,* Exam. 2014: April 4**

State Board of Examiners accepted teacher's relinquishment of Teacher of Social Studies Certificate of Eligibility with Advanced Standing. Teacher had been convicted of Unlawful Possession of Weapons-Rifle/Shotgun and was ordered to relinquish his Teacher of Social Studies Certificate of Eligibility with Advanced Standing with the force and effect of a revocation and all attendant circumstances. ***IMO the Certificate of Hartman,* Exam. 2014: April 4**

State Board of Examiners revoked teacher's Teacher of Elementary School Certificate of Eligibility With

Advanced Standing, Teacher of Spanish Certificate of Eligibility With Advanced Standing, Teacher of Elementary School and Teacher of Spanish certificates, Principal Certificate of Eligibility, and a Supervisor certificate. Teacher pled guilty to Sexual Assault and was ordered to forfeit her teaching certificates. Haskell agreed to relinquish her certificates with the force and effect of a revocation and all attendant consequences. ***IMO the Certificates of Haskell,* Exam. 2014: April 4**

State Board of Examiners ordered revocation of employee's School Social Worker's certificate. Social Worker's exposing his penis to a female teacher on school grounds, coupled with his unwelcome comments made to four other female staff members demonstrated that social worker repeatedly crossed a boundary that should exist between professional colleagues. While the ALJ, in recommending a two year certificate suspension, lauded the social worker for his interactions with students, he is responsible for his conduct as a whole. On balance, the State Board of Examiners found that his conduct warrants certificate revocation, rejecting the ALJ's recommendation. ***IMO the Certificates of Holloway,* Exam. 2014: April 4**

State Board of Examiners ordered three month suspension of teacher's Teacher of Nursery School and Teacher of Elementary School certificates effective immediately. SBE adopted ALJ's decision that found that teacher had breached test security during the administration of the 2010 NJASK5 as alleged. Such action constituted conduct unbecoming a teaching staff
member warranting sanction. Teacher touched and pointed to students' test booklets during the test, helped a student on questions regarding symmetry, helped a student by explaining the meaning of two math questions to him, helped a student by rewording questions and helped a student by answering her question with regard to how something should be worded. Such actions constituted a clear violation of test security protocols set forth in the Test Security Agreement.
***IMO the Certificates of Kelley,* Exam. 2014: April 4**

State Board of Examiners suspended teacher's Teacher of Art Certificate of Eligibility With Advanced Standing and Teacher of Art Certificate pending the outcome of the criminal proceedings against him. Teacher was indicted on charges of Endangering the Welfare of Children, Luring or Enticing a Child, Sexual Assault, Hindering Apprehension or Prosecution, Official Misconduct, Attempted Endangering the Welfare of Children and Attempted Official *N.J.S.A*. 18A:6-7.1 *et seq.* The Board may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. *N.J.A.C.* 6A:9-17.5. In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be dangerous. Individuals convicted of crimes such as Endangering the Welfare of Children, Luring or Enticing a Child, Sexual Assault, Hindering Apprehension or Prosecution, Official Misconduct, Attempted Endangering the Welfare of Children and Attempted Official Misconduct fall squarely within this category. The Commissioner's long-held belief is that teachers must serve as role models for students. In this case, the teacher has an indictment for crimes that directly involved danger to children. If the charges are resolved in the teacher's favor, the teacher may apply to the SBE for appropriate action. ***IMO Certificates of Reilly,* Exam. 2014: April 4**

State Board of Examiners suspended, with the consent of the teacher, teachers' Teacher of Music Certificate of Eligibility With Advanced Standing, and Teacher of Music certificate pending resolution of the criminal charges filed against him. ***IMO Certificates of Scheck,* Exam. 2014: April 4**

State Board of Examiners revoked teacher's Teacher of Physical Education certificate. Teacher had surrendered his teaching certificates in New York after allegations that teacher had made a sexual proposition to a 17 year-old student. Teacher had informed student that she could pass his class by performing "extra credit"; having sex with him. SBE determined that teacher's conduct constituted conduct unbecoming a certificate holder. The Board may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. The Board is not restricted to behavior that takes place in New Jersey in determining whether that person is fit to teach in this state. ***IMO the Certificate of Stern,* Exam. 2014: April 4**

State Board of Examiners revoked teacher's Teacher of Social Studies certificate, Teacher of Elementary School certificate, Supervisor certificate, Principal Certificate of Eligibility, and Principal certificate. Teacher pled guilty in federal court to Possession of Child Pornography, disqualifying himself from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as Possession of Child Pornography fall squarely within in this category. The strong legislative policy statement is also in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. In this instance, teacher's conviction for Possession of Child Pornography demonstrates behavior that falls far short of a role model. The strong policy statement on the part of the Legislature set forth in *N.J.S.A*. 18A:6-7.1(b) also offers guidance to the Board as to the appropriate sanction in this matter. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold himself out as a teacher. Accordingly, the Board believes that the only appropriate sanction in this case is the revocation of his certificates. ***IMO the Certificates of Sysock,* Exam. 2014: April 4**

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New Jersey Council on Local Mandates

At this time, there are no related decisions reported for March/April 2014.

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New Jersey Division on Civil Rights

Director of DCR dismisses complaint against school district and administrators by teacher with lupus; there was no failure to provide her with reasonable accommodations for her disability, nor did they subject her to a hostile work environment based on her disability or retaliate against her for requesting accommodations in violation of the NJLAD. ***C.B. v. Paterson and Santana***, (4/21/14).

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Election Law Enforcement Commission

At this time, there are no related decisions reported for March/April 2014.

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Government Records Council

Although the Custodian failed to respond to the Complainant's OPRA request in a timely manner and failed to bear his burden of proving that the denial of access to copies of telephone logs, auditing fees and publications regarding legal and/or auditing services, and settlement agreements for certain time periods was authorized by law, he did comply with the terms of the GRC's Order. ***Inzlebuch v.***

***Lakewood Board of Education*, GRC 2013-97, March 25, 2014**

Requestor sought all OPRA requests submitted to the NJDOE in 2013. No special service charge warranted. However, NJDOE can charge materials and supplies used in actually making the copies. ***Scheeler v. N.J. Department of Education*, GRC 2013-190, March 25, 2014**

Records sought are not immediate access records and the Complainant verified his complaint before the statutory time frame provided for the Custodian to respond had expired, this complaint is materially defective and must be dismissed. ***Alexander v. NJ Department of Corrections*, GRC 2014-70, April 29, 2014**

Request for reconsideration denied where Custodian had been found only one month earlier to be in contempt of an Interim Order due to his lack of a response. ***Shuster v. Pittsgrove*, GRC 2013-6, April 29, 2014**

Copies of all custodians and maintenance records, plus their bosses, salaries, overtime and bonuses from July 1, 2011 to June 3, 2012. Copies of name and salaries plus overtime pay for every employee of board in a non-teaching capacity to include cafeteria, stadium, maintenance, warehouse, janitors, etc. Custodian failed to respond to records request in required amount of time. Records are deemed to have been denied, yet actions do not rise to knowing and willful denial. ***Bidnick v. Clifton Board of Education*, GRC 2013-254, April 29, 2014**

Requestor sought any and all documents provided to the Somerset County Prosecutor's Office relating to a complaint initiated by requestor. All records responsive to the Complainant's OPRA request were disclosed to the Complainant within the statutorily mandated response time and the Complainant failed to provide any competent, credible evidence to contradict the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to the requested records. ***Wicks v. Bernards Township Bd. of Educ.*, GRC 2013-210, April 29, 2014**

Requestor sought Financial records specific to the Autism unit for the years 2010 through 2013 and all Request for Autism & ABA Student Services forms to the Autism Unit from all school districts for the years 2010 through 2013. Custodian did not bear her burden of proof that she timely responded to the Complainant's OPRA request. *N.J.S.A.* 47:1A-6. As such, the Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request. However, the Complainant's request, in part fails to identify any government records and instead seeks "financial records" that support an unidentified "determination." ***Breslin v. Burlington County Special Services School District*, GRC 2013-295, April 29, 2014** (Interim order)

Requestor sought the redacted portion of a superintendent search report prepared by search firm subtitled "concerns and challenges facing the school district." After *in camera* examination of documents in question, GRC determines the Custodian lawfully denied access to the redacted segment of the requested record as advisory, consultative or deliberative material pursuant to *N.J.S.A.* 47:1A-1.1, the Custodian did not knowingly and willfully violate OPRA and unreasonably deny access under the totality of the circumstances. ***Stone v. Manasquan School District*, GRC 2013-203, April 29, 2014**

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Election Law Enforcement Commission

There are no education-related cases reported for this period.

New Legislation

P.L.2014, c.2 - Requires school districts to adopt policies concerning electronic communications between employees and students.

P.L.2014, c.3 - Provides that nonpublic school nursing services may include nursing services for a preschool pupil in the event of an emergency.

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New Regulation/Executive Orders

Bilingual education……46 N.J.R. 501(a)

Programs to support children development…….46 N.J.R. 505(a)

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SCHOOL LAW NEWS • JANUARY/FEBRUARY 2014 • VOLUME XI NO. 1

United States Supreme Court

There are no education-related decisions posted for January or February 2014 at this time.

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3rd Circuit Court of Appeals

Bullying

Court of Appeals affirms District Court dismissal of plaintiffs' claims. Parents of allegedly bullied middle school students claimed that school district officials, after being notified of the bullying, did not act to prevent the bullying of the students. The appellants asserted claims under 42 U.S.C. § 1983 for violations of the First, Fourth, and Fourteenth Amendments. The District Court dismissed all of these claims. No affirmative retaliatory actions by the school district alleged or proven. No special relationship existed between plaintiffs and the state nor was any state created danger existed in this case. The bullying of the children by other students did not give rise to a procedural due process claim; no constitutional duty to protect children from bullying by other children. ***Monn v. Gettysburg Area Sch. Dist.,*** No. 13-2730, (3rd Cir. January 21, 2014)

IDEA

Parents entitled to tuition reimbursement for three year period of private school placement (Benchmark) between hearing officer's decision that Ridley's IEP denied FAPE and the court of appeals affirmance of the district court's decision reversing the hearing officer's decision, holding that Ridley's IEP provided FAPE. Board was required to pay private school tuition for three years under "stay put." Parent's right to interim funding extended through the time of the judicial appeal. Parent's claim was not barred by res judicata or the compulsory counterclaim rule. Parents did not have to file their claim for payment before the administrative ruling in their favor was reversed. ***M.R. v. Ridley Sch. Dist.,*** No. 12-4137, (3rd Cir. February 20, 2014)

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New Jersey District Court

Bullying

Plaintiffs brought various state and federal statutory constitutional and common law claims against board of education and superintendent based on defendant's alleged failure to prevent students from bullying K.T. Numerous HIB complaints filed regarding teasing about K.T.'s mother's weight and aunt's disability, profanity directed against K.T., threats of physical violence, etc. None were substantiated after investigation by anti-bullying specialist. NJLAD claim dismissed – no evidence that K.T. was bullied based on gender, no protected status based on Southern-American heritage. No constitutional rights shown to be violated. No fundamental right to a public education under the United States

Constitution. No "discriminatory enforcement" of the Anti- Bullying Bill of Rights Act. No state created danger, no negligent infliction of emotional distress. Anti-Bullying Bill of Rights Act does not create or alter tort liability; cannot be a basis for a claim of negligent infliction of emotional distress. ***Thomas G/A/L K.T. v. East Orange Board of Education***, Civ. No. 2:12-01446 (D.N.J. February 6, 2014)

Defendant board of education and various employees' motion to dismiss granted without prejudice. Plaintiff attended middle school from 2003-2008 and alleged that during that time period that she was abused by a teacher in the school. Plaintiff alleged that defendants were liable for the injuries she sustained as a result of that abuse. In thirteen separate counts, the Complaint accuses Defendants of discrimination under Title IX of the Education Amendment of 1972 (20 *U.S.C*. § 1681(a)); various civil rights violations under both 42 U.S.C. § 1983 and its state law corollary, the New Jersey Civil Rights Act (*N.J.S.A*. § 10:6-1 *et seq.*); and six separate torts under New Jersey state law. The Complaint was devoid of any factual allegations connecting Defendants to the alleged abuse. Plaintiff may file an amended complaint within 45 days. ***E.R. v. Lopatcong Twp. Middle Sch.,*** Civ No. 13-1550 (D. N.J. January 27, 2014)

IDEA

District Court denied plaintiff parents' motion, affirming the administrative finding that tuition reimbursement was inappropriate where parents unilaterally removed student and placed student in a private school without following the IDEA notice requirements and applicable state and federal regulations. Plaintiff parents did not seek permission to remove student and did not notify school district of their intent to remove until after student had been enrolled in the private school, violating the notice requirements, including the 10-day written notice requirement. Plaintiffs "disregarded their obligation to cooperate and assist in the formulation of an IEP, and failed to timely notify [Defendant] of their intent to seek private school tuition reimbursement." Plaintiff parents failed to demonstrate any procedural violations, any loss of educational opportunity for the student, any serious deprivation of parents of their participation rights, or deprivation of educational benefits. ***W.D. v. Watchung Hills Reg'l High Sch. Bd. of Educ.,*** Civ. No. 13-3423, (D. N.J. February 24, 2014)

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New Jersey Supreme Court

Certification

Petition for certification denied. ***L.A. v. Board of Educ. of Trenton***, C-570 (N.J. 2014) (February 11, 2014)

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New Jersey Superior Court, Appellate Division

CEPA

Appellate Division reverses trial court ruling in Conscientious Employee Protection Act (CEPA) matter. Employee demonstrated a nexus between the adverse employment action of non-renewal of his annual contract and his complaints about both the safety of a school bus and the working conditions in the garage. The record was replete with direct and circumstantial evidence that employee's contract non-renewal was directly related to his complaints to the MVC and PEOSH. Appellate Division also reversed the motion judge's determination to dismiss the count in the complaint seeking punitive damages. Punitive damages may be awarded against public entities pursuant to *N.J.S.A.* 34:19-2(a). Our

Supreme Court in *Abbamont, supra*, noted that there is no specific provision of CEPA that precludes punitive damages against public employers. 138 *N.J.* at 426. Because the Legislature intended CEPA claims to be treated like common-law tort actions, punitive damages should be determined by a jury as the trier of fact. ***Id.* at 432-33**. ***Dukin v. Mount Olive Twp. Bd. of Educ.,*** DOCKET NO. A-2585-12T1 (App. Div. January 27, 2014)

Indemnification

Appellate Division affirmed Commissioner's decision that teacher entitled to indemnification in municipal court matter. Teacher was charged with the petty disorderly persons offense of harassment, *N.J.S.A.* 2C:33-4(c), for allegedly having inappropriate contact with a female student. Following numerous court appearances, the charge was ultimately dismissed by the State. Commissioner, pursuant to N.J.S.A. 18A:16-6.1, found that teacher was entitled to reimbursement and ordered the board to reimburse teacher a total of $18,755.28 for the reasonable fees and costs attributable to the attorney's services. Fees relating to attorney's associates were disallowed because they did not testify or submit certifications that would permit a determination as to whether their fees were reasonable. $ 250 per hour rate was reasonable. ***Salaam v. Bd. of Educ. of Irvington, Essex County***, DOCKET NO. A-5592-11T4(App. Div. February 4, 2014)

Non-renewal

Appellate Division affirms Commissioner decision upholding non-renewals of three teachers by the school district. Time served as a replacement teacher, substituting for a teacher on maternity leave did not count towards tenure acquisition, despite administrator assertions to the contrary. Teachers were employed by the board of education, not the principal. Replacement or substitute teachers are governed by a different statute, which enables a board of education to designate a person "to act in place of any officer or employee during the absence, disability or disqualification of any such officer or employee." *N.J.S.A.* 18A:16-1.1. However, the statute provides that "no person so acting shall acquire tenure in the office or employment in which he acts pursuant to this section when so acting." *Ibid.* Thus, "under *N.J.S.A.* 18A:16-1.1, substitute teachers do not earn credits toward tenure." Interesting arguments from union that tenure should be granted as a matter of equity; reliance on apparent authority of principal and equitable estoppel. ***Bridgewater-Raritan Educ. Ass'n v. Bd. of Educ. of the Bridgewater-Raritan Sch. Dist.,*** DOCKET NO. A-1868-12T4 (App. Div. January 9, 2014)

Statute of Limitations

Appellate Division affirms Law Division's denial of second motion for reconsideration of an order dismissing his complaint. Plaintiff claimed that he was subjected to racially discriminatory educational practices in 1953 while he was a student at Robert Treat Junior High School in Newark. Plaintiff was eleven years old when these incidents occurred. Plaintiff filed his complaint in the Law Division on February 3, 2012. *N.J.S.A.* 59:8-8 requires that a claim against a public entity be filed "not later than the 90th day after accrual of the cause of action." However, plaintiff had never filed a notice of claim. In addition, the trial court judge found that, once plaintiff reached the age of majority, he had two years to file a complaint against defendant. Because plaintiff did not file his complaint for over fifty years after he was subjected to discrimination, the trial court judge ruled that the complaint must be dismissed. Appellate Division affirmed. ***Fortney v. Board of Educ.,*** DOCKET NO. A-0081-12T3 (App. Div. February 13, 2014).

Tenure Acquisition

Appellate Division reversed Commissioner of Education decision, which upheld board of education decision denying tenure to a teacher under the temporary employee exception to the Tenure Act, N.J.S.A. 18A:16-1.1. While teacher Platia served for one year as a long term substitute under a contract which stated that it was non-tenurial, she served in a position which was vacant. To be considered a "substitute" be it long term or short term, the employee must be serving in the place of another who is

absent from the position and intends to return. Prior special education teacher Snyder was transferred to the position of Special Education Literacy Resource Coach from the Robinson School to the Lalor School. Platia taught at the Greenwood School, not the Robinson School. The record failed to support findings that Snyder was "absent" for the year in which Platia was hired as a "Long Term Substitute" or that Platia filled a position that was available by virtue of Snyder's "absence." ***Platia v. Board of Educ. of the Twp. of Hamilton,*** DOCKET NO. A-1730-12T3, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, ___ N.J. Super. ___ (App. Div. 2014) Decided January 29, 2014.

Tenure Charges

Appellate Division affirms determination of the Office of Administrative Law that the OAL has jurisdiction to determine the tenure charges brought against plaintiff by the State-Operated School District of the City of Newark. District brought tenure charges against her based on excessive absenteeism, absence without leave/abandonment of position, and incapacity as a teacher due to absenteeism. Pursuant to *N.J.A.C.* 6A:3-5.1, the State district superintendent certified that probable cause existed for the tenure charges. Commissioner deemed the charges to be "sufficient, if true, to warrant dismissal or reduction in salary." Pursuant to *N.J.S.A.* 18A:6-16, the matter was referred to the OAL. Hearing was delayed in the OAL because teacher had pending workers' compensation claim pending against the district. Various state and federal claims regarding authority of the State district superintendent, First Amendment and ADA violations were presented and rejected. *State-Operated Sch. Dist. of Newark v. Gillespie*, DOCKET NO. A-0391-11T2, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, Decided January 6, 2014

Tenure Rights

Appellate Division held that Commissioner's decision that tenured secretary retained her secretarial tenure rights and could "bump" a non-tenured secretarial employee when her voluntarily accepted position of assistant school business administrator was eliminated, was unauthorized by the applicable statutory scheme and reversed. The language of *N.J.S.A*. § 18A:17-2 limited the retention of tenure to the time during which the employee held her secretarial office, position or employment. Had the New Jersey Legislature had intended for a secretary, who acquired tenure pursuant to *N.J.S.A*. § 18A:17-2 (b) or (c), to retain tenure upon relinquishment of his or her secretarial position, it would have provided for such protection in the statute, similar to the provisions found in other tenure retention provisions. The New Jersey Legislature has enacted *N.J.S.A*. §§ 18A:28-6 and 18A:17-20.4, which afford tenure retention rights to teachers and superintendents notwithstanding promotion or transfer. Had they intended to similarly preserve the rights of secretaries, they would have done so. ***Dinapoli v. Board of Educ. of the Twp. of Verona,*** 434 *N.J. Super*. 233 (App. Div. 2014) Decided January 22, 2014

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New Jersey Superior Court, Law/Chancery Division

There are no education-related decisions posted for January or February 2014 at this time.

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Commissioner of Education

Federal Impact Aid

Governor Christie's Executive Order 14 on February 11, 2010 – which declared a fiscal emergency and,

inter alia, ordered the Commissioner to withhold State aid payments to districts based upon any surplus and reserve account monies available to them at the end of the 2009 fiscal year. Board provided expert evidence in support of its position that the withheld funds were comprised of unanticipated federal impact aid received prior to FY 2009, and that respondent has been unable to persuasively rebut the Board's evidence. Accordingly, the Commissioner found that, under 20 *U.S.C.A*. Sec. 7709, respondent must reimburse the petitioning Board in the amount of $1,672,507. NJDOE may apply for certification from the United States Secretary of Education that the State has in effect a program of State aid to equalize expenditures for free public education among local educational agencies in the State; such certification is a prerequisite that can enable the respondent to reduce State aid to an agency which receives federal impact aid, and may thereby eliminate the potential for future litigation over the issues in the present case. ***Northern Burlington Regional High School Bd. of Educ*., Commr 2014: Feb. 4**

Harassment, Intimidation and Bullying

Petitioner sought a finding that coach engaged in acts of harassment, intimidation, bullying and retaliation, and that the coach be relieved of her coaching duties. Board had not found HIB. Matter not mooted by departure of coach from position. Issue of HIB and surrounding facts still in controversy. Matter remanded to OAL for proceedings to determine whether coach's conduct constituted harassment, bullying or intimidation. ***J.M. on behalf of minor child T.M*., Comm: Jan 23**

Increment Withholding

Commissioner upholds increment withholding by board. Petitioner bears the burden of proving that the withholding of his increment was arbitrary, capricious or unreasonable; petitioner's increment was withheld based on several performance evaluations; credible testimony at hearing supported the respondent's determination that petitioner's classroom instruction during the year in question was lacking, particularly in pedagogical skills; and petitioner's contention that his problems stemmed in part from a lack of curriculum materials was without merit. ***Lopez*, Comm. 2014: Jan 15**

Jurisdiction

While Commissioner does have jurisdiction concerning claim that district failed to provide thorough and efficient education under state constitution, such claim is premature, moot and precluded by the principles of res judicata; given state takeover of district. Commissioner does not have jurisdiction over NJLAD claims. Petition dismissed. ***S.V., M.R. and G.R*., Comm., 2014: Jan 21**

Non-renewal

Non-renewal upheld where principal received poor evaluations. In particular, principal's improper response to student bringing weapon to school was enough to warrant non-renewal. Principal did not follow policy when he gave weapon back to parent, failing to notify superintendent in a timely manner and law enforcement. Principal endangered school community and did not appreciate gravity of actions. Claim that non-renewal was politically motivated not supported by record. ***Nazziola,* Comm 2014: Jan 31.**

90-day time limit

Matter challenging refusal of principal to admit students to prom who arrived under the influence of alcohol dismissed. Matter filed over year after incident, despite administrative rules specifying 90 days to appeal. Additionally, Commissioner without authority to impose monetary damages or discipline against local district employee. ***Tracy,* Comm. 2014: Jan 15**

Reduction in Force

Appeal of Reduction in Force of technology teacher dismissed for failure to prosecute. ***Alfonso,* Commr 2014: February 26.**

Residency

Family was determined to have a residence and was not homeless as first claimed. Board sought reimbursement. Matter dismissed for failure to prosecute. Claim for tuition dismissed as time spent in district was "transitional." ***M.K., on behalf of minor children, V.K. and N.K.*, Commr 2014: Feb 4**

Suspension of Certificates

Order to show cause issued suspending teaching certificate for unprofessional conduct pursuant to N.J.S.A. 18A:26-10 and N.J.A.C. 6A:9-17.9 – for resigning position on inadequate notice. Respondent failed to respond and the allegation is deemed admitted. Certificate is suspended**. *I/M/O Certificates of Washer*, Commr 2014: Feb 12**

Certificates suspended for one year where teacher engaged in conduct unbecoming after she arranged for a meeting between the 15 year old student and a 28 year old man with whom she was not related, without principal or parental authorization. Contact between the two had actually been forbidden by parent. Teacher put student at risk by facilitating 1) her absence from a class which she should have been taking and 2) her socialization with a grown man whose behavior toward her had not been wholesome. Teacher should have understood that it was reckless to facilitate a meeting between a 15 year old girl and a 28 year old man who was not a family member. Nor is the fact that student may have advocated for said social encounter relevant to this controversy. She is a minor. ***Sloan*, Commr 2014: Feb 12**

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Tenure Arbitration Cases "TeachNJ"

Arbitrator orders dismissal of seventh grade social studies teacher who used the "f" word and other inappropriate language with students (fag, gay, fruit loop); misused school computer for personal emails and to view obscene and sexually suggestive material on Miami Hurricanes website and inadvertently exposed students to same such that DCF Institutional Abuse and Investigation Unit found a child was at risk of harm. Teacher also had pattern of missing conferences, hall duties and arriving late to class despite verbal warnings. Older incidents of misbehavior for which he had already been disciplined by letter, or which were stale, could not be used to support the charges but could be used to show that he was on notice of administration's concern; fact that warning letter did not specify that he could be dismissed did not preclude the board from seeking dismissal. Given failure of counseling and warnings over many years to correct the conduct, principle of progressive discipline is rejected-withholding increment is not likely to correct the conduct. ***Tenure Hearing of Orlovsky*, Arb. 2014: Jan 6 (Toms River) (Joyce M. Klein, Arbitrator)**

Arbitrator , in weighing credibility of sole witness against teacher, found no reason to disbelieve witnesses' account that teacher aggressively pulled pre-k student from his chair and hit him student twice on the buttocks with open hand in front of class; teacher's account that it was a tap, contained inconsistencies and was not credible; engaging in corporal punishment with refusal to take responsibility requires dismissal. ***Tenure Hearing of Barnes-Bey,* Arb. 2014:Jan 22 (Newark)**(Edmund Gerber, Arbitrator)

Arbitrator orders dismissal of computer technology teacher who was also an actor, as increment withholding would not be likely to alter his conduct; eighth grade girls complained that he showed a video clip from *Law and Order* in which he was partially naked and kissing a woman in bed, and that he had negative interactions with other students, made inappropriate comments about another teacher insinuating (falsely) that they had a relationship, had poor classroom demeanor and grading practices; continued a food-exchange despite directives to stop. Showing video clip violated district's sexual

harassment policies; other music videos he showed were not serious violations but nonetheless unprofessional as unrelated to curriculum. Withholding increment and filing charges did not constitute double jeopardy. **Tenure Hearing of Graffanino, Arb 2014:Jan 31. (River Dell)** (Walter DeTreux, Arbitrator)

Tenure Dismissal

Tenure charges upheld against teacher for conduct unbecoming where teacher engaged in unprofessional and inappropriate comments toward students and fellow staff members over the course of several school years. The Board proved that respondent exhibited unbecoming conduct. ALJ found testimony of the respondent was less credible than that of the students and teachers presented by the Board; the honest and forthright testimony of the student witnesses revealed consistent stories of a raucous classroom environment rife with name-calling, sarcasm, and sexual innuendo; respondent's references to several female students as prostitutes and whores disrespected and demeaned these students in a personal way, and violated all standards of decency in relating to his students; the preponderance of credible evidence established that the respondent's conduct toward one of his co-workers, a female teacher, included sexual innuendo and direct sexual references to his desire to view her kissing another female staff member, as well as repeated unwanted invitations on Facebook and in person; teachers are required to exercise a high degree of self-restraint and controlled behavior as they are entrusted with the custody and care of children. Commissioner upholds charges against teacher. ***I/M/O Tenure Hearing of Lang*, Comm., 2014: Jan. 13**

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School Ethics Commission

SEC rejects ALJ dismissal of complaint and instead issues default judgment against respondent for failure to appear at OAL hearing. SEC also determines that by his conduct, the respondent has admitted the facts as alleged in the complaint and established a finding that the respondent violated *N.J.S.A*. 18A:12-24(b) and *N.J.S.A.*18A: 12-24.1(d). SEC recommends that the Commissioner of Education impose a penalty of reprimand. ***I/M/O/ Sterling Waterman, Jersey City Board of Education, Hudson County, C10-12, SEC 2014: January 28***

SEC found no proof that board president, a seven year employee of Sodexo, food services division, violated either *N.J.S.A.*18A:12-24(a) or (c) of the School Ethics Act when he was in the school business administrator's office immediately prior to a meeting between the school business administrator and the Sodexo representative of the custodial services division. Testimony of the school business administrator, superintendent and respondent indicated that no Sodexo business was discussed between the school business administrator and the board president, the meeting with the Sodexo representative was fortuitous and not planned and only pleasantries were exchanged. No business interest, no "business transaction or professional activity" which was in *substantial conflict* with the proper discharge of his duties as a Board member, no proof that the board president participated in or engaged in a discussion regarding Sodexo so as to potentially violate *N.J.S.A.* 18A:12-24(c) proven.***Boyle v. Giannakis, South Plainfield Board of Education, Middlesex County, C01-13, SEC 2014:January 28***

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State Board of Examiners

Revocation of Certificates appropriate where teacher submitted fraudulent Supervisor's certificate in

attempt to gain promotion. ***Bonsu*, Exam 2014: January 17**

School Social worker agrees to relinquish his certificate voluntarily with the force and effect of a revocation. ***Esposito*, Exam 2014: January 17**

Teacher of Mathematics Certificate of Eligibility with Advanced Standing and a Teacher of Mathematics certificate revoked where teacher pled guilty to Criminal Sexual Contact and was sentenced to three years' probation, ordered to comply with Megan's Law and ordered to forfeit her teaching certificates. ***Garcia-Calle*, Exam 2014: January 17**

Teacher of Elementary School in Grades K-5 Certificate of Eligibility With Advanced Standing, Teacher of Preschool Through Grade 3 Certificate of Eligibility With Advanced Standing, Teacher of Students With Disabilities Certificate of Eligibility With Advanced Standing, Teacher of Preschool Through Grade 3 Provisional certificate and Teacher of Students with Disabilities Provisional certificate suspended for a period of three years following the revocation of her out-of state certificates for conducting an inappropriate relationship with a 16 year old student on Facebook. ***Picklo*, Exam 2014: January 17**

Principal Certificate of Eligibility, Substance Awareness Coordinator Certificate of Eligibility with Advanced Standing, Teacher of the Handicapped and Supervisor certificates are revoked after teacher engaged in explicit discussions of a sexual nature with his students the contents of which were extremely offensive due to the graphic sexual acts described and the profanity used. ***Salaam, Exam, 2014: January 17***

Teacher of Music, Supervisor, Principal and Teacher of Elementary School certificates revoked following voluntary relinquishment. ***Strack, Exam 2014: January 17***

School Social Worker certificate revoked following guilty plea for lewdness. ***Williams, Exam 2014: January 17***

Following tenure dismissal for conduct unbecoming by threatening a student with a knife, violating school policy by possessing a weapon and disciplining a student with corporal punishment, certificates revoked. Unsheathing a knife before a student in relation to a minor transgression, standing alone, warrants the strongest rebuke-revocation of Teacher of Industrial Arts certificate warranted. ***Zawadski, Exam 2014: January 17***

Teacher pled guilty to a disorderly persons offense for Failing to Report Child Abuse, which touched upon her public position with school district. Teacher sentenced to one year of probation and ordered to forfeit her public position in the district. Principal and School Administrator Certificates of Eligibility and her Teacher of Comprehensive Science, Supervisor, and Principal certificates revoked. ***DePaul, Exam 2014: Feb 27***

Teacher of Mathematics, Supervisor, Principal, School Administrator, and Assistant Executive Superintendent with Specialization in Supervision and Curriculum certificates following guilty plea to Endangering the Welfare of a child. ***DeStefano, Exam 2014: Feb 27***

Following a plea of guilty to Official Misconduct and Possession of CDS, Teacher of Elementary School, Teacher of English, Supervisor and Principal certificates revoked. ***Peters, Exam 2014: Feb 27.***

Suspend Teacher of Latin Certificate of Eligibility With Advanced Standing and his Teacher of Latin certificate for a period of six months for failing to disclose federal convictions for Customs Fraud and Tax Fraud. Sincere sense of remorse coupled with his cogent explanation of what transpired in his life warrant against revocation. ***Ramo, Exam 2014: Feb 27.***

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New Jersey Council on Local Mandates

There are no education-related decisions posted for January or February 2014 at this time.

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New Jersey Division on Civil Rights

There are no education-related decisions posted for January or February 2014 at this time.

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Election Law Enforcement Commission

There are no education-related cases reported for January or February 2014 at this time.

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Government Records Council

Where requestor claimed that the township custodian redacted the 136 billing entries in the invoices requested "to the point of meaninglessness" the GRC will conduct an in camera review to determine the validity of the Custodian's assertion that the records constitute attorney-client and work product privileged material exempt from disclosure. ***Skidmore v. Lebanon Twp***, GRC 213-194(January 28, 2014)

Although the Complainant may not have received the Custodian's correspondence tendering the requested documents, the letter was mailed out on and documents were produced by the Custodian a month prior to the Complainant filing her complaint; since the documents were produced prior to filing of the Complaint, the filing of the same did not bring about a change in the Custodian's conduct, so she was not a prevailing party entitled to counsel fees. Reconsideration request is denied as untimely filed. ***Giblin v. Wildwood,*** GRC 2012-302, 2012-303 and 2012-304 (January 28, 2014)

Custodian violated OPRA when she did not timely respond to OPRA request and that failure resulted in a "deemed" denial of the request; failed to provide immediate access to the requested bills and vouchers in redacted or unredacted form; denied access to the remaining records relevant to the complaint without providing a legal reason; refused to refund the $317.80 he prepaid in copying fees for which she was unable to provide a proper accounting; and failed to comply with the terms of the Council's Interim Order. ***Femminella v. Atlantic City***, GRC 2012-232 (January 28, 2014)

No violation where there were no responsive records regarding the sale prices for specific property and how many times it has been sold. ***Kulig v. Deerfield***, GRC 2013- 174(January 28, 2014)

GRC will review unredacted MVR (video recording) to determine if redactions were proper. ***Nelson v. Law and Public Safety,***GRC 2013-124 (January 28, 2014)

Deemed denial was not knowing or willful, where Custodian certifies that the OPRA request "fell through the cracks" as it arrived while the Custodian's assistant was on vacation and the office was

short-staffed. ***Kohn v. Livingston*** *(*January 28, 2014)

Motion for reconsideration is denied; Custodian has failed to establish that: 1) the Council's decision is based upon a "palpably incorrect or irrational basis"; or 2) it is obvious that the Council did not consider the significance of probative, competent evidence or that it acted arbitrarily, capriciously or unreasonably. Thus, the Custodian failed to support her claim that reconsideration should be granted based on mistake and her request for reconsideration should be denied and this complaint should be referred to OAL. ***Cherensky v. Fanwood,*** GRC 2013-87 (January 28, 2014)

The Custodian complied with the Council's September 24, 2013 Interim Order by providing the Complainant with the responsive closed session minutes without redactions of the homeowner's name; Complainant was a prevailing party entitled to reasonable counsel fees of $960.00, representing 3.2 hours at $300 per hour. ***White v. Monmouth Reg. High School,*** GRC 2012-218 (January 28, 2014)

Although the Custodian violated OPRA's immediate access provision at N.J.S.A. 47:1A-5(e), he provided the Complainant with all records responsive to the request even though the MVC does not maintain the requested contracts; no willful violation found. ***Scheeler v. NJMV***, GRC 2013-207(January 28, 2014)

Complainant's dissatisfaction with the Council's decision is not a basis for reconsideration and request for reconsideration should be denied. The Complainant failed to establish extraordinary circumstances, fraud, new evidence or illegality, or that the GRC acted arbitrarily, capriciously or unreasonably regarding the municipal prosecutor's records, where no records where township responded that no records responsive exist or that documents requested were not amply identified. ***Caggiano v. Green,***GRC 2012-252 (January 28, 2014)

Click here to access ***Government Records Council*** *decisions.*

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Election Law Enforcement Commission

There are no education-related cases reported for this period.

New Legislation

P.L.2013, c.172. -see S2086
Changes deadline for filing nominating petitions for school board candidates to last Monday in July; revises procedure for filling school board candidate vacancy; and revises certain other election procedures.
Pamphlet Law 5 pages Approved 12/27/2013 **PDF Format** HTML Format

P.L.2013, c.173. -see A248
Requires Commissioner of Education to change deadline for municipal review of defeated school budgets whenever he changes the annual school election date.
Pamphlet Law 2 pages Approved 1/2/2014 **PDF Format** HTML Format

P.L.2013, c.183. -see A1825
Requires DOE to develop educational fact sheet for distribution to parents concerning sports-related eye injuries.
Pamphlet Law 1 pages Approved 1/13/2014 **PDF Format** HTML Format

P.L.2013, c.187. -see A3997
Prohibits inclusion of bonus in employment contract of school superintendent for reducing number of out-of-district placements of students with special education needs.

Pamphlet Law 1 pages Approved 1/13/2014 **PDF Format** HTML Format

P.L.2013, c.189. -see A1273
Requires SHBP and joint insurance funds to provide certain information to participating public employers.
Pamphlet Law 1 pages Approved 1/17/2014 **PDF Format** HTML Format

P.L.2013, c.199. -see S1127
Permits a board of education to adopt a salary policy of up to five years.
Pamphlet Law 1 pages Approved 1/17/2014 **PDF Format** HTML Format

P.L.2013, c.209. -see S2367
"Sudden Cardiac Arrest Prevention Act"; provides student-athletes, parents, and coaches with information on sudden cardiac arrest and establishes protocol concerning removal-from-play for athletes exhibiting symptoms of sudden cardiac arrest.
Pamphlet Law 3 pages Approved 1/17/2014 **PDF Format** HTML Format

P.L.2013, c.210. -see S2442
Requires certain public school students to be screened for dyslexia and other reading disabilities.**
Pamphlet Law 2 pages Approved 1/17/2014 **PDF Format** HTML Format

P.L.2013, c.220. -see S2995
Prohibits discrimination based on pregnancy, childbirth or related medical conditions.
Pamphlet Law 10 pages Approved 1/17/2014 **PDF Format** HTML Format

P.L.2013, c.221. -see S2996
Concerns eligibility for certain leave and benefit programs.
Pamphlet Law 6 pages Approved 1/17/2014 **PDF Format** HTML Format

P.L.2013, c.231. -see A735
Permits a child who moves out of a school district due to a family crisis to remain enrolled in that district until the end of the school year.
Pamphlet Law 1 pages Approved 1/17/2014 **PDF Format** HTML Format

P.L.2013, c.236. -see A1521
Modifies process for contested case hearings by OAL with regard to telephone and video conferences, delegation of final decision authority, oral decisions, checklist decisions, electronic filings, and settlements.
Pamphlet Law 6 pages Approved 1/17/2014 **PDF Format** HTML Format

P.L.2013, c.249. -see A3019
Authorizes public schools to serve to students certain produce grown in community garden.
Pamphlet Law 1 pages Approved 1/17/2014 **PDF Format** HTML Format

P.L.2013, c.256. -see A3270
Requires Commissioners of Education and Labor and Workforce Development to study and report on departments' efforts in providing students with information on employment in high-demand industries.
Pamphlet Law 1 pages Approved 1/17/2014 **PDF Format** HTML Format

P.L.2013, c.257. -see A3292
Requires school districts to provide instruction on responsible use of social media for middle school students as part of the Core Curriculum Content Standards in Technology.
Pamphlet Law 1 pages Approved 1/17/2014 **PDF Format** HTML Format

P.L.2013, c.261. -see A3362
Exempts certain properties acquired by municipalities from county, school, and fire district taxes

immediately upon aquisition.
Pamphlet Law 4 pages Approved 1/17/2014 **PDF Format** HTML Format

P.L.2013, c.262. -see A3398
Allows nonpublic schools to participate in joint purchasing agreements entered into by two or more school districts.
Pamphlet Law 1 pages Approved 1/17/2014 **PDF Format** HTML Format

P.L.2013, c.272. -see A3785
Creates crime of cyber-harassment.
Pamphlet Law 1 pages Approved 1/17/2014 **PDF Format** HTML Format

P.L.2013, c.277. -see A4072
Establishes pilot program in DOE to recruit, select, and train veterans for school security positions in school districts.
Pamphlet Law 1 pages Approved 1/17/2014 **PDF Format** HTML Format

P.L.2013, c.280. -see A4300
Extends the timeline for performing certain budget-related tasks in school districts that have moved the annual school election to November.
Pamphlet Law 7 pages Approved 1/17/2014 **PDF Format** HTML Format

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New Regulation/Executive Orders

45 N.J.R. 2590(a), amendments to *N.J.A.C.* 6A:32, adopted 12/16/2013

45 N.J.R. 2545(a), amendments to *N.J.A.C.* 6A:8, adopted 12/16/2013

45 N.J.R. 2544(a), adopted without change, *N.J.A.C.* 6A:5, adopted 12/16/2013

45 N.J.R. 2557(a), amendments to *N.J.A.C*. 6A:26, adopted 12/16/2013

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Commissioner of Education

Arbitrator TEACHNJ

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United States Supreme Court

There are no education-related decisions posted for November/December at this time.

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3rd Circuit Court of Appeals

Special Education

Student alleged that defendant school district violated Title II of the Americans with Disabilities Act (ADA) and § 504 of the Rehabilitation Act, plaintiff's personal testimony regarding her experience in the district's special education program was insufficient to create a genuine dispute of material fact as to the district's knowledge that she might not have had a disability; Although the classification of plaintiff under the category of "other health impairment" may have been in technical noncompliance with the Individuals with Disabilities Education Act, that fact alone did not provide a basis for a claim under § 504 or the ADA; It could not be said that the district's continued evaluations and diagnoses throughout the course of plaintiff's education effectively put the district on notice that she had likely been misidentified. ***A.G. v. Lower Merion Sch. Dist.***, 542 Fed. Appx. 193 (3d Cir. 2013)

A board of education did not violate the procedural safeguards of the Individual with Disabilities Education Act (IDEA), 20 *U.S.C.S.* § 1400 et seq., by challenging a student's Individualized Education Program (IEP) by initiating a due process proceeding; The safeguards under the IDEA were not implicated where a resident school district, which was not responsible for developing the IEP merely disputed that a charter school's IEP provided a free and appropriate education (FAPE) in the least restrictive educational environment; The board of education followed the appropriate procedures in initiating its due process petition; The proposed program met the FAPE and mainstreaming requirements of the IDEA. ***L.Y. v. Bayonne Bd. of Educ.***, 542 Fed. Appx. 139 (3d Cir. 2013)

Compliance with the federal Individuals with Disabilities Education Act through the provision of a free appropriate public education did not immunize a program or practice from being challenged under the Americans with Disabilities Act and the Rehabilitation Act; Pennsylvania's funding formula did not violate the ADA or the RA because there was no evidence to show that the funding formula deprived the class members of a program, benefit, or service that was provided to the disabled students who attended schools in the non-class districts. ***CG v. Pennsylvania Dep't of Educ.***, 734 F.3d 229 (3d Cir. 2013)

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New Jersey District Court

Civil Procedure

It is the accepted practice in this Circuit and in the Federal Court System generally that a party must request and receive an entry of default from the Clerk prior to moving for default judgment before the

Court." Under Rule 55, plaintiff failed to do so, therefore, plaintiff's motion for default judgment is denied without prejudice. ***Mears v. Bd. of Educ. of the Sterling Reg'l High Sch. Dist.***, 2013 U.S. Dist. LEXIS 167624 (D.N.J. Nov. 26, 2013).

Employment Discrimination

Custodian asserts claims of age and disability discrimination under the New Jersey Law Against Discrimination, N.J. Stat. Ann. § 10:5-1 et seq. ("NJLAD"), violations of the federal Family and Medical Leave Act, 29 U.S.C. § 2611 ("FMLA"), breach of contract, and violations of his Fifth and Fourteenth Amendments. Board asserted that termination was for excessive absenteeism. For the reasons stated herein, the Court finds that Plaintiff has failed to offer evidence in support of his NJLAD age and disability discrimination, FMLA, contract, and constitutional claims that would create a genuine dispute of material fact for trial. Motion granted. ***Walters v. Carson,*** 2013 U.S. Dist. LEXIS 178249, 1-2 (D.N.J. Dec. 19, 2013)

Special Education

Motion to dismiss granted in part and denied in part. Lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1) and/or failure to state a claim upon which relief can be granted in matter concerning special education student where it was alleged that services were not provided for number of years. ***S.B. v. Trenton Sch. Dist.***, 2013 U.S. Dist. LEXIS 167073 (D.N.J. Nov. 25, 2013)

In special education matter, the defendants moved to have plaintiffs' claims dismissed on several grounds, including lack of subject matter jurisdiction because plaintiffs failed to exhaust their administrative remedies. Matter stayed pending outcome of state administrative proceedings. *J.R. v. Camden City Bd. of Educ.*, 2013 U.S. Dist. LEXIS 163416 (D.N.J. Nov. 15, 2013)

Seeking emergent relief in special education matter, plaintiffs have failed to carry their high burden on this motion for a preliminary injunction to show a likelihood of success on the merits of their underlying claim. Preliminary injunctive relief is an extraordinary remedy and should be granted only in limited circumstances. ***B.C. v. Wall Twp. Bd. of Educ***., 2013 U.S. Dist. LEXIS 175180 (D.N.J. Dec. 11, 2013)

Termination

Summary judgment granted in favor of school district where terminated employee failed to offer support for her claims of Violations of the Civil Rights Act of 1964, Defamation;Theft of Property; Intentional Infliction of Emotional Distress; Records Tampering and Providing False Statements; and Attempted Murder and Terroristic Threats. ***Williams v. Fort Lee Pub. Sch.,*** 2013 U.S. Dist. LEXIS 179757 (D.N.J. Dec. 23, 2013)

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New Jersey Supreme Court

Charter Schools

The arbitrary, capricious, or unreasonable standard of review was applicable to the New Jersey Commissioner of Education's decision to grant or deny a charter school application under *N.J.S.A.* 18A:36A-4(c); The decision to deny appellant's charter school application was amply supported by the record and was not arbitrary, capricious, or unreasonable; No error in relying on an existing desegregation order as a factor to consider in rejecting the application, as Commissioner was obligated to assess the racial impact that a charter school would have on the district and to avoid segregation resulting from the grant of a charter school application; Commissioner properly considered unsolicited letters from local citizens and relied on her own expertise in assessing the viability of the proposed

charter school. ***In re Proposed Quest Acad. Charter Sch. of Montclair Founders Group***, 216 *N.J.* 370 (N.J. 2013)

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New Jersey Superior Court, Appellate Division

Board Liability

Board permitted to file claim in insurance rehabilitation proceeding in Illinois. Contractor was terminated from project and surety entered into agreement with board to finish project. Surety then became insolvent. Judge properly dismissed board's counterclaim for liquidated damages, in accordance with comity and full faith and credit, in accordance with the principles in the Uniform Insurers Liquidation Act (the "Act"), *N.J.S.A.* 17:30C-1 to -31. ***Am. Motorists Ins. Co. v. N. Plainfield Bd. of Educ.,*** 2013 N.J. Super. Unpub. LEXIS 2714 (App.Div. Nov. 12, 2013)

Summary judgment granted to board when Student allegedly slipped and fell on a wet floor in her elementary school cafeteria. Plaintiff presented no evidence that the school custodian, principal, guidance counselor, or security guard knew of the wet floor before plaintiff slipped. Plaintiff did not notice there was water on the floor until after she fell and noticed that her hands were wet. It is just speculation that the custodian left the floor in a slippery condition or that the adults saw that it was wet before plaintiff fell. The proofs were so one-sided that defendant must prevail as a matter of law. ***Parker v. Stokes Elem. Sch.,*** 2013 N.J. Super. Unpub. LEXIS 2786 (App.Div. Nov. 19, 2013)

Conscientious Employment Protection Act

Trial court properly denied defendant's motion to dismiss an indictment charging her with official misconduct, in violation of *N.J.S.A*. 2C:30-2(a), and theft of public documents, in violation of *N.J.S.A*. 2C:20-3 and 2C:20-2(b)(2)(g), based on her activity of allegedly taking confidential student records to assist her attorney in the prosecution of civil employment discrimination claims against her employer because she did not have an absolute right to take the records. Case law did not establish a bright-line rule decriminalizing such conduct. Court applied balancing test and stated that applying Quinlan analysis to the documents before the court, we find ourselves in agreement with the distinction that the trial court drew. Plaintiff's act of taking the documents was not protected and that the employer was free to terminate her for doing so. ***State v. Saavedra, 433 N.J. Super.* 501 (App.Div. 2013)**

Employment Discrimination

Summary judgment in favor of school district upheld in discrimination case where it was alleged that district officials forced teacher to retire. Plaintiff failed to establish a prima faciae case of discrimination. *Lovett v. Flemington-Raritan Reg'l Bd. of Educ*., 2013 N.J. Super. Unpub. LEXIS 2683 (App. Div. Nov. 6, 2013)

Ethics

Court remands for further consideration by School Ethics Commission issue of who may request a Rice notice. SEC decision fails to clearly delineate the respective authority of a board member, board president, and full board in determining how and when a school superintendent's employment is reviewed. Once SEC clarifies this issue, then it can properly determine whether board member exceeded the scope of his authority and, if so, whether his issuance of the Rice notice, standing alone, was properly sanctionable. SEC decision also fails to provide adequate guidance for boards and board members who may be confronted with this issue in the future. An administrative agency must conduct an independent evaluation of all relevant evidence and legal arguments presented in support of and in opposition to proposed administrative agency action. The failure to do so may make the agency's

decision arbitrary and capricious and require a remand for reconsideration. Here, a remand is necessary so that the agency may conduct "a full analysis" of the evidence and its factual findings. ***Persi v. Woska,* No. A–6038–11T4 (App.Div. Dec. 11, 2013)**

Pensions

Court finds no reasonable grounds to toll two-year limitation. Petitioner did not exercise reasonable diligence. Despite changing jobs and pension plans, and thereafter purchasing service credits for PERS, she took no action to determine the status of her PERS accounts for three years, until the Division contacted her. According to the pension handbook, the Division intended to contact petitioner sooner. However, the Division was not required to do so. Court finds nothing to warrant adopting argument for equitable tolling of the two-year time period provided by *N.J.S.A.* 43:15A-7(e). ***Linnett v. Public Emples. Ret. Sys.,***2013 N.J. Super. Unpub. LEXIS 2908, 14-15 (App. Div. Dec. 10, 2013)

Public School Contracts Law

Board's decision to reject bids upheld. Consequently, so long as a board of education rejects all bids for any of the reasons permitted under *N.J.S.A.* 18A:18-22 and the decision was neither arbitrary nor capricious, the rejection is proper. The fact that it was unnecessary to reject all bids in order to permit substitutions does not render the Board's action arbitrary or capricious. Further, there was no evidence proffered that the action was in bad faith. ***Sur. Mech. Servs. v. Bridgeton Bd. of Educ.,*** 2013 N.J. Super. Unpub. LEXIS 2914 (App. Div. Dec. 11, 2013)

In matter concerning school construction contract pursuant to the New Jersey public bidding laws, the central issue is whether the fourth-lowest bidder can bring suit directly against the lowest bidder challenging the award and seeking money damages. Bidder's complaint was properly dismissed. General purpose of bidding laws is to secure for the taxpayers the benefits of competition and to promote the honesty and integrity of the bidders and the system. Their objects are to guard against favoritism, improvidence, extravagance and corruption; their aim is to secure for the public the benefits of unfettered competition. New Jersey's bidding laws have been construed to curtail the discretion of local authorities by demanding strict compliance with public bidding guidelines. A bidder claiming to be entitled to the award of a contract for public work has long been held to have sufficient standing to challenge the rejection of his bid or the letting of the contract to another bidder, and to compel the award of the contract to him. There is no legislative support for such an implied cause of action for damages by an unsuccessful bidder against the bidder who was awarded the contract, based on alleged misrepresentations in the successful bidder's submissions. The Legislature did not intend to create a private right of action. ***Brockwell & Carrington Contrs., Inc. v. Dobco, Inc.,***2013 N.J. Super. Unpub. LEXIS 3029 (App.Div. Dec. 26, 2013)

Special Education

Medicaid (SEMI) reimbursement is not mandated for special education services provided to parentally-placed disabled children in non-public schools. Congress did not intend to include service plans under a broader IEP framework. ***Lakewood Bd. of Educ. v. Department of Human Servs.,***2013 N.J. Super. Unpub. LEXIS 2694(App. Div. Nov. 7, 2013)

Decision on denial of waiver of *N.J.A.C*. 6A:23A-18.3(c)1.iii that requires a private school for students with disabilities maintain a minimum Average Daily Enrollment of 16 public school placement students in a school year remanded where Commissioner failed to give any reasons for the denial of petitioner's waiver request, Court cannot make any determination whether his decision was arbitrary or in accord with legislative policy. A search of the record does not reveal the basis for his decision, either. ***You & Me Preschool v. New Jersey Dep't of Educ.***, 2013 N.J. Super. Unpub. LEXIS 2674 (App.Div. Nov. 4, 2013)

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New Jersey Superior Court, Law/Chancery Division

Open Public Meetings Act

While cognizant exemptions or privileges may apply to certain attachments, absent the same, the public has a right to know and receive the full agenda prior to any meeting. There exists a significant public interest in ensuring the open, transparent, and public review of matters discussed by the Board consistent with the legislative intent pursuant to OPRA, OPMA, and the common law right of access. To the extent the Board does not claim an exemption, privilege, or some particularized reasons why it cannot produce the documents, all attachments shall be uploaded with the agenda pursuant to the requirements of OPMA. ***Opderbeck v. Midland Park Bd. of Educ***., 2013 N.J. Super. Unpub. LEXIS 3010, (Law Div. Dec. 24, 2013)

Open Public Records Act

In dispute over production of records pursuant to OPRA concerning implementation of a random drug testing policy, the issue of attorneys' fees is reserved to be addressed at a later date. While the court recognizes the substantial, albeit delayed, production made by defendant, there remains to be resolved the issue of withheld documents. Board shall provide a more exacting Vaughn Index that complies with case law so as to permit plaintiff's counsel to analyze the documents which have been withheld to see if further review by the court is necessary. Custodian shall certify to her good faith effort to locate the requested documents, the nature of her search, that all responsive documents have been produced and no further responsive documents exist which have not been produced. The custodian shall directly reference the categories of documents listed which plaintiff asserts have not been produced. *Hausmann v. N. Valley Reg'l Bd. of Educ*., 2013 N.J. Super. Unpub. LEXIS 2705 (Ch. Div. Nov. 7, 2013)

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Commissioner of Education

Certification-revocation/suspension

Commissioner affirms the determination of the New Jersey State Board of Examiners that the facts underlying the revocation of appellant's teaching and administrative certificates in the State of New York warrant revocation of his New Jersey teaching and supervising certificates, where the Board of Examiners learned of the revocation of appellant's New York certificates after due process and plenary hearing, for touching and kissing a student. ***Matter of Revocation of Certificates of Landa*, 2013: Nov. 6 . (**see also, **Exam (SBE) Decision**)

Teacher's entering into a plea agreement in Hudson County Superior Court – which agreement provided that she would be permanently barred from public employment in New Jersey – warranted the revocation of her teaching certificates; Commissioner will not disturb the determination of the New Jersey State Board of Examiners and dismisses teacher's appeal. ***Matter of Revocations of Certificates of Guerra*, 2013:Nov 4.** (see also, **Exam (SBE) Decision**)

Commissioner affirms ruling of New Jersey State Board of Examiners to revoke appellant's certificate, and rejects argument that Examiners Board should have conducted an analysis or considered the underlying circumstances concerning the nature of the conduct at issue, other than the reliance on the fact that appellant was convicted for assault by motor vehicle and wandering, and that he consented to a permanent bar from public employment. Commissioner notes that appellant was afforded the necessary due process before his certificates were revoked. ***Matter of Certificates of Windelried*,**

2013:Dec 16. (see also, **Exam (SBE) Decision**)

Discipline/HIB-Student

Commissioner grants board's motion for summary dismissal of petition brought by parent; parent sought to reverse the district's determination that his daughter violated its anti-bullying and harassment policy and to expunge her student disciplinary record in connection with the HIB investigation of an incident which occurred in March 2012. Commissioner found that there was no disciplinary record in the student's educational file to expunge. Further, the student is currently attending college, and there is no evidence to suggest that the board conveyed any finding related to the HIB incident to any higher educational institution. The Board's actions in investigating the March 2012 incident and subsequently requiring the student to participate in sensitivity and awareness training were in compliance with the district HIB policy. A determination of whether the student engaged in the alleged HIB incident is moot, as resolution would not further a remedy. ***G.T.S., o/b/o S.A.S.*, Commr 2013: Dec 2 (Union Cty Vocational)**.

Commissioner dismisses parent's petition for lack of prosecution in matter where parent challenged the discipline imposed upon student by Board following an incident in which the student allegedly yelled "I have a shotgun" into a darkened auditorium full of students, and where board excluded the student from his high school graduation ceremony. Emergent relief had been denied following a hearing on the day of graduation, and student did not walk with his class. No response was received from parent on remaining issues that had not been resolved, the record closed and an Initial Decision was issued dismissing the matter as moot. Thereafter, the parent's counsel submitted exceptions challenging the ALJ's determination, contending, *inter alia*, that an issue remains as to whether the discipline imposed was excessive, arbitrary, capricious, or otherwise unreasonable. Commissioner found it unnecessary to reach a determination on the issue of mootness, as petitioner failed to prosecute the appeal. ***R.B., o/b/o/ A.B.*, Commr 2013: Dec 12 (Burlington).**

Ethics

Commissioner affirms SEC's June 26, 2013 decision finding that the board member violated *N.J.S.A.* 18A:12-24.1(e) in connection with his conduct at the polling place during the April 2011 school board election, and the SEC's recommended penalty of reprimand. Evidence in the record fully supports the SEC determination that on the day of the election, respondent took action beyond the scope of his authority by confronting, intimidating, and embarrassing complainant (who was an employee) and others, and that his conduct has compromised the Board because the public may have lost confidence in him and respect for his judgment, thereby potentially making every vote that he is involved with suspect. ***Murphy*, 2013:Nov 7 (Washington Twp). SEC Decision**

Jurisdiction

Commissioner grants motion to dismiss for lack of jurisdiction over matter solely involving allegations arising under OPMA (in reliance on *Sukin)*; board member alleged that the board violated OPMA when it failed to contact her by telephone to participate in a vote on the 2012-2013 school budget where she left the meeting prior to the vote on the school budget – which was on the meeting agenda—and where the board allegedly called another absent member and who voted telephonically. ***Bembry*, Commr 2013:Nov. 7 (Hackensack)**. (see, **OAL Decision**)

Commissioner dismisses matter brought by constituent member of Central Regional school district (Berkeley Twp) against another constituent member (Seaside Heights) alleging that Seaside Heights channeled public funds through a charitable organization (Citizens) to pay tuition for Central Regional students to attend Toms River Regional School District. Commissioner dismisses for lack of jurisdiction this matter which engages local public contracts law, ethical codes for municipal officials, and the operation of Citizens as a charitable organization and for which there is evidence that the two Boards believed that the arrangement was sanctioned by the County Superintendent and where the diversion of

twelve students from Seaside Park to Toms River is not an acute impact; however, Commissioner warns that his dismissal should not be construed to signify that future efforts by municipalities to evade the responsibilities of membership in a regional school district will elude Commissioner review and sanction, where appropriate. ***Berkeley, Central Regional v. Seaside Park et al*, Commr: 2013: Nov 4. et al.,**

Policy

Commissioner upholds school district decision to deny student admission to first grade, where student had turned six on October 2, 2013, and had already completed a private school kindergarten program; board's policy allowed child to enter first grade if he or she has attained the age of six years on or before October 1 of the year in which entrance is sought or has completed the District's kindergarten program or if transferring from an American public school because the parents have moved into the township—and petitioner met none of these criteria. ***D.H. and J.H., o/b/o , S.H.,* Commr 2013: Nov 7 (Parsippany-Troy Hills)**. (see, » **OAL Decision**)

Reduction in Force

Commissioner finds that tenured Supervisor of Mathematics for grades 7-12, whose position was abolished in a reorganization, was not qualified for the position of Director of Mathematics and Science because that is a district-wide position that – pursuant to *N.J.A.C.* 6A:9-12.3(a) – requires a school administrator endorsement, which petitioner does not hold; the job responsibilities of the Director position are of a qualitatively higher level than those of petitioner's former position as Supervisor of Mathematics; not enough that she holds principal and supervisor endorsement. ***Kohn v. Orange*, 2013:Nov 4.**

Residency-Student

Where petitioner failed to appear and prosecute his appeal of the Board's residency determination and the undisputed evidence established that the student was not domiciled in West Orange, the Board properly determined that the student should be removed from the district and that the district is entitled to recover tuition for periods of ineligible attendance in its schools in the amount of $24,040.68 for a period of 178 days during the 2012-2013 school year. ***F.L., o/b/o R.L.*, Commr 2013:Nov 18 (West Orange)**.

Board is awarded back tuition of $11,439.00 where parent did not provide the requisite re-registration documents when requested by the respondent Board; and the parent failed to prosecute the appeal and student was not entitled to a free public education in the respondent's school district. ***A.L.T., o/b/o, K.I.R.*, Commr 2013:Dec 23. (Jamesburg)** (see, » **OAL Decision**)

Salary

ALJ finds that Board did not violate the Employer-Employee Relations Act (EERA) when it determined, without negotiating with the Teachers Union, to recoup funds erroneously paid under the 2002-2005 and 2005-2008 teacher contracts by freezing salaries and withholding increments and other benefits. The Board had managerial discretion to determine the means for recouping an inadvertent overpayment made to petitioners – as long as their salaries were not reduced. Ruling was sent to PERC for review as PERC had predominant interest in implementing the EERA, and PERC adopted the recommendations of the ALJ and obtained an extension of time for the Commissioner to issue a final decision on the school law issues involving calculating the payments. ***Alparone, et al, v. High Bridge*, Commr 2013:Dec 19**.

Send-Receive

Commissioner dismisses as moot a request by the Harrison School District for emergent relief, demanding that East Newark be barred from withdrawing from the send-receive relationship with

Harrison; East Newark rescinded its resolution to withdraw its high school students from the send/receive relationship with Harrison and East Newark approved and executed a tuition contract with Harrison. ***Harrison v. East Newark*, Commr 2013:Dec 19.**

Tenure Dismissal

Commissioner upholds charges filed by school district against tenured physical education teacher for failure to uphold the implicit standards of good behavior expected of a teacher, as his remarks offended publicly accepted standards of decency; he referred to students as "nigger," "mad Mexican," and "spic," as well as other demeaning names, and engaged in the use of profanity in their presence; and, despite several warnings and being given many "second chances," failed to learn from his mistakes, and continued to make inappropriate comments about race and socio-economic status to and about his students. ***Matter of Tenure Hearing of Surace*, Commr 2013: Nov 1. (East Windsor)**.

Tenure Rights

Commissioner dismisses petition by former employee who was terminated in 2001 after a criminal indictment, incarcerated, and who claimed that when the Supreme Court reversed his criminal conviction in 2013, he was entitled to reinstatement and back pay to the date of his wrongful termination. Employee had never earned tenure as he served under renewals of his emergency certification as an educational media specialist (an endorsement on the educational services certificate) throughout his entire employment with the school district; although he also had a Certificate of Eligibility as an elementary school teacher he never served under that endorsement; any appeal to his termination in 2001 should have been made within 90 days of that date. ***Nash v. Newark*, Commr 2013: Nov 25.** (see, » **OAL Decision**)

Timeliness -90 day rule

Commissioner dismisses matter brought by Medford Investor Associates (MIA), which had previously leased office space to the board, which alleged that the board violated various school laws when it entered into an agreement to lease office space from another vendor, Hartford, when MIA's lease expired. Although MIA has standing as a taxpayer within the school district, its petition was untimely as it was not filed within 90 days of receiving notice of the Board's final action with respect to the Hartford lease; nor was there any "continuing violation" that tolled the 90-day rule nor compelling reason to relax the rule. Filing a complaint initially in Superior Court did not defeat the ninety-day rule. ***Medford Investor Associates*, 2013: Nov 25 (Medford)**. (see, » ***OAL Decision***)

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Tenure Arbitration Cases "TeachNJ"

Arbitrator determined that school district proved charges of insubordination and inefficiency. The district went to extraordinary efforts to remedy the tenured music teacher's deficiencies. After more than a full year of assistance, the music teacher had not made significant improvement in independently developing lesson plans consistent with school district practice and procedures; showed limited improvement in effectively implementing those plans in the classroom and effectively managing student behavior. Teacher failed to accept constructive criticism. Inefficiency was proven. The music teacher failed to follow directives from the superintendent and the curriculum supervisor and made disrespectful comments to both. Teacher suggested that superintendent sign three copies of his rebuttal and that either of the supervisors should teach a music lesson in Italian. The ongoing defiance and disrespect amounted to insubordination. Tenure charges were sustained. Teacher was dismissed. ***Tenure Hearing of Nell*, Arb 2013 November 22 (Beverly) (Brown, Arbitrator)**.

Arbitrator found that school district did not prove tenure charges filed against teacher Nartowicz and

guidance counselor Baskay. Suspensions of 20 days for Nartowicz and 10 days for Baskay upheld. Nartowicz improperly accessed a student record and shared it with two board members. Baskay improperly accessed a student record through her computer and disseminated it to a school crossing guard. Teacher and guidance counselor were reimbursed all salary denied during the period and were credited with all rights and seniority they otherwise would have accrued except for the period of upheld suspension. ***Tenure Hearing of Baskay and Nartowicz*, Arb 2013: December 10 (Carteret)(Gerber, Arbitrator)** .

Arbitrator found that school district proved charges of unbecoming conduct against tenured music teacher. Teacher was charges with corporal punishment, insubordination, violation of school district policy and New Jersey law and other willful misconduct. Teacher grabbed a sixth grade general music class student with two hands, lifted him off the ground and threw him onto the teacher's desk, violating state law and school district policy regarding corporal punishment. Teacher demonstrated poor classroom management skills and poor judgment, failed to exercise self-restraint and controlled behavior required of a teacher, acted in an unprofessional and inappropriate manner, placing a child at risk of physical and emotional harm. Music teacher made inappropriate comments to a seventh grade student in an instrumental music class, calling the student "stupid" an "idiot" and telling the student to "shut up." The comments were inappropriate and unprofessional and constituted conduct unbecoming a teacher. Teacher grabbed another student in the same seventh grade instrumental music class by the arm and pushed it away, such conduct constituting conduct unbecoming a teacher. Several charges, while proven by the school district were dismissed because of principles of double jeopardy. Tenured music teacher was dismissed from employment. ***Tenure Hearing of Carlomagno,* Arb. 2013: December 20 (Hillside) (Biren, Arbitrator)**.

Arbitrator found that while school district substantiated all three charges against middle school teacher, such charges did not warrant teacher's dismissal from employment. Teacher had kissed an 18 year old female student on the cheek and made her feel uncomfortable, teacher had also sent the student text and Facebook messages, also making her uncomfortable. Teacher had served as student's track coach when she was a minor. Teacher took another female student alone to a play in Philadelphia, with the parent's permission but without notifying the school district administration. Teacher contacted other female students outside of school on non-school related matters. No proof of any romantic or sexual activity. School district had no policy on staff use of social media. Teacher reinstated without back pay and must comply with all psychologist recommendations. ***Tenure Hearing of Boyle*, Arb. 2013:December 23 (Pittsgrove) (Buchheit, Arbitrator)**.

*Click here to access **Arbitrator TEACHNJ** decisions.*

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School Ethics Commission

Complaint dismissed with prejudice where complainant filed a defective complaint and failed to remedy the deficiencies in the complaint. ***Wilson v. Gray*, C-17-13 (SEC 2013:Nov. 26)**

Board member violated the Code when she shared the recording of the taped a portion of the Executive Session at the regular meeting of the Board with her attorney for use against certain Board members in another ethics matter filed against her with the Commission. In excluding the tape, the Commission recognized that each public body enjoys its own protection of confidentiality, individually and separately from any other public body. The protection of confidentiality attaches to each public body as a whole: It is not severable and no one Board member or official can waive that protection for the Board without breaching his duty. Further, the Commission finds that sharing the deliberations of a closed meeting with any third party, who would not have been permitted to attend the meeting, is tantamount to a breach of trust and to the promise and expectation of confidentiality. When the respondent, in consultation with another Board member, turned on her phone's recording app, she was still within her

rights to do so, as the Commission found in *Pitts v. Gidwani*. However, the Commission concludes that, here, the respondent took private action, or action that was outside the scope of her duties as a Board member when she disclosed the deliberations to two other third parties who would not otherwise have been privy to the Board's deliberations. Commission finds that the Board's protection of confidentiality was breached when the respondent played the recording for two other individuals who were not permitted in Executive Session. Accordingly, the Commission finds that the respondent took private action, which was of such a nature that it had the potential to compromise the Board in violation of *N.J.S.A.* 18A:12-24.1(e). The Commission also reviews its determination in *Pitts v. Gidwani*, C27-11, 09/27/11, and its reassessment leads to a cautionary note. The Commission does not believe that it is within its authority to prohibit the taping of the Executive Session. However, it does recommend that each District determine for itself the rule it wishes to follow. The Commission supports such a prohibition since allowing the taping of Executive Session Board deliberations creates too great a probability that Board members may not freely discuss school business. Such an outcome must not be countenanced as it makes ineffective the very purpose of a closed session—to discuss the public's business unfettered and protected. Most importantly, allowing members to tape a closed session, even a portion, introduces a greater and unacceptable threat that the confidential deliberations may become available to public scrutiny through an individual who is not a beneficiary of the protection of confidentiality recognized in Executive Session. The Commission recommends a penalty of reprimand for breaching the confidentiality of Board deliberations by sharing the recording with another who would not have been permitted to attend the meeting or be privy to the Board's discussions. The Commission takes this opportunity to encourage the Board as a whole and its members individually to put this rancor behind them so that it does not continue to taint the future and further recommends that they attempt to rebuild the trust that the people who elected them look to for leadership. ***Messner and Condo v. Gray and Berglund v. Gray* C16-13 and C22-13, consolidated** (SEC 2013: Dec. 19)

No evidence that the respondent took action beyond the scope of her duties as the Board Vice President. Board Member was acting in her capacity as a private citizen. As such, there is no reason to reach the question of whether the action was of such a nature that it had the potential to compromise the Board. Rather, the respondent played no role in the creation of the placard or in the attribution at the silent auction. Based on the testimonial and documentary evidence, the Commission finds that the complainant failed to factually establish that the respondent violated N.J.S.A. 18A:12-24.1(c) and (e) of the Code of Ethics for School Board Members. Further, the Code of Ethics for School Board Members circumscribes the conduct of Board members only; the rules do not limit the spouse of a Board member. Mr. Dean is not answerable to the Commission and has no duty or obligation to follow the Code. ***Pollack v. Dean*, C20-13 (SEC 2013:Dec 19)**.

*Click here for **School Ethics Commission** decisions.*

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State Board of Examiners

Examiners orders revocation of Certificates of Teacher of Health and Physical Education, Teacher of Driver Education, and Substance Awareness Coordinator Certificate of Eligibility With Advanced Standing, where holder of certificates pled guilty to Assault By Auto/Vessel in the third degree, and as a result was disqualified from public school employment. Behavior fell far short of a role model. ***IMO Certificate of Bonner: Exam 2013: Nov 1.***

Examiners orders revocation of Teacher of Music Certificate of Eligibility With Advanced Standing, and a Teacher of Elementary School in Grades K-5 Certificate of Eligibility With Advanced Standing where holder of certificates pled guilty to Showing Obscene Material to Person Under 18 to Arouse Self/Another and as a result was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* Conviction and subsequent disqualification constitute conduct unbecoming a certificate holder. ***IMO Certificate of Dorrell, Exam 2013:Nov 1.***

Examiners orders revocation of Teacher of Elementary School Certificate of Eligibility With Advanced Standing, Teacher of the Handicapped certificate, and Teacher of Elementary School certificate, where holder agreed to relinquish her certificates with the force and effect of a revocation and all attendant consequences after having pled guilty to 1st degree Murder, Attempted Murder and Conspiracy to Desecrate Human Remains and having been sentenced to 58 years in prison. ***IMO Certificates of Dorsett, Exam 2013: Nov. 1.***

Teacher of Elementary School Certificate of Eligibility, Teacher of Elementary School certificate, Principal Certificate of Eligibility, and Principal certificate where holder pled guilty to Simple Assault after having been indicted on charges of Criminal Sexual Contact, Aggravated Sexual Assault with Bodily Injury and Threatening to Kill and sentenced to one year of probation. ***IMO Certificates of Folayan, Exam 2013: Nov. 1.***

Examiners orders revocation of Substitute Credential where substitute teacher had resigned from his assignment as a substitute teacher following allegations that he had made numerous inappropriate sexual comments to students, as well as inefficient classroom performance and practices, and where he did not respond to the order to show cause or hearing notice. ***IMO Certificates of Hull, Exam 2013: Nov 1.***

Examiners orders revocation of Teacher of the Handicapped certificate where board of education had successfully litigated tenure dismissal charges against teacher who engaged in a continuing pattern of professional misconduct which included: ignoring or defying direct orders or suggestions of her supervisors; exhibiting anger, hostility and disrespectfulness in her communications with fellow teaching staff members, at times in the presence of students; and, in a number of instances, categorically refusing to perform the duties required by her position. ***IMO Certificate of Kubicki, Exam 2013:Nov 1.***

Examiners orders revocation of Substitute Credential, where holder pled guilty to Conspiracy to Endanger the Welfare of a Child and Criminal Sexual Contact, and as a result agreed to relinquish his credential with the force and effect of a revocation and all attendant consequences. ***IMO Certificate of Lemunyon, Exam 2013: Nov. 1.***

Examiners accepts holder's proposal to suspend his Teacher of Music certificate for five years, where holder did not admit to the allegations in the Order to Show Cause. ***Matter of the Certificate of Millner, Exam 2013: Nov. 1.***

Examiners accepts holder's proposal to suspend Teacher of Elementary School Certificate of Eligibility and a Teacher of Elementary School certificate "until such time as the final agency decision is rendered in the above-captioned matter." ***IMO Certificates of Omert, Exam 2013:Nov. 1.***

Examiners accepts proposal to relinquish Teacher of Mathematics and Teacher of Physical Science Certificates of Eligibility, and Teacher of Mathematics and Teacher of Physical Science certificates voluntarily with the force and effect of revocation. ***IMO Certificates of Schanne, Exam 2013:Nov 1.***

Examiners orders revocation of Teacher of the Handicapped certificate where holder was convicted in Pennsylvania of Rape of Child, Involuntary Deviate Sexual Intercourse with Child, Endangering the Welfare of Children-Parent/Guardian, Corruption of Minors and Indecent Assault of Person Less Than 13 Years of Age, and he failed to respond to the Order to Show Cause or the Hearing Notice. ***IMO Certificate of Shero, Exam 2013:Nov 1.***

Examiners modifies its initial decision and orders the revocation of P.S.'s Teacher of Music Certificate of Eligibility and her Teacher of Music certificate 's certificates, where teacher had resigned from her tenured position after allegations that she "inserted a drumstick between student's buttocks over his underwear, stroked his buttocks and threatened to 'stick the drumstick all the way in'" while student was being held on the ground; her lengthy teaching experience and position as a mentor to students in the band made it more inexcusable; rejects categorization as "horseplay." ***Matter of the Certificate of P.S.***

Exam 2013:Nov 1.

Examiners orders revocation of Teacher of Social Studies Certificate of Eligibility and Teacher of Social Studies certificate where holder agrees to relinquish his credential with the force and effect of a revocation. ***IMO Certificate of Tirri, 2013:Nov 1.***

Examiners voted to suspend Teacher of Music Certificate of Eligibility and Teacher of Music certificate pending resolution of the criminal proceedings against him where he was indicted on five counts of Sexual Assault, six counts of Criminal Sexual Contact, three counts of Endangering the Welfare of a Child and one count of Official Misconduct and where if convicted he would be disqualified from public employment pursuant to *N.J.S.A*. 18A:6-7.1 *et seq*. ***IMO Certificate of Van Hoven, 2013:Nov 1.***

Examiners revokes Principal and School Administrator Certificates of Eligibility and his Teacher of Biological Science, Teacher of Comprehensive Science, Teacher of Data Processing and Supervisor certificates, where holder had resigned/retired from his tenured position following allegations that he had accessed pornographic, aberrant and deviant subject matter on a district computer during work hours; revocation ordered despite his agreement to retire and seek psychological counseling, despite his 32 year heretofore-unblemished career, and that viewing took place in administrative building separated from students. ***IMO Certificate of Dantinne, 2013:Dec. 6.***

Examiners orders revocation of Teacher of Mathematics Certificate of Eligibility With Advanced Standing and Teacher of Mathematics certificate where holder who pled guilty to Criminal Sexual Contact agreed to relinquish his certificates with the force and effect of a revocation. ***IMO Certificate of Greco, 2013:Dec. 6.***

Examiners accepts the proposal to suspend Teacher of Elementary School Certificate of Eligibility, and Teacher of Elementary School certificate for six years. ***IMO Certificate of Omert, 2013:Dec. 6.***

Examiners orders revocation of Substitute Credential of holder who had resigned and acknowledged that he had submitted a falsified college transcript from Lehigh University when he applied for a teaching certificate. ***IMO Certificate of Ritter, 2013:Dec. 6.***

Examiners suspends Teacher of the Handicapped certificate for a period of one year where teacher did not properly administer the NJ ASK4 test insofar as OFAC reported that he breached test protocol by helping students on the test when he conducted math reviews prior to the test contrary to protocols, and reworded some questions on the test for students. ***IMO Certificate of Evans, 2013: Dec. 6.***

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New Jersey Council on Local Mandates

There are no education-related decisions posted for November/December at this time.

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New Jersey Division on Civil Rights

There are no education-related decisions posted for November/December at this time.

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Election Law Enforcement Commission

No education-related cases reported for this period.

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Government Records Council

GRC determined that the Custodian of Records attempted to reasonably accommodate the Complainant's voluminous requests and subsequently certified that responding to the requests would have substantially disrupted agency operations. Complainant sought countless complaints and documents related thereto for over a 15-year period (1998- 2013). Such a request was overly broad. Additionally, it is evident that the parties could not reach a reasonable accommodation. Therefore, the Custodian did not unlawfully deny access to the Complainant's OPRA request. *N.J.S.A*. 47:1A-5(g); *N.J.S.A*. 47:1A-6; C*aggiano v. NJ Dep't of Law & Public Safety, Div. of Consumer Affairs*, GRC Complaint No. 2007-69 (September 2007); *Vessio v. NJ Dep't of Cmty. Affairs, Div. of Fire Safety*, GRC Complaint No. 2007-63 (May 2007); *Dittrich v. City of Hoboken* (Hudson), GRC Complaint No. 2008-13 (June 2009). *See also Davis v. NJ Dep't of Health & Senior Services*, GRC Complaint Nos. 2012-94 and 2012-142 (May 2013). ***Karakashian v. NJ Department of Law & Public Safety, Division of Consumer Affairs, Office Board of Medical Examiners* No: 2013-121 and 2013-144 (GRC November 19, 2013)**.

GRC determined that the Custodian of Records did not unlawfully deny access to the requested records; a copy of the completed Permanent Aeronautical Facility Application Evaluation Ranking form (an "Evaluation") used by the DOT's Aeronautics Division in evaluating licensing criteria for a helistop application. Because the evaluations contain recommendations about DOT policy and were generated before the DOT made a decision regarding the helistop, the responsive Evaluations are reflective of the deliberative process and are exempt from access as ACD material. *See* N.J.S.A. 47:1A-1.1; In *Re the Liquidation of Integrity Insurance Company,* 165 *N.J*. 75, 84-85 (2000). *See also Education Law Center v. New Jersey Department of Education,* 198 *N.J*. 274, 304 (2009). ***Held v. NJ Department of Transportation* No: 2013-142 (GRC November 19, 2013)**.

GRC determined that $300 was a reasonable fee for an attorney of Counsel's experience representing clients before the GRC. A Counsel's hourly rate should be assessed to reflect his experience and the local prevailing rates for representation of clients in OPRA matters. However, the Council found that the time expended, 17.0 hours, was not reasonable. The Council finds that 5.2 hours at $300 per hour is reasonable for the work performed by Counsel in the instant matter. ***Deloy v. Township of Lyndhurst* No. 2012-128 (GRC November 19, 2013)**.

GRC determined that the Custodian of Records did not unlawfully deny access under OPRA to the requested email directing the placement of a State Ethics Commission report into a University employee's personnel file. *See N.J.S.A*. 47:1A-6. The requested email was the equivalent of "personnel records" exempted under *N.J.S.A*.47:1A-10, and "[t]he same legislative intent embodied in the general exemption of personnel files from disclosure – one that aims to protect personal information disclosed to government agencies when such agencies are operating under the mantle of employer – demands that protection be afforded to the documents at issue" here. *North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office*, 405 N.J. Super. 386, 389 (App. Div. 2009); *see also Dusenberry v.New Jersey City University*, GRC Complaint No. 2009-101 (April 28, 2010). ***Rodriguez v. Kean University* No. 2013-268 (GRC November 19, 2013)** .

GRC determined that the Custodian of Records did not unlawfully deny access to government records. Complainant's request for emails was impermissibly broad in that it failed to identify with sufficient

"specificity or particularity the governmental records sought." *See MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 *N.J. Super*. 534, 549 (App. Div. 2005). Nor did Complainant specify the identifying particular dates and parties. GRC further determined that the Custodian did not unlawfully deny access to the requested OEM Organizational Charts and EMP. *N.J.S.A*. 47:1A-6. These documents are not considered "government records" under OPRA because such records contain security measures and emergency or security information or procedures that, if disclosed, would substantially interfere with the State's ability to protect and defend the State and its citizens. *N.J.S.A*. 47:1A-1.1; N.J.S.A. 47:1A-9(a); Executive Order No. 21 (McGreevey 2002); *Vasquez v. Burlington County*, GRC Complaint No. 2005-193 (February 17, 2005); *Mariano v. New Jersey Department of Environmental Protection,* GRC Complaint No. 2003-140 (February 27, 2004). ***Russomano v. Township of Edison* No. 2012-307 (GRC November 19, 2013)**.

GRC determined that Complainant's requests were invalid under OPRA because the requests were overly broad, failed to identify specific government records and would require the Custodian to conduct research in order to determine which records may be responsive to the requests. *See MAG Entm't, LLC v.Div. of ABC*, 375 *N.J. Super*. 534 (App. Div. 2005), *Bent v. Stafford Police Dep't*, 381 N.J. Super. 30 (App. Div. 2005), and *NJ Builders Assoc. v. NJ Council on Affordable Hous*., 390 *N.J.Super*. 166 (App. Div. 2007). Complainant sought copies via e-mail of all license restoration letters sent from March 11, 2013 to March 15, 2013, by the NJMVC to New Jersey drivers who were suspended for reasons as determined by the courts, the MVC, or any other agency. Complainant also sought unredacted copies of all municipal court orders in which there was a driver license suspension, received by the NJMVC from March 11, 2013 to March 15, 2013, inclusive. ***Siciliano v. NJMVC* No. 2013-98, 2013-99 (GRC November 19, 2013)**.

Custodian lawfully denied access under OPRA to the requested memoranda regarding the disciplinary action taken by the Complainant against two (2) University employees. *See N.J.S.A*.47:1A-6 as the records are personnel records that are exempt from disclosure under OPRA, and the complainant does not qualify as an "individual in interest" under *N.J.S.A*. 47:1A-10. *See Kovalcik v. Somerset County. Prosecutor's Office*, 206 *N.J*. 581, 594 (2011); *North Jersey Media Group, Incorporated v. Bergen County*. Prosecutor's Office 405 *N.J. Super*. 386, 389(App. Div. 2009); *Hewitt v. Longport Police Department*, GRC Complaint No. 2004-148 (March2005); *Mapp v. Borough of Roselle* (Union), GRC Complaint No. 2009-334 (November 30,2010). ***Rodriguez v. Kean University* No. 2013-157 (GRC November 19, 2013)**.

GRC determined that the Custodian of Records did not unlawfully deny access to governmental records. Complainant sought overtime justifications for several employees. There is no requirement that payroll records must include a description or justification of the work performed. Additionally, information pertaining to or which may reveal the duty assignments of law enforcement officers are exempt from OPRA. Custodian lawfully denied access to the records under *N.J.S.A.* 47:1A-6. *N.J.A.C.* 12:16-2.1; *N.J.A.C*. 13:1E-3.2(a)(7). ***Baker v. New Jersey State Parole Board* No. 2013-143 (GRC November 19, 2013)**.

GRC determined that Complainant's request seeking "… all records …" concerning the BME's complaint process was invalid because it failed to seek specific, identifiable government records; the Custodian is not required to research every record in his possession to determine whether same refers to the process. *MAG Entm't, LLC v. Div. of ABC*, 375 *N.J. Super*. 534, 546 (App. Div. 2005); *Bent v. Stafford Police Dep't*, 381 *N.J. Super*. 30, 37 (App. Div. 2005); *NJ Builders Assoc. v. NJ Council on Affordable Hous.*, 390 N.J. Super. 166, 180 (App. Div. 2007); *Schuler v. Borough of Bloomsbury,* GRC Complaint No. 2007-151 (February 2009). ***John Ciszewski v. NJ Department of Law & Public Safety, Division of Consumer Affairs, Office Board of Medical Examiners Custodian of Record* No. 2013-127 (GRC November 19, 2013)** .

GRC determined that the Custodian of Records did not unlawfully deny access to governmental records. Responsive documents (Mayor & Council Budget Workbook include all material etc. handed

out during budget Meetings) were reflective of the deliberative process and were exempt from access as ACD material because they contained recommendations about Township policy and were generated before the Township made a decision regarding its Municipal Budget. *See* N.J.S.A. 47:1A-1.1; *In Re the Liquidation of Integrity Ins.Co*., 165 *N.J*. 75, 84-85 (2000). *See also Educ. Law Ctr. v. N.J. Dep't of Educ*., 198 *N.J*. 274, 304 (2009). ***Kohn v. Township of Livingston* No. 2013-123 (GRC December 20, 2013)**.

GRC determined that the Custodian of Records lawfully denied access to the requested Affirmative Action File because same is exempt from disclosure as information related to a sexual harassment complaint and grievances filed by or against an individual. *N.J.S.A.* 47:1A-1.1.; *N.J.S.A*. 47:1A-6. ***Bell v. Paterson Public Schools* No. 2013-04 (GRC December 20, 2013)**.

The GRC determined that the Custodian of Records did not unlawfully deny access to various governmental records. The Custodian lawfully denied access to the Complainant's complete medical/dental record based on the exemptions to OPRA listed at *N.J.A.C*. 10A:22-2.3(a)(4) and the alternative procedures available at *N.J.A.C*. 10A:22-2.7. The Custodian lawfully denied access to Complainant's complete Account state pay monthly forms based on Executive Order No. 26 (McGreevey 2002). *N.J.S.A*. 47:1A-6; *N.J.S.A*. 47:1A-9. ***Sheridan v. New Jersey Department of Corrections* No. 2013-122 (GRC December 20, 2013)**.

GRC determined that the Custodian of Records did not unlawfully deny access under OPRA to the requested report from the University's Ethics Liaison Officer setting forth his findings and recommendations regarding sanctions of a University employee. *See N.J.S.A*. 47:1A-6. The report related to an ethics investigation that was the equivalent of the "personnel records" exempted under *N.J.S.A*. 47:1A-10, and "[t]he same legislative intent embodied in the general exemption of personnel files from disclosure – one that aims to protect personal information disclosed to government agencies when such agencies are operating under the mantle of employer – demands that protection be afforded to the documents at issue" here. *North Jersey Media Group, Inc. v. Bergen County Prosecutor's Office*, 405 *N.J. Super*. 386, 389 (App. Div. 2009); *see also Dusenberry v. New Jersey City University*, GRC Complaint No. 2009-101. ***Rodriguez v. Kean University* No. 2013-197 (GRC December 20, 2013)**.

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Election Law Enforcement Commission

There are no education-related decisions posted for this period.

New Legislation

P.L.2013, c.170. -see **S2479** Allows certain students including undocumented immigrants who meet certain criteria to qualify for in-State tuition at public institutions of higher education. Approved 12/20/2013

P.L.2013, c.172. -see S2086 Changes deadline for filing nominating petitions for school board candidates to last Monday in July; revises procedure for filling school board candidate vacancy; and revises certain other election procedures. Approved 12/27/2013

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New Regulation/Executive Orders

45 N.J.R. 2590(a), amendments to *N.J.A.C.* 6A:32, adopted 12/16/2013

45 N.J.R. 2545(a), amendments to *N.J.A.C.* 6A:8, adopted 12/16/2013

45 N.J.R. 2544(a), adopted without change, *N.J.A.C.* 6A:5, adopted 12/16/2013

45 N.J.R. 2557(a), amendments to *N.J.A.C*. 6A:26, adopted 12/16/2013

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The New Jersey School Boards Association, a federation of boards of education, provides training, advocacy and support to advance public education and promote the achievement of all students through effective governance.

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SCHOOL LAW NEWS • SEPTEMBER/OCTOBER 2013 • VOLUME X NO. 5

United States Supreme Court

U.S. Supreme Court denies certiorari; upholds appellate division's affirmance of district court's order that under the IDEA, the hearing officer had committed legal error when she declined to order a publicly-funded independent educational evaluation despite her conclusion that the district's report was inappropriate. Once the hearing officer determined that the reevaluation was inappropriate, the student was entitled to an independent educational evaluation at public expense as a matter of law. *Bethlehem Area Sch. Dist. v. D. Z.*, No. 13-248, 2013 U.S. LEXIS 7594; 82 U.S.L.W. 3234 (October 21, 2013)

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3rd Circuit Court of Appeals

Special Education

Third circuit remands for further proceedings after determining that the district court improperly granted summary judgment to a school district as to claims for compensatory damages by parents under the Rehabilitation Act and the ADA on the basis of the district having denied their daughter a FAPE; there was a genuine dispute of material fact as to whether the school district was deliberately indifferent. However, the district court did not err in refusing to consider supplemental evidence. ***Chambers v. Sch. Dist. of Phila. Bd. of Educ***., No. 12-3574 (3d Cir. Sept. 17, 2013)(not precedential)

Third Circuit affirms district court in matter where student was erroneously identified as a having a disability under IDEA; student could not bring an action under IDEA based on violation of district's duty to properly assess students as not disabled, because the IDEA created a cause of action only for children with disabilities and the student never was a child with a disability; the school district's erroneous identification of the student as a child with a disability did not violate § 504 of the Rehabilitation Act, or the Americans with Disabilities Act because there was no evidence that the school district knew, prior to an independent education evaluator's determination that the student was improperly designated as disabled, that the student had likely been misidentified as having a learning disability. ***S.H. v. Lower Merion Sch. Dist.,*** No. 12-3264 2013 U.S. App. LEXIS 18458 (3d Cir. Sept. 5, 2013)(precedential)

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New Jersey District Court

Discrimination

Teacher who claimed she was discriminated on basis of age from Newark Public Schools and on basis of her disability was entitled to appointment of pro bono counsel for the limited purpose of advising and consulting her on the strengths and weaknesses of her case for the purpose of attending a settlement conference; if the settlement conference is unsuccessful pro bono counsel has satisfied his/her obligations and will be permitted to withdraw. ***Roome v. Newark Pub. Schs.***, No. 2:12-cv-04484 (CCC)(JAD), 2013 U.S. Dist. LEXIS 136165 (D.N.J. September 23, 2013)(not for publication)

Court dismisses parent's request for injunction. Parents alleged that NJSIAA's decision to deny waiver of the NJSIAA eight semester rule as pertains to their autistic son's request to play a fifth year of competitive football as place kicker in Brick Township High School, violates the Americans with Disabilities Act. While Court disagrees with NJSIAA and concludes that granting a waiver would be a reasonable accommodation under the ADA, nonetheless, it denies the waiver because there was no finding as required under the ADA that the student was denied an equal opportunity to play competitive football, via a waiver of eligibility rules, by reason of his disabilities; rather, meaningfully participated in Brick's football program for four consecutive years, and district provided him the same opportunities afforded to every other student on the football team. ***Starego v. N.J. State Interscholastic Ath. Ass'n, 2013 U.S. Dist. LEXIS 128406 (D. N.J. Sept 9, 2013)***

School Principal alleges that Superintendent sent e-mail messages inappropriately inviting her to share hotel room, and made other inappropriate comments of sexual nature in her presence directed at other women, in violation of Title VII § 1983, and NJLAD, and seeks damages under New Jersey common law for intentional infliction of emotional distress. Motion to dismiss granted in part, and denied in part. Hostile work environment claims under Title VII and NJLAD survive. Although there is conflicting precedent, the Court dismisses with prejudice her Title VII claim against the Superintendent in his official capacity as he is not the employer. Court finds that retaliation claim under Title VII or the NJLAD was sufficiently plead and not precluded or barred by earlier administrative action as OAL had no jurisdiction. Plantiff's § 1983 claim against the Board is dismissed without prejudice. Intentional infliction of emotional distress claim is barred by NJ Tort Claims Act as she has not alleged permanent loss of a bodily function, permanent disfigurement, or dismemberment, nor medical expenses exceeding $3,600.00. Defendant's motion for more definite statement is denied. ***Stallone v. Camden County Tech. Schs. Bd. of Educ***., No. 12-7356 (RBK/JS), 2013 U.S. Dist. LEXIS 131082 (D.N.J. September 13, 2013) (not for publication)

Court grants Plaintiff's application to proceed *in forma pauperis* where plaintiff alleges that district failed to issue him a high school diploma in violation of his rights under the Fourteenth Amendment to the Constitution even after he met the New Jersey high school graduation requirements which resulted in, *inter alia*, Plaintiff's loss of income, loss of employment opportunities, loss of professional reputation, and prevented Plaintiff from pursuing his dream of being accepted into college and becoming a professional basketball player in the NBA. Court dismisses complaint without prejudice, for failure to allege facts sufficient to demonstrate that Plaintiff can maintain a plausible claim for relief. ***Crisdon v. Camden City Bd. of Educ.***, No. 13-4427 (NLH/KMW), (D.N.J. October 11, 2013) 2013 U.S. Dist. LEXIS 147115.

Court dismisses in part, grants in part, request to amend complaint in matter brought by student who had been victim of illegal sexual relationship with student teacher. Proposed amendments would set forth facts showing that Defendants had actual notice of the sexual relationship to sustain claims under Section 1983 and Title IX; (2) the New Jersey Tort Claims Act does not bar liability for negligent hiring or supervision in the face of an employee's criminal or willful conduct; and (3) the NJLAD provides a cause of action against Defendants for sexual harassment of a public school student. ***E.K. v. Massaro***, Civ. No. 12-2464 (ES) (D.N.J. October 7, 2013) 2013 U.S. Dist. LEXIS 144579(unpublished)

Labor

Court grants motion to confirm an arbitration award in matter arising out of a dispute between

Petitioners and Newark School District over whether the district had failed to make required contributions to the Funds. Court finds there was a valid agreement to arbitrate, that District's ability to challenge the award was limited because it did not appear at the arbitration after receiving notice of the hearing, that the CBA requires employers to contribute to the Funds; and that in the event that an employer does not make the required contributions the CBA clearly contemplates that the Trustees may choose to collect delinquent funds through arbitration, and the Trust Agreement provides for the specific mechanism used in this case—the designation of a permanent arbitrator to hear and determine collection disputes. ***N.J. Bldg. Laborers' Statewide Benefit Funds v. Newark Bd. of Educ.,*** No. 12-7665(FSH), (D.N.J. September 13, 2013) 2013 U.S. Dist. LEXIS 131088 (not for publication)

OPRA

Federal court denies motion made on behalf of plaintiff student, to set aside the judgment entered below. Court finds that plaintiff has not shown that the 12 student disciplinary reports are missing, much less that the board's counsel engaged in any act of fraud. Court denied Plaintiff's Motion to Set Aside the Judgment, Motion for Discovery, and Motion for Reconsideration. Underlying matter involved numerous actions brought by plaintiff student who had been suspended for having knife at school; parent had unsuccessfully challenged district's action before the Appellate Division and NJDOE; Appellate Court also dismissed parent's subsequent suit alleging violation of civil rights and disparate treatment claiming that similarly situated Caucasian students were not referred to the police and received shorter suspensions. OPRA complaints brought to Superior Court and complaints based on allegations that the district and its employees engaged in fraudulent concealment and intentional spoliation of evidence and records, had also been dismissed. ***O.R. v. Hutner,*** Civ. No. 10-1711, 2013 U.S. Dist. LEXIS 130422 (D.N.J. September 12, 2013) (unpublished)

Private Schools

Entity running for-profit schools serving students with disabilities did not have standing to bring ADA and Rehabilitation Act claims against NJDOE NJDA and USDA on behalf of the students and the private schools, for terminating school lunch reimbursement plan that had been a state-endorsed "workaround" the federal Meals Programs statute allowing reimbursement for students "attending . . . a public or nonprofit private school." No standing as there was no injury to students; same meals continue to be provided but cost now passed on through tuition to sending district as allowable cost; nor does testimony show that private school's declining enrollment is linked to the cost of the lunch increase cost —or that any specific districts decided not to send their students there for that reason. Nor did the cessation of the plan run afoul of the Rehabilitation Act or the ADA. ***Deron Sch. of N.J., Inc. v. USDA***, 2013 U.S. Dist. LEXIS 125109 (D. N.J. September 3, 2013) (unpublished)

Special Education

Parent objected to transferring student with OTI from outside program to program newly created within the district. Noting that the preference for mainstreaming is secondary to the IDEA's goal that children receive a "meaningful educational benefit" the court found strong evidence in the record contradicting the ALJ's conclusion that the in-district placement would be a mirror-image of the outside program. Therefore, matter is remanded for further proceedings, including an evidentiary hearing. The ALJ was ordered to take special care to factor in consideration of the possibility that the student's placement in-district, as compared to the outside placement, will detrimentally affect his ability to receive a free appropriate public education. ***In re R.C. & J. v. Great Meadows Reg'l Bd. of Educ.***, No. 12-5241 (MAS) (TJB), 2013 U.S. Dist. LEXIS 145761 (D.N.J. October 8, 2013) (unpublished)

Parents of student with hearing problems challenged the Board's placement; requested reimbursement for services they paid for during the summer months ("ESY"), reimbursement for a hearing aid, and alleged numerous procedural violations of the IDEA. A desktop speaker, in conjunction with his hearing normal right ear, would have allowed G.A. to receive "meaningful benefit." Court grants Board's motion for summary judgment in part, and grants Plaintiffs' motion for summary judgment in part. Plaintiffs'

cross-motion for post-administrative expenses is denied. Plaintiffs' request for reimbursement of a hearing aid, private tuition and related expenses is denied. Defendant shall reimburse Plaintiffs for the private evaluation.
G.A. v. River Vale Bd. of Educ., Civil Action No. 11-3801 (FSH), (D.N.J. September 18, 2013) 2013 U.S. Dist. LEXIS 133911 (not for publication)

Court grants defendant board's motion to stay proceedings; plaintiffs had filed four due process proceedings, and had fully exhausted their administrative remedies with the first three and each time, the school Board failed to comply with the outcome, but had not exhausted its remedies with the fourth pending petition. The systematic failure exception to the exhaustion doctrine did not apply as the allegations speak to the Defendants' treatment of the student individually as opposed to involving the framework and procedures for assessing and placing students in appropriate educational programs; further, the district court would benefit from further development of the administrative record. The Court stayed the proceedings until such time as the fourth due process petition is exhausted. ***R.C.S. v. Shrewsbury Borough Sch. Dist. Bd. of Educ.***, 2013 U.S. Dist. LEXIS 126467 (D.N.J. Sept. 5, 2013).

Court dismisses *pro se* parent's complaint in special education matter, for failure to exhaust administrative remedies; no exclusion to the exhaustion requirement applied. ***Allen v. State-Operated Sch. Dist.***, Civil Action No.: 12-3128 (ES), 2013 U.S. Dist. LEXIS 125923 (D.N.J. September 4, 2013)

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New Jersey Supreme Court

Labor

Supreme Court denies certification; Appellate Court found that PERC properly determined that compensation for additional work by psychologist and speech language therapist was mandatorily negotiable and thus arbitrable. Board terminated its existing outside contract with these employees through their companies for conduct of bilingual evaluations of students outside school hours, and directed employees to perform the evaluations as part of their duties without additional compensation. Board denied union's grievance and sought to restrain arbitration by filing scope petition. Court found that it matters not that the claimed additional work may be covered by the employee's existing job description; at issue was the change in volume of duties, not the kind of duties, without a commensurate increase in pay. *Atlantic City Bd. of Educ. v. Atlantic City* ..., 2013 N.J. Super. Unpub. LEXIS 787 (April 9, 2013), certif. den., 2013 N.J. LEXIS 920 (September 10, 2013)

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New Jersey Superior Court, Appellate Division

Civil procedure

In a civil rights action in which plaintiff charges Board with "reverse race discrimination and arbitrary and capricious hiring practices," her attorney sought to strike the board's answer for failure to provide discovery until the eve of the trial. Trial judge struck board's answer with prejudice "based upon fundamental litigation fairness." Appellate court rules that, as the trial judge's decision was not directly linked to a rule providing for the sanction imposed, striking the board's answer with prejudice was an abuse of discretion requiring reversal; involuntary termination of a civil action due to discovery delinquencies is not just a last resort, it must be preceded by a scrupulously indulgent effort to evaluate even a venal or stone walling litigant's discovery efforts, as long as that analysis can be accomplished

fairly to both sides. ***Mora v. Pleasantville Bd. of Ed.,*** No. A-3396-12T4, 2013 N.J. Super. Unpub. LEXIS 2524 (App. Div. October 21, 2013)

Construction

Court upholds ruling that board of education was not entitled to indemnification. Electrical company, Smith, claimed that delays in construction project caused it to incur large expenses; where project management company had gone bankrupt during project, and the successor company, AMIC, assumed obligations. Court finds AMIC was not obligated to defend and indemnify the Board against Smith's claims, and affirms the orders under review that, at various points and in various ways, denied the Board indemnification from AMIC. Under the contract language, the Board may not recover defense costs incurred in defending allegations of its own independent fault. Nor was the Board entitled to an award under the frivolous litigation statute, or to an award of counsel fees and costs as damages for Smith's alleged breach of contract. ***P.J. Smith Elec. Contrs. v. N. Plainfield Bd. of Educ.,*** No. A-1853-11T1, 2013 N.J. Super. Unpub. LEXIS 2346 (App. Div. September 25, 2013)(unpublished)

Indemnification

Appellate Division reverses Commissioner in indemnification case involving school security guard who was sued by a student for civil assault. The case settled. The Commissioner ordered the board to reimburse the guard for costs incurred in defense of the suit, relying on a 1997 Supreme Ct decision, *Bowe*r, for proposition that when a civil suit is settled without an admission or adjudication of facts and where claims have not been substantiated, the employee is entitled to indemnification. However, in *Bowe*r, where because all charges were dismissed before trial, the Court found there was no other evidence to refute that the allegations arose out of the course of his employment. Here, however, there exists sufficient evidence proving L.A. sexually assaulted the student as there was a DYFS report substantiated sexual/genital contact with students, and a criminal conviction resulting from the conduct. In matters such as this one, where the conduct giving rise to alleged civil liability is also the basis for criminal charges, the factual basis for and ultimate disposition of those criminal charges is highly probative when determining whether the employee's conduct "arose out of and in the course of the performance of his or her duties." Here, the record does not support a sufficient between L.A.'s official duties as a security guard and his conduct with the students to trigger the protection of *N.J.S.A.* 18A:16-6. ***L.A. and Horace Mann Ins. Co v. Trenton Bd. of Ed.*** (per curiam) (Sept 24, 2013) unreported App. Div. 2013 N.J. Super. Unpub. LEXIS 2336 (App Div. Sept 24, 2013)

Negligence

Court affirms summary judgment in favor of school district and other defendants in matter brought by assistant coach of a girls' soccer team who fell in the evening while scrimmaging on a poorly lit field adjacent to a football field where artificial turf was being installed. Board did not act in a "palpably unreasonable manner" with respect to maintenance of the field. ***Neumann v. Brick Twp. Bd. of Educ.,*** No. A-1402-11T1, 2013 N.J. Super. Unpub. LEXIS 2416 (App. Div. October 7, 2013) (not published).

Retirement

In 2006 teacher was injured when a door hit her in the face as she was entering classroom to break up a fight; 3 years later she began to experience post traumatic disorder and other symptoms and filed for accidental disability; Court agrees with TPAF's determination that while she was totally and permanently disabled, it was not due to a "traumatic event" that was terrifying or horror-inducing to be sufficient to entitle her to enhanced accidental disability retirement benefit, and affirms that she is only entitled to ordinary disability. ***King v. Board of Trs. of the Teachers' Pension & Annuity Fund,*** No. A-3483-11T3, 2013 N.J. Super. Unpub. LEXIS 2454 (App. Div. October 10, 2013) (unpublished).

School calendar

The Education Association challenged the board's decision to move the start of its school year to August 24, to coincide with the start of the school year of North Hunterdon Regional High School. Challenge was brought 9 months after the board's approval (much after 90-days), and thus was time-barred. Exception to 90-day rule for matters arising out of statutory entitlement as per Lavin did not apply; there here is no statutory basis prohibiting the Board in this case from commencing the academic or school year on September 1. ***Bethlehem Twp. Educ. Ass'n v. Bd. of Educ. of Bethlehem Twp.***, No. A-1168-11T2, 2013 N.J. Super. Unpub. LEXIS 2212 (App. Div. September 6, 2013) (unpublished)

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New Jersey Superior Court, Law/Chancery Division

There are no education-related decisions posted for September/October at this time.

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Commissioner of Education

Coaches

Board of education erred when it hired a tennis coach who was not properly certificated. Person was not properly credentialed as she only possessed a Certificate of Eligibility with Advanced Standing (CEAS). A board of education must hire a qualified and certificated applicant for a coaching position unless such a person does not exist; the Board erred in hiring an applicant who was not fully certified, but instead possessed only a CEAS. Board should have hired the petitioner, a three year incumbent, for the coaching position, as he was the only qualified and certified applicant for the position. Former tennis coach compensated with the stipend he would have received had he been hired as tennis coach. ***Rulon,* Commissioner 2013: October 7**

HIB

Board of education's determination that in-class support teacher's interaction with student did not constitute HIB within the intendment of the Anti-Bullying Bill of Rights Act was neither arbitrary nor capricious. In-class support teacher's handling of possible dress code violation (skirt length) and alleged cheating on a math test and related verbal interactions were nothing more than disciplining a student for violation of school rules and did not constitute HIB. There was no indication that the teacher's actions and subsequent verbal interaction were motivated by a distinguishing characteristic. The school district responded promptly and appropriately to petitioner's HIB complaint. ***R.C.F. and A.L.F o/b/o S.N.F, Commissioner 2013: September 18***

Increment Withholding

Board's decision to withhold teacher's 2010-2011 salary increment was not arbitrary, capricious or unreasonable. Increment was withheld based on performance evaluations during the 2009-2010 school year. Petitioner's classroom instruction during the year in question was lacking in many respects, including unacceptable lesson plans, repeating lessons already taught, and leaving the class alone on multiple occasions.
Craig-Ndiaye, Commissioner 2013:September 30

Non-Renewal

Board of education's decision to non-renew non-tenured teacher's aide was neither arbitrary, capricious or unreasonable. Non-renewal was recommended by the superintendent and was based on ample and demonstrable performance concerns over a six year period. Boards of education have nearly unfettered discretion in the renewal or non-renewal of non-tenured staff. ***Turchio,* Commissioner 2013: October 18**

Procedure

Initial decision rejected and remanded. Contained an inaccurate description of the procedural posture of the case and failed to attach the proposed settlement agreement. ***Alston-Balatura,* Commissioner 2013:September 16**

Reduction in Force

Tenured supervisors of curriculum, who were subject to a RIF, entitled to Assistant Director positions currently held by non-tenured staff. Unrecognized Assistant Director position improperly determined by ECS to not require approval prior to appointment of candidates. Petition did not require supervision of principals or other supervisors; administrator/principal endorsement not required in job description. Position should be retitled as Supervisor. Enhanced certification requirements (certain teaching certificate and endorsement for each position) have a logical nexus to the positions and were appropriate for the job description. Minuskin and Graf entitled to Assistant Director Grades 9-12 and Assistant Director Grades 4-8 position; ordered to be immediately appointed with full salary and benefits retroactive to June 30, 2010. ***Nicholson, Minuskin and Graf,* Commissioner 2013: September 16**

Residency

Commissioner determined that student was not domiciled in the school district as of October 1, 2011, the date upon which the lease commenced in the out of district property. District deemed entitled to tuition reimbursement of $ 14,824.62 for the 162 days of tuition at the cost of $ 91.51 per day of ineligible attendance. District's proofs regarding the purported cost of the student's special education component, $ 5,417.87, failed to establish the accuracy or authenticity of the special education amount. ***C.F. o/b/o A.F.,* Commissioner 2013: September 17**

Commissioner determined that students were not domiciled in the school district for the 2011-2012 school year. While parent stated that she was living in her father's house in Marlboro, the Board's residency investigation, testimony and documentary evidence established that parent and her children were living at her grandparents' house in Edison at the time in question. Parent and children have since established residency in Marlboro. Parent found liable to the Marlboro school district for 2011-2012 tuition for both children in the amount of $20,598. ***S.S. o/b/o A.S. and A.S.,* Commissioner 2013: October 10**

Tenure Dismissal

Commissioner concluded that tenure charges of unbecoming conduct against two tenured physical education teachers were substantiated and teachers must be removed from their tenured employment. Teachers exhibited a lack of professional judgment when they participated in a racially derogatory verbal exchange in reference to a group of African American students. The exchange took place in the girls' locker room, during school hours, and was witnessed by several students. The teachers' remarks fell well below the acceptable standard of conduct for an educational institution and created ongoing concern about the negative impacts on the school environment. ***Geiger and Jones*, Commissioner 2013: October 7**

Commissioner concluded that tenure charges of unbecoming conduct against tenured math teacher were substantiated and that teacher must be terminated from her tenured employment. Teacher failed on numerous occasions to properly maintain grade books as required by district policy, repeatedly refused to follow her supervisors' instructions regarding timely entering of grades; continued a pattern of

tardiness despite notifications from her supervisor that such behavior was not acceptable; failed to adhere to an administrative directive that prohibited cell phones in testing rooms during the HSPA; communicated in a highly inappropriate manner with students – including calling one "a loser like you" on Facebook, made sarcastic comments in the classroom and challenged the integrity and honesty of her superiors. Such unacceptable behavior constitutes unbecoming conduct and insubordination, and the number and nature of the instances of her conduct are such that the proper penalty in this case is termination of tenure. Matter was forwarded to the State Board of Examiners for action as may be appropriate. ***Weckesser,* Commissioner 2013: September 16**

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Tenure Arbitration Cases "TeachNJ"

Arbitrator upholds tenure charges; teacher engaged in unbecoming conduct when she slapped a student across the face when he failed to let go of a marker she tried to pull from his hand. Despite mitigating factors of post-traumatic stress disorder from her experience being bullied as a child, daughter's attempted suicide and her recognition immediately after the incident that her conduct was wrong, these mitigating factors do not overcome the conduct that warrants dismissal. ***Sugarman, Arb 2013: Sept. 17****(Klein, arbitrator)*

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School Ethics Commission

In a "combination" matter involving complaints alleging *both* prohibited acts and a violation of the Code of Ethics for School Board Members, SEC finds no probable cause that board members received donations for their election campaigns from the same law firm they later voted to retain as board counsel; complainant submitted no evidence to show that the respondents solicited or accepted any election contributions in violation of *N.J.S.A.* 18A:12-24(e) or (f), or that they had knowledge or reason to believe that any campaign contributions were accepted by their electoral campaigns from Cooper Levenson when they voted to appoint that firm as board counsel. SEC declines to reach to the merits of allegations that a board member participated in a political campaign event held on school property supporting her candidacy for school board member while a school board member, since the allegations were time-barred. ***Lesinski v. Hall, Smallwood & Taylor*, SEC 2013:Sept 24 (Asbury Park)**
SEC dismisses charges against administrators who allegedly violated *N.J.S.A*. 18A:12-24(b), (c) and (f), in connection with conduct involving the annual report upgrade by the Assistant Superintendent and as Coordinator of Network and Computer Services in the District. Defers to ALJ's credibility determinations. ***IMO Jerome Dunne and Alberto Marsal*, SEC 2013:Sept 24 (Elizabeth)**

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State Board of Examiners

State Board of Examiners ordered revocation of School Psychologist Certificate. School psychologist created and submitted three fraudulent letters of recommendation in order to obtain public employment. In reaching his initial decision, the ALJ noted that the school psychologist's conduct "tended to destroy public respect for the delivery of government services and constituted behavior that was unsuitable and inappropriate under the circumstances." The Commissioner has long held that teachers serve as role models for their students. The school psychologist's fraud negates his position as a role model and

undermines the notion of trust that is an essential quality necessary to teach children. Certificate revocation is the only appropriate response. ***IMO Certificate of Beltran*, Exam. 2013: September 20**

State Board of Examiners ordered revocation of Teacher of Social Studies certificate and Supervisor certificate. Teacher pled guilty to Bribery and Attempted Tax Evasion and was sentenced to 37 months in federal prison. SBE determined that teacher's conduct constituted conduct unbecoming a certificate holder. SBE has the right to revoke a certificate where the teacher was involved in criminal activities, even if the activities were unrelated to the classroom. A federal conviction for Bribery and Attempted Tax Evasion constitutes conduct which implicates the employee's honesty and resulted in a lengthy prison sentence. The Commissioner has long held that teachers serve as role models for their students. The teacher's conviction indicates that his actions here are not those of a role model. Certificate revocation is the only appropriate sanction. ***IMO Certificates of D'Alonzo*, Exam. 2013: September 20**

State Board of Examiners ordered revocation of Principal Certificate of Eligibility. On March 1, 2011, the California Commission on Teacher Credentialing revoked teacher's teaching certificates there as a result of his conviction for Fraud in 2010. SBE determined that teacher's conviction and the revocation of his California certificates constituted conduct unbecoming a certificate holder. SBE has the right to revoke a certificate where the teacher was involved in criminal activities, even if the activities were unrelated to the classroom. Teacher's conviction for Fraud, implicates his honesty, resulted in a prison sentence and is relevant in determining that person's qualifications and continued fitness to retain his certificates. The Commissioner has long held that teachers serve as role models for their students. A conviction for Fraud indicates that this person's actions are not those of a role model. The California Commission on Teacher Credentialing thought so and the SBE agrees. Certificate revocation is the only appropriate sanction. ***IMO Certificate of Fiszer,* Exam. 2013: September 20**

State Board of Examiners ordered suspension of teacher's Teacher of Earth Science and Teacher of Students With Disabilities Certificates of Eligibility. Teacher was indicted on charges of Aggravated Sexual Assault, Sexual Assault and Endangering the Welfare of Children. If convicted, he would be disqualified from public employment pursuant to *N.J.S.A*. 18A:6-7.1 *et seq*. SBE may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause.. In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.,* the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be dangerous. Individuals convicted of crimes such as Aggravated Sexual Assault, Sexual Assault and Endangering the Welfare of Children fall squarely within this category. In this case, teacher has an indictment for crimes that directly involved danger to children. A teacher's behavior outside the classroom may be relevant in determining that person's qualifications and continued fitness to retain his certificate. Teacher'spotential disqualification from service in the public schools of this State because of his indictment on charges of Aggravated Sexual Assault, Sexual Assault and Endangering the Welfare of Children provides just cause to suspend his certificates. ***IMO Certificates of Miller*, Exam. 2013: September 20**

State Board of Examiners ordered revocation of teacher's Teacher of Comprehensive Science certificate. The Commissioner has long held that teachers serve as role models for their students. Teacher's conduct amply demonstrates that he misunderstands his position as a role model. The record was replete with instances of behavior in which no teacher or any adult supervising children should engage. Even at a minimum, his choice not to report students smoking marijuana or drinking proves his lack of judgment. His sexually explicit conversations with female students and his feeding of test question answers to certain students is further evidence that he crossed the fundamental boundaries that should exist between teacher and student. SBE determines that certificate revocation is the only appropriate response. ***IMO Certificate of Norton,* Exam. 2013: September 20**

State Board of Examiners ordered revocation of superintndent's Teacher of Elementary School certificate, Supervisor and Principal certificates, School Administrator certificate, and an Assistant Superintendent for Business certificate. Superintendent pled guilty to Scheme to Defraud Public and

Conspiracy to Impede and Impair the Functions of the IRS and was sentenced to 135 months in federal prison. It is well established that the State Board of Examiners has the right to revoke a certificate where the teacher was involved in criminal activities, even if the activities were unrelated to the classroom. Superintendent has a federal conviction for Scheme to Defraud Public and Conspiracy to Impede and Impair the Functions of the IRS, conduct which implicates his honesty and resulted in a lengthy prison sentence. A teacher's behavior outside the classroom may be relevant in determining that person's qualifications and continued fitness to retain his certificates. The Commissioner has long held that teachers serve as role models for their students. The superintendent's conviction indicates that his actions here are not those of a role model. SBE believes that certificate revocation is the only appropriate sanction. ***IMO Certificates of Ritacco,* Exam. 2013: September 20**

State Board of Examiners ordered revocation of Teacher of Art Certificate of Eligibility with Advanced Standing. Department of Children and Families, Institutional Abuse Investigation Unit (IAIU) substantiated allegations of Sexual Abuse/Sexual Molestation against defendant. Allegations of inappropriate conduct included an ongoing personal relationship with a student who was 16 years old, including a sexual interaction at his home and sending the student a sexually explicit photograph of himself via text message. The SBE may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. Defendant's act of engaging in a sexual relationship with a student is inexcusable for any individual, teacher or not. His conduct amply demonstrates his inability to be a role model for students. SBE believes that certificate revocation is the only appropriate sanction. ***IMO Certificate of Shaw,* Exam. 2013: September 20**

State Board of Examiners ordered revocation of defendant's Teacher of Music Certificate of Eligibility With Advanced Standing and Teacher of Music certificate. Defendant pled guilty to Endangering the Welfare of a Child and was sentenced to three years' probation, community supervision for life and ordered to comply with all provisions of Megan's Law. SBE may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. Defendant's act of Endangering the Welfare of a Child is inexcusable for any individual, teacher or not. The Commissioner has long held that teachers serve as role models for their students. Clearly, a teacher convicted of Endangering the Welfare of a Child cannot claim status as a role model to anyone. SBE believes that certificate revocation is the only appropriate sanction. ***IMO Certificates of Stauffer*, Exam. 2013: September 20**

State Board of Examiners accepted teacher's relinquishment of his Teacher of Health and Physical Education Certificate of Eligibility with Advanced Standing, with the full force and effect of a revocation. Defendant pled guilty to Criminal Sexual Contact and was disqualified from public school employment. ***IMO Certificate of Stivers,* Exam. 2013: September 20**

State Board of Examiners ordered revocation of defendant's Teacher of Music certificate. Defendant pled guilty to Attempted Online Solicitation of a Minor and Purchase Alcohol for a Minor, having sent inappropriate sexual text messages to a student and, on one occasion, having placed a bottle of alcohol in the student's vehicle. Defendant surrendered his teaching certificate in Texas. SBE may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause.
Defendant's acts of sending numerous inappropriate sexual texts to a student as well as placing alcohol in a student's vehicle are inexcusable for any individual, teacher or not. Commissioner has long held that teachers serve as role models for their students. Defendant's conduct and guilty plea indicate that his actions here are not those of a role model. The Texas State Board for Educator Certification thought so and the SBE agrees. SBE believes that certificate revocation is the only appropriate sanction. ***IMO Certificates of Wygant*, Exam. 2013: September 20**

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New Jersey Council on Local Mandates

There are no education-related decisions posted for September/October at this time.

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New Jersey Division on Civil Rights

Under a **settlement agreement**, Old Bridge Board agreed to $75,000 payout to resolve allegations the school district did not effectively address alleged harassment and bullying of the former student that went on for approximately four years, took place on the school bus and on the Internet, and included name-calling, derogatory comments and physical contact, and focused on student's perceived sexual orientation and Jewish faith. May have been as many as 50 students who she alleged participated in bullying her son at one time or another; in some instances, no action was taken because administrators were unable to obtain reliable information about who was involved; in other cases 12 students received discipline ranging from a verbal warning to after-school detention to in-school suspension. Division's Finding of Probable Cause cited Old Bridge schools for dealing with the problem only through "after-the-fact" discipline, without any prevention measures or attempts at broader outreach to students. Settlement also requires schools to have and distribute to all staff, parents and students a written anti-discrimination policy, a written discrimination complaint procedure, and a written policy on student harassment, intimidation and bullying, and to implement a bias-based harassment prevention program that includes an awareness component for all students at the middle and high school levels, and an awareness and training component for all staff and administration, and is to be separate from any prevention program designed to address bullying generally. (Sept 18, 2013)

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Election Law Enforcement Commission

No education-related cases reported for this period.

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Government Records Council

Custodian should not have withheld regular meeting minutes; however, if the meeting minutes were not yet approved as of the date of the OPRA request, the Custodian would not have been obligated to disclose them; unapproved, draft meeting minutes constitute inter-agency or intra-agency advisory, consultative, or deliberative material, they are not government records pursuant to the definition of same in N.J.S.A. 47:1A-1.1. ***Hemmann** v. Borough South Toms River*, GRC 2013-224 (Oct 29, 2013).

Request was invalid because it failed to provide ample identifiers necessary for the original Custodian to locate the responsive records where request did not include a subject for the correspondence; it generally sought all correspondence the Complainant sent to the NPD for a certain time frame and all records generated from that correspondence. ***Ciszewski v. Newton Police**,* GRC 2013-90(Oct 29, 2013).

Request for the dates of a workers' compensation judge's leave of absence and "a copy . . . any other

record recording [the judge's] leave of absence including any and all E-Mails requesting and granting such leave of absence" fails to identify with reasonable clarity those records that were desired. ***Gillespie v. Dept Labor*** GRC 2013-84(Oct 29, 2013).

Custodian denied request for "[i]ndex to waterfront development permits from 1973 to the present," because the Custodian has certified that no such record exists; while records of various permits may exist in different forms and in different storage mediums, OPRA does not require a custodian to analyze such records in order to create a new document in response to a complainant's request. ***Eastman v. NJDEP*** GRC 2013-113 (Oct 29, 2013).

Custodian lawfully denied access to invalid request; request fails to identify the specific minutes sought and would require the Custodian to research minutes for a ten year period to determine whether any of those minutes contain the motions sought by the Complainant. ***Valdes v. Union City BOE,*** GRC 2012-329(Oct 29, 2013).

As Custodian certified in the Statement of Information that no records responsive to the Complainant's OPRA requests seeking the 2011 contract and numerical lists exist, and because the Complainant did not submit any evidence to refute the Custodian's certifications, the Custodian did not unlawfully deny access to the requested records. ***Papiez v. Mercer Cty***, GRC 2013- 2013-82 and 2013-88 (Oct 29, 2013).

Custodian violated the act by failing to respond to each request item individually and failed to respond to request for for legal invoices. The Custodian additionally violated the Act as she failed to prove that the special service charge of $2,969.88 was reasonable and warranted; however, special service charge of $465.44 for other items was reasonable. Counsel fees are warranted as the Complainant was prevailing party having achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Specifically, the Council ordered the Custodian to calculate the "actual cost" of the records responsive to request Item No. 1 within five (5) business days from receipt of the July 31, 2012 Interim Order and ordered the Custodian to assess a special service charge of $1,857.75 for the records responsive to request Item No. 2 and not $2,969.88 as the Custodian originally calculated. Further, the relief ultimately achieved had a basis in law. ***Halper v. Piscataway Twp*** , GRC 2010-281(Oct 29, 2013)

No violation for custodian's failure to provide copy of all accident reports involving named individual and a copy of all scooter board purchase records, respectively, where custodian certified that the records are nonexistent, of which Complainant provides no evidence to refute. Custodian failed to bear her burden of proving a lawful denial of access to copies of all tort claim notices during the twenty year period preceding date of request, which are the records responsive to the request; therefore, the Custodian must disclose said records. ***Figueroa v. Nutley Board of Education (***Essex) GRC 2012-266(Oct 29, 2013)

No violation where complainant sought "all documentation identifying the Insurance Carrier for the Township of Deptford." Complainant did not provide any limitations to help identify which documents were sought; did not specify types of coverage or time periods; request on its face lacked sufficient information to allow the Custodian to identify and provide any responsive records. ***Cokos v. Deptford Twp***, GRC 2013-60 (Sept. 24, 2013)

Complainant is seeking records of the consultations between the University's In-House Counsel and the University's representative at the Attorney General's Office regarding the In-House Counsel's potential conflict of interest in investigating an ethics complaint; emails responsive to this request constitute written legal advice rendered to a public entity by retained counsel. Thus, the Custodian lawfully denied access to these communications as they are shielded from disclosure based on OPRA's exemption for attorney-client privileged materials. ***Rodriguez v Kean University,*** GRC 2013-68 (Oct 29, 2013).

Where requestor sought copy of the resolution packet and counsel opinion on the collective bargaining

agreement between the Jersey City Housing Authority and the Independent Service Workers' of America, and the custodian provided the packet but not the counsel opinion; no violation as the document did not exist; deemed denial for failure to timely respond, but not knowing or willful violation. ***Costigan v. Jersey City Housing Authority***, GRC 2012-274(Sept 24, 2013)

Private email addresses: Where requestor sought communication regarding budget proposal, custodian did not unlawfully redact personal e-mail addresses, but was ordered to disclose names of e-mail senders and recipients "where only redacted e-mail address[es are] present …" Counsel asserts that the issue of under what circumstances e-mail addresses should be disclosed is a novel one that the GRC answered by requiring the disclosure of the names of senders or recipients if their names were not disclosed by way of redacted e-mail addresses. Judge had found that OPRA's dual aims of public access and protection of personal information weigh in favor of redacting the personal email addresses from the disclosed emails in the present case; the potential for harm in subsequent nonconsensual disclosure of the email addresses and the lack of any adequate safeguards that would prevent unauthorized disclosure of the email addresses outweigh the degree of need for access to these email addresses. The public interest in knowing to whom public records are sent dictates in favor of disclosure of the names of the email "senders" and recipients" where only the redacted email address is present on the subject emails. ***Gettler v. Wantage Twp*** , GRC 2009-73 and 2009-74(Oct 29, 2013)

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Election Law Enforcement Commission

There are no education-related decisions posted for this period.

New Legislation

P.L.2013, c.169. -see A4188
Concerns requirements to report newly hired employees.
Pamphlet Law 1 pages Approved 10/16/2013 **PDF Format HTML Format**

P.L.2013, c.170. -see S2479
Allows certain students including undocumented immigrants who meet certain criteria to qualify for in-State tuition at public institutions of higher education.
Pamphlet Law 1 pages Approved 12/20/2013 **PDF Format HTML Format**

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New Regulation/Executive Orders

Professional licensure and standards: administrative correction regarding requirements for certificates of eligibility, *N.J.A.C*. 6A:9-8.1 **45 *N.J.R.* 2033(a)**

Adult education programs, *N.J.A.C*. 6A:20 **45 *N.J.R.* 2033(b)**

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United States Supreme Court

There are no education-related decisions posted for July and August at this time.

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3rd Circuit Court of Appeals

Student Speech

Circuit Court affirms district court's granting of preliminary injunction of school district's ban on wearing of breast cancer awareness bracelets bearing slogan, "I (heart) Boobies!." Applies a standard prohibiting a school board from restricting speech that is not clearly lewd or advocating illegal drug use if the speech concerns political or social issues, as long as speech is not disruptive. Rejected the school district's claim that the slogan is lewd, and found no basis to establish that the bracelets were disruptive. ***B.H v. Easton Area School District***, 725 F.3d 293, No. 11-2067, 2013 U.S. App. LEXIS 16087 (3d Cir. Aug. 5, 2013).

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New Jersey District Court

Defamation

Plaintiff's motion to remand common law defamation claim to New Jersey Superior Court and decline to exercise supplemental jurisdiction granted. All other matters have been settled. Court concluded that the remand satisfies the principles of judicial economy, convenience, and fairness to the litigants. ***Denuto v. Sayreville Bd. of Educ.,*** Civil Action No. 10-1211 (PGS), 2013 U.S. Dist. LEXIS 99984 (D.N.J July 17, 2013).

Discrimination

School district's motion to vacate clerk's entry of default judgment in matter involving employee allegations of racial discrimination, harassment and defamation of character granted. Given the strong presumption in this Circuit against judgment by default and the strong presumption in favor of trial on the merits, vacating default under the circumstances presented in this case was appropriate. ***Paris v. Pennsauken Sch. Dist.,*** No.12-7355 (NLH/JS), 2013 U.S. Dist. LEXIS 112280 (D.N.J. August 9, 2013).

Free Speech

Court determines that the Board and school officials did not violate a parent's First Amendment rights to express his opinion and to protest a governmental policy, when they refused to accept the signed permission form required by board policy prior to students participating in extracurricular activities, which

was accompanied by the parent's letter stating that he signed the form "under duress." Board relied on attorney's advice that "under duress," would, in essence, invalidate and nullify the consent given, and the attorney suggested instead language indicating parent's "full reservation of rights." The board's conduct was not designed to deter speech, but rather to elicit affirmation that his daughter would not violate the laws against drug use and underage drinking during lacrosse season. Motion for summary judgment granted. *Doe v. Banos*, 2013 U.S. Dist. LEXIS 118383 (D.N.J. August 19, 2013)

Labor

In matter involving allegations of wrongful termination and discrimination, plaintiff's motion to reopen the case was denied. School district's motion to enforce the settlement granted. ***DaPonte v. Barnegat Twp. Sch. Dist.***, No.: 12-4016 (MAS), 2013 U.S. Dist. LEXIS 111589 (D.N.J. August 8, 2013)

Section 1983

Plaintiff's Title VII and ADA claims against Defendant dismissed with prejudice because, after considering conflicting precedent, the Court concluded that those statutes do not provide for individual liability, even when the individual is sued in his official capacity. Plaintiff's § 1983 claim against the Board dismissed without prejudice because the Board is not vicariously liable for Defendant's actions under § 1983 and Plaintiff has not identified any Board policy or custom that caused her injuries. Plaintiff's IIED claim dismissed with prejudice because the New Jersey Tort Claims Act bars damages for pain and suffering unless the Plaintiff suffered a permanent injury and over $3,600 in medical expenses. *Gretzula v. Camden County Tech. Schs. Bd. of Educ.*, No. 12-7357 (JBS/JS), 2013 U.S. Dist. LEXIS 115193 (D.N.J. August 14, 2013).

Special Education

A procedural violation is actionable under the IDEA only if it results in a loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of educational benefits. Court affirms ALJ that district was not liable for IDEA violation. Failure to include a statement of goals and objectives did not impede student's right to FAPE, did not impede the parents' opportunity to participate in the decision-making process, and did not cause a deprivation of educational benefits. District was working to complete the IEP by the beginning of school and intended to produce an IEP containing goals and objectives shortly after child began the school year. ***P.C. v. Harding Twp. Bd. of Educ.****, No. 2:11-06443 (WJM) 2013 U.S. Dist. LEXIS 107166 (D.N.J. July 31, 2013).*

Once a parent unilaterally removes a child from an existing state program governed by an IEP, the protections of the stay-put provision cease until the parent and the school agree on a new placement. Where child remained in the unilateral placement for several years prior to seeking due process hearing, the last educational placement of child for stay-put was the in-district placement pursuant to the IEP then in effect; court rejects parent's argument that that the stay-put provision should be restarted every school year, regardless of unilateral removal from an existing state program. Nor did settlement agreement approved by the board and ALJ constitute an agreement between the parties that the unilateral placement was an appropriate placement for R.L; it was simply an agreement for reimbursement of past tuition at private school, but specifically did not include agreement on stay-put rights. ***K.L. v. Berlin Borough Bd. of Educ.****,* 2013 U.S. Dist. LEXIS 111047 (D.N.J. Aug 7, 2013).

District Court does not have jurisdiction in breach of contract action arising out of an approved settlement agreement regarding the education of an autistic student. Parties had agreed that N.J. Superior Court, Union County would have sole and exclusive jurisdiction to adjudicate an action to enforce the settlement. ***S.B. and E.B. o/b/o J.B. v. Summit Bd. of Ed.***, No. 2:13-03161 2013 U.S. Dist. LEXIS 117694 (WJM) (D.N.J. August 20, 2013)

Matter involved an eleven year old child with autism, generalized anxiety disorder, and a learning disability in the area of math. Complaint asserted claims against the school district arising under Section

504 of the Rehabilitation Act, Title II of the Americans with Disabilities Act, 42 U.S.C. § 1983 ("§ 1983"), Title IX of the Education Amendments of 1972, and New Jersey's Law Against Discrimination. Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), the District's motion will be granted as to the Title IX and NJLAD claim and denied as to the Section 504, ADA and 1983 claims. ***D.V. v. Pennsauken Sch. Dist.*, CIVIL ACTION NO. 12-7646 (JEI/JS)**, 2013 U.S. Dist. LEXIS 111045, (D.N.J. August 7, 2013).

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New Jersey Supreme Court

There are no education-related decisions posted for July and August at this time.

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New Jersey Superior Court, Appellate Division

Regional School Districts

Appellate Court finds that chancery court properly upheld the dismissal of a suit brought by Seaside Park, its board of education and 13 taxpaying residents seeking the dissolution of Central Regional School district, as well as Seaside Heights and Island Heights, permission to withdraw from the district, or alteration of the district's funding formula, due to disproportionate tax liability. Court declines to grant the Commissioner extraordinary authority to equitably revise the tax apportionment as in *Haledon*; unlike *Haledon*, this case does not implicate the impact of withdrawal or dissolution on racial diversity or issues of other constitutional dimension that compel it to remain in the district after a successful referendum. Court holds that the voter referendum on the dissolution failed and they did not pursue the statutory processes for withdrawal and modification of the tax allocation method, failed to exhaust the administrative remedies available, and failed to set forth a cognizable constitutional or other claim entitling them to any legal or equitable basis for judicial intervention and relief. ***Borough of Seaside Park v. Commissioner of the N.J.D.O.E.,****A-0743-10T4, 2013 N.J. Super. LEXIS 118 (August 12, 2013) approved for publication*

State Intervention

Appellate Division finds that Commissioner did not act arbitrarily in refusing to recommend partial withdrawal of the State's intervention in the Newark in the areas of fiscal management, personnel and governance. Fluctuating scores indicate that the district has not exhibited "sustained and substantial progress" in satisfying the pertinent indicators of quality performance. Statute does not require the Commissioner to recommend withdrawal of State intervention merely because a district may have achieved a score of 80 percent or greater in a key area of effectiveness in a three-year comprehensive review; Commissioner must initiate withdrawal in area only if district has successfully implemented improvement plan and made sufficient progress in meeting the relevant quality performance indicators. The Commissioner retains broad discretion in making those findings. Affirmed in part, dismissed in part per representation at oral argument that Commissioner will initiate the process for partial withdrawal in fiscal management. ***In re Newark QSAC Appeal****, 2013 N.J. Super. Unpub. LEXIS 1682 (July 8, 2013) (published)*

Appellate Division finds the Commissioner did not act arbitrarily in declining to recommend the partial withdrawal of State intervention in Paterson and affirms. Although the district scored 88% in governance, the District had not demonstrated “sustained and substantial progress,” and the Commissioner's decision reflects consideration of other factors*. In re **Paterson Sch. Dist. QSAC**, 2013*

N.J. Super. Unpub. LEXIS 2046 (App. Div. August 15, 2013)(published)

Tenure Acquisition

Appellate Division affirms Commissioner's ruling that substance abuse counselor (SAC) had not acquired tenure and board did not violate tenure rights when he was RIF'd, as he only held a provisional certificate when serving as a SAC for more than three years, which is not a "proper certificate" for the position; nor had he satisfied the conditions of provisional certification and the requirements for standard certification prior to the RIF. The Commissioner found that although prior case law, *Anson v. Bridgeton Bd. of Ed.*, 1972 S.L.D. 638 – held that service under provisional certification might count toward tenure, such tenure was contingent upon the employee's satisfaction of the conditional requirements of that provisional certification. ***Ruiz v. Bd. of Educ. of Fort Lee*, 2013 N.J. Super. Unpub. LEXIS 1676 (July 8, 2013)**

Tenure Dismissal

Court affirms Commissioner's dismissal of tenured physical education teacher, for unbecoming conduct where she placed tape on second grader, allowed and/or encouraged other students to follow her lead which humiliated the student, and when she falsely denied her role in the incident; teacher dismissed despite her 21 years' experience and claim that she acted in the spirit of fun. Rejects teacher's arguments that the ruling is unsupported by substantial credible evidence, violates statutory law, that judge's *in camera* examination of two children violated her right to due process, and that her dismissal as contrary to the doctrine of progressive discipline. *In re Tenure Hearing of Susan Parezo, 2013 N.J. Super. Unpub. LEXIS 2134 (App. Div. August 28, 2013)*

Court affirms acting Commissioner's to dismiss tenured teacher for unbecoming conduct unbecoming a teacher, finding that it is not too extreme of a penalty where, in an attempt to illustrate a chemistry concept, the teacher made inappropriate comments about Caucasians, Hispanics, Asians and African-Americans. The ALJ had recommended a lesser penalty of suspension without pay, forfeiture of increments and remedial training. Teacher's behavior, albeit a single incident, was sufficiently egregious to warrant termination. She consciously introduced racial stereotyping into her lesson plan, which was negatively perceived by her students. ***Tenure Charges Against Chaki, 2013 N.J. Super. Unpub. LEXIS 2032 (App. Div. August 13, 2013) . (per curiam)***

Court upholds dismissal of special education teacher in Special Services School District. Teacher disparaged, confronted and intimidated special education student in geometry classroom setting. Commissioner specifically noted the negative reinforcement Roth's conduct had on his students, many of whom had behavior problems, and the impact his conduct had on the administration and confidence of the community in same. Use of intimidation, ridicule and disparagement has no place in the school environment. Remarks included that no one in the public would care that the student was "special" and chastised the student for objecting to the use of the term. Teacher referred to the Special Services School District name and the fact that the student would never make it back to "regular ed." Teacher's actions were surreptitiously recorded on a cell phone; resulting video was used in evidence. Properly considered teacher's successful teaching history, his honest concern for student and severe remorse, but this did not outweigh gravity of conduct. (Note: ALJ had found that teacher's conduct violated school district's HIB policy and constituted unbecoming conduct, but in light of mitigating factors had recommended 120 days forfeiture of pay, suspension without pay for the rest of the 2011-2012 school year, withholding of salary increment for the 2012-2013 and 2013-2014 school years, completion of anger management training at teacher's expense and written apologies to student, his parents and all other student present. ***In the Matter of the Tenure Hearing of Steven E. Roth, 2013 N.J. Super Unpub. (App. Div. July 1, 2013)***

Court reverses Commissioner's decision dismissing tenure charges that had been brought against custodian for conduct unbecoming due to his sexual advances, inappropriate physical contact and sexual remarks made to minors employed by the board in the summer program, where custodian had

been acquitted after a bench trial for same behavior. Court finds that credibility determinations of ALJ and Commissioner were not reasonable or supported by the record, and that the ALJ erroneously used the federal criminal standard for 'sexually explicit conduct' instead of the standard for 'conduct unbecoming' applicable under tenure laws, which gave Court the feeling that the findings were clearly mistaken. Remanded for new findings before another ALJ. ***In re Tenure Hearing of Melillo, 2013 N.J. Super. Unpub. LEXIS 1866 (App. Div. July 25, 2013)***

Court upholds determination by Commissioner that dismissal of teacher who had engaged in unbecoming conduct was too harsh a penalty given the circumstances, despite ALJ's recommended penalty of dismissal; applies deferential standard, and penalty does not shock sense of fairness. Loss of respondent's increment for one year, along with the 120 days salary withheld. Special education and physical education teacher gave student "light slap," and joked about giving student "100s" for the rest of the year, and tolerated student provocation and horseplay. Proven conduct does not establish respondent's unfitness to discharge the duties of his position, nor was respondent's behavior "premeditated, cruel or vicious, or done with the intent to punish" as per *In re Fulcomer*-1967 appellate division case.***In re Tenure Hearing of Forman, 2013 N.J. Super. Unpub. LEXIS 1821 (July 12, 2013)***

Workers Compensation

Appellate Division reverses order of the workers' compensation judge denying the Board's motion for reimbursement from employee for overpayment of workers' compensation. The Appellate Division reversed and remanded the claim back to the Division for further proceedings, to include an evidentiary hearing wherein the net worth of the petitioner, the amount of petitioner's income and expenses and whether or not a payment plan would be appropriate, would be considered. The court's basis for the remand was "given the paucity of evidence, there was no reasonable basis for the judge of compensation's factual finding that petitioner had limited resources and therefore it would be inequitable to require him to repay the duplicative payments for the same disability." ***Weiner v. Elizabeth Bd. of Educ.,*** No. A-0627-12T2, 2013 N.J. Super. Unpub. LEXIS 1729 (App. Div. July 15, 2013)

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New Jersey Superior Court, Law/Chancery Division

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Commissioner of Education

Evaluation

Commissioner dismisses petition for lack of jurisdiction over teacher's allegations that her evaluations were arbitrary, capricious and contrary to law causing her to suffer depression, and seeking restoration of her sick days used as a result of this depression and order prohibiting certain staff from evaluating her; some allegations are barred by 90-day rule, and others are appropriately pursued as a grievance in accordance with the collective bargaining agreement between respondent and petitioner's union. ***Miller, Commr 2013: Aug. 16***

Graduation

Where petitions for emergent relief seeking change in time for holding high school and middle school graduations were denied, and as graduation took place, matter dismissed as moot. ***Bermudez, Commr***

2013: Aug 16.

HIB

Commissioner remands question of whether board investigated incident of alleged bullying by teacher; parent alleged that teacher forced African-American student to eat a bagel which had been retrieved from the trash can in front of the other students in her classroom. ALJ dismissed petition, finding that an independent investigation conducted by the Department of Children and Families, Institutional Abuse Investigation Unit (IAIU), found no evidence of neglect or abuse and that district staff have been trained in New Jersey's anti-bullying procedures; Commissioner, however, rejects initial decision finding, *inter alia*, that: the ALJ was in error when he applied a "default" standard of review to the Board's motion for summary decision, whereby the unopposed motion was automatically granted; pursuant to New Jersey's Anti-Bullying Bill of Rights Act, all alleged acts of harassment, intimidation and bullying (HIB) require a mandatory internal investigation by a school anti-bullying specialist; it is unclear from the record whether respondent Board undertook such required internal investigation.. the conduct of an investigation by IAIU – or any other agency or entity – does not relieve a school district of its obligation to conduct the statutorily-required internal investigation."
K.T., o/b/o K.H. AND T.D. v. Deerfield, Commr 2013: July 30

Ninety-Day Rule

Commissioner declines to extend 90-day rule to pro-se teacher who filed appeal 3 months late, of time challenging the determination of State Board of Examiners that she had not satisfied the requirements for a Certificate of Eligibility to teach American Sign Language. ***Murnaghan v. State Bd of Examiners, Commr 2013: July 15***

Commissioner rejects ALJ determination that parents were time-barred in their challenge to board of education's HIB determination; 90- day period began to run on November 29, 2012 when they received notice of the board's determination, and not 3 days earlier when the Board voted on the petitioners' challenge to the HIB determination during the public meeting. Parents filed on November 27, and cured deficiencies within 48 hours after they were advised that if the additional information was timely filed, the date of the original submission would be deemed the filing date. Remanded for hearing on the merits.
T.R.and T.R., obo, E.R. v. Bridgewater-Raritan Reg., Commr 2013: July 22

Non-renewal

Commissioner dismisses petition of City Association of Supervisors and Administrators, which claimed that the State-Operated School District of Newark violated their rights by failing to properly evaluate their performance as principals in accordance with applicable statutes, regulations and the provisions of the CBA, and sought reinstatement of the three former principals whose contracts were not renewed after two years; the District cited fiscal and reorganizational concerns as its rationale for the non-renewals, and no performance issues were noted in the non-renewal letter; although the District did fail to comply with the requirements of *N.J.S.A.* 18A:27-3.1 and *N.J.A.C.* 6A:32-4-5 relative to evaluation, but – non-compliance with the statute holds no penalty, and previous court cases have held that such non-compliance does not prevent a school district from acting to non-renew the employment of a non-tenured teaching staff member; and any claims pursuant to the' CBA is a contractual matter not under the jurisdiction of the OAL. ***City Ass'n of Supervisors and Administrators, Commr 2013: Aug 9.***

Commissioner dismisses teacher's challenge to her nonrenewal for filing six months late, in matter where teacher claimed she had tenure; she had been employed in as a bilingual science teacher from September 2006 until June 2009, when her contract was nonrenewed for reasons of economy; in September 2011 she was reappointed and was notified on May 11, 2012 that her contract would not be renewed for the next school year because of performance issues. Commissioner declines to address whether she had acquired tenure, since the May 11 date of her nonrenewal notice triggered the 90- day period for the filing of appeals. It is clearly the date of the notice of non-renewal, not the date of a

Donaldson hearing, which starts the clock for an appeal to the Commissioner. ***Rosenstrauch, Commr 2013:Aug 30.***

Overpayments

Commissioner agrees with ALJ and dismisses petition by tenured teaching staff member who claimed that board reduced her in compensation in violation of tenure rights when board reduced her salary by withholding a total of $5,000 in five monthly installments to reimburse for a stipend which she was inadvertently double-paid. Despite a body of case law establishing that a board of education cannot require reimbursement of money paid in error through no fault of the employee, these facts differ as there is no dispute regarding teacher's position on the salary guide nor the amount of salary she was entitled to; she received full salary for the year, with full benefits; she was aware that she had received double payment of her stipend, as she brought the initial overpayment to the attention of respondent's payroll department and jokingly indicated that she would "love to keep it"; the overpayment was recaptured in the same manner in which it made in 5 installments; and the double payment was not a salary guide error but rather an overpayment of which petitioner was aware. Did not constitute an impermissible reduction in compensation as contemplated by *N.J.S.A.* 18A:6-10. See ***Trenton Education Association, et al. v. Board of Education of the City of Trenton, St. Bd., 1999: Dec 1. Elson, Commr 2013: Aug 15.***

Regional School District

In matter concerning equitable contributions methodology by constituent board to regional high school, the Commissioner directed implementation of a formula employing 50% equalized property valuation and 50% enrollment to allocate funding among the constituents of Manchester Regional. Previous formula had been 67% equalized valuation / 33% enrollment. Court takes into account that North Haledon's forced membership in the regional due to racial impact of withdrawal, its disproportionate contributions per pupil, as well as Haledon's greater ability to pay, and also the other constituents' ability under *N.J.S.A.* 18A: 13-23 to veto any formula change that North Haledon might propose. The Commissioner emphasized that the formula developed in this decision is based upon unique circumstances, and that while the principles employed to reach the result may be useful in analyzing future controversies, the formula per se shall not serve as precedent. ***Petition for Authorization to Conduct a Referendum on the Withdrawal of North Haledon School District from the Passaic County Manchester Regional High School District, Commr 2013: Aug. 29.***

Residency

Pro se residency appeal is dismissed in favor of district for failure to prosecute; as ALJ decision fails to provide exact amount of back tuition, matter is remanded to the OAL for a determination as to the exact amount of tuition costs for which parent is liable in connection with student's ineligible attendance in the district. ***A.L.T., o/b/o K.I.R. , Commr 2013: Aug 2***

RIF

Teacher who had been improperly terminated in 1998 and ordered returned to his skilled trades and position by State Board ruling in 2005, had been awarded back pay through the June 30, 2003 RIF which would have resulted in his legitimate dismissal; however, since he had obtained Teacher of Handicapped endorsement in 2002, he was entitled to tenure rights based on all of the endorsements he possessed at the time of 2003 RIF; board failed to offer petitioner reemployment and instead hired non-tenured teachers for positions that Ziegler was qualified for. Commissioner orders back pay in the amount of $7,997 plus benefits and emoluments, and remains entitled to reemployment over non-tenured teachers in any position for which he is qualified. ***Ziegler v. Bayonne BOE, Commr 2013: July 15.***

Non-tenured administrator who was also tenured teacher, was not subject to a RIF where during restructuring, board eliminated 3 administrative positions including hers, and offered her the choice of

another administrative or a teaching position, and she agreed to the transfer to a teaching position. ***Ragoo-Mohammed v. Newark, Commr 2013: July 22.***

Salary Caps

Commissioner finds that board properly reduced superintendent's salary; ECS never provided the required written approval of salary exceeding cap prior to announcement of new regulations on November 1, 2010, and does not find credible Superintendent contention that there had been verbal approval prior to the effective date of the new salary regulations (February 7, 2011). Rejects Superintendent's alternate argument that his initial contract automatically "rolled over" because advance notice was not given of a change to the terms of the contract; rather, the initial contract remained in effect until it expired on July 1, 2011, entitling him to compensation in excess of the new salary cap; but on July 1, 2011, any "roll over" contract is unenforceable absent approval of the ECS; the ECS directed the Board to submit a new contract for her approval that complied with the maximum salary provisions; the Board rescinded and voided petitioner's former contract, but continued to pay petitioner in excess of the maximum until November 3, 2011. Board's actions in reducing petitioner's salary in November were proper and Board is entitled to reimbursement of $17,597,to recoup the salary it had paid to the petitioner in excess of the salary cap. ***Seitz v. Parsippany-Troy-Hills Reg. BOE, Commr 2013: July 15.***

Sending/Receiving

Commissioner approves Woodbine Board's application for severance of its sending-receiving relationship with Millville City Board and establishment of a new sending-receiving relationship with the Middle Township board; feasibility study shows no substantial educational, financial or racial impact will inure to any of the parties by changing receiving district for its high school students. ***Woodbine v. Millville (Cape May Cty), Commr 2013: July 29***

Tenure Acquisition

Commissioner addresses issue of whether teacher tenure despite an extended medical leave of absence, where he was hired in September 2005, was assaulted by a student in November 2005 (hip fracture, herniated disc, torn tendon) and went on worker's compensation. He remained on leave 2005-06 school year, returned in October 2006, but again placed on medical leave in November 2006 – through June 2009. He returned to work in the 2009-10, 2010-11, and 2011-12 school years. ALJ ruled that he was an "employee" during three years and one day in a four year period; pension and other benefit contributions were made continuously on petitioner's behalf by the District from September 2005 until his termination on September 1, 2012, consistent with the treatment of an employee in active service; the District had ample opportunity to evaluate petitioner's job performance, and did perform a final, positive evaluation. Commissioner reverses ALJ, and finds that teacher did not satisfy the necessary statutory criteria. He did not perform services during *each* of the contract years as required pursuant to *N.J.S.A.* 18A:28-5(c), and the circumstances in this case are distinguishable from those in *Kletzkin v. Board of Education of the Borough of Spotswood, Middlesex County*, 136 *N.J.* 275 (1994). Kletzkin had been "employed" by the respondent district for the requisite period of time, since: she performed services during each of the contract years. ***Kowalsky, Commr 2013: July 29.***

Tenure Dismissal

Commissioner dismisses teacher who failed to respond to allegations of unbecoming conduct, neglect of duty and insubordination, involving teacher who was caught with a controlled substance for the second time in less than two years, which resulted in her teaching license being suspended, and who failed to comply with the conditions of her return to work agreement with the District that settled her previous tenure charges; who was late and filed to provide information to administrators about her the status of the pending criminal charges, her substance abuse treatment or when she will be able to return to work, despite attempts by the District to reach out to her. ***Tenure Hearing of Gallo, Commr 2013: July 1.***

Commissioner dismisses teacher where she fails to respond to charges of chronic and excessive absenteeism (total of 326 days during the 2009-2010, 2010-2011, 2011-2012 and 2012-2013 school years) constituting conduct unbecoming. ***Tenure Hearing of Wall, Commr 2013: July 25.***

Tenured math teacher with long history of unacceptable behavior constitutes unbecoming conduct and insubordination, and the number and nature of the instances of her conduct are such that the proper penalty in this case is termination of tenure. ***Tenure Hearing of Weekesser, Commr 2013: July 29.***

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Tenure Arbitration Cases "TeachNJ"

Arbitrator finds that district acted properly in dismissing School Counselor and Substance Awareness Coordinator from her counseling positions. In dozens of incidents over several years, she engaged in unbecoming conduct, was insubordinate and failed to cooperate with law enforcement and DCP&P (formerly DYFS) officials, based on her belief that government agencies were conspiring to cover up information and evidence that would expose them to findings of wrongdoing. Board correctly moved her to a physical education teaching position in which she was tenured. (Note: Commissioner approved extending timelines; hearing held on 7 days; 31 witnesses; delay caused by teacher extended 120-day period without pay.) ***Tenure Hearing of Bocco, West Long Branch, Arb. 2013:July 14.***(Mastrianni, arbitrator)

Tenure charges were rendered moot by letter of resignation, on charges of unbecoming conduct grounded in absenteeism. Arbitrator finds there is no need for Commissioner's approval. ***Tenure Hearing of Blood, Bordentown, Arb 2013: July 15.*** **(Simmelkjaer, arbitrator)**

Arbitrator orders dismissal of special education teacher and uphold charges of inefficiency occurring for a 7-year period, and insubordination over a 5-year period. District did not prove unbecoming conduct. Evidence showed lesson plan deficiencies over period of years, classroom management issues, numerous incidents of unprofessional and insubordinate behavior. Arbitrator holds that with the exception of cases already transferred to and pending before OAL as of Sept 1, 2012, the new law applies and the 90-day improvement period is eliminated. Fact that board filed its inefficiency charges 43 days after filing with the board does not render it invalid; moreover teacher waived that claim by not raising it in earlier proceedings. Although limited number of evaluations, /observations, there were other competent and reliable measures of performance such as testimony about walk-throughs and visits, as well as numerous efforts to assist him.***Tenure Hearing of Carter, Camden, Arb 2013: July 18(***Simmelkjaer, arbitrator)

Arbitrator denies tenure charges; although teacher was culpable for serious shortcomings in his teaching they were not for racism or purposeful humiliation of students, where he told student her "people came a long way out of busting out of those chains" and made political comments about same-sex marriage and Latino and single parent households. Teacher claimed incidents were to bolster the students' self-esteem, not harm them. Further, board's finding that he committed HIB was invalid since it applies to student-student interaction, not faculty- student interactions. This otherwise stellar educator is ordered returned to his position-- reinstatement to be without back pay as period of suspension deemed to be unpaid. District is entitled to impose other discipline for his unprofessional injudicious verbal conduct, and he had been cited in earlier increment withholdings, but insufficient nexus between that behavior and current allegations to sustain removal as progressive discipline or single incident.***Tenure Hearing of King, Freehold, Arb 2013: July 22(***Brent, arbitrator)

While working with group of students in shared time technical school, carpentry instructor pushed the student and the student fell backwards and bruised his leg; in the prior year the teacher pushed a

student down stairs and had been suspended with pay, ordered to undergo a psychological fitness test; and returned after weekly counseling; 8 years earlier he had kicked a student three times. Arbitrator notes that progressive discipline does not require that once disciplined for conduct, the slate is wiped clean; rather disciplinary history may be considered in determining future discipline. ***Tenure Hearing of Flood, Cumberland Tech, Arb 2013: July 29****(*Brown, arbitrator*)*

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School Ethics Commission

SEC dismisses complaints brought by Superintendent against various board members in separate matters; facts fail to demonstrate that board members violated any provisions of *N.J.S.A.* 18A:12-24.1; no showing any of the board members: violated any cited law, rule, regulation or court ruling; violating the Act by discussing personnel matters not on the agenda in executive session or acted beyond the scope of his authority; became involved in the activities or functions that are the responsibility of school personnel by voting against the Superintendent's recommendation; surrendered independent judgment or used the schools for personal gain; or failed to support and protect school personnel by having a difference of opinion in a public comment; violated the Act by public comment, which disagreed with the Superintendent's position or by becoming involved in activities or functions that were the responsibility of school personnel; or by convening the Personnel Committee to investigate the certain allegations of theft. Commission lacks jurisdiction over *Rice* notice violations*.* ***Caffrey v. Tejeda, Perth Amboy Board of Education, Middlesex County, C26-12, 2013:July 30****. See also, **Caffrey v. Puccio,** Caffrey v. Gonzalez.*See also, ***Caffrey v. Lebreault, C27-12, 07/30/13****.*

SEC dismisses for lack of factual support a complaint brought by disgruntled Supervisor of Buildings and Grounds against board member who launched investigation into employee's credentials. Unclear as to which allegations occurred prior to swearing in. Complaint had alleged that board member provided inaccurate information, failed to support and protect school personnel in the proper performance of their duties and neglected to refer all complaints to the Superintendent before acting on complaints in a public meeting. OFAC report showed that employee lacked the necessary credentials for the position. ***Berglund v. Gray, Deptford Twp. Board of Education, Gloucester Counter, C10-13, 07/30/13***

SEC dismisses complaint by board candidate against Board member; complaint alleged that on Facebook board member referred to the candidate as an "unhinged lunatic" with a "learning disability, " commented about her political leanings to curry favor with the local political parties, treats the members of the community with disrespect by scoffing at their comments, and mischaracterized her platform with lies and inflammatory comments. SEC Commission found that the complainant failed to demonstrate how she learned of the respondent's comments since they were not made to her, and also failed to provide any factual support that the comments were available to the public. That the comments were on the respondent's Facebook does not prove they were accessible for public viewing. No inaccurate information, just personal opinion. Complaint fails to allege facts sufficient to maintain a claim that the respondent violated *N.J.S.A.* 18A:12-24.1(b), (c) (f) or (g). ***Close v. Messinger, Freehold Reg. H. S. District Board of Education, Monmouth County, C14-13, SEC 2013: July 30***

Penalty of censure imposed on board member who no longer serves on board, where she conceded by affidavit that her behavior violated the SEA; after CSA had barred two seniors from participating in graduation ceremony she had directed the CSA to allow one to participate, after the police had warned that the senior was intended target of possible shooting to take place that day, and in fact a shooting took place the next day resulting in bystander being shot. ***IMO Doris Graves, Pleasantville Board of Education, Atlantic County, C40-10, SEC 2013: July 30***

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State Board of Examiners

Teacher agrees to relinquish, with effect and force of a revocation, his Teacher of Elementary School Certificate of Eligibility With Advanced Standing, and a Teacher of Elementary School certificate following his tenure dismissal for conduct based on his arrest for lewdness. **Bringhurst, Exam 2013: July 25**.

Teacher agreed to relinquish his Teacher of Music Certificate of Eligibility With Advanced Standing, and a Teacher of Music certificate, with the force and effect of a revocation. ***Carpenter, Exam 2013: July 25***.

Substitute teacher agreed to relinquish his substitute credential with the force and effect of a revocation following his acceptance into a pre-trial intervention program. ***Davis, Exam 2013: July 25***.

Teacher agreed to relinquish her Teacher of English Certificate of Eligibility, a Teacher of English certificate, and a Supervisor certificate with the force and effect of a revocation following a conviction for Endangering the Welfare of a Child and receiving a three year suspended sentence with lifetime parole supervision and was ordered to register as a sex offender under Megan's Law. ***Depalo, Exam 2013: July 25***.

Teacher of Comprehensive Business Certificate of Eligibility With Advanced Standing and Teacher of Comprehensive Business certificate suspended for a period of two years following tenure dismissal for unbecoming conduct, lack of professionalism and failure to respect the privacy rights of students. Given the teacher's otherwise long and unblemished record, coupled with her willingness to accept responsibility for the display of inappropriate photographs in her classroom, merits a less severe punishment than revocation. ***Forsell, Exam 2013: July 25***.

Teacher agreed to relinquish his Teacher of Elementary School Certificate of Eligibility With Advanced Standing, and a Teacher of Elementary School certificate with the force and effect of a revocation following a guilty plea to one count of Sexual Assault in the second degree and two counts of Endangering the Welfare of a Child in the second degree. Teacher was sentenced to seven years in prison, parole supervision for life and ordered to register as a sex offender under Megan's Law. He was also ordered to forfeit his public employment. ***Gervasi, Jr., Exam 2013: July 25***.

Teacher agreed to relinquish his Teacher of Elementary School certificate with the force and effect of a revocation and all attendant consequences following a guilty plea to three counts of Aggravated Sexual Assault in the first degree and one count of Endangering the Welfare of a Child in the second degree. ***Hildreth, Exam 2013: July 25***.

Holder of Teacher of Social Studies Certificate of Eligibility With Advanced Standing, a Teacher of Psychology Certificate of Eligibility With Advanced Standing, a Teacher of English As a Second Language Certificate of Eligibility With Advanced Standing, and Teacher of Social Studies, Teacher of Psychology, and Teacher of English As a Second Language certificates pled guilty to two counts of Criminal Sexual Contact in the fourth degree. On that same date, Leone was ordered to forfeit her public employment and was forever disqualified from holding any office or position of honor, trust or profit under this State or any of its administrative or political subdivisions pursuant to N.J.S.A. 2C:51-2a(2) and N.J.S.A. 2C:51-2d. Holder agreed to relinquish her certificates with the force and effect of a revocation and all attendant consequences. ***Leone, Exam 2013: July 25.***

Holder of Teacher of Elementary School Certificate of Eligibility, a Teacher of Elementary School Certificate of Eligibility With Advanced Standing, Teacher of Elementary School certificate, a Teacher of General Business certificate, a Principal Certificate of Eligibility, a Principal certificate, and a School Administrator Certificate of Eligibility pleads guilty to 30 counts of Endangering the Welfare of a Child

and 29 Counts of Invasion of Privacy and agrees to relinquish his certificates with the force and effect of a revocation and all attendant consequences. ***Lott, Exam 2013:July 25***.

Holder agreed to relinquish his Teacher of Social Studies certificate with the force and effect of a revocation and all attendant consequences following a plea of guilty to Debauching or Imperiling the Morals of a Child. ***Murphy, Exam 2013:July 25***.

Following a conviction for lewdness, holder agreesto relinquish his Teacher of Nursery School and Teacher of Elementary School certificates with the force and effect of a revocation and all attendant consequences. ***Ruppert, Exam 2013: July 25***.

Teacher of Elementary School certificate revoked following conviction for Aggravated Sexual Assault, Sexual Assault and Official Misconduct. ***Santamaria, Exam 2013:July 25.***

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New Jersey Council on Local Mandates

There are no education-related decisions posted for July and August at this time.

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New Jersey Division on Civil Rights

Secaucus Board of Education has agreed to pay a severely disabled student $30,000 to resolve allegations it deliberately caused the student to miss out on her middle school graduation ceremony in 2012 by failing to notify her mother of the opportunity. No admission of wrongdoing. Settlement also includes agreement to provide proper notification -- via postal correspondence or e-mail -- to all students with disabilities regarding graduation ceremonies and other special events, and to notify the students' case managers, and to provide staff-wide training in the NJLAD, with a particular emphasis on how the LAD relates to student participation in events and activities. Settlement also included an invitation for the student to participate in the 2013 graduation ceremony, but mother declined. ***Civil Rights Settlement***(August 1, 2013)

Cape May Vo Tech has agreed to overhaul the admissions practices of the Cape May County Technical High School (CMCT) to give students with disabilities a fair opportunity to attend, following DCR investigation into why almost no students with disabilities were enrolled in the CMCT's full-time program. The settlement with DCR requires Cape May to use objective criteria in its admissions procedures, precludes asking if a student is classified as having a disability, precludes reviewing an applicant's health record, IEP, Section 504 Plan without permission from a parent. Requires notice and training. ***Civil Rights Settlement***(June 25)

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Election Law Enforcement Commission

No education-related cases reported for this period.

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Government Records Council

Counsel fees are ordered to complainant, prevailing party, for the full amount of $690.00, representing 2.3 hours of service at $300 per hour where the custodian improperly required the Complainant to complete an official OPRA request form; pursuant *to Renna*, e-mailed and faxed non-form OPRA requests clearly invoked OPRA and made clear the nature of the request. The Fire District's policy not to accept electronic transmissions of OPRA requestsdoes not impose an unreasonable obstacle to the transmission of a request for a government record because the Fire District accepts requests hand-delivered, mailed, or faxed (*Paff)*. See Paff v. City of East Orange, 407 *N.J. Super*. 221 (App. Div. 2009). ***Paff v. Bordentown Fire Dist #2, No. 2012-158)(GRC August 29, 2013).***

Request was for hardcopies via pickup of 16 items for work conducted by attorney firm pertaining to "Testing Scandal." Here, the Complainant disputed the original Custodian's response that no additional records existed. The Complainant stated that given the amount of money spent on the BOE's "testing scandal," he could not believe that the BOE maintained no documentation to support the attorney charges. GRC agrees with custodian that the original Custodian was not required to create a record supporting how the attorney's legal fees were accumulated, but also finds that one responsive record was withheld and orders custodian to either disclose the responsive letter, with redactions if necessary, provide the Council with a lawful basis for denying the responsive record, or certify if the letter does not exist. ***Simons v. Lakewood Board of Education,*** No. 2012-216(GRC August 27, 2013)

E-mail titled "Jane – Confidential Personnel Matter" was exempt from disclosure as ACD material pursuant to *N.J.S.A.* 47:1A-1.1, as determined by GRC's *in camera* inspection; sender is the Complainant's department head and recipients are the Township Administrator and Assistant Township Administrator who are responsible for employee discipline; e-mail comprised internal municipal correspondence between administrators and contained advice concerning an employee and thus contained advisory and deliberative content. Custodian lawfully denied access as it was an intra-agency ACD material exempt from disclosure. *N.J.S.A*. 47:1A-1.1. Unnecessary for the GRC to determine whether the record is exempt as a personnel record pursuant to *N.J.S.A.* 47:1A-10. ***Gasparik v.Township of Middletown (Monmouth), No. 2012-234(August 27, 2013)***

Request for "check in the amount of $5.05 for copy fees paid relevant to Request No. C66396 seeking a copy of the complete set of tenure charges with the original markings made by the Honorable Stephen G. Weiss, Administrative Law Judge" lacked sufficient information allowing the Custodian to identify and provide the responsive check for inspection. While request went into extensive detail about the records the Complainant submitted his check for, it lacked necessary identifiers to locate a specific check, such as a specific check number and/or date. A check is comprised of few elements by which to identify it and a check number and date are among them. These elements are crucial to the identification process when seeking a specific check; however, the Complainant failed to identify same. ***Valdes v.New Jersey Department of Education*, No. 2012-190 (July 23, 2013)**.

Request was made for personnel or pensions records which contain the name, position, salary, payroll record and length of service for every full or part time Police Department or Municipal Court employee within a specified time frame. GRC determines that where OPRA makes provision for disclosure of specific information and the Custodian compiles such information from existing government records, such disclosure is an adequate response. Here, the Custodian went beyond what is required after the Complainant expressed dissatisfaction with the list of information prepared by the Custodian and demanded actual payroll records, which the Custodian provided with redactions, whereupon the complainant then asked for a redaction index for each redaction the Custodian made. GRC finds that while a redaction index is necessary to provide a lawful basis for denying access to the requested record, or part(s) thereof, a redaction index is unnecessary, however, when as here, the redactions were made to material that has not been requested and is being withheld from disclosure via redaction.

In this instance, the Custodian redacted a more comprehensive record so that only the information required to be disclosed was revealed, and tailored it by redaction to fulfill the complainant's request. The Complainant did not request the content of the records that were redacted, and therefore it is unreasonable for the Complainant to demand a redaction index. ***Marinaccio v. Borough of Fanwood, No. 2012-174 (July 23, 2013)***

The Custodian lawfully denied access to the requested training records for a particular police officer (relating to training on discrimination in the workplace; on retaliation and/or the conscientious employee protection act in the workplace; on harassment) , on the basis that said records are exempt from public access as personnel records. N.J.S.A. 47:1A-10. The Custodian has borne her burden of proving that said records do not demonstrate compliance with specific experiential, educational or medical qualifications required for public employment. The Custodian unlawfully denied access to the requested attendance records because said records are considered payroll records. ***Argento v.Township of Bloomfield, Complaint No. 2012-165 (August 27, 2013).***

Request for "Onsite inspection of motion made and carried by the Union City Board of Education ("BOE") to approve executive and special meeting held on June 13, 2000, included in the minutes made for any regular or special meeting held for the months of January 2001, to March 2011" was an invalid request. Request fails to identify the specific minutes sought and would require the Custodian to research minutes for a ten (10) year period in order to determine whether any of those minutes contain the motions sought by the Complainant. Custodian has lawfully denied access to the Complainant's request. ***Valdes v.Union City Board of Education, Complaint No. 2012-329 (August 27, 2013)***

Where request was for "electronic copies via e-mail of closed session minutes of Board of Education meetings… from November 1, 2002 through March 1, 2003" and Custodian provided redacted records but failed to indicate the specific lawful basis for each redaction, Custodian's response to the Complainant's OPRA request is insufficient. *Kellinger v. Bergen County Prosecutor's Office*, Complaint No. 2012-193

A valid OPRA request requires a search, not research. An OPRA request is thus only valid if the subject of the request can be readily identifiable based on the request. Whether a subject can be readily identifiable will need to be made on a case-by-case basis. When it comes to e-mails stored on a computer, a simple keyword search may be sufficient to identify any records that may be responsive to a request. Further, a completed "subject" line may be sufficient to determine whether the record relates to the described subject. Again, what will be sufficient to determine a proper search will depend on how detailed the OPRA request is, and will differ on a case-by-case basis. What a custodian is not required to do, however, is to actually read through numerous e-mails to determine if any are responsive: in other words, conduct research. ***Carter v. Franklin Fire Dist No. 1****, GRC Complaint Nos. 2012-288, 2012-289, 2012-290, 2012-293 and 2012-2942.*

Custodian correctly denied access to requestor's own mental health records. ***Larry McLawhorn GRC Complaint No. 2012-292 Complainant v. New Jersey Department of Corrections*** (July 23, 2013)

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Election Law Enforcement Commission

There are no education-related decisions posted for this period.

New Legislation

P.L. 2013, c.68. -see A2892 Allows certain military spouses with out-of-State teaching license to receive

temporary instructional certificate in New Jersey. Approved 6/13/2013 **PDF Format**

P.L.2013, c.71. -see S1912 "Scholastic Student-Athlete Safety Act;" establishes measures to ensure health of student-athletes. Approved 6/27/2013 **PDF Format**

P.L.2013, c.77. -see S3000 Appropriates $32,976,962,000 in State funds and $13,427,159,762 in federal funds for the State budget for fiscal year 2013-2014. Approved 6/28/2013 **PDF Format**

P.L.2013, c.105. -see A3606 Requires DOE provide professional development opportunities related to reading disabilities; mandates certain school district personnel annually compete two hours of professional development related to reading disabilities. Approved 8/7/2013 **PDF Format**

P.L.2013, c.131. -see A3608 Directs State Board of Education to incorporate the International Dyslexia Association's definition of dyslexia into special education regulations. Approved 8/9/2013 **PDF Format**

P.L.2013, c.142. -see A3583 Establishes School Security Task Force. Approved 8/16/2013 **PDF Format**

P.L.2013, c.146. -see S2715 Requires DOE to prepare and distribute informational pamphlets on how parents can limit a child's exposure to media violence. Approved 8/19/2013 **PDF Format**

P.L.2013, c.149. -see S2821 Makes various changes to the Urban Hope Act including the financing and siting of renaissance school projects. Approved 8/19/2013 **PDF Format**

P.L.2013, c.150. -see A3371 Protects minors by prohibiting attempts to change sexual orientation. Approved 8/19/2013 **PDF Format**

P.L.2013, c.151. -see A718 Requires Department of Education to biannually distribute a letter to school districts reminding districts of requirement to enroll resident students regardless of immigration status. Approved 8/28/2013 **PDF Format**

P.L.2013, c.154. see A2648 Concerns disclosure of certain employment information. Pamphlet Law 9 pages Approved 8/28/2013 **PDF Format**

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New Regulation/Executive Orders

N.J.A.C. 6A:9 Requirements and standards for the approval of professional education programs preparing educational personnel – correction of spelling and grammar error. **45 N.J.R. 1909(b)**, 8/5/13

N.J.A.C. 6A:14 Special education rules readopted with technical changes to Correct grammar; punctuation; and agency, statute, and rule cross-references.**45 N.J.R. 1909(c)**, 8/5/13

N.J.A.C. 6A:33 School Turnaround and Improvement rules; adopted with technical changes.**45 N.J.R. 1637(a)** 7/1/13

N.J.A.C. 6A:9 Professional licensure and standards; adopted with substantive and technical changes. **45 N.J.R. 1605(a)** 7/1/13

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United States Supreme Court

No education-related cases reported.

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3rd Circuit Court of Appeals

Age Discrimination

Appellant, who had lost an earlier employment discrimination lawsuit against the school district, subsequently alleged that she was targeted in retaliation for her failed lawsuit by individuals staring at her, driving by her house, calling her and hanging up, and, directing a racial slur at her. She sought relief pro se in district court; District Court dismissed her civil rights complaints; Circuit Court summarily affirms, as the appeal does not present any viable constitutional claims; facts alleged did not show causal connection. ***White v. Camden Bd. of Ed, No. 12-3743,*** 43, 2013 U.S. App. LEXIS 12708, No. 12-3743 (3d Cir. June 20, 2013) (not precedential)

Special Education

Parents had no right to tuition reimbursement for placement in private special education program where District Court determined that IEP was designed to provide FAPE in-district. ***R.G. v. Downingtown Area Sch. Dist., No. 12-3904 (3d Cir. June 3, 2013)***

Termination

Court affirms District Court ruling granting summary judgment to school district, in matter brought by school bus driver who refused to take a random workplace drug and alcohol test, which refusal ultimately led to her termination; District Court properly analyzed the state and federal constitutional dimensions of this claim under the "special needs" test; court determined that drug test did not constitute illegal search and seizure because there was no private cause of action for violation of procedural protections and neither violations of protocol nor testing procedure violated Fourth Amendment. ***Freeman v. Middle Twp. Bd. of Educ.,* 2013 U.S. App. LEXIS 13456, *No.* 12-3728** (3d Cir. June 28, 2013) (not precedential)

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New Jersey District Court

Court denies district's request to vacate an arbitration Award and Order entered in favor of New Jersey Building Laborers' Statewide Benefit Funds and its Trustees finding that board failed to make required employee benefit contributions to the Funds in violation of a collective bargaining agreement . ***N.J. Bldg. Laborers Statewide Benefit Funds the Trustees thereof v. Newark Bd. of Educ.,*** No. 12-cv-7233 (DMC) (MF), 2013 U.S. Dist. LEXIS 90423 (D.N.J. June 27, 2013) (not for publication)

Court denies motion to enforce settlement agreement; court lacked subject matter jurisdiction because the court's Order of Dismissal did not incorporate the terms of the settlement. ***Stanton v. Deptford Twp. Bd. of Educ.***, No. 11-2525 (JHR-JS), 2013 U.S. Dist. LEXIS 89634 (D. N.J. June 26, 2013)

Special Education

Court grants district's motion to reconsider its earlier remand order, as all factual and legal issues had been resolved, including the claim for compensatory education, and there was no need for a remand. ***A.C. v. Collingswood Pub. Schs, 2013 U.S. Dist. LEXIS 85997 No. 10-594 (D.N.J. June 19, 2013)***

Parents' motion for summary judgment is denied and matter is remanded. Parents filed for due process when they received letter from private school, advising that the private school would discontinue educating the child because it was terminating its contractual relationship with the public school. No violation as termination did not result in a deprivation where the child was not removed from Garden Academy until a settlement was reached. Furthermore, although Plaintiffs did not participate in an IEP meeting 10 days after the notice, this did not result in a deprivation of the parents' rights as parents' rights were protected in the mediation forum and subsequently before the OAL. Parents' right to provide input was not violated as placement discussions would not trump the implementation of the stay put provisions due to the parents filing for mediation. As to comp ed claim by parents for termination of home visits, the issue of whether IEP and thus stay-put, required home visitation once per week by teachers or teachers' aides as part of home programming, was a question for remand. ***S.M. v. Marlboro Twp. Bd. of Educ., (MAS) (LHG), 2013 U.S. Dist. LEXIS 79773 No.10-4490 (D.N.J. May 31, 2013)*** (*not for publication)*

Court rules, in matter where parent claims that district failed to implement student's IEP and therefor should pay for immediate placement in another district, that Plaintiff special education student is not excused from exhausting administrative remedies. In order to show futility, plaintiffs must allege systemic legal deficiencies and, correspondingly, request system-wide relief that cannot be provided (or even addressed) through the administrative process. Merely asserting that the administrative process is moving too slowly is not enough to overcome the exhaustion requirement. Court denies Plaintiff's request for emergent relief and dismisses the Verified Complaint without prejudice. ***L.V. v. Montgomery Twp. Sch. Dist. Bd. of Educ., 2013 U.S. Dist. LEXIS 78662 No. 13-2595 (D.N.J. June 5, 2013)****(*not for publication)

Employment

In matter where coordinator of gifted program (John Hopkins) is terminated after 5 years by board and sues board, union and union president, alleging Section 1983 violations, NJLAD discrimination on basis of age and ethnicity, wrongful discharge, breach of contract, breach of the covenant of good faith and fair dealing, and tortious interference with contract, the court dismisses claims against union and union president as there was no contractual relationship between employee and union. ***Hillenbrand v. Hoboken Bd. of Educ., 2013 U.S. Dist. LEXIS 77452 No. 13-598 (D.N.J. June 3, 2013)*** (not for publication)

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New Jersey Supreme Court

Supreme Court grants certification of Robinson v. Vivirito, 2013 N.J. Super. Unpub. LEXIS 464, wherein Appellate court held that the motion judge should not have dismissed the plaintiff's case on summary judgment. Appellate Court determined that a jury could reasonably find that the school had a duty to protect persons walking on school property from a dog when school was closed, where the dog had previously come onto the school's property and attacked two people, while leaving for the jury the

question of whether in fact the principal was negligent in failing to take remedial action. *Robinson v. Vivirito and Buena Regional School District and Nelson*, 214 *N.J*. 117 (June 4, 2013)

Court denies certification of Appellate Division decision which had affirmed the Commissioner's decision that board of education, by adopting a July 1, 2009 resolution, which established salary guides for 2007-2008, 2008-2009, 2009-2010, and 2010-2011, exceeded its authority by binding itself and future boards for a total of four years in violation of *N.J.S.A.* 18A:29-4.1, and declared the fourth year of the salary policy null and void. A collective bargaining agreement (CBA) that provides for retroactive payment covering a two-year period and prospectively establishes the pay scale for the next two years is inconsistent with *N.J.S.A*. 18A:29-4.1. *Bd. of Educ. of Ramsey v. Ramsey Teachers Assn,* 213 N.J. 535 (May 2, 2013), denying certif. of ***Bd. of Educ. of Ramsey v. Ramsey Teachers Ass'n,*** No. A-1338-11T3, 2012 *N.J. Super*. Unpub. LEXIS 2566 (App. Div. November 21, 2012).

Court denies certification of Appellate Division ruling that upholds regulations imposing caps on superintendent salaries in matter brought by NJASA. Addressing the numerous challenges made to the cap, the Court determined that: the cap did not exceed the authority delegated to the Commissioner by the Legislature or violate the Separation of Powers Clause in the State Constitution, nor does it conflict with the authority of a local school board to fix its superintendent's salary, *N.J.S.A.* 18A:17-19. Application of the salary cap to superintendents whose contracts expired on June 30, 2011 is not precluded by *N.J.S.A*. 18A:17-20.1 or -20.2 and the Commissioner did not violate the rulemaking provisions of the Administrative Procedure Act by directing the ECSs to suspend review of renegotiated contracts pending adoption of the salary caps. There is nothing arbitrary, capricious or unreasonable in the Commissioner's effort to rein in spending with salary caps based on enrollment. *N.J. Ass'n of Sch. Adm'rs v. Cerf*, 213 *N.J*. 536 (May 7, 2013), Supreme Court denying certification of ***New Jersey Ass'n of Sch. Adm'rs v. Cerf, 428 N.J. Super*. 588 (October 25, 2012)**.

Court denies certification. ***Feldman v. Board of Educ.*** , 214 *N.J*. 119 (June 25, 2013)

Court denies certification. ***Rivera v. Elizabeth Bd. of Educ.,*** 213 *N.J*. 538 (May 13, 2013)

Court denies certification. Certification denied, where, based on finding that board member statements were hearsay and should not have been admitted, appellate court reversed jury verdict that had been entered in favor of non-renewed security guard on LAD disability discrimination and workers compensation retaliation claims, and for counsel fee award. ***Pace v. Elizabeth Bd. of Educ.***, 213 *N.J*. 538 (May 13, 2013)

Court denies certification. ***D.F. v. Collingswood Bd. of Educ.,*** 213 *N.J*. 538 (May 13, 2013),

Court denies certification. ***Freehold Reg'l High Sch. Dist. Bd. of Educ. v. Freehold Reg'l High Sch. Custodial Maint. Ass'n***, 213 *N.J*. 536 May 7, 2013(May 9, 2013).

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New Jersey Superior Court, Appellate Division

Personal Injury

Dismissal of complaint against district upheld where plaintiff's injuries were not substantial. The Legislature intended that a plaintiff must sustain a permanent loss of the use of a bodily function that is substantial. Although plaintiff still experiences some pain following a fall into a hole in a parking lot, the limitations on activities are minor. Plaintiff does not experience problems with her foot when the weather is dry, she can wear shoes, she can get in and out of vehicles other than trucks, she can still perform her job even though she is often on her feet, and she takes her children to their sporting events and

watches them, albeit seated rather than standing. ***Termyna v. Jonas Salk Middle Sch., No. A-3495-11T4 (App.Div. June 26, 2013)***

After defendant-board was dismissed on summary judgment, plaintiff's claim that defendant Colonia Girls Softball League's negligent conduct caused her to fall on a sidewalk on school property, which was used by the League on evenings and Saturdays, went to trial and resulted in a judgment for plaintiff. The appellate panel reversed because the trial court had not presented special interrogatories to identify whether the jury found the League negligent because it failed to remove rocks that were on the walkway as the result of the League's construction of a pavilion and it had actual and constructive knowledge of the rock on which plaintiff fell, or as a result of removing the construction tape around the area before construction was completed, or both, and the first theory regarding knowledge of the rock should not have been submitted to the jury because of insufficient evidence. On retrial, the league's motion for an involuntary dismissal was granted. On appeal, the panel affirms, finding that the trial judge correctly concluded that the League's failure to restrict the area through the use of tape could not constitute a proximate cause of plaintiff's fall since, if the League cannot be held liable for the alleged hazardous condition near the pavilion, as was held in the prior appeal, it cannot be held liable for failing to take measures to keep pedestrians from strolling through that same area. *St. George v. Woodbridge Twp. Bd. of Educa*., App. Div. (per curiam)

Employment

Termination due to a RIF is upheld; Commissioner had found that board followed proper procedures and where employee worked as a secretary for only one year during her 11 and a half years with the district, and otherwise duties were of an aide. As such, petitioner did not have secretarial tenure under *N.J.S.A*. 18A:17-2. Rejects her that argument that she did not receive notice of a possible layoff from her position as required by the Open Public Meetings Act. ***White v. Board of Educ. of Glassboro, 2013 N.J. Super. Unpub. LEXIS 1400 No. A-4711-11T3 (App.Div. June 10, 2013)***

Jurisdiction

In tenure dismissal proceedings, CSA's claims that board violated the contract are properly before the Commissioner, not the Superior Court. Allegations involved in the tenure proceeding and the current contract claims are part of the same "integrated dispute" stemming from defendant's decision not to renew superintendent plaintiff's employment contract and defendant's subsequent decision to institute tenure charges against plaintiff. Superintendent's response to the tenure charges, which was to file a complaint in the Law Division contending the board breached its contractual duty of good faith and fair dealing by drafting and filing bogus charges of misconduct against him, is a claim that cannot be separated as they derive from the same factual basis. Court finds that Commissioner had primary jurisdiction to hear this entire dispute and affirms Law Division's dismissal of Superintendent's complaint. ***Costanzo v. Lebanon Borough Bd. of Educ., 2013 N.J. Super. Unpub. LEXIS 1231 No. A-6330-11T2 (App.Div. May 22, 2013)***

Retirement Benefits

Plaintiff who was a non-certificated computer specialist in district appeals denial of her claim for accidental disability retirement benefits. Employee injured her hand when she was standing in the bathroom at work, stall door fell towards her and while trying to protect herself, a metal piece pressed into her hand between her palm and thumb. Independent medical examiner disagreed with her expert, and found no permanent disability. The ALJ weighed the expert testimony of her Dr. and that of independent Dr., and found that independent Dr.'s opinion was more accurate, that the plaintiff had not borne her burden to prove by a preponderance of the credible evidence that she is totally and permanently disabled as a direct result of a traumatic event. ***Wright v. Public Emples. Ret. Sys., No. A-2390-11T2 (App.Div. May 31, 2013).***

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New Jersey Superior Court, Law/Chancery Division

Pensions

Court dismisses challenge to pension reform law. Claim that increased pension contributions by employees was unconstitutional and violative of civil rights was without merit. Claim that pension law impaired contract was not ripe as committees set up under the law had taken no action that would alter those contracts. Further, New Jersey enjoys sovereign immunity from both federal statutory and federal constitutional claims. *New Jersey Educ. Ass'n v. State, No. L-771-12 (Law Div. June 13, 2013)*

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Commissioner of Education

Anti-Bullying Law

Commissioner finds that board was not arbitrary or unreasonable when it found that a middle school student committed HIB where he called a classmate “fat,” “fat ass” and “horse” on more than one occasion in 7th and 8th grade, and by referring to her by the name of another other female student after she dyed her hair black. The ALJ determined that E.B.’s actions were verbal acts motivated by distinguishing characteristics, i.e., appearance and body type. Board’s imposition of two after-school detentions as consequence for his behavior was designed to redirect his behavior in a manner that was consistent with his age and recognized that this was his first offense. ***R.G.B. obo E.B., v. Ridgewood Bd. of Ed.*, 2013:June 24. OAL Decision**

Commissioner dismisses complaint brought by parent alleging that her daughter, a kindergartner, was twice subjected to HIB on a school bus when two girls on the bus called her names and told her to pull down her pants or they would not be friends with her. Parent disputed board’s determination that the matter was not a confirmed case of HIB; Commissioner finds that parent’s appeal was procedurally deficient; she had not filed and perfected her petition until months after the 90 day period for filing, and after one of the incidents she had not exhausted her administrative remedies before the board before seeking relief from the Commissioner. ***E.G.M. obo J.M. v. Mahwah BOE*, Commr 2013:May 21.**

Commissioner upholds board’s determination that Petitioner’s son engaged in HIB, when on a school bus the sixth grader called a fellow classmate names, including “faggot”, and suggested that the student engaged in sexual aggression. Verbal acts were motivated by distinguishing characteristics, i.e., gender and sexual orientation, and district’s response of assigning him to 4 days of lunch and recess detention and reassignment of his bus seat, was designed to redirect the child’s behavior in a manner that was consistent with his age and recognized that this was his first offense. Actions of school personnel relative to this incident were consistent with the letter and spirit of *N.J.S.A.* 18A:37-14 and *N.J.A.C.* 6A:16-7.9. ***G.A., obo K.A. V. Mansfield Bd*, Commr 2013: June 24.**

Certification

Petitioner did not establish that the State Board of Examiner's (SBE’s) decision to deny her application for a Supervisor endorsement was arbitrary, capricious or unreasonable, and the SBE’s denial of her request to extend the time for consideration of her application for a Principal Certificate of Eligibility under the regulatory provisions that were in place in January 2008 was appropriate, as she missed the deadline for submission under the former requirements and must apply under the current requirements of *N.J.A.C.* 6A:9-12.5. ***Hutchinson v. Examiners*, Commr: 2013:May 15.**

Commissioner dismisses matter as moot, where pro-se petitioner challenged the determination of the SBE that he had not met the requirements for a principal certificate. However, subsequent to the filing of the appeal, petitioner obtained a Principal's Certificate of Eligibility. ***Nkam v. Examiners,* Commr 2013: June 24.**

Commissioner affirms SBE's revocation of Elementary School, Teacher of Nursery School, and Teacher of the Handicapped Certificates, where the appellant engaged in chronic and excessive absenteeism and tardiness, unbecoming conduct, and insubordination. Record amply supported the SBE's assessment of the appellant's conduct, which included a pattern of inappropriate and unprofessional conduct not suitable to a school environment, and the penalty was not based on any one fact but rather the totality of the appellant's conduct. Nothing in the record suggests that the decision was arbitrary, capricious or unreasonable. ***Revocation of Certificates of True*, Commr 2013:May 29.**

Commissioner upholds SBE's revocation of the teacher's Teacher of Music Certificate of Eligibility with Advanced Standing and Teacher of Music Certificates, where the teacher admits that after consuming alcohol he displayed a rifle to two youths and told them to get off his property, after which the rifle was accidentally discharged approximately 200 feet from the trespassers. As a result of the incident, the appellant was convicted of several misdemeanor criminal offenses in Pennsylvania. SBE did not simply base its decision on the criminal disqualification but expressly stated it would have revoked his certificates even if the criminal disqualification were overturned as the incident warranted removal. ***Revocation of Certificates of Kelly*, Commr 2013:May 29**.

Conflict of Interest

Commissioner determined that a board member's position as Deputy Chief of Police does not preclude him from serving as a member of the Board. Fact that law enforcement is a party to the memorandum of agreement with the school district was not the type of contract that created a conflict of interest---as it was not a commercial or employment contract. The decision contains some useful analysis and review of legal rulings. No inherent conflict between respondent's duties as Deputy Police Chief and his responsibilities as a Board member. Board member abstained on issues that could create appearance of conflict – such as the issue of remuneration for police officers who provide security at school events, and the discipline of a Kearny student who had been arrested. ***Doran v. King*, Commr 2013:June 17.**

Employment Disqualification

Commissioner affirms ALJ's determination that State properly determined, pursuant to *N.J.S.A.* 18A:12-1.2, that individual is permanently disqualified from holding the office of member of a school board as a result of his criminal conviction in South Carolina on charges of possession of cocaine; the conviction was not expunged and it remains on his record; plain language of *N.J.S.A.* 18A:12-1.2 warrants petitioner's disqualification despite his argument that he was pardoned by the South Carolina Department of Probation, Parole and Pardon Services as a pardon does not remove the record of the conviction.***Palmer v. NJDOE*, 2013:June 5**.

Facilities

Commissioner partially granted Education Law Center's motion for summary disposition on seeking an order for the Office of School Facilities (OSF) to act on applications for emergent repairs to school facilities under the 2011 New Jersey Potential Emergent Projects Program (PEPP); OSF fell short of its responsibility to speedily advance projects designed to remediate emergent conditions in SDA districts; the determinations on the PEPP projects at issue here came significantly later than 150 days after the application date; Commissioner orders OSF to issue PPRs for the projects at issue no later than August 30. Although administrative code appears to suggest that the OSF is not required to issue a preliminary project report (PPR) and preliminary cost estimates until after the SDA has completed its preconstruction activities, such an interpretation is inconsistent with other provisions of the EFSFA, and with the EFSFA's clear legislative intent. ***Education Law Center v. NJDOE, OSF,* Commr 2013: June**

13.

Indemnification

Commissioner agrees with ALJ that art teacher was not entitled to be indemnified by the board for the costs of litigating a civil lawsuit alleging that he engaged in wrongful conduct, *i.e.,* making sexual comments and advances to a female student; although the case was ultimately settled with no admission of wrongdoing, the allegations were adjudicated in prior separate proceedings in which the State Board of Examiners successfully revoked his teaching certificates based on allegations by several female students that he made sexually inappropriate comments to them; conduct that has been adjudicated as unbecoming does not qualify as conduct which arises out of a school employee's duties; and indemnification only applies when an employee is sued individually for an action taken in furtherance of his prescribed duties. ***Vanden Huevel and Horace Mann v. Hackettstown BOE*, Commr 2013:May 2.**

Jurisdiction

Commissioner dismisses petition, finding he has no jurisdiction to decide board member's challenge to board's use of the Doctrine of Necessity; board member argued that the board's use of the Doctrine of Necessity was merely a scheme involving the identification of conflicts of interest that did not in fact exist, in order to overcome the board's failure on numerous occasions to obtain the required number of votes to appoint particular administrators. Commissioner determines that claims did not sufficiently implicate the school laws or necessitate an interpretation of the school laws, requiring the expertise of the Commissioner. Jurisdiction resides with SEC or Superior Court. Commissioner declined to transfer matter, as election of forum belongs to petitioner. ***Gardner v. Hackensack Bd. of Ed.*, Commr 2013: June 7.**

NJSIAA

Commissioner upholds NJSIAA determination not to grant a waiver of Age Rule to a boy diagnosed with autism, ADHD, and cognitive impairments who would be 19 when the 2013 football season begins. Age Rule prohibits students who turn 19 before the school year starts from participating in high school sports. Petitioners asserted that they only sought a limited waiver to allow student to participate as a place kicker on the football team – a position that gives him a sense of self-esteem, self-worth, and dignity. NJSIAA ruled that allowing him a fifth year would provide him with an advantage over all other Brick students and would create potential safety issue because of a disparity in size between a 19 year old and younger players and as he is a "difference-maker" on the field, and would provide the team with a competitive advantage. ***Starego v. NJSIAA*, Commr 2013:June 28.**

Privacy

Commissioner affirms decision of State Board of Examiners (SBE) denying appellant's request to remove internet postings of SBE's denial of her request for an additional year of participation in the provisional teacher program and of minutes of meeting in which SBE voted to grant her an extra year in the program. Although she wanted the postings removed "from all search engines" because they were allegedly interfering with job prospects and creating vulnerability to abuse because of the personal information posted, the Commissioner found that an applicant for certification had no "reasonable expectation of privacy" regarding her qualifications and that while the public initial rejection of her application for another year in the provisional teacher program may not have been appropriate, she was accommodated by removing the specifics of her case from the minutes; however it could not remove the minutes as their posting was required under the OPMA. ***Muench v. State Board of Examiners*, 2013:May 28.**

Pupil Residency

Where parents failed to appear at hearing to refute board's proofs that, as a result of a residency

investigation her children were not domiciled in East Brunswick during period in question, Commissioner determines that they owe tuition for 50 day period of illegal attendance totaling in the amount of $6,191 following the mother's move to Old Bridge. ***East Brunswick v. C.C.*** **, Commr 2013: May 21.**

Reduction in Force

Tenured teacher with an instructional certificate with endorsement in Skilled Trades, Machine Shop and whose last position was that of In-House Suspension Teacher, had no entitlement to be recalled after a RIF, to reconstituted position of In-House Suspension (IHS) teacher; no bad faith shown by board's addition of instructional physical education component which required that the new instructor possess a physical education endorsement – which teacher did not possess; newly hired teacher provides physical education instruction during in-school suspensions. ***Martin v. South Amboy BOE,*** **Commr 2013: May 13.**

In light of well-settled case law that secretaries are not terminated or reinstated on the basis of seniority, the board did not violate the rights of a tenured secretarial employee whose position was abolished in a RIF, and where the board retained less experienced tenured secretaries. However, the secretary's petition was not time-barred as the date that triggered the 90 days for filing the petition was not the date of her RIF, but rather the date that the board decided to retain less tenured staff through a motion to rescind the RIF of other secretaries. ***Pavia-Musi v. Carteret BOE*****, Commr 2013:June 18**.

Sending-Receiving

Ventnor, a sending district, had standing to bring an action for tuition reimbursement from the Egg Harbor, where Ventnor had a sending-receiving relationship with Atlantic City High School for grades 9-12, paid tuition for the student to Atlantic City, but alleges that in fact the student lived in Egg Harbor. ALJ's finding that Ventnor had no standing ignored the fact that Ventnor, as sending district for grades 9-12, was responsible for paying student's tuition to the receiving district. Statute does not preclude sending district from seeking reimbursement for tuition it has paid to send its students in grades 9-12 to the receiving district when it is determined that such a student is not domiciled in the sending district. Matter remanded regarding Ventnor's entitlement to reimbursement. ***Haymaker v. BOE of Ventnor,*** **Commr 2013: June 17.**

Superintendents

Commissioner dismisses with prejudice for failure of either party to appear, a matter initiated by former Superintendent seeking removal of her annual evaluation from her file on allegations that the Board's conclusions in the evaluation were arbitrary, capricious and unreasonable, and that the Board failed to comply with its legal requirement to complete her annual written performance evaluation report in a timely fashion. ***Granthan v. Pleasantville BOE*****, Commr 2013:May 15**.

Tenure Acquisition

Commissioner rejected ALJ decision, and found that the teacher on full year's unpaid maternity leave never acquired tenure under *N.J.S.A.* 18A:28-5 where she worked for the 2002-2003, 2003-2004, and 2004-2005 academic years, before taking leave for the 2005-2006 school year. The leave year did not count toward employment under *N.J.S.A.* 18A:28-5 although she would have earned tenure had she worked one day during the 2005-2006 school year (more than 3 within 4 consecutive years) but failed to do so. Distinguishes *Kletkin, Mendez-Azzollini, Jarmond*. Relaxation of the service requirements of *N.J.S.A.* 18A:28-5 were not warranted; she had no tenure rights when the board non-renewed her in in 2007. ***Kolodziej v. Southern Reg.*****, Commr 2013: May 16.**

Commissioner determines in "a case of first impression" that the period of a principal's paid suspension-- based on allegations which were later determined to be unfounded in a DYFS report-- may be counted toward the accrual of his tenure. Therefore, the board acted improperly when it demoted him from principal to vice principal where they had taken no action to demote or remove him until after the

presumptive date of his tenure. Relying on *Kletkin, Mendez-Azzollini, Jarmond*, the Commissioner found that he continued to be an "employee" during the suspension and the Board had enough time to evaluate him during his probationary period. Accordingly, on the particular facts, the Commissioner granted petitioner's motion for summary decision and ordered the Board to restore petitioner to the position of principal with back pay and emoluments. ***Valentino v. Camden*, Commr: 2013:May 16.**

Tenure Dismissal

Commissioner finds that Administrative II secretary should be dismissed, where he failed to processing transcript requests – and turn over the money orders submitted as payment for transcripts – in a timely fashion; and where a 4-year backlog of transcript requests, student records, and money orders – was discovered under his desk, and where he removed school documents without permission, mishandled funds entrusted to him, failed to take advantage of the accommodations made by the district to deal with work stress and failed to comprehend the district's needs with regard to his job function despite assistance offered by the administration. ***Tenure Hearing of Asim*, Trenton, Commr: 2013:May 28.**

Commissioner finds ALJ's recommendation for tenure dismissal of Physical Education Supervisor/ Athletic Director to be unduly harsh, and instead orders forfeiture of 120 days' pay already withheld as well as suspension for an additional six months without pay and forfeiture of one future salary increase, where during school hours the respondent had placed a bag of dog feces on the windshield of the car parked on school grounds belonging to his ex-wife, also a district teacher. While the conduct was highly improper and in violation of the standards of conduct expected of educators, taking in account analysis of factors required by *Fulcomer*, the Commissioner finds that the conduct stemmed from a domestic matter not associated with school duties, that he was obtaining counseling and that the incident did not establish the teacher's unfitness to discharge his duties. ***Tenure Hearing of Carr*, Commr 2013: May 15.**

Commissioner upholds tenure charges against tenured teacher where attendance and punctuality had been unsatisfactory, and – on at least one occasion – the cause had been consumption of alcohol. Respondent was absent for 49.5 days during the 2007-08 school year, 83.5 days in the 2009-2010 school year, 183.5 days in the 2010-2011 school year, 91.5 days in the 2011-2012 school year and 71 days in the current school year. Commissioner deems allegations to be admitted due to teacher's failure to respond, and rules that they warrant respondent's dismissal from tenured employment. ***Tenure Hearing of Fay*, Commr 2013: May 6.**

Commissioner grants board's motion to dismiss the petition of a former security guard that he was illegally terminated, as that determination must be made by a grievance arbitrator. Here, guard initially alleged that he was illegally suspended without pay following the certification of tenure charges for unbecoming conduct which were ultimately dismissed by the Commissioner for lack of subject matter jurisdiction as security guards do not obtain statutory tenure. The board converted his suspension to a retroactive termination, whereupon he sought reinstatement with back pay and benefits under *N.J.A.C.* 18A:6-30. The Commissioner holds that the legality of his termination is contingent on the arbitrator's determination of whether he was terminated without good cause under the collective bargaining agreement. ***Newby v. Hillside Bd. of Ed.*, Commr 2013:May 10.**

Computer teacher's plea to second degree sexual assault and five year prison sentence and Megan's Law registration, in connection with allegations brought against him by a former middle school student, rendered tenure charges of conduct unbecoming moot; charges had been held in abeyance pending the resolution of the related criminal case. ***Tenure Hearing of DeFranco*, 2013:May 31 (Denville)**

Commissioner upholds tenure charges of conduct unbecoming, insubordination, and other just cause against respondent, a tenured teacher; failure to file an answer to the petition, charges that she refused to comply with the District's order to undergo an independent medical examination, and has exhibited insubordinate behavior towards district administrators deemed admitted and are sufficient to warrant summary decision for termination of the respondent from her tenured position. ***Tenure Hearing of***

***Johnson*, 2013:May 4 (Newark)**

Commissioner grants summary decision dismissing tenured teacher from his position where he filed to file an answer to the petition; allegations were deemed admitted and are sufficient to warrant termination of employment. ***Tenure Hearing of McMeekan,* 2013: June 17 (Scotch Plains-Fanwood.**

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Tenure Arbitration Cases "TeachNJ"

Arbitrator determined that board of education, by a preponderance of the credible evidence, satisfied its burden of proving the incapacity, conduct unbecoming and neglect of duty tenure charges filed against tenured special education teacher. Teacher had been chronically and excessively absent, preventing her from performing her critical role as an inclusion teacher for special education students. Teacher had been absent over 600 days in her career, including 195 days from 2002 through 2012. Board of education unsuccessfully attempted to correct teacher's absenteeism through progressive discipline, withholding special education teacher's increments for three school years; 2008-2009, 2010-2011, 2011-2012. ***Tenure Hearing of Stapleton,* Arb 2013: May 7 (Newark) (Pecklers, arbitrator)**

Arbitrator determined that board of education, met its burden of proving the charge of incompetence, filed against tenured special education teacher. Teacher was chronically late, careless and incomplete in preparing lesson plans, failed to timely read the IEPs of his students and through his misspellings symbolizing an embedded carelessness metastasizing into incompetence, demonstrated a larger framework of insufficient care and diligence in his work. Teacher was formally reprimanded and suspended without pay from May 24 until the end of the 2012-2013 school year. Charges of insubordination and conduct unbecoming were not proven. The arbitrator posited that imperfect, incomplete, or even careless, minimal and thoroughly mediocre unsatisfactory effectuation did not sink to the depths of insubordination. ***Tenure Hearing of Evans*,** Arb 2013: May 24 (Gloucester Township) (Gregory, arbitrator)

Arbitrator determined that board of education met its burden of proving charges of unbecoming conduct, neglect of duty, negative conduct towards staff and incapacity against tenured special education teacher. Teacher acted inappropriately, was insensitive and largely unaware of the needs of her students, could not take criticism, could not work with other staff members and was incapable of teaching students in an effective manner. Teacher did not demonstrate the temperament and judgment necessary for a teacher. Teacher was dismissed from her tenured employment. ***Tenure Hearing of Gibbs*,** Arb, 2013: May 20 (Jersey City) (Gerber, arbitrator)

Arbitrator determined that board of education met its burden of proving charges of unbecoming conduct, incompetency and other just cause against tenured teacher. Teacher engaged in inappropriate and intentional misconduct; overreacted to situations; created a classroom that was a battleground rather than a supportive and nurturing environment; failed to give students with disabilities their necessary accommodations until threatened with insubordination; was unable to interact professionally with children or adults; retaliated against students; inflicted pain on a student by grabbing his sweatshirt; slammed a chair to the floor; had poor classroom management skills; acted negligently and incompetently when students were able to access pornography on the computer; used profanity and called students names; did not have control of his class; did not take advantage of improvement plans offered by the school district. ***Tenure Hearing of Carter,*** Arb, 2013: June 19 (Paterson) (Gandel, arbitrator)

Arbitrator determined that board of education met its burden of proving charges of unbecoming conduct against tenured middle school in-school suspension (ISS) teacher. Teacher engaged in a book fight with an ISS student who had cursed him, called him by his first name, used racial epithets against him and

threw the first book to start the book fight. More than 20 books were thrown, two of which struck and injured the student. Teacher's loss of control and willing and continuous participation in the book war while two other ISS students looked on, warranted dismissal, notwithstanding his 13 years of employment, nine of which were served as an ISS teacher. Student received a three day out of school suspension. Charges that teacher intentionally threw Vitamin Water on the student and "mushed" her in the face, causing her glasses to fall off were not proven. ***Tenure Hearing of Hilliman***, Arb, 2013: June 25 (Franklin Township) (Licata, arbitrator)

Arbitrator determined that board of education met its burden of proving charges of unbecoming conduct against tenured school nurse. Nurse's treatment of sixth grade student who injured his foot in physical education class was inadequate; student did not receive proper examination or treatment by the nurse. Nurse never left her desk during the period of time that student was in her office. Nurse's testimony was confusing and less than credible. Nurse did not accept responsibility for her actions, which were the final example of a series of misbehaviors over a significant period of time. ***Tenure Hearing of Alexander***, Arb, 2013: June 27 (Vernon Township) (Dorsey, arbitrator)

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School Ethics Commission

Complaint alleging violations of *N.J.S.A.* 18A:12-24(b) and (g), as well as *N.J.S.A.* 18A:12-24.1(c) and (d) of the Code of Ethics for School Board Members dismissed following approved settlement of complaints. Complaint withdrawn with prejudice. ***Galante v. Brill, SEC 2013: May 28***

Complaint alleges that member violated *N.J.S.A.* 18A:12-24.1(b), (c), (d), and (h) of the Code. The complainant asserts that the Board conducted a Donaldson hearing at her request. She further asserts that at this meeting, the respondent again voted not to renew her contract, thus ignoring the Superintendent's recommendation, and failed to discuss or comment on the reasons why the contract was not renewed. Teacher has the right to informally appear before the district board to contest the decision not to renew the contract whenever a teaching staff member has requested in writing and has received a written statement of reasons for non-reemployment pursuant to *N.J.S.A.* 18A:27-3.2. Board has sufficiently complied with the regulations governing these circumstances. Board member's vote contrary to the Superintendent's recommendation did not constitute an ethics violation. Respondent's Motion to Dismiss granted. Complaint untimely filed as to some allegations; the Tolling Order issued by the New Jersey Supreme Court in the aftermath of Hurricane Sandy, which tolled the time between Monday, October 29, 2012 and November 16, 2012 for the purposes of filing deadlines did not extend deadlines that did not fall within those two weeks; consequently the complainant was not given an additional two weeks to file her complaint. Moreover, the complainant could have filed her complaint with the Commission at any point after she filed her petition with the Commissioner of Education in order to preserve her rights. ***Baumgartner v. Castelli, SEC 2013: May 28.Baumgartner v. King, SEC 2013: May 28, Baumgartner v. Leadbeater, SEC 2013: May 28, Baumgartner v. Plaugic, SEC 2013: May 28***

Board member allegedly said that community organizer was engaging in "torch pitchfork tactics" following the tragic death of student. No ethics violation found where uncle of student who was killed, accuses board member of violating ethics act and interfering with efforts to galvanize community, by dissuading residents from attending a meeting, including having a police presence at the meeting and requiring some who attended to sign in. Even assuming the facts as alleged are true, the SEC does not find that the respondent failed to uphold the law, took action beyond the scope of his authority which had the potential to compromise the Board, acted on behalf of some special interest group, or used the schools for his own benefit. ***Spadafora v. Radio, SEC 2013: June 25.***

SEC found no violations of the Act where board member made racist and sexist comments and lewd

gestures to a security guard and to a fellow board member, about fellow board members. SEC finds no violation of the Act, on allegations that board member respondent told school security guard that another board member is "evil" and called her a vulgar name, told fellow board member that the Main Office was a "cat house" and a "sorority house" in need of "male leadership" because those positions should not be held by women at the same time and accompanied his comments with a lewd hand gesture, where he promised another board member that if he were to vote for him for Board President, he could have any business cards and any chair or parking space he wanted, staring at the complainant during Executive Session and continuing when called on it, and where, and after a board meeting at which a Latina was appointed B.A., he was heard to say disdainfully, "another Puerto Rican." SEC found that the comments, gesture and staring were private; promise of cards and parking space is hollow since the respondent is not authorized to provide such accommodations; and negative comments towards fellow board member does not constitute failure to support personnel, since board members are not personnel. (However, SEC recognizes in footnote the repugnant nature of sexist or racist comments.)***Pilovsky v. Caputo, SEC 2013: June 25***

The SEC determined that a board member did not disclose confidential information at a public meeting; the comments he made about a matter that had been decided by the OAL and the Commissioner and was on appeal to the Appellate Division was not confidential, as any matter that is not under seal before the OAL is a public record unless it has been sealed. No showing that the comments were other than unskilled disclosures due to board member's unfamiliarity with legalese or his lack of understanding and articulating the complicated outcome in the matter before the Commissioner of Education. ***DiNapoli v. Quattrocchi, SEC 2013: June 25***

Board Member violated *N.J.S.A.* 18A:12-24.1(e) and had the potential to compromise the Board when he yelled at a board employee whose wife was on the ballot, that he had better hope that the board member's wife would win, and that if she did not, the employee had better "watch his back." Fact that respondent apologized or that election was heated was of no moment; also, and "most damning," was his attempt to get another employee to perjure himself. The Commission finds that by his conduct, the respondent has now potentially made any vote or Board action in which he is involved suspect. The public may now have lost its respect and confidence for this member and the Board, which is now compromised. Reprimand ordered. Moreover, pursuant Advisory Opinion A06-08 in which the Commission advised a board member not to participate in any vote or Board action involving someone with whom he had a negative history, the respondent is also advised that he must abstain from any vote or Board action regarding this complainant. Board Member did not violate N.J.S.A. 18A:12-24.1(a), (d), (i) and (j) of the Code of Ethics for School Board Members. ***Murphy v. Murphy, SEC 2013: June 25***

Board Member did not violate N.J.S.A. 18A:12-24.1(c), (e), (f), (g), (i) and (j). Complaint dismissed. ***McClellan v. Bey-Blocker and Famularo, SEC 2013: June 25.***

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State Board of Examiners

Teacher with Pennsylvania certificates suspended for three years, after having been charged with engaging in conduct that constituted immorality, negligence and intemperance involving viewing inappropriate material on his classroom computer while students were in the classroom, constitutes conduct unbecoming a certificate holder, and warranted revocation of certificates of Teacher of Health and Physical Education. ***Certificate of Ammon*****, Exam 2013: May 16.**

Examiners orders two –year suspension of Teacher of Biological Science Certificate of Eligibility and Teacher of Biological Science certificate of teacher who was dismissed by Freedom Academy Charter School following a physical confrontation with a student; mitigating factors in Coleman's favor including the fact that he had a good, albeit short, record, did not act punitively and was provoked and threatened

by the student; however, Examiners diverges from the ALJ's assessment that these behaviors warranted only a one year suspension of certificates, given the serious nature of this offense. ***Certificates of Coleman*, Exam 2013:May 16.**

Corcoran's conduct by engaging in an inappropriate relationship with a student, and the revocation of his Massachusetts and Pennsylvania licenses for such conduct, constitute conduct unbecoming a certificate holder in New Jersey and warrant the revocation of his Teacher of Health and Physical Education and Teacher of Driver Education certificates. "Teachers… are professional employees to whom the people have entrusted the care and custody of … school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." Summary ruling as teacher failed to respond to the Order to Show Cause. ***Certificates of Corcoran*, Exam 2013:May** 16.

Examiners accepts relinquishment of certificates with full force and effect of revocation, for individual holding Teacher of Mathematics Certificate of Eligibility With Advanced Standing and Teacher of Mathematics certificate, where individual pled guilty to Official Misconduct and, as part of his sentence, was ordered to forfeit his teaching position and was also forever barred from holding any office or position of honor, trust or profit under this State or any of its administrative or political subdivisions. ***Certificates of Michielli*, Exam 2013:May 16.**

Examiners orders revocation of Teacher of English Certificate of Eligibility and Teacher of English certificate of individual who was convicted of Criminal Sexual Contact and sentenced to 364 days' imprisonment, 5 years' probation, and ordered to forfeit his public office and teaching license and register under Megan's Law. As a result of the conviction, Morales was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* "An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold himself out as a teacher." Summary ruling given failure to respond to Order to Show Cause and return of certified mail as "unclaimed. " ***Certificates of Morales*, Exam 2013:May** 16.

Examiners orders revocation of the certificates of Teacher of Social Studies and Student Personnel Services, of individual who had plead guilty to Wandering after having initially been charged with Conspiracy and Possession of CDS with Intent to Distribute, and to Assault By Motor Vehicle and was sentenced to two years' probation, and had signed a consent order barring him from holding public employment in the State of New Jersey. Convictions were related to his admitted substance abuse. Examiners has the right to revoke a certificate where the teacher was involved in criminal activities, even if the activities were unrelated to the classroom as these may be relevant in determining qualifications and continued fitness to retain certificates. Rehabilitation has no bearing on this proceeding, the purpose of which is "to permit the individual certificate holder to demonstrate circumstances or facts to counter the charges set forth in the Order to Show Cause." ***Certificates of Winkelried, Exam 2013:May 16***

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No education-related cases reported for this period.

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No education-related cases reported for this period.

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No education-related cases reported for this period.

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Government Records Council

Custodian's failure to respond in writing to the request within the statutorily mandated seven business days was a "deemed denial" of complainant's OPRA request. The evidence does not indicate that the Custodian's "deemed" denial had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's "deemed" denial did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. ***Coffey v. New Jersey Department of Health and Senior Services***, No. 2012-140(GRC June 25, 2013)

Custodian unlawfully denied access to the requested attendance records because said records are considered payroll records, which are available for public access. Custodian lawfully denied access to the requested training records, on the basis that said records are exempt from public access as personnel records. Said records do not demonstrate compliance with specific experiential, educational or medical qualifications required for public employment. ***Argento v. Township of Bloomfield**, No. 2012-165 (GRC June 25, 2013)*

Custodian did not unlawfully deny the Complainant access to his medical records for the period of time which he was at the Steps Program. Complainant's records request, related to "medical, psychiatric or psychological history, diagnosis, treatment or evaluation," and thus were exempt from production pursuant to OPRA.***Janowski v. New Jersey Department of Corrections***, No. 2012-240 (GRC June 25, 2013)

Custodian's failure to respond in writing to the request within the statutorily mandated seven business days was a "deemed denial" of complainant's OPRA request. Notwithstanding the Custodian's "deemed denial," the Custodian has not unlawfully denied access to the records the Complainant asserts were withheld because the Complainant's OPRA request is overly broad and invalid. The evidence does not indicate that the Custodian's "deemed" denial had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's "deemed" denial did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. ***Fleming v. Town of Phillipsburg***, No. 2012-222 (GRC June 25, 2013)

Custodian failed to bear her burden of proving a lawful denial of access to the responsive invoices for Roach's Towing and Sam's Garage on the basis that the Township was not in possession of any records. Custodian had an obligation to obtain and provide the responsive invoices to the Complainant. ***DeRobertis v. Township of Montclair***, No. 2012-199 (GRC June 25, 2013)

Custodian established in his request for reconsideration of the Council's May 28, 2013 Interim Order that 1) the GRC's decision is based upon a "palpably incorrect … basis" and 2) it is obvious that the GRC did not consider the significance of probative, competent evidence; to wit, the GRC did not

consider the Custodian's SOI submission when rendering its decision. Custodian's request for reconsideration is granted. ***Lamanteer v. County of Gloucester,*** No. 2012-198 (GRC June 25, 2013)

No unlawful denial of access occurred because the Delaware Valley Regional Planning Commission is a bi-state agency that is not subject to the provisions of OPRA. ***Frey v. Delaware Valley Regional Planning Commission*** No. 2012-139 (GRC June 25, 2013)

Custodian lawfully denied access to the requested 1,300 e-mail addresses. Custodian has borne her burden of proving that the disclosure of approximately 1,300 County e-mail addresses at once, in one document, constituted administrative or technical information regarding computer hardware, software and networks which, if disclosed, would jeopardize computer security. ***Scheeler v. County of Atlantic***, No. 2012-97 (GRC June 25, 2013)

Conceptual drawings of redevelopment plan for a B3 zone are exempt from access as "inter-agency or intra-agency advisory, consultative or deliberative" material. Plans were "pre-decisional" and essential to the recommendation or opinion of a Planning Board member intended to facilitate discussion and debate about the B3 zone. ***Eastwood v. Borough of Englewood*** Cliffs No. 2012-121 (GRC June 25, 2013)

Custodian's failure to respond in writing to the Complainant's OPRA request either granting access, denying access, seeking clarification or requesting an extension of time within the statutorily mandated seven (7) business days results in a "deemed" denial of the Complainant's OPRA request. Custodian lawfully denied access to request item nos. 1-7 because said requests sought information rather than specifically identifiable government records. ***Rangwala v. Borough of Point Pleasant Beach***, No. 2012-171 (GRC June 25, 2013)

Custodian improperly required the Complainant to complete an official OPRA request form, because the Complainant's e-mailed and faxed non-form OPRA requests clearly invoked OPRA and made clear the nature of the request. Fire District's policy not to accept electronic transmissions of OPRA requests does not impose an unreasonable obstacle to the transmission of a request for a government record because the Fire District accepts requests hand-delivered, mailed, or faxed. Counsel fees awarded. The GRC finds that 2.3 hours at $300 per hour is reasonable for the work performed by Counsel in the instant matter. ***Paff v. Bordentown Fire District No. 2***, No. 2012-158 (GRC June 25, 2013)

The Custodian unlawfully denied access to Complainant's OPRA request, for salary, position, title, payroll records, length of service, date of service and separation, the reason for separation, for several employees and arrest records. OPRA delineates the specific information contained on an arrest report which must be disclosed to the public. ***Barkley v. Essex County Prosecutor's Office,*** No. 2012-34 (GRC May 28, 2013)

Custodian's failure to respond in writing to the request within the statutorily mandated seven business days was a "deemed denial" of complainant's OPRA request. The evidence does not indicate that the Custodian's "deemed" denial had a positive element of conscious wrongdoing or was intentional and deliberate. Therefore, the Custodian's "deemed" denial did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. ***Marinaccio v. Borough of Fanwood***, No. 2012-180 (GRC May 28, 2013)

Custodian did not unlawfully deny access to the Complainant's OPRA request. Custodian attempted to reasonably accommodate the Complainant's voluminous OPRA requests, an attempt that substantially disrupted the New Jersey Department of Health &rsquo Senior Services' operations. Parties could not reach a reasonable accommodation without DHSS incurring additional costs to compile all responsive records to complete a privilege log and risking nonpayment for extraordinary time and effort. ***Davis v. New Jersey Department of Health and Human Services***, No. 2012-94, 142 (GRC May 28, 2013)

Custodian certified that the responsive preliminary incident report describes an inmate injury and the

medical action taken; said report is exempt from disclosure because the report relates to medical treatment or evaluation. ***Robinson v. New Jersey Department of Corrections***, No. 2012-129 (GRC May 28, 2013)

Custodian satisfied her burden of proving a lawful denial of access to the responsive GPS records; copies of global positioning system records, to include full reports, of the primary vehicles used by certain staff. GRC found that since the responsive records likely contain information regarding "… security measures and surveillance techniques …" that could create a risk to the officer identified in the request, same are exempt from disclosure under OPRA. ***Fano v. New Jersey Department of Human Services***, No. 2012-148 (GRC May 28, 2013)

GRC determined that, in balancing the Complainant's need to the redacted individual's name against the New Jersey Department of Education's need to keep the information confidential, non-disclosure was favored. The complaint, seeking copies of all documents, complaints or records alleging that the South Plainfield Board of Education President had a conflict of interest in the Sodexo contract, as set forth in an April 17, 2012 OFAC report , was filed by an anonymous person naming the individual as someone possessing evidence to support the complaint. Although it may be true that the Complainant has a right to know the name of his accuser, the accuser that filed the complaint is anonymous. Custodian lawfully denied access to the name of the individual in the New Jersey Department of Education complaint on the basis that disclosure of same would violate the citizen's reasonable expectation of privacy. ***Giannakis v. New Jersey Department of Education***, No. 2012-152 (GRC May 28, 2013)

Although the NJCU Foundation is a 501(c)(3) nonprofit organization, the Foundation was created as an instrumentality of NJCU to support the University's development, and thus is a public agency for the purposes of OPRA. Complainant's OPRA requests, including any and all e-mails, telephone records, memoranda, facsimiles and letters between the NJCU Foundation and the Executive Committee are overly broad because they fail to identify specific government records sought, and are thus invalid under OPRA. ***Dusenberry v. New Jersey City University Foundation***, No. 2012-82 (GRC May 28, 2013)

GRC determined that the Matawan First Aid and Rescue Squad Squad is not a public agency. The Squad was created by and is run by the members of the Squad, with no oversight from the municipality or any other public agency. Thus, the Squad is not required to receive or respond to OPRA requests. ***Fisher v. Matawan First Aid and Rescue Squad***, No. 2012-164 (GRC May 28, 2013)

GRC determined that the Complainant's request for inspection of any and all non-confidential records relating to an ethics complaint filed by the Complainant is invalid under OPRA because it fails to reasonably specify identifiable government records and constitutes an overbroad and unclear request that would require the Custodian to conduct research outside the scope of his duties. ***Reid v. New Jersey Department of Corrections***, No. 2012-248 (GRC May 28, 2013)

Custodian lawfully denied access to the twenty-seven (27) records the Complainant asserts were withheld because the Complainant's OPRA request is overly broad and invalid. Complainant's request fails to identify any government records and rather seeks "every public record" on file with the agency. ***Gettler v. Township of Wantage***, No. 2012-162 (GRC May 28, 2013)

Custodian unlawfully denied access to portions of the 23 pages of records responsive to the Complainant's OPRA request. Custodian must disclose the responsive e-mails with appropriate redactions for information exempt under Executive Order No. 26 (McGreevey, 2002). ***Scheeler v. Township of Mt. Laurel***, No. 2012-83 (GRC May 28, 2013)

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Election Law Enforcement Commission

There are no education related decisions posted for this period.

New Legislation

P.L.2013, c.46. -see **S2082**
The "Opioid Antidote and Overdose Prevention Act."
Pamphlet Law 5 pages Approved 5/2/2013 **PDF Format HTML Format**

P.L.2013, c.47. -see **A893**
Establishes a process for renewal of DOE issued authorization of certified educational facilities manager.
Pamphlet Law 1 pages Approved 5/6/2013 **PDF Format HTML Format**

P.L.2013, c.50. -see **A3080**
Requires health benefits coverage for refills of prescription eye drops under certain conditions.
Pamphlet Law 4 pages Approved 5/6/2013 **PDF Format HTML Format**

P.L.2013, c.52. -see **A3410**
Requires school districts provide pupil directory information to county vocational schools upon request.
Pamphlet Law 1 pages Approved 5/6/2013 **PDF Format HTML Format**

P.L.2013, c.59. -see **S2410**
School bond validating act.
Pamphlet Law 1 pages Approved 5/9/2013 **PDF Format HTML Format**

P.L.2013, c.89. -see **S1918**
Permits local units to enter into joint agreements to purchase fire equipment.
Pamphlet Law 1 pages Approved 8/7/2013 **PDF Format HTML Format**

P.L.2013, c.99. -see **A2431**
Permits person with developmental disability and legal guardian to audio record sessions of interdisciplinary team in which person or guardian participates.
Pamphlet Law 1 pages Approved 8/7/2013 **PDF Format HTML Format**

P.L.2013, c.103. -see **A3357**
Changes pejorative terminology referring to mental capacity of individuals.
Pamphlet Law 72 pages Approved 8/7/2013 **PDF Format HTML Format**

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New Regulation/Executive Orders

N.J.A.C. 6A:11-1.2, 45 N.J.R. 1101(a), May 6, 2013

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United States Supreme Court

There are no education-related decisions posted for March and April at this time.

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3rd Circuit Court of Appeals

Employment Discrimination

Matter remanded back to district court for further fact-finding over whether female basketball referee was discriminated against on the basis of sex when she was not assigned officiating duties at any boys' basketball games. Plaintiff alleged violations of the Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq., Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq., and the New Jersey Law Against Discrimination. ***Covington v. Int'l Ass'n of Approved Basketball Officials*, 710 *F.3d* 114 (3d Cir. 2013)**

Special Education

Third Circuit affirms district court finding plaintiffs' allegation of a purely procedural violation failed to provide standing under IDEA or the Rehabilitation Act, and to the extent plaintiffs alleged a substantive violation, they failed to exhaust their IDEA administrative remedies before bringing their claim in federal court. The IDEA permitted schools to provide special education services in a centralized location. The district court was correct to find plaintiffs lacked standing. Plaintiffs did not dispute they would not have standing under the Rehabilitation Act if they contended they suffered the same harm as they contend they suffered under IDEA. There was no reason to excuse plaintiffs' failure to exhaust the IDEA administrative process, which was designed to address precisely the issue at hand. ***J.T. v. Dumont Pub. Schs*, No. 12-2241(3d Cir. Apr. 26, 2013)**

District Court affirmed that student was entitled to an independent educational evaluation at public expense as a matter of law, once reevaluation by school district was found to be inappropriate, as the assessment tools used did not provide relevant information needed to make a prospective determination of future eligibility for services. ***M. Z. v. Bethlehem Area Sch. Dist*., No. 11-2887 (3d Cir. Mar. 27, 2013)**

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New Jersey District Court

Employment Discrimination

District's motion for summary judgment granted where plaintiff's claims of violation of the New Jersey Law Against Discrimination ("NJLAD"), the First Amendment and New Jersey Constitution and the Conscientious Employee Protection Act ("CEPA"), N.J.S.A. 34:19-2(e). Plaintiff also asserts state law

claims for breach of contract and tortious interference with economic gain and employment. District had legitimate reasons for nonrenewing secretary's contract. ***Goldberg v. Egg Harbor Twp. Sch. Dist., No. 11-1228* (D.N.J. Mar. 28, 2013)**

On the basis of her disability, auditorily-impaired paraprofessional alleged that district failed to renew her contract, failed to accommodate her disability during her subsequent employment in another capacity, retaliated against her for complaining about the lack of accommodation, and did not hire her for another available position. Plaintiff asserts claims against Defendant for allegedly violating the Americans with Disabilities Act, and the New Jersey Law Against Discrimination, *N.J.S.A*. 10:5-1. While Plaintiff may proceed with her ADA-based claims, the statute of limitations has lapsed for the state law claims. ***Golembeski v. Moorestown Twp. Pub. Sch., No*. 11-02784 (D.N.J. Mar. 13, 2013)**

Special Education

Plaintiff's summary judgment motion denied where school board's policy choice to educate special education student in centralized location rather than neighborhood school was permissible under the IDEA. Schools have significant authority to determine the school site for providing IDEA services. The proximity presence or factor is not a presumption that a disabled student attend his or her neighborhood school. Proximity is only one of many factors to be considered in determining a student's placement. No federal appellate court has recognized a right to a neighborhood school assignment under the IDEA. ***J.T. v. Newark Bd. of Educ., No.* 03566 (D.N.J. Apr. 5, 2013)**

Prevailing plaintiff in IDEA matter sought $546,355.53 in fees awarded as prevailing party. Court reduced award to $414,140.85. Fees for experts are not recoverable under the IDEA. District showed that fee should be reduced because of (1) problems inherent in block billing, (2) vagueness of the entries, (3) overstaffing, and (4) overbilling. *D.B. v. Gloucester Twp. Sch. Dist.*, No. 08-5667 (D.N.J. Mar. 28, 2013)

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New Jersey Supreme Court

Labor Relations

Certification denied where a collective bargaining agreement containing lump-sum retroactive adjustments for two years and a prospective salary schedule for two years violated state law on the three-year limitation on the duration of salary schedules. B*d. of Educ. of Ramsey v. Ramsey Teachers Ass'n*, 2013 N.J. LEXIS 503 (N.J. Apr. 29, 2013)

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New Jersey Superior Court, Appellate Division

Charter Schools

Matter remanded to Commissioner for further proceedings where charter schools that would have been impacted by appeal were given no formal notice. State Board of Education position needs to be formalized and confirmed before court can examine validity of regulation, and sparse content of the Commissioner's letter provides none of the reasons for denial of the district's petition that have been crafted on appeal concerning *N.J.A.C.* 6A:23A-22.4(e), a regulation which states that the Commissioner has the discretion to authorize a district to pay a lower per-pupil rate if the charter school spends significantly less than budgeted and has accumulated a sizable surplus. ***Piscataway Twp. Bd. of Educ.***

***v. Cerf,* No. A-3202-11 (App. Div. Apr. 2, 2013)**

Facilities

Actions of the Schools Development Authority and the regulations it has promulgated, are neither arbitrary, capricious or unreasonable. SDA complied with the statutory authority granted to it by the Legislature to determine what types of projects an SDA district could seek to undertake and promulgated regulations establishing the procedures a district is required to follow to achieve that goal. ***Education Law Ctr. v. New Jersey Schs. Dev. Auth*, No. A-4732-11T2 (App. Div. Apr. 29, 2013)**

Labor Relations

In matter where school psychologist and speech therapist initially were receiving additional compensation for bilingual evaluations but then district ceased the additional pay. However, additional duties could not be done during regular work day. School board must negotiate issue of extra pay for extra work. It matters not that the claimed additional work may be covered by the employee's existing job description. Although there may be no change in the kind of duties assigned, at issue is whether there has been a change in the volume of duties without a commensurate increase in pay. ***Atlantic City Bd. of Educ. v. Atlantic City Educ. Ass'n,* No. A-2549-11T1 (App. Div. Apr. 9, 2013)**

Premises Liability

Parent who was picking up her child from school alleged that Board of Education was negligent in removing snow from school property caused her to fall and be injured. Based upon the well-established common law immunity conferred upon public entities in connection with snow removal, no liability accrues to school district. By their very nature, snow-removal activities leave behind "dangerous conditions." No matter how effective an entity's snow-removal activities may be, a multitude of claims could be filed after every snowstorm. No other governmental function that would expose public entities to more litigation if this immunity were to be abrogated. ***Holub v. Livingston Bd. of Educ.*, No. A-2928-11T2 (App. Div. Mar. 18, 2013)**

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New Jersey Superior Court, Law/Chancery Division

There are no education-related decisions posted for March and April at this time.

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Commissioner of Education

Bullying

Commissioner determined that board of education acted properly when it found that incidents between two swim team members at swim team competitions, swim team parties and events and online did not constitute HIB as defined by the Anti-Bullying Bill of Rights Act and applicable board policy. Disagreement reflected a dispute between the girls regarding their respective roles on the swim team and was more of a personal vendetta; no acts of HIB as defined in the law occurred. Board responded to all complaints in a timely manner, seriously evaluated the merits of petitioner's concerns and took extraordinary measures to address the disagreement. ***L.B.T. o/b/o K.T.*, Commr 2013: March 7**.

Board of education found that shoving a crumbled piece of paper down another student's sweatshirt

was designed to antagonize the victim, disturbing the educational environment. ALJ and Commissioner overturned the board's decision. No distinguishing characteristics found. Matter was part of an ongoing unresolved conflict between two students. Element of "mutually" involved. Relied on DOE Guidelines document. ***J.A.H. o/b/o C.H.*** **Commr 2013: April25**

Conflict of Interest

Board member not disqualified from board membership under *N.J.S.A.* 18A:12-2 by virtue of receiving unemployment benefits as a result of her former employment as a student aide in the school district. ***Masciocchi,*** **Commr, 2013: April 11**

Executive County Superintendent

Challenge to Executive County Superintendent's rejection of shared school business administrator employment contract deemed moot. ECS had rejected contract as salary was higher than comparable shared positions in the county. Proposed shared person had been appointed to superintendent of schools position, pending ECS contract approval, making original challenge moot. ***Franklin Township,*** **Commr 2013: March 19**

Increment Withholding

Board of education's withholding of security guard's 2011-2012 salary increment was arbitrary, capricious and unreasonable. Withholding was based on board's inconsistent, confusing, and inaccurate evaluation forms that combined performance evaluations for the 2009-2010 school year and prior years, but did not include an addendum for the 2010-2011 school year or provide information on petitioner's work performance during the 2010-2011 evaluation period. Salary increment ordered restored. ***Shuler,*** **Commr 2013: March 19**

Indemnification

Board member, who was improperly subject to school board censure regarding alleged conduct under the Code of Ethics for School Board Members, entitled to indemnification of legal fees in the amount of $107,475.00 plus $202.67 in expenses. No evidence that $250/hour rate was unreasonable. ***Castriotta*****, Commr 2013: March 21**

Jurisdiction

Commissioner lacks subject matter jurisdiction to adjudicate alleged violation of the Code of Ethics for School Board Members. Exclusive jurisdiction lies in the School Ethics Commission. Allegation was that board of education failed to honor petitioner's request for anonymity after he contacted the Board to advise that two students from the same family were non-resident school attendees. Reimbursement of $ 4,387.65 in legal fees for municipal court defense and formal apology sought. ***Taylor*****, Commr 2013: March 19**

Non-renewal

Non-renewal of non-tenured school business administrator upheld; board did not act in an arbitrary, capricious or unreasonable manner. To the extent that a dispute exists regarding the Standard Residency Agreement, that is a contract between the parties and is not under the purview of school law. Any contractual violation should be addressed in another forum. ***Jones*****, Commr 2013: April 11**

Reduction in Force

Vice principal, who received standard certification – principal on August 2010 with a retroactive date of September 2009, was eligible for tenure as a vice principal in June 2010 and should have been treated no differently than other vice principals at the end of the 2009-2010 school year when a RIF of vice principals occurred. At time of the RIF vice principal only possessed a provisional certificate.

Commissioner ordered that petitioner be reinstated to the position of vice principal and be paid the difference between her teacher's salary and vice principal's salary retroactive to June 2010. See also Francisco, Commissioner 2012: September 14. ***Francisco,* Commr 2013: April 17**

Board of education had legal authority to eliminate position of certified school nurse for reasons of economy and enter into a shared services agreement with another school district. Petitioner's tenure and seniority rights were not violated by the RIF. ***Prezioso,* Commr 2013: April 26**

Residency

Board of Education's determination to discontinue the funding of student's educational services must be overturned. Student was placed in a group home by the Division of Developmental Disabilities (DDD) in 2010, at which time the Department of Education determined the board of education was the student's district of residence for school funding purposes. Any change in such designation can only be accomplished by a redetermination of district of residence on appeal. The board of education remains the district of residence responsible for the funding of the student's educational services unless and until such designation is altered through the utilization of the appropriate methodology. ***R.L. o/b/o K.O.L.,* Commr 2013: March 4**

Student deemed ineligible to receive a free public education in the school district. Student alleged that mother's home was damaged by Hurricane Irene, causing her to move in with sister, enabling her to complete her senior year. Parent deemed liable for tuition from April through June 2011. ($3559.20) Parent and sister deemed liable for tuition for all of 2011-2012 school year. ($11,864) No specific time frame for payment ordered. ***C.B. o/b/o S.H.,* Commr 2013:March 7**

Student deemed not resident in the school district for the 2011-2012 school year. Tuition assessed in the amount of $ 5,255.48, representing seventy-four days of ineligible attendance at the daily rate of $ 71.02. Parent failed to appear at OAL hearing. ***A.H. o/b/o N.H.,* Commr 2013: March 19**

Board of education properly determined that student was non-resident and ineligible to attend school in the district. Board was neither arbitrary nor capricious in declining request to attend as non-resident tuition student; student did not meet any of the criteria. Board entitled to tuition reimbursement for the 2011-2012 and 2012-2013 school years; fairness and time considerations dictate that student be allowed to finish her senior year. Parent ordered to pay, by July 1, 2013 – tuition in the amount of $32,393 for ineligible attendance during the 2011-2012 and 2012-2013 school years, with student being allowed to finish her senior year. ***J.G. o/b/o S.G.,* Commr 2013: April 3.**

State Board of Examiners

Commissioner overturns State Board of Examiners decision to suspend certificates of tenured school nurse. Given the fact that the ALJ determined that the school nurse's conduct never rose to the level of unbecoming conduct and the fact that the State Board of Examiners never sustained any of its charges, the suspension of the school nurse's certificates cannot be justified. ***Lentine,* Commissioner 2013: April 16**

Student Discipline

Emergent relief denied for parent who challenged board suspension of student from Senior Class Trip and for up to three athletic contests for alleged off campus conduct; specifically participation in underage drinking party at private home which resulted in various alcohol and drug-related charges against the 36 Delran students at the party. Matter remanded to OAL for development of factual record and a determination as to whether the board decision to impose discipline with regard to the off-campus incident was arbitrary capricious or unreasonable. Questions of fact include whether student attended the party and drank alcohol while under the legal age, "tweeted" anything about the party or created a disruption at school. ***M.A. and L.A. o/b/o M.A. (Delran)* Commissioner 2013: March 7**

Tenure Dismissal

Charges of conduct unbecoming and other just cause were proven against tenured principal for violations of school district policies, regulations and procedures. Principal violated district policy by improperly requesting and allowing monies to be taken out in cash to pay security guards, mishandled proceeds from the school play by failing to properly account for them and keep them in a safe, improperly transferred funds from the yearbook account to pay for baseball championship rings, improperly failed to report missing funds from football game proceeds and then covered up the shortage, violated policy by conducting rapid dismissal fire drills instead of traditional fire drills, failed to conduct the appropriate number of statutorily required monthly fire drills, allowed pizza sales to take place during a rapid dismissal fire drill, and allowed staff to remain in the building during another rapid dismissal fire drill, in violation of district policy. ***Simon,* Commissioner 2013: March 7**

Charges of conduct unbecoming proven against tenured special education teacher for inappropriate language and conduct directed toward her 2011-2012 fifth grade resource room special needs students. She told her rowdy special needs students that their behavior was “stupid” and that they were “acting like monkeys”; uttered profanities in the classroom on various occasions; grabbed the shirt of a student and hit him; forced a pupil back to his seat by grabbing his shirt or arm, grabbed a rubber band from another student, causing it to snap back and inflict pain; telling the student after the rubber band incident that she “deserved it”; and told a fellow staff member that she was “going to flatten” two of her students. Teachers are required to exercise a high degree of self-restraint and controlled behavior as they are entrusted with the custody and care of children; respondent in this matter failed to uphold implicit standards of good behavior. Teacher was dismissed from her tenured position. ***Watson,* Commissioner 2013: March 13**

Tenured teacher failed to fulfill the requirements of a disciplinary sanction imposed by the Commissioner in an August 2010 decision. Teacher’s unprofessional conduct, while proven, did not rise to the level of tenure dismissal. (120 days’ salary, salary increment withheld, completion of coursework in pedagogy which addressed inappropriate behavior and classroom demeanor) Classwork not completed in a timely manner and when completed, final grade was “F”. ALJ recommended giving teacher one last opportunity to enroll in and pass an appropriate course. Commissioner disagreed, finding that teacher’s “astoundingly casual approach” to her coursework requirements, when considered in light of her previous behavior, required that she be dismissed from her tenured position. ***Geurds,* Commissioner 2013: March 27**

Charges of incapacity, neglect of duty and abandonment of position proven by board of education in matter of tenured teacher. Due to an injury incurred at school, teacher was absent for 124 days during the 2007-08, 2008-2009 and 2009-2010 school years; as a result of a second in-school injury teacher was absent for 60 days in the 2010-2011 school year; was unable to work for the entire 2011-2012 school year; and has not resumed her duties in the 2012-2013 school year. Board is encouraged to consider, if appropriate, filing an application for ordinary disability retirement for the teacher. ***Biricik,* Commissioner 2013: April 16**

Charges of unbecoming conduct proven by the board of education against tenured social worker who had sex with a minor student and attempted to stop the victim from speaking to the police once the social worker became aware of the investigation. Social worker dismissed from her tenured employment. ***Johnson,* Commissioner 2013: April 16**

Charges of incapacity, unbecoming conduct, and neglect of duty based on chronic and excessive absenteeism and tardiness proven by board of education against tenured teacher. Teacher has been absent from his duties nearly 123 days and tardy 37 times during the course of his six year employment with the District, 46 days in the first four months of the 2012-2013 school year alone, which has caused an adverse impact on the continuity of the educational process for District students. Neither teacher nor his attorney filed an answer, allowing the charges to be deemed admitted. Teacher was dismissed from his tenured employment. ***Mays,* Commissioner 2013: April 18**

Charges of seventeen counts of conduct unbecoming and insubordination proven by board of education against tenured teacher. Charges detailed inappropriate behavior that included urinating in a garbage can in his classroom; urinating in a plastic urinal in the classroom and having students empty the urinal; inappropriate conduct with students, including unauthorized emails and telephone calls to students' homes; driving students home; having students run personal errands for him and failure to follow proper procedures during fire drills. Respondent denied the charges, contended that he is physically handicapped and wheelchair-bound, asserted that necessary accommodations for his handicap were refused by the school administration. The commissioner determined that regardless of the difficulties that the respondent may have faced because of his health issues, urinating in the classroom is never an appropriate solution. ***Tuitt,* Commissioner 2013: April 18**

Transportation

Six month suspension of school bus driver's school bus S endorsement on her driver's license for leaving a student on the bus after the completion of her route upheld. Bus driver failed to appear at OAL hearing and gave no explanation for her nonappearance. Challenge to suspension dismissed. ***Bridgeman,* Commissioner 2013: March 22**

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Arbitrator TEACHNJ Decisions

Arbitrator found teacher/track coach guilty of unbecoming conduct; accessing pornography on district issued laptop computer, communicating with current female track athletes using obscene and inappropriately suggestive language, making and engaging in inappropriate comments to female students and using profanity with students while they were under his supervision as a track coach. Teacher/coach dismissed from tenured employment. ***Tenure Hearing of Nicholas Brown,* Arb 2013: April 13 (Bridgeton) (Restaino, arbitrator)**

Arbitrator found teacher guilty as charged of conduct unbecoming. Teacher had repeated confrontations with his female students in which he used vulgar language. Teacher received fifteen written warnings from his supervisors involving his failure to meet his professional responsibilities, insubordination and unbecoming conduct. Eight of ten charges involved allegations of HIB against students and violation of school district's HIB policies. **In the Tenure *Hearing of Jose DaCosta*, Arb 2013: April 1(Newark) (Weiss, arbitrator)**

Arbitrator found teacher guilty of unbecoming conduct and dismissed teacher where teacher breached NJASK protocols, discussed and disclosed information about secure test items to students before the 2010 and 2011 NJASK tests, provided feedback, including hints regarding correctness of answers, and influenced students' answers during the tests. "Even if [he] acted purely to protect his students, there is a profound difference between giving a student a push in the right direction and riding the bicycle for him," **T*enure Hearing of Radzik*, Arb 2013: April 17 (Woodbridge) (Licata, arbitrator)**

Arbitrator determined that school district did not prove charges of unbecoming conduct filed against special education teacher. Teacher was accused of being verbally and physically abusive of students, with one allegation that she punched a student in the chest. After reviewing the security video, the arbitrator found the testimony of several witnesses to be inconsistent with the video. The teacher may have pushed the student and screamed in a threatening manner, but the incident did not rise to hitting or striking the student. It was isolated incident in 22 years as a teacher, with no other blemishes on her record. Dismissal not warranted, 120-day unpaid suspension issued. ***Tenure Hearing of Hancock*, Arb 2013: April 10 (Bridgeton) (Brown, arbitrator)**

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School Ethics Commission

Advisory Opinion: School board member, whose son is a custodial employee, may participate in negotiations for administrators unless some relationship exists that links the administrators' contract to the custodians' contract, providing a benefit, advantage, profit or gain to the son. Her son is a member of NJEA, but no one in the Administrators' Bargaining Unit is his immediate supervisor; his immediate supervisor (Building and Grounds Supervisor) is neither in the administrators' unit nor represented by it. Neither the Superintendent nor BA are represented by the Administrators' Bargaining Unit. ***A14-12*** (July 26, 2012)

SEC finds that the complaint set forth no facts to support a conclusion that board members acted beyond the scope of their duties or that they surrendered their "independent judgment" so as to violate *N.J.S.A*. 18A:12-24.1(c) and (f) when they served on an *ad hoc* committee which proposed that the district build a new playground and basketball courts and then cast the deciding votes in support of the same committee's final ground-building proposal. Nor was it a violation for them not to obtain input from residents prior to their vote. Nor did board member surrender his independent judgment by serving both as a member of the Spring Lake Board of Education and as a trustee of the Spring Lake Education Foundation which donated funds to build the district's playground and basketball courts, where in fact the board member was not the trustee of the foundation but rather the board liaison. ***Close v. Panzini, et al*., SEC 2012: Sept 25. (Spring Lake)**

SEC finds that board member, who is also a science teacher in another district and member of NJEA, did not participate in closed session discussions concerning contract negotiations between the Board and the local bargaining unit, contrary to allegations that he was present; board minutes may have been deficient but BA affidavit and other proofs lead SEC to find no probable cause. ***Bleistine v. McShea*, SEC 2012:Dec 18 (South Harrison)**

SEC finds no probable cause that the Board President violated *N.J.S.A*. 18A:12-24.1(d), (c) and (f); no indication that she took action beyond the scope of her authority, failed to confine her Board actions to policymaking, planning, and appraisal, or surrendered her independent judgment, when she voted against a project to restructure the playground and basketball courts, or by her comments during the discussion of the plan for the approved project, or that before the actual vote on the plan, gave a direct order to school personnel or involved herself in the day-to-day operations of the schools. Rather, it appeared that she accepted the Board's approval of the project and undertook the duties of her position to see that the plan was developed as designed. ***Clark v. Hansen*, SEC 2012:Dec 18 (Spring Lake)**

School Ethics Act did not have jurisdiction over complaint alleging that board did not vet superintendent properly when hiring him and that his resume is rife with falsehoods; the SEA does not empower the SEC to supplant the decisions of duly elected or appointed local board members when they are acting in their capacities as board members. Allegation that Board has acted in a manner that is arbitrary and capricious, or otherwise contrary to law or regulation, must be brought before the Commissioner of Education. **Goldstein v. Lent, et al., SEC 2013:Jan 22 (Northern Valley Reg)**

SEC finds no probable cause to find ethics violation, where board member participated in a vote to place a staff member on administrative leave and not to renew her contract. The Commission determines that the complainant has failed to show that the respondent intended to do any more than to share information about the loss of services in the community and point out the impact that loss would have on the families in the district. ***Caffrey v. Rodriquez*, SEC 2013:March 19 (Perth Amboy)**

Parties submitted Agreement and Mutual Release with the intent to settle and resolve all issues in ethics complaint. Complaint is dismissed according to terms of agreement. (Decision does not detail the

ethics charges.) ***Chmielewski v. Fracasso*, SEC 2013: March 19(Hackettstown).**

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State Board of Examiners

Holder of Teacher of Mathematics Certificate of Eligibility, issued in December 1992, and a Teacher of Mathematics certificate, issued in April 1994, voluntarily relinquished his certificates with the force and effect of a revocation. ***IMO Certificates of Capparelli*, Exam 2013: April 12.**

Examiners orders revocation of Teacher of Elementary School Certificate of Eligibility and Teacher of the Handicapped Certificate, of teacher against whom tenure charges had been settled. Teacher used school computer for accessing and enrolling in adult dating websites, taking a pornographic picture of himself and putting it on his school computer, placing inappropriate photographs of himself and others in a partially naked state on his school computer and intentionally giving false and misleading information to district authorities when they were investigating the inappropriate material. His combat military service and overcoming his own learning disabilities to become a special needs teacher, were not sufficient mitigation against the inappropriate conduct. ***IMO Certificates of Daggett*, Exam 2013:April 12.**

Examiners orders one year suspension of Teacher of Spanish Certificate of Eligibility where teacher was accepted into a Pretrial Intervention program (PTI) with a resulting dismissal of his indictment upon its successful completion, after having been arrested for Eluding, DWI and Resisting Arrest. ***IMO Certificate of Guzman**,* Exam 2013:April 12.

Examiners orders revocation of New Jersey teaching certificates based on his conduct and revocation of his New York certificates by the Professional Practices Subcommittee of the State Professional Standards and Practices Board for Teaching; New York certificate had been revoked after findings that while giving a student a ride home in his vehicle, Landa put his hands on the student's face, touched her hair and moved it from her face, and kissed her hand and her arm. ***IMO Certificates of Landa*, Exam 2013:April 12.**

Examiners orders revocation of Teacher of Mathematics Certificate of Eligibility and Teacher of Mathematics certificate where teacher pled guilty to Official Misconduct and as part of his sentence, he was ordered to forfeit his public employment and agreed to relinquish his certificates with the force and effect of a revocation. **I*MO Certificates of Logandro*, Exam 2013: April 12.**

Examiners orders revocation of Teacher of Health and Physical Education Certificate of Eligibility With Advanced Standing, and a Teacher of Health and Physical Education certificate where teacher pled guilty to Hindering Prosecution and as part of his sentence, he was ordered to forfeit his teaching certificates. ***IMO Certificates of Martinelli, Exam 2013:April 12.***

Examiners orders revocation of Substitute Credential where individual convicted of Sexual Assault agreed to relinquish his credential with the force and effect of a revocation. ***IMO Certificates of Wea, Exam 2013:April 12.***

Examiners orders 3-year suspension of teacher's certificates, Teacher of English Certificate of Eligibility with Advanced Standing and Teacher of English certificate, where he continued to teach after his 1-year suspension in 2003. ***IMO Certificates of Wunsch, Exam 2013:April 12***

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New Jersey Council on Local Mandates

There are no education-related decisions posted for March and April at this time.

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New Jersey Division on Civil Rights

There are no education related decisions posted for March and April at this time.

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Election Law Enforcement Commission

There are no education related decisions posted for January and February at this time.

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Government Records Council

County violated the Act when Custodian failed to provide date certain upon which it would respond to request for electronic copies (via e-mail) of all cell phone call detail reports for County; however, the Custodian's redactions of the public employee cell phone bills, which redactions were only of the incoming and outgoing telephone numbers except for those calls to the Complainant's residence, are consistent with previous GRC and court decisions on similar records, thus, the Custodian lawfully redacted same as per *Livecchia v. Borough of Mt. Arlington*, 421 *N.J.Super*. 24, 19 (App. Div. 2011), which held that "… the privacy interest attached to government telephone records, which protects the person called and his or her telephone number, does not similarly cloak the destination location of calls placed by government employees when necessary to advance the watchful eye of a vigilant public seeking accountability of its municipal representatives." ***Papiez v. Mercer Cty***. No. 2012-52(GRC April 30, 2013).

Custodian violated Act by failing to provide cover page of compliance manual***. Carter v. Franklin*** *Fire Dist*., No.2011-319(GRC April 30, 2013)

OSHA reports were not immediate access reports; however, the Custodian's response was insufficient pursuant to N.J.S.A. 47:1A-5(i) because she failed to provide a date certain on which she would respond. ***Papiez v. Mercer County***, 2012-59 (GRC March 22, 2013).

Request for listings of "… positions filled, being filled, [etc.]" for DOT and Public Works from June 10, 2006 and February 14, 2012" ; custodian responded by providing current employees lists and noting that the County did not maintain lists of changes or openings. The evidence of record supports that the Custodian provided all responsive records and that no other records exist. GRC declines to determine that lists of jobs are "immediate access" records because said records are not specifically identified under OPRA as such. ***Papiez v. Mercer County***, No. 2012-56 (GRC March 22, 2013) .

Where requestor sought access to vacancy announcements for the position of "Superintendent, Veteran's Haven" and the Custodian conducted a reasonable search for the requested records based on the information provided in the Complainant's OPRA request, he did not unlawfully deny access to

the May 2005 vacancy announcement for "Principal Staff Officer 1 (Superintendent, Veterans Haven.)" Therefore, the Custodian did not knowingly and willfully deny access or unreasonably deny access under the totality of the circumstances. ***Serdiuk v. NJ Div Military &Veterans Affairs,***No. 2012-27 (GRC March 22, 2013).

Request for an entire personnel file fails to identify specific government records sought and constitutes a broad and unclear request. ***Boslet v. Greenwich Township***, No. 2012-29 (GRC March 22, 2013).

Where valid OPRA request was made through email, and Custodian counsel's response was inadequate because it failed to provide any specific legal basis for the redactions made to the requested meeting minutes, and the Custodian failed to comply with the terms of the Council's March 22, 2013 Interim Order requiring that the custodian provide the legal basis for redactions, the Board of Education's current OPRA request form, and the resolutions that authorized the Board of Education executive session minutes; and given possibility that the Custodian's actions were intentional and deliberate, and not merely negligent, complaint is referred to the Office of Administrative Law for determination of whether the custodian knowingly and willfully violated OPRA and unreasonably denied access under the totality of the circumstances, and amount of reasonable attorney's fees due complainant as prevailing party. ***Schmidt v. Salem City Board of Education***, No. 2012-14 (GRC April 30, 2013).

Custodian lawfully denied access to the OPRA request for the following reasons: the Custodian properly notified the Complainant that the Civil Service Commission does not maintain the requested proof of veteran status or proof of disability; remainder of the request was invalid because it failed to identify any specific government records but asks for "all information related to" a named candidate for employment. Custodian properly sought clarification of the invalid request; and when Complainant failed to provide adequate clarification the Custodian reiterated request; once Complainant clarified that request was for an employment application; the Custodian correctly denied access to pursuant to Executive Order No. 26, which states that only *resumes* of successful candidates shall be disclosed once that candidate is hired, but makes no mention of employment applications being disclosed after the completion of the recruitment search. ***Michael Deutsch v. N.J. Civil Service***, No. 2011-361 (GRC March 22, 2013).

Requested individual employee health benefit information was exempt from disclosure pursuant to the Privacy Rule of HIPAA and *N.J.A.C.*17:9-1.2, and *N.J.S.A*. 47:1A-9; however, the sum total amount of money the Board spends to provide its employees with health benefits is not exempt from disclosure. Disclosure by Custodian of a copy of the Township's budget, which shows the amount the Township spends on health benefits and the amount the Township spends on life insurance plans as directed in the Council's Order and submitted to the GRC, certified confirmation of compliance, the Custodian complied in a timely manner with the Council's February 26, 2013 Interim Order. (Matter dismissed; complaint withdrawn) ***Schilling v. Little Egg Harbor Twp***, No. 2011-294 (GRC April 30, 2013).

Where custodian requested an extension of time to respond to records request but failed to provide a date certain upon which the requested records would be provided, the Council held that the custodian's request for an extension of time was inadequate under OPRA pursuant to*N.J.S.A*. 47:1A-5(i). Council orders Custodian to allow Complainant to inspect the responsive logbook and provide her with the estimated cost to receive copies of the logbook for 2010 through 2012, pursuant to a listed time frame. Also enters order with respect to other responsive records with appropriate redactions. ***Papiez v. Mercer***, No. 2012-55 (GRC March 22, 2013).

Council finds that Custodian failed to make any arguments against the Complainant's Denial of Access Complaint and instead attached irrelevant correspondence; based on the inadequate evidence in this matter the GRC is unable to determine whether the Custodian unlawfully denied access to the requested records, and refers the matter to the OAL. (Request had been for all e-mails or inter-office documents sent to and from all parties, in regard to matter concerning James Whelan or Jim Whelan, all memoranda and e-mails involving discussions about the Complainant; details of any conversation

between the Custodian and Custodian's Counsel regarding the Complainant; any records provided by Custodian's Counsel as to why James Whelan failed to follow election requirements regarding filing papers; James Whelan and Jim Whelan's voting record, signature and voter card, electronic copy of the policy and procedures rules and regulations manual; State and federal statutes regarding what signature on an oath must be notarized; any documentation in which Custodian's Counsel stated that James Whelan could use the name of Jim Whelan on an Oath of Acceptance and what law supports this decision; what steps were taken in the Complainant's complaint with the Division regarding the forgery and the fraudulent signature submitted to the Division pertaining to Jim Whelan; and whether altering an Oath of Acceptance fraud.) ***Roundtree v. Division of Election,*** No. 2011-266 (GRC March 22, 2013).

Custodian was ordered to provide requested 2010 Exit Conference Report with Exhibit 1 redacted because Exhibit 1 of the report, "Exit Conference Summary of Audit Findings," contains inter-agency or intra-agency advisory, consultative, or deliberative material exempt from disclosure pursuant to *N.J.S.A*. 47: 1A-1.1. ***Maschke v.Winslow Township Fire District #1***, No. 2011-261 (GRC March 22, 2013).

Although Custodian timely responded to request for multiple records stating that the Township needed an additional two (2) weeks to prepare a response, he did not meet that 2- week deadline when he later notified the requestor that the Township needed a second extension of time and thus failed to respond within the extended time period and thus the Complainant's OPRA request is "deemed" denied. Further, Custodian unlawfully denied access to the 26 pages of records that the Complainant identified during his inspection of the responsive records because he failed to provide same to the Complainant via e-mail as requested. ***Kohn v. Livingston Twp***, 2011-342 (GRC March 22, 2013).

Council ordered Custodian to convert and provide the requested CD of open session meeting within five (5) business days from receipt of the Council's Interim Order with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction, and simultaneously provide certified confirmation of compliance to the Executive Director. Request had been for Inspection of the audio recording of the Township of Livingston ("Township") open session meeting dated August 1, 2011; and November 28, 2011 OPRA request: Copy of the audio recording of the Township's open session meeting dated August 1, 2011 in CD audio format. The Complainant had acknowledged that the Township suffered from a storm but alleged that many of the OPRA-related issues found within have been consistent since before the storm and have continued since. ***Kohn v. Livingston***, No. 2011-344 (GRC March 22, 2013).

Request for copies via U.S. mail of 1) student records; 2) hearing records from a board meeting concerning J.W.; and 3) discipline records, and subsequent request for : Inspection of 1) student records; 2) hearing records from a board meeting concerning J.W.; 3) discipline records; and 4) test results. Although Custodian failed to respond timely when she responded in 12 days rather than 7 business days, she bore her burden of showing that all responsive records were subsequently provided; Custodian certifies that she disclosed 85 records ranging from progress reports and grades to disciplinary and medical records; there was no evidence of "hidden" records as alleged by requestor; no willful violation. ***Watson v. Washington Township Public Schools,*** No. 2012-33 (GRC March 22, 2013).

The Custodian's failure to respond to the Complainant's OPRA request for emails resulted in a"deemed" denial; Custodian failed to bear her burden of proving a lawful denial of access. However, current Custodian timely complied with the Council's Order. Additionally, the evidence does not indicate that the Custodian's violations were intentional and deliberate. Complainant is a prevailing party entitled to an award of a reasonable attorney's fee; complaint should be referred to the OAL; enhancement of the lodestar fee is not appropriate. ***Carter v. Franklin Fire Dist****, No. 2011-234(GRC March 22, 2013).*

Request was for current suits involving Orange and West Orange, and a list of law suits involving Orange; due to the complexities of the matter and the lack of sufficient evidence in the record, the GRC refers this matter to OAL to determine whether there has been an unlawful denial of access and whether

an attorney who asks to intervene is entitled to intervene on behalf of Complainant where he, while not representing the complainant in this matter, claims an interest in this matter and in "transparency" as he has been the plaintiff or plaintiff's counsel in eight other prerogative writ actions against the City; city objects and notes that the attorney's claims are without merit, as three of them have already been dismissed by Judge Coleman and Judge Kennedy and affirmed by the Appellate Courts. ***Gordon v. Orange***, Nos. 2011-336 and 2011-337 (GRC March 22, 2013).

Request for reconsideration is granted because the Complainant has established that GRC's decision that the Complainant's request was overly broad and would require the Custodian to conduct research, was based on a palpably incorrect basis, as it relied heavily on *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control*, 375 *N.J. Super*. 534 (App. Div. 2005) which is called into question by the Appellate Division's recent decision of *Burke v. Brandes*, No. A3051-11T3 (App. Div. December 7, 2012). ***Loigman v. Ocean County Prosecutor's Office,*** No.2011-197 (GRC March 22, 2013).

Although Custodian's failure to respond in writing to the request within the statutorily mandated seven business days was a "deemed" denial of access; however, Custodian bore burden of proving that the responsive daily shift schedules were exempt from disclosure as "… emergency or security information … for any buildings or facility which, if disclosed, would jeopardize security of the building or facility or persons therein. " However, delay in providing access to other documents was reasonable to ensure that the appropriate copying costs were remitted. ***Durham v. Dept. of Corrections,*** No. 2012-35 (GRC March 22, 2013).

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Election Law Enforcement Commission

There are no education related decisions posted for March/ April at this time.

New Legislation

P.L.2013, c.28. -see **A720**
Requires direct deposit for all State employee compensation on and after July 1, 2014; allows county, county college, municipality, and local school district to opt for mandatory direct deposit for all employee compensation on or after July 1, 2014.*** Pamphlet Law 3 pages Approved 3/12/2013 **PDF Format HTML Format**

P.L.2013, c.31. -see **S600**
Establishes task force to study various issues related to improving special education programs and services for public school students. Pamphlet Law 2 pages Approved 3/12/2013 **PDF Format HTML Format**

P.L.2013, c.33. -see **S1327**
Requires schools that participate in Statewide interscholastic sports programs to annually inform student-athletes about National Collegiate Athletic Association eligibility standards for participation in collegiate athletics. Pamphlet Law 1 pages Approved 3/12/2013 **PDF Format HTML Format**

P.L.2013, c.35. -see **S1783**
Prohibits manufacture, sale, or possession of synthetic marijuana. Pamphlet Law 6 pages Approved 3/12/2013 **PDF Format HTML Format**

P.L.2013, c.44. -see **S2057**
"The Anti-Big Brother Act." Pamphlet Law 1 pages Approved 4/15/2013 **PDF Format HTML Format**

P.L.2013, c.45. -see **S2366**
"New Jersey Supplemental Nutrition Assistance Program Employment and Training Provider Demonstration Project Act." Pamphlet Law 9 pages Approved 4/15/2013 **PDF Format HTML Format**

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New Administrative Code/Executive Orders

N.J.A.C. 6A:10 Educator Effectiveness Evaluation System, adopted February 7, 2013, effective March 4, 2013.

N.J.A.C. 19:36 Readoption with Amendments: Procedures for Procurement of Design Build Contracts for School Facilities Projects for the Schools Construction Program March 4, 2013, Readoption; April 1, 2013, Amendments, Repeals, and New Rules.

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United States Supreme Court

There are no education-related decisions posted for January and February at this time.

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3rd Circuit Court of Appeals

Discrimination/Equal Protection

Third Circuit Court affirmed the District Court's grant of summary judgment in favor of defendants, school district, principal, superintendent, and athletic director, in matter by tenured teacher who was former cheerleading coach alleging hostile work environment and retaliation under Title VII and the New Jersey Law Against Discrimination (NJLAD), and retaliation under the First Amendment; she could not show intentional discrimination regarding the hiring of an untenured teacher instead of her as the affirmative-action officer as tenure status was not a stated job qualification, and the other teacher was well liked, and the principal's revocation of a promise to re-hire her for the coaching job did not show intent. Title VII and NJLAD retaliation claims failed because she was denied the affirmative-action officer job before she participated in the protected activities, and the school had repeatedly rejected her previous coaching applications before she spoke at the board meeting. The First Amendment retaliation claim also failed. ***White v. Cleary,*** 2013 U.S. App. LEXIS 2552 (Feb. 6, 2013, 3d Cir) (not precedential) (Monmouth Regional)

Pennsylvania public school district does not violate the Constitution when it sets teacher salaries based, in part, on prior in-state teaching experience. Third Circuit affirms district court's ruling; district's failure to fully credit teacher's out-of-state teaching experience did not violate his right to interstate travel under the Privileges and Immunities Clause or deny him equal protection of the law. The district's classification was based on the location of teaching experience, not duration of residency such that teacher was treated no differently than lifelong residents of the state and strict scrutiny did not apply. The district's experience-based salary classification was sufficiently tied to the legitimate state purpose of promoting an efficient and effective public school system to pass the rational basis test.***Connelly v. Steel Valley Sch. Dist***., 2013 U.S. App. LEXIS 1882 (3d. Cir. Jan 24, 2013) (precedential)

Parent who was barred from attending district's home game lost appeal of district court's denial of injunction; 1983 suit against Pa. school district alleged various constitutional violations arising from the district's operation of a basketball program, where parent sent a number of emails to coaches complaining about alleged favoritism toward white players, and where principal informed the parent that his emails violated the district's parent/spectator guidelines and barred the parent from attending the next home game. The guidelines did not prohibit criticism, but regulated the time, place, and manner in which such concerns were expressed. Circuit Court affirms district court's judgment. ***Blasi v. Pen Argyl Area Sch. Dist***., 2013 U.S. App. LEXIS 2095 (Jan 30, 2013, 3rd Cir) (not precedential)

Public Records

Procedural dictates at issue required court to vacate the sanction award against student's attorney and remand to the District Court, in matter arising out of an OPRA request for documents identifying various

school district staff with Electronic Violence and Vandalism Reporting System (EVVRS) responsibilities and training. ***Or v. Hutner***, 2013 U.S. App. LEXIS 2760 (3rd Cir Feb 8, 2013)(not precedential)

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New Jersey District Court

Retaliation

After sole federal claim (FMLA) was dismissed, court finds lack of subject matter jurisdiction over state claims, and grants plaintiff special education teacher's motion to remand matter to Superior Court; teacher working for health care network alleged that Defendants took retaliatory actions against her because of her union activities, and her disability for depression and anxiety. ***Moran v. Northwest Essex Cmty. Healthcare Network*, 2013 U.S. Dist. LEXIS 23480** (D.N.J. February 20, 2013) (not for publication).

Special Education

In this IDEA matter, by way of a summary judgment motion, Plaintiff D.F. appeals the ALJ's dismissal of his due process petition due to insufficient factual pleading. Court denies renewed motion for summary judgment where plaintiff sought to include on remand an allegation of improper restraint of the student, an issue raised by an earlier due process petition for which inclusion had been denied by the ALJ; orders that remand will not include question of improper restraint, as complaint fails to allege related facts related such as the nature of restraints, perpetrator or restraints, the circumstances, and whether the IEP authorizes reasonable restraints if and when the student engages in behaviors which may be dangerous to self and/or others. ***D.F. v. Collingswood Pub. Schs,*** 2013 U.S. Dist. LEXIS 2624 (D.N.J. Jan 8, 2013)

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New Jersey Supreme Court

Civil Service

Civil Service Act's vacation leave provisions apply to a career service, non-teaching staff employee who works on a full-time ten-month basis for a school district that opted to be part of the civil service system; however, the CNA provides her with more than that minimum amount guaranteed by statute, even assuming that legal holidays are not included in the calculation. ***Headen v. Jersey City Bd. of Educ.***, __*N.J.* ___(2013), 2013 N.J. LEXIS 10 (Decided November 15, 2012, revised January 11, 2013)

Criminal

In criminal matter involving allegations that former school librarian committed aggravated sexual assault on a special education student in the school bathroom, sought post-conviction-relief, alleging ineffective assistance of counsel, prosecutorial misconduct, and newly discovered evidence. Court held that evidence that the purported victim was assigned an aide who accompanied him throughout the day at school constituted newly discovered evidence that likely would have changed the outcome of the trial if it had been presented to the jury; a new trial was warranted on all charges. *State v. Nash*, 212 N.J. 518 (2013) 2013 N.J. LEXIS 79 (January 22, 2013)

Student Conduct

New Jersey Supreme Court denies certification to district in matter involving 24/7 student conduct policies. *G.D.M. v. Board of Educ. of the Ramapo Indian Hills Reg'l High School,* __N.J. __(2013), 2013 N.J. LEXIS 62 (January 16, 2013)

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New Jersey Superior Court, Appellate Division

Conflict of Interest

Appellate court affirms Law Division order granting request for former board president and former Acting Superintendent to reimburse the District $63,622, where the Board had paid that amount from district funds to a law firm that filed and prosecuted a civil action, against fictitious entities only, on defendants' behalf, until the trial court enjoined the Board from further funding the lawsuit. The trial court determined that the lawsuit primarily involved personal claims filed on behalf of defendants and the lawsuit had not been authorized by the Board, which violated OPMA and constituted a conflict of interest that required restitution. *Rivera v. Elizabeth Bd. of Educ.,* 2013 N.J. Super. Unpub. LEXIS 116 (App. Div. Jan 18, 2013).

Public School Contracts

Matter regarding whether parties entered into valid joint purchasing agreement, and whether if so such agreement was breached, has been amicably adjusted, parties have stipulated to dismissal, and accordingly, the appeal is dismissed with prejudice and without costs. ***Bd. of Educ. of Sparta v. Bd. of Educ. of Byram,*** 2013 *N.J. Super*. Unpub. LEXIS 156 (App. Div. Jan 28, 2013)

In matter on remand, arising out of remodeling and renovation of the Board's seven school facilities, appellate court affirms trial court ruling that referred seven of the fourteen counts to arbitration; ruling was not under-inclusive despite a mandatory arbitration clause, nor did the entire controversy clause mandate that all claims be litigated together; given the explicit terms of Settlement Agreement and Rider, which specifically preserved for litigation in court plaintiff's claims for non-payment and any other claims that arose relating to that Settlement Agreement and Rider, the trial court correctly declined to refer such claims to arbitration without the mutual consent of the parties, and also properly maintained jurisdiction over those counts containing claims against co-defendants who were not parties to an arbitration agreement. The jurisdictional division of plaintiff's claims into the two tribunals, although it is inefficient, did not violate the entire controversy doctrine. Appellate court affirms trial court ruling ***Tri-Tech v. Nutley Bd. of Ed,*** 2013 *N.J. Super*. Unpub. LEXIS 247 (App. Div. Jan 25, 2013)

Reduction in Force (RIF)

Appellate Court rejects ALJ and the Commissioner conclusion that both of two former tenured staff members lacked standing to challenge the district's elimination of its CST program and contracting for services through the Sussex County Educational Services Commission; staff member who was RIF'd had standing, other who merely retired lacked standing. Court did not address merits of the Board decisions changing the method of how CST services are provided in the district. Court finds that 90-day filing deadline began to run not from date of board's resolution to discontinue its in-house CST or date that board notified parties of that resolution, but rather when board decided to enter into allegedly illegal agreement with SCESC. Court remands. ***McKenna v. Bd. of Educ. of the Andover Reg'l,*** 2013 *N.J. Super*. Unpub. LEXIS 435 (App. Div. Feb 27, 2013)

Appellate Court affirms affirms board's determination that plaintiff was the principal with the least seniority among several principals subject to a reduction in force that resulted in his termination. Service under certificate of eligibility did not count towards seniority; under *N.J.S.A.* 18A:28-5 and *N.J.S.A.* 18A:1-1, only a "teaching staff member" who has an emergency, provisional, or standard certificate can

acquire tenure. Rejects principal's argument that the effective date of his provisional certificate should relate back to the date he actually began work, or the date when his mentorship informally began; the only material fact was the date the provisional certificate was issued. ***Feldman v. Branchburg Bd. of Ed***., 2013 *N.J. Super*. Unpub. LEXIS 440 (App. Div. Feb 27, 2013).

Teacher of Italian who was RIF'd and claimed entitlement to elementary school position over non-tenured staff; she had obtained tenure status while employed as an elementary Italian teacher and thus achieved tenure status under all endorsements to her teaching certificate—both as an Italian teacher and an elementary teacher and was entitled to reinstatement. Court affirms Commissioner's decision to reinstate her with back pay and other enumerated benefits. ***Gillikin v. Garfield Bd. of Educ.***, 2013 *N.J. Super*. Unpub. LEXIS 348 (Feb. 15, 2013).

Salary Caps

Court affirms final decision of Acting Commissioner of Education upholding board's reduction of administrator's salary to comply with the salary-cap provisions of ***N.J.A.C*. 6A:23A-1.2** and -3.1(e)(2), relying on its opinion in *New Jersey Ass'n of School Administrators v. Cerf*, 428 *N.J. Super.* 588 (App. Div. 2012). *Bacher v. Bd. of Educ. of Mansfield*, 2013 *N.J. Super*. Unpub. LEXIS 293 (App. Div. Feb 8, 2013)

State Monitor

State-appointed monitor in Pleasantville did not exceed his statutory authority in overriding a board vote, and approving the settlement of a CEPA claim where the board had rejected the proposed settlement against board counsel's advice. Appellate Division affirms Commissioner's ruling. ***Bd. of Educ. v. Riehman***, 2013 *N.J. Super*. Unpub. LEXIS 312 (App. Div. Feb 11, 2013).

Tenure Dismissal

Court affirms ALJ and Acting Commissioner's rulings affirming district's dismissal of Paterson teacher dismissal on tenure charges of unbecoming conduct , where she had posted statements on Facebook: " I'm not a teacher — I'm a warden for future criminals!" and "They had a scared straight program in school — why couldn't [I] bring [first] graders?" The posting of such derogatory and demeaning comments about first-grade students showed a lack of self-control, insensitivity and a lack of professionalism, and were not protected speech under the Pickering balancing test. ***In re Tenure Hearing of O'Brien,***2013 *N.J. Super*. Unpub. LEXIS 28 (App. Div. Jan 11, 2013)

Torts

Board employee injured himself while using a fitness machine in the weight room at Monmouth Regional; while New Jersey has not recognized tort action for spoliation, if such existed, employee's action for spoliation of evidence began to run when he learned the machine had been sent back to the distributor, and not when his product liability case was dismissed; therefor, he failed to file timely notice of tort claim. ***Smith v. Monmouth Reg'l Bd. of Educ***., 2013 *N.J. Super*. Unpub. LEXIS 376 (App. Div. February 20, 2013).

Court affirms lower court's decision to allow plaintiff to file late notice of tort claim against school district in car accident matter, where plaintiff did not learn that school district was a party until she received DWI report indicating that other driver had been drinking at school Christmas party. ***Valentin v. Twp. of Pemberton,*** 2013 *N.J. Super*. Unpub. LEXIS 413 (Feb 25, 2013).

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New Jersey Superior Court, Law/Chancery Division

There are no education-related decisions posted for January/February at this time.

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Commissioner of Education

Bus Drivers

Bus driver failed to discover that a child remained on her bus; she failed to inspect bus at the end of her route in a manner that would ensure that she would see a child who was still on her bus; petitioner's argument that there was no roster of student names nor head count available to her does not excuse petitioner from her obligation. Six month suspension of school bus "S" endorsement on her driver's license is affirmed. ***Herzog,* Commr 2013:Feb. 26**

Commissioner affirms DOE's determination to suspend driver's bus endorsement pursuant to *N.J.S.A.* 18A:39-29 after child was left on the school bus. ***McKenney*, Commr 2013:Feb 5**

Certification

Commissioner affirms Examiners decision to revoke certificates of administrator who signed a consent order in Superior Court permanently barring his employment in New Jersey public schools or school systems; administrator argued that had signed consent order merely to allow him to enter a PTI program, and did not realize that signing would put his certificates at risk. ***Matter of Revocation of Administrative Certificates of Gallon*, Commr 2013:Jan 28**

Teacher's certificate is suspended for one year for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 and *N.J.A.C.* 6A:9-17.9 in light of teacher's failure to deny charges that she resigned her position on inadequate notice. ***Matter of Suspension of Certificates of Normyle*, Commr 2013:Jan 30**.

Commissioner affirms denial of employee's request that State Board of Examiners amend its meeting minutes to exclude any reference to actions taken with respect to her. ***Kavazanjian*, Commr 2013:Feb 5**

Choice Schools

Commissioner grants the petition of Mine Hill seeking clarification of its responsibility to pay for the private school placement of a special education student who lives in neighboring district but who attends the Mine Hill schools as a "choice student." Disagreeing with the ALJ's finding that the matter should be dismissed on the basis of *res judicata* and noting that an ALJ's 2011 order in the instant case was never submitted to the Commissioner for review and therefore was not a final ruling capable of triggering *res judicata*; and that subsequent to the 2011 order, *N.J.A.C.* 6A:12-9.1(b) was amended to clarify the financial responsibilities of the choice and sending district in the provision of services to choice students who require a private day or residential school, the Commissioner held that the sending district has fiscal responsibility but the choice district is required to contribute any State aid received for such a student and the sending district is responsible for the balance. ***Mine Hill*, 2013: Commr Feb.11**

Disqualification

Substitute custodian is disqualified from employment as his criminal history record check revealed two convictions for drug offenses; the statute applies prospectively, and contains no waiver or appeal process to determine whether an individual is rehabilitated. Accordingly, the ALJ affirmed the respondent's action to disqualify petitioner from school employment, and dismissed the petition. ***Michaels*, Commr 2013:Jan 28**

HIB

Commissioner dismisses petition by parents who challenged Board's determination that their 6th grader engaged in harassment, intimidation and bullying (HIB) when he and told classmate that he "danced like a girl" and called him "gay". Board did not act arbitrarily by giving him 3 day detention. ***J.M.C.*, Commr 2013: Jan 9 (East Brunswick)**

Commissioner dismisses petition by parents who challenged Board's determination that their 4th grader engaged in harassment, intimidation and bullying (HIB) when he explained to classmates that another student had dyed her hair because she had head lice. Student was given a learning assignment to encourage greater sensitivity and his parents were informed but the incident did not appear in student's record. Commissioner agrees with ALJ that the parents failed to show that Board's actions were arbitrary, capricious or unreasonable. ***W.C.L.* , Commr 2013:Jan 9 (East Brunswick)**

Ninety-day Rule

Commissioner dismissed tenured teaching staff member's petition alleging that the Board improperly reduced his annual base salary; petition was filed well outside the 90-day limitation period set forth in *N.J.A.C.* 6A:3-1.3(i) for the filing of an appeal and the record provided no reason for relaxation of the rule. ***Giantisco*, Commr 2013: Feb 5 (Delaware Valley Reg.)**

Public School Contracts Law

Commissioner finds that Board's resolution authorizing an award to an engineering firm for building commissioning services was *ultra vires* because it should have been competitively bid; it qualified neither as professional services nor extraordinary unspecifiable services. Also, the Board violated *N.J.S.A*. 18A:76-33, which precludes contractors from bidding on work for school facility projects unless they are prequalified by the NJDSA. Commissioner rules in light of the public importance of the issues, and even though the petitioner, an unsuccessful vendor, participated in the relaxed RFP solicitation process and is therefore estopped from challenging the process. All relief demanded in the petition, save for the above *ultra vires* declaration, was denied as moot as the contracted work has been substantially completed. ***Concord Engineering*, Commr 2013: Feb 11(Livingston)**

Reduction in Force

Commissioner dismisses teacher's appeal of the board's action to terminate his employment through a reduction in force (RIF) in June 2011, as the teacher failed to cooperate in the prosecution of his appeal, having made no sincere effort to obtain a copy of his elementary teaching certificate despite having been asked to do so since June 2012 as the issue of whether he was properly certified to earn tenure was at issue; he therefore has abandoned the matter. ***Simmons*, Commr 2013:Jan 3(Elizabeth)**

Commissioner determines that the approach used by the Board and its consultant to determine seniority for the purpose of implementing a RIF was outside of the parameters established by *N.J.A.C.* 6A:32-5.1. Accordingly, the ALJ concluded that the petitioner should have been retained in the RIF and granted her motion for summary decision. Consultant had created unauthorized additional class of categories which included "elementary with math specialization" and "elementary teacher of secondary math." Board must compensate teacher wages, COBRA premiums; restore personal, critical illness and sick days and pension contributions and increase her seniority credit for the period of improper RIF. ***Miles, Wronko and Sacks,* Commr 2013:Feb 19 (Asbury Park)**

Residency

Residency appeal is dismissed for failure to prosecute. ***M.W.*, Commr 2013:Feb 5 (North Brunswick)**

Petition dismissed for failure to prosecute, in *pro se* appeal requesting that student remain in his present elementary school placement. ***T.W.*, Commr 2013:Jan 3 (North Brunswick)**

Tenure Dismissal

Commissioner upholds tenure removal charges for conduct unbecoming against high school business teacher where he directed students to internet sites like Utube and Ning that contained sexually suggestive and salacious material that was inappropriate for students and without pedagogical value, and where he logged over 800 views of YouTube during school time, most occurring when he should have been teaching, observing, or preparing to teach, and used school technology for reasons other than learning in violation of the school district's Acceptable Use Policy. ***Tenure Hearing of Holmes*, Commr 2013:Jan 4**(Brick)

Commissioner upholds tenure dismissal charges for conduct unbecoming against tenured clerk in the guidance office at a Camden district middle school, where he engaged in an inappropriate relationship with a 13-year-old student involving visits to the child's house, smoking marijuana in front of the child, and communications via Facebook that included improper language, admissions of his use and sale of marijuana, an offer to sell the minor marijuana, and discussion of pornography. ***Tenure Hearing of Crump*, Commr 2013:Jan 18** (Camden)

Commissioner upholds tenure dismissal charges for conduct unbecoming against tenured special education teacher following a party at her home, during which other school staff members smoked marijuana and drank alcohol with the teacher's minor son. Further, she had failed to report her arrest or charges against her within fourteen calendar days, as required by board policy and *N.J.A.C.* 6A:9-17.1(c); nor did she report on her acceptance into a PTI program. ***Tenure Hearing of Bessellieu*, Commr 2013:Jan 15**(Hopewell Reg.)

Special education teacher who engaged in single incident of conduct unbecoming for using excessive force on a student to get him to stand up when he refused to get up from the floor, and for breaching APA testing protocols, is suspended without pay for 120 days plus an additional 360 days, and her increment withheld for two years. This penalty represents a modification of the ALJ's lesser recommended penalty. Commissioner also orders that teacher receive, at her own cost and expense, the appropriate training and assistance in the use of assistive techniques for dealing with difficult students and the protocol for the APA. ***Tenure Hearing of Eisenhour*, Commr 2013: Feb 11 (Howell)**

Tenure Rights

Board violated tenure rights of teacher of Italian when it non renewed him; *N.J.A.C.* 6A:9-9.1(a)(5) provides that teachers who hold versions of endorsements issued before 2004 creation of specialized elementary endorsement categories, may continue to teach in the subject areas in which they were authorized to teach under the former rules; *N.J.A.C.* 6A:9-9.2(b)(2)(iii) authorizes teachers holding an elementary endorsement to teach world languages pursuant to *N.J.A.C.* 6A:9-11.10; and petitioner therefore attained tenure in respondent's district. Board must reinstate petitioner, calculation of back pay and emoluments are remanded to OAL. ***Girimonte v. Kearny*, Commr 2013: Feb. 25 (Kearny)**

Tuition

Commissioner grants motion filed by Toms River to have itself and its former superintendent dismissed from a larger case, in which Berkeley Township Board of Education and Central Regional School District alleged that the Seaside Park board of education and municipal government had conspired to siphon students away from Central Regional by allowing these students to attend respondent's schools tuition-free rather than attend their district of residence, Central Regional. ***Berkeley and Central Reg. v. Toms River and Ritacco*, Commr 2013:Jan 10**

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Arbitrator TEACHNJ

Piano teacher who threw a textbook at a student, lacerating her head, because student was not listening, and who had previously thrown tissue box "as a warning" engaged in unbecoming conduct but not corporal punishment; reduction in salary equal to 120 days and loss of increment for one year; no evidence that he threw items to hit students, but merely to be funny or get their attention, and had 10 unblemished years. ***Tenure Hearing of Lorge, Arb 2013:Jan 4 (Atlantic City) (Biren, arbitrator)***

Arbitrator finds that board failed to establish the sufficiency of the inefficiency tenure charge filed in 17 areas against social studies teacher; arbitrator applied the old standard of review of *a preponderance of the credible evidence* since evaluation rubrics were not required to be submitted until January 2013; ordered charges to be reduced to the withholding teacher's increment during the 2011-2012 school year, with return to duty and otherwise making him whole; although board complied with 90-day improvement period, arbitrator notes that a senior instructor may not be summarily removed from his tenured position after only one year of an "Unsatisfactory" evaluation, even in the face of continuing shortcomings. ***Tenure Hearing of Newson, Arb 2013:Jan 10 (Newark) (Pecklers, arbitrator)***

Special education teacher charged with incapacity, conduct unbecoming and neglect of duty for chronic and excessive absenteeism (about 30 days per year over 7 years plus additional 270 days in years 8 and 9 including when she failed to return to work after request for FMLA leave) was denied; even though she had valid personal injuries and events that forced her to miss work, tenure charges are upheld on basis of incapacity as absences diminished her value in the classroom. ***Tenure Hearing of Francis, Arb 2013:Jan 10 (Jersey City)*** *(De Truex, arbitrator)*

Arbitrator upheld dismissal of teacher on inefficiency charges, where teacher with experience teaching adult math was assigned to teach 6th grade departmentalized math and failed to make transition despite extraordinary efforts by district and considerable assistance and 90-day improvement plan; the underlying facts preceded effective date of NJTEACH and board had not evaluated him under required rubrics; however, as charges were referred after the effective date of the law, they should be treated differently than charges referred prior to effective date of the law; arbitrator's review in such case is limited to determination of whether district has shown that tenure charges are "true" by a preponderance of evidence. ***Tenure Hearing of Chavez, Arb 2013:Feb 6 (Newark) (Brown, arbitrator)***

Arbitrator dismissed charges involving 82 incidents of inefficiency against math teacher, as "arbitrary and capricious "; used clear and convincing evidence standard, where charges were lodged prior to adoption of NJTEACH and charges covered years prior to 2012-13. Finds lack of communication between employee and supervisor to be deplorable; pre- and post-observation conferences through electronic means were inadequate and not in compliance with district guidelines, insufficient assistance was offered and teacher's requests, including for transfer, were ignored; allegations that teacher was inefficient were inconsistent with high achievement of his students; board must return teacher to work with full back pay and reimbursement for any medical costs during suspension; recommends transfer to another school. ***Tenure Hearing of Hawthorne, Arb 2013:Feb 6 (Newark) (Restaino, arbitrator)***

Arbitrator upholds inefficiency charges filed after two years of unacceptable ratings; "basic" in 2009-10 and 20010-11, and "unsatisfactory" in 2011-12; Arbitrator rejects teachers argument that board must wait until 2 years of unsatisfactory are established under an approved rubric, finding no evidence legislature intended two year hiatus in preferring tenure inefficiency charges; not arbitrary to assign her to teach social studies even if she was not technically "highly qualified" as subject matter was within the scope of her licensure in Sociology; moreover, charges were not based on lack of subject matter mastery, but on poor pedagogical technique, albeit in extremely difficult and challenging assignment; technical shortcoming of 87 days rather than 90 day improvement period was not fatal under circumstances; no showing that board acted arbitrarily or capriciously in bringing charges. ***Tenure Hearing of Pugliese, Arb 2013:Feb 15 (Newark) (Brent, arbitrator)***

Click here for Arbitrator TEACHNJ <---NEED LINK!!!! decisions.

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School Ethics Commission

There are no School Ethics Commission decisions posted for January and February at this time.

*Click here to access **School Ethics Commission** decisions.*

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State Board of Examiners

State Board of Examiners accepts teacher's proposal that his Teacher of Social Studies Certificate, issued in 1979, be voluntarily suspended for five years. ***IMO The Certificate of Gary Basile: Exam 2013: January 25***

State Board of Examiners ordered the revocation of teacher's Teacher of Elementary School Certificate of Eligibility. Teacher pled guilty to Theft By Deception-False Impression, was sentenced to one year of probation, ordered to forfeit the right to hold public office, ordered to pay restitution to the Cumberland Regional Board of Education and was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* SBE found that such conduct and conviction constituted conduct unbecoming a credential holder. In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as Theft By Deception fall squarely within this category. This strong legislative policy statement is in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold herself out as a teacher. SBE found that revocation was the appropriate sanction. ***IMO the Certificate of Amy Brewer: Exam 2013:January 25***

State Board of Examiners ordered the revocation of teacher's Teacher of Elementary School Certificate of Eligibility. Teacher pled guilty to Third Degree Theft and was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* SBE found that such conduct and conviction constituted conduct unbecoming a credential holder. In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as Third Degree fall squarely within this category. This strong legislative policy statement is in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold herself out as a teacher. SBE found that revocation was the appropriate sanction. ***IMO the Certificate of Lorye Craver: Exam 2013:January 25***

State Board of Examiners ordered the revocation of teacher's Teacher of Music Certificate, issued in 1978. Teacher pled guilty to Theft by Unlawful Taking – Movable Property was sentenced to one year of probation, ordered to forfeit his public employment, and was forever barred from public employment. Music teacher had sold one of the band instruments no longer in use at his high school when he sold off the stock of his personal music school. SBE found that such conduct and conviction constituted conduct unbecoming a credential holder. The Commissioner's long-standing belief is that teachers must serve as role models for their students. An individual's conviction for Theft by Unlawful Taking – Movable Property and permanent, court-ordered disqualification from public employment clearly undermines his status as a role model. SBE found that revocation was the appropriate sanction. ***IMO the Certificate***

of Albert Crosta: Exam 2013:January 25

State Board of Examiners ordered the suspension of teacher's Teacher of Elementary School Certificate of Eligibility with Advanced Standing, issued in August 1995, Teacher of Elementary School Certificate, issued in July 1997, Supervisor Certificate, issued in June 2007 and Principal Certificate of Eligibility, issued in June 2007, pending resolution of the criminal charges against him. Teacher was indicted on one count of Sexual Assault and two counts of Endangering the Welfare of a Child. SBE found that such conduct and conviction constituted conduct unbecoming a credential holder. In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of crimes such as Sexual Assault and Endangering the Welfare of a Minor fall squarely within this category. This strong legislative policy statement is in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. An individual's potential disqualification from service in the public schools of this State because of his indictment on charges of Sexual Assault and Endangering the Welfare of a Child provides just cause to take action against his certificates. SBE found that suspension, pending resolution of the criminal charges, was the appropriate sanction. ***IMO the Certificate of David Eidel: Exam 2013: January 25***

State Board of Examiners accepts teacher's proposal that his Supervisor and Principal certificates, both issued in September 1976 and a School Administrator certificate, issued in August 1983 be voluntarily suspended for four years and two days. Teacher's Teacher of the handicapped Certificate, issued in May 1971, was unaffected. ***IMO The Certificates of Brian Gross: Exam 2013: January 25***

State Board of Examiners ordered the revocation of teacher's Supervisor Certificate, issued in September 2011. On December 14, 2011 the New York State Commissioner of Education revoked teacher's Teacher of Special Education and School District Administrator certificates. The revocation was based on the teacher's inappropriate relationship with several male students that included intimate, physical and/or sexual contact. SBE found that such conduct and conviction constituted conduct unbecoming a credential holder. The Commissioner's long-standing belief is that teachers must serve as role models for their students. A teacher who has engaged in inappropriate behavior with students and had his certificates revoked as a result cannot claim status as a role model to anyone. SBE found that teacher's conduct and revocation of his New York certificates warranted revocation of his New Jersey certificate. ***IMO the Certificate of Jerry Lamb: Exam 2013: January 25***

State Board of Examiners ordered the revocation of teacher's Teacher of Elementary School in Grades K-5 Certificate of Eligibility. Teacher was convicted in November 2010 of Burglary and was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* SBE found that such conduct and conviction constituted conduct unbecoming a credential holder. In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as Burglary fall squarely within this category. This strong legislative policy statement is in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold herself out as a teacher. SBE found that revocation was the appropriate sanction. ***IMO the Certificate of Diana Martinez : Exam 2013:January 25***

State Board of Examiners ordered the revocation of non-tenured teacher's Teacher of Chemistry Certificate of Eligibility, issued in June 2008, Teacher of Chemistry Certificate, issued in April 2010, and Teacher of Biological Science certificate, issued in September 2001. School district reported to SBE that teacher had resigned from his non-tenured teaching position as a result of allegations that he had exchanged sexually explicit text messages with a student, detailing sexual acts that he wished to engage in with the student. SBE found that such conduct constituted conduct unbecoming a credential holder. The Commissioner's long-standing belief is that teachers must serve as role models for their

students. A teacher who has engaged in inappropriate conduct with a student cannot claim status as a role model to anyone. SBE found that revocation was the appropriate sanction. ***IMO the Certificate of Daniel Padilla : Exam 2013:January 25***

State Board of Examiners ordered the revocation of teacher's Teacher of Social Studies Certificate of Eligibility With Advanced Standing, issued in October 2007, Teacher of Elementary School in Grades K-5 Certificate of Eligibility With Advanced Standing, issued in October 2010 and Teacher of Elementary School with Subject Matter Specialization: Science in Grades 5-8 Certificate of Eligibility With Advanced Standing, issued in April 2011. Teacher was convicted of Harassment By Offensive Touching, was fined and ordered to forfeit his public office pursuant to *N.J.S.A.* 2C:51-2. The Commissioner has long held that teachers serve as role models for their students. Clearly, a teacher convicted of Harassment By Offensive Touching cannot lay claim to that status. SBE found that revocation was the appropriate sanction. ***IMO the Certificate of Diana Martinez : Exam 2013:January 25***

State Board of Examiners ordered the revocation of social worker's Student Personnel Services certificate, issued in March 1982 and School Social Worker certificate, issued in December 1988. Acting Commissioner of Education had dismissed tenured social worker position for charges of inefficiency, unbecoming conduct and insubordination. The record was replete with instances which demonstrate that social worker's inefficiencies were not an aberration, nor the result of inexperience. Social worker was either unable or unwilling to accept the help and support that the school district continually offered her, even long before tenure charges were filed. This recalcitrance had a deleterious effect upon the district and its students. Social worker's negative interaction with superiors, colleagues and parents was determined to have been unacceptable. Social worker's conduct, in its totality, amply demonstrates her unfitness to continue to hold her educational services certificates. SBE could not conclude that a sufficient nexus exists between social worker's behavior and her instructional certificate or that she would not work effectively under that certificate. Working as a School Social Worker as part of a CST or under a Student Personnel Services certificate have specific job requirements with regard to tracking and evaluating students that are not replicated to the same extent in an instructional setting. SBE determined that the appropriate response to social worker's inefficiency is the revocation only of her School Social Worker and Student Personnel Services certificates. ***IMO the Certificate of Maria Parise: Exam 2013:January 25***

State Board of Examiners ordered the revocation of teacher's Teacher of Elementary School Certificate of Eligibility, issued in April 2000, a Teacher of Elementary School certificate, issued in March 2002 and a Teacher of Elementary School With Subject Matter Specialization: Mathematics in Grades 5-8 certificate, issued in September 2008. Teacher pled guilty to Theft By Deception-False Impression, was sentenced to one year of probation, ordered to forfeit the right to hold public office, ordered to pay restitution to the Cumberland Regional Board of Education and was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* SBE found that such conduct and conviction constituted conduct unbecoming a credential holder. In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as Theft By Deception fall squarely within this category. This strong legislative policy statement is in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold herself out as a teacher. SBE found that revocation was the appropriate sanction. ***IMO the Certificate of Kelly Richter-Jobes: Exam 2013: January 25***

State Board of Examiners ordered the revocation of teacher's Teacher of Art certificate, issued in May 1987. On November 13, 2006 the New York State Commissioner of Education revoked teacher's Teacher of Nursery-6 and Teacher of Art certificates based on teacher's inappropriate relationship with a male student that included intimate, physical and/or sexual contact, improper correspondence and/or

communication and providing gifts to the student. SBE found that such conduct and conviction constituted conduct unbecoming a credential holder. The Commissioner's long-standing belief is that teachers must serve as role models for their students. A teacher who has engaged in inappropriate behavior with students and had his certificates revoked as a result cannot claim status as a role model to anyone. SBE found that teacher's conduct and revocation of his New York certificates warranted revocation of his New Jersey certificate. ***IMO the Certificates of F. Gloria Snauffer: Exam 2013: January 25***

State Board of Examiners ordered the revocation of nurse's School Nurse issued in June 2000. School district reported to SBE that nurse had resigned from her tenured school nurse position as a result of allegations that many student health records were incomplete; that student records were not kept in individual folders; that there was no medical documentation entered for any student in the district's student management system; that documents that should have been filed in student health files as far back as 2000 were not filed; that additional documents were shoved into nooks and crannies; that there were many inhalers and other medications found throughout the health office that had expired, some many years ago; that there were medications found belonging to students who no longer attended the school; that medication orders for the current year were not on file; that current diabetic student health plans were not centrally located; and that the health office was excessively stocked with office supplies while being scarcely supplied with medical supplies. SBE found that such conduct constituted conduct unbecoming a credential holder. Nurse's sloppy record keeping and negligent office upkeep demonstrated more than a lack of organizational skills; she was a danger to students since the proper maintenance of medication and health records is an essential component of a school nurse's duties. She completely failed in her role as a caretaker for students' health and well-being. Her ineptitude was so severe that the SBE found that revocation was the appropriate sanction. ***IMO the Certificate of Lia Trembath : Exam 2013:January 25***

State Board of Examiners ordered the revocation of teacher's Teacher of Elementary School in Grades K-5 Certificate of Eligibility, issued in December 2008. School district reported to SBE that teacher had created and submitted a fraudulent Teacher of Mathematics certificate in an effort to obtain a teaching position in the school district. SBE found that such conduct constituted conduct unbecoming a credential holder. The Commissioner's long-standing belief is that teachers must serve as role models for their students. Teacher's fraud negates her position as a role model and "undermines the notions of trust, truthfulness and veracity," all "essential qualities necessary to teach children." SBE found that revocation was the appropriate sanction. ***IMO the Certificate of Deborah Cantz : Exam 2013:February 28***

State Board of Examiners ordered the revocation of teacher's Teacher of Production, Personal or Service Occupation: Cosmetologist/Hairstylist Certificate, issued in October 1996. Acting Commissioner of Education had dismissed tenured teacher from his position, finding that the teacher had engaged in conduct unbecoming by engaging in an inappropriate and unauthorized, albeit consensual, relationship with an adult inmate. The relationship included sexually explicit notes and sexual touching. SBE agrees with the Commissioner's assessment that the teacher's conduct, in its totality, proves his unfitness to continue to be a teacher and would extend this finding to apply to any public school in New Jersey. SBE determines that the appropriate response to the teacher's unbecoming conduct is the revocation of his certificate. ***IMO the Certificate of Anthony Coluccio: Exam 2013: February 28***

State Board of Examiners accepted the relinquishment of teacher's Teacher of Elementary School in Grades K-5 Certificate of Eligibility With Advanced Standing, issued in June 2010 and a Teacher of Elementary School in Grades K-5 certificate, issued in June 2011. Teacher had pled guilty to Endangering the Welfare of Children. As part of his sentence, teacher was ordered to forfeit his teaching certificates. SBE accepted teacher's relinquishment of certificates with the force and effect of a revocation pursuant to *N.J.A.C.* 6A:9-17.*8.* ***IMO the Certificates of Sean Coughlin: Exam 2013: February 28***

State Board of Examiners accepted the relinquishment of teacher's Substitute Credential which expires

in January 2017. Teacher had pled guilty to Endangering the Welfare of Children. As part of his sentence, teacher was ordered to forfeit his teaching credential. SBE accepted teacher's relinquishment of his teaching credential with the force and effect of a revocation pursuant to *N.J.A.C.* 6A:9-17.8. ***IMO the Certificates of Richard D'Amato, Jr.: Exam 2013: February 28***

State Board of Examiners ordered the suspension of teacher's Teacher of English certificate, issued in July 1989, for a period of two years, with reinstatement conditioned on the submission of proof of a driving record free of DUIs or DWIs during the suspension period. Teacher had pled guilty to False Report to Incriminate Another and Driving While Intoxicated (3rd offense) and was sentenced to 180 days in prison and one year of probation. Farrell currently holds a Teacher of English certificate, issued in July 1989. The Commissioner has long held that teachers serve as role models for their students. While the convictions for False Report to Incriminate Another and DWI (3rd offense) clearly undermine the teacher's status as a role model, the court saw fit to offer an attempt at rehabilitation and the teacher provided evidence that served to mitigate the penalty. However, the SBE would not be mindful of its responsibilities to New Jersey's public school children if it did not ensure that the teacher was ready to return to the classroom. The SBE believed that the appropriate penalty in this case is a two-year suspension of the teacher's certificate, with reinstatement conditioned on the submission of proof of a driving record free of DUIs or DWIs during the suspension period***. IMO the Certificate of Rose Farrell: Exam 2013: February 28***

State Board of Examiners ordered the revocation of teacher's Teacher of Music Certificate of Eligibility With Advanced Standing, issued in September 2006. Teacher surrendered his Florida teaching certificate in November 2010 after an administrative complaint was filed against him alleging inappropriate contact with a 14-year-old boy. His Florida certificate was permanently revoked. Specifically, the complaint alleged that while a passenger on a commercial flight from New Jersey to Florida, the teacher had offered to purchase an alcoholic beverage for the boy, who was an unaccompanied passenger, and also placed his hand under the boy's shirt and rubbed his stomach and chest. The teacher also allegedly ran his hand up the boy's leg and touched the boy's genital area over his clothing and persisted in talking to and touching the boy even after the boy and another passenger told the teacher to stop. In October 2011, the Pennsylvania Professional Standards and Practices Commission revoked the teacher's Pennsylvania teaching certificate on the basis of the Florida charges. The SBE determined that the teacher's act of engaging in inappropriate contact with a 14-year-old boy is inexcusable for any individual, teacher or not. The Commissioner has long held that teachers serve as role models for their students. Clearly, a teacher who has engaged in inappropriate contact with a minor and had his certificates revoked as a result cannot claim status as a role model to anyone. The SBE determined that the teacher's conduct and the revocation of his Florida and Pennsylvania certificates warranted the revocation of his New Jersey certificate. ***IMO the Certificate of James Faux: Exam 2013 : February 28***

State Board of Examiners ordered the revocation of teacher's Teacher of Preschool Through Grade 3 and Teacher of Students With Disabilities Certificates of Eligibility With Advanced Standing, both issued in September 2008 and Teacher of Preschool Through Grade 3 and Teacher of Students With Disabilities certificates, both issued in September 2009. As a condition of her acceptance into a Pre-Trial Intervention Program (PTI) after being charged with Forgery and Theft for falsifying payroll sheets, teacher was required to forfeit her public employment and was disqualified from future public employment. Teacher had provided home instruction to an autistic student, had signed the mother's signature and had included hours for days she had missed. While, having completed the PTI program, the teacher was not technically disqualified from public employment pursuant to *N.J.S.A*. 18A:6-7.1 et seq., SBE determined that a *de facto* disqualification had occurred. By agreeing to that term as a prerequisite to PTI, the teacher could never again work in a public school setting in New Jersey. The Commissioner's long-standing belief is that teachers must serve as role models for their students. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Nor should that person be permitted to continue to hold himself out as a teacher. In this case, the court imposed the condition of the Consent

Order as a prerequisite to the teacher's admission into PTI. SBE found that there can be no question that where, as here, an individual is forever barred from public school employment in the State of New Jersey, revocation is the appropriate sanction. ***IMO the Certificate of : Kathryn Schmicking Guerra: Exam : 2013 February 28***

State Board of Examiners ordered the revocation of teacher's Teacher of the Handicapped certificate, issued in June 1996, a Teacher of Elementary School Certificate of Eligibility With Advanced Standing, issued in August 1996, a Teacher of Elementary School certificate, issued in September 1999, a Principal Certificate of Eligibility, issued in August 2003, a Supervisor certificate, issued in August 2003, a School Administrator Certificate of Eligibility, issued in April 2005 and a Principal certificate, issued in December 2005. In June 2011, teacher was convicted of third degree Theft of Moveable Property, was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.,* ordered to forfeit her public employment and was forever barred from holding any office or position of honor, trust or profit under the State of New Jersey or any of its administrative or political subdivisions pursuant to *N.J.S.A*. 2C:51-2. SBE found that such conduct and conviction constituted conduct unbecoming a certificate holder. In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as third degree Theft of Movable Property fall squarely within this category. This strong legislative policy statement is in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold herself out as a teacher. Furthermore, teacher was also permanently barred by the sentencing court from ever holding a public position. SBE found that revocation was the appropriate sanction. ***IMO the Certificate of Donna Johnson: Exam 2013: February 28***

State Board of Examiners ordered the suspension of teacher's Teacher of Elementary School certificate, issued in August 1993, pending resolution of the criminal charges against him. Teacher was indicted in Massachusetts on nine counts of Rape and Abuse of Child and three counts of Furnishing Liquor to Minors. SBE found that such conduct and conviction constituted conduct unbecoming a credential holder. In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of crimes such as Rape and Abuse of Child and the Furnishing Liquor to Minors fall squarely within this category. This strong legislative policy statement is in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. An individual's potential disqualification from service in the public schools of this State because of his indictment on charges of Rape and Abuse of Child and Furnishing Liquor to Minors provides just cause to take action against his certificates. SBE found that suspension, pending resolution of the criminal charges, was the appropriate sanction. ***IMO the Certificate of Brendan Kenny: Exam 2013: February 28***

State Board of Examiners ordered the revocation of teacher's Teacher of the Handicapped certificate, issued in July 2004. In June 2012, teacher pled guilty to Aggravated Assault and was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq* . SBE found that such conduct and conviction constituted conduct unbecoming a certificate holder. In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as Aggravated Assault fall squarely within this category. This strong legislative policy statement is in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold herself out as a teacher. SBE found that revocation was the appropriate sanction. ***IMO the Certificate of Tamara Reyes: Exam***

2013: February 28

State Board of Examiners ordered the revocation of teacher's Teacher of Elementary School Certificate of Eligibility With Advanced Standing, issued in February 2006 and a Teacher of Elementary School certificate, issued in August 2009. In June 2012, teacher was convicted of Endangering the Welfare of Children and was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq .* SBE found that such conduct and conviction constituted conduct unbecoming a certificate holder. In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as Endangering the Welfare of Children fall squarely within this category. This strong legislative policy statement is in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold herself out as a teacher. SBE found that revocation was the appropriate sanction. ***IMO the Certificate of Arnaldo Rodriquez: Exam 2013: February 28***

State Board of Examiners ordered the revocation of teacher's Substance Awareness *Coordinator Certificate of Eligibility With Advanced Standing, issued in July 2006. In June* 2009, teacher was convicted of Harassment, Unlawful Possession of a Weapon and Possession of a Weapon for Unlawful Purposes, was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.,* sentenced to five years' probation and barred from holding any employment, office or position of trust, honor or profit under this State or any of its administrative or political subdivisions pursuant to *N.J.S.A.* 2C:51-2d. SBE found that such conduct and conviction constituted conduct unbecoming a certificate holder. In enacting the Criminal History Review statute, *N.J.S.A*. 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as Harassment, Unlawful Possession of a Weapon and Possession of a Weapon for Unlawful Purposes fall squarely within this category. This strong legislative policy statement is in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold herself out as a teacher. SBE found that revocation was the appropriate sanction***. IMO the Certificate of Tamica Ruffin: Exam 2013: February 28***

State Board of Examiners ordered the revocation of teacher's Teacher of the Handicapped certificate, issued in June 1973, a Teacher of the Deaf or Hard of Hearing certificate, issued in September 1981 and a Principal certificate, issued in June 1990. DCF affirmed the IAIU substantiated allegations of Physical Abuse/Cuts, Bruises, Welts, Abrasions and Oral Injuries, and Physical Abuse/Substantial Risk of Physical Injury/Environment Injurious to Health and Welfare. Specifically, IAIU's investigation revealed that the teacher entered a classroom and found two boys in a closet. She attempted to keep the students in the closet by pressing on the door until it broke. When the two boys ran out of the closet, the teacher struck each of them with her cane. She hit one student in the back of the head and the other student in the back/neck area. Both boys were examined and treated by the school nurse and one was also examined at the emergency room of a local hospital. SBE found that such conduct and conviction constituted conduct unbecoming a certificate holder. The Commissioner's long-standing belief is that teachers must serve as role models for their students. This teacher's conduct with regard to striking two students with her cane and causing physical injury to them amply demonstrates her inability to be a role model for students. The inappropriate behavior speaks volumes about her unfitness to be a teacher and demonstrates egregious behavior that warrants revocation. SBE found that revocation was the appropriate sanction. ***IMO the Certificate of Darrelle Tobe: Exam 2013: February 28***

State Board of Examiners accepted the relinquishment of teacher's Teacher of Health and Physical Education Certificate of Eligibility With Advanced Standing, issued in June 2007, a Teacher of Driver

Education Certificate of Eligibility With Advanced Standing, issued in June 2007, a Teacher of Health and Physical Education certificate, issued in November 2008 and a Teacher of Driver Education, issued in November 2008. Teacher had pled guilty to Official Misconduct. As part of his sentence, teacher was ordered to forfeit his teaching certificates. SBE accepted teacher's relinquishment of certificates with the force and effect of a revocation pursuant to *N.J.A.C.* 6A:9-17.8. ***IMO the Certificates of Gabriel Vasquez: Exam 2013: February 28***

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New Jersey Council on Local Mandates

There are no education related decisions posted for January and February at this time.

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New Jersey Division on Civil Rights

The Director, Division on Civil Rights ordered the Toms River Regional Board of Education to pay a former student more than $68,000 for pain and suffering, plus interest, after concluding that the school district failed to take reasonable actions to remedy a hostile educational environment and stop persistent bullying of the student based on his perceived sexual orientation, in violation of the NJLAD. The Director affirmed the ALJ determination that the Toms River district's counseling-based handling of students who subjected L.W. to verbal harassment, physical assault and what the Supreme Court described as repeated "molestation" was ineffective and failed to protect him. The Toms River regional district was ordered to pay L.W. $50,000 plus $ 18,116.98 in interest and pay a $10,000 statutory penalty. ***L.W. v. Toms River Board of Education, February 25, 2013***

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Election Law Enforcement Commission

There are no education related decisions posted for January and February at this time.

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Government Records Council

GRC determined that custodian's response four business days after request for copy of current contract of business administrator and board secretary did not constitute a timely response to an "immediate access" government record. Because the Custodian failed to immediately respond to the Complainant's OPRA request for the contract, the Custodian violated *N.J.S.A*. 47:1A-5.e., pursuant to *Herron v. Township of Montclair*, GRC Complaint No. 2006-178 (February 2007). The Custodian's OPRA violations did not have a positive element of conscious wrongdoing nor was intentional and deliberate; not deemed a knowing and willful violation of OPRA. ***Kaplan v. Winslow Twp. Board of Education, No. 2011-237 (GRC January 29, 2013)***

GRC determined that custodian's response, eight business days after request, for copies of salary,

wage, pension amount, life insurance costs, for certain employees and legal costs, did not constitute a timely response to "immediate access" government records. Because the Custodian failed to immediately respond to the Complainant's OPRA request, the Custodian violated *N.J.S.A.* 47:1A-5.e pursuant to *Herron v. Township of Montclair*, GRC Complaint No. 2006-178 (February 2007). I*ndividual* employee health benefits and waivers information are exempt from disclosure pursuant to the Privacy Rule of Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 U.S.C.A. Section 1301, *N.J.A.C.* 17:9-1.2, and *N.J.S.A.* 47:1A-9 and were lawfully denied. The Custodian's OPRA violations did not have a positive element of conscious wrongdoing nor was intentional and deliberate; not deemed a knowing and willful violation of OPRA. ***Brown v. Ocean City Board of Education, No. 2011-271 (GRC January 29, 2013)***

GRC determined that custodian's response, eight business days after request, for copies of salary, wage, pension amount, life insurance costs, for certain employees and legal costs, did not constitute a timely response to "immediate access" government records. Because the Custodian failed to immediately respond to the Complainant's OPRA request, the Custodian violated *N.J.S.A.* 47:1A-5.e. pursuant to *Herron v. Township of Montclair*, GRC Complaint No. 2006-178 (February 2007). I*ndividual* employee health benefits and waivers information are exempt from disclosure pursuant to the Privacy Rule of Health Insurance Portability and Accountability Act of 1996 ("HIPAA"), 42 *U.S.C.A*. Section 1301, *N.J.A.C.* 17:9-1.2, and *N.J.S.A.* 47:1A-9 and were lawfully denied. The Custodian's OPRA violations did not have a positive element of conscious wrongdoing nor was intentional and deliberate; not deemed a knowing and willful violation of OPRA. ***Brown v. Sea Isle City Board of Education, No. 2011-273 (GRC January 29, 2013)***.

Custodian lawfully denied access to legal memorandum regarding proposed county layoffs as the requested record contained attorney client privilege information pursuant to N.J.S.A. 47:1A-1.1; Requested record was a written legal opinion regarding *N.J.S.A*. 40A:14-60 *et seq*. and its applicability to Complainant's status regarding the current/proposed layoffs for the County. ***Wargacki v. County of Bergen, No. 2011-198 (GRC January 29, 2013)***

GRC's jurisdiction does not extend to disputes under common law right of access to public records. Jurisdiction is limited to disputes under OPRA. Complainant sought access to emails between athletic director and a staff member and the superintendent and the same staff member. ***Rowan v. Warren Hills Regional School District, No. 2011-347 (GRC January 29, 2013)***

GRC determined that employee sign-in sheets qualify as disclosable payroll records. Employee sign-in sheets detail the number of weeks and dates specifically worked as specified in *N.J.A.C.* 12:16-2.1 and, as such, are deemed a payroll record subject to disclosure under *N.J.S.A*. 47:1A-10. ***Havlusch v. Borough of Allenhurst, No. 2011-243(GRC*** January 29, 2013)

GRC determined that teacher certifications are personnel file records which disclose conformity with specific experiential and/or educational qualifications required for government employment and are subject to disclosure pursuant to *N.J.S.A.* 47:1A-10 and *Bonanno v. Garfield Board of Education Business Department*, GRC Complaint No. 2006-62 (June 2008). Resumes of successful candidates for employment are subject to disclosure pursuant to Executive Order No. 26 (McGreevey) (provides that the résumés of successful candidates shall be disclosed once the successful candidate is hired) ***Krrywda v. Pinelands Regional School District, No. 2011-285 (GRC January 29, 2013)***

GRC determined that attendance records of former superintendent, including total number of absences, including sick days, personal days, and vacation days for each school year are payroll records accessible under OPRA. ***Vargas v. Camden City School District, No. 2011-315 (GRC January 29, 2013)***

GRC determined that e-mail addresses received through a solicitation posted on the Borough's website were received "in the course of official business," between July, 2007 and September 15, 2009, making such e-mail addresses government records pursuant to *N.J.S.A*. 47:1A-1.1 and subject to OPRA. ***Mayer***

v. Borough of Tinton Falls, No. 2008-245 (GRC January 29, 2013)

GRC determined that "as built drawings" responsive are exempt from disclosure as they contain security information or procedures for a building facility which, if disclosed, would jeopardize security of the building or facility or persons therein pursuant to *N.J.S.A*. 47:1A-1.1 and *Cardillo v. City of Hoboken (Zoning Office*), GRC Complaint No. 2005-158 (December 2006). ***Kohn v. Township of Livingston, No. 2011-330 (GRC February 26, 2013****)*

GRC determined that custodian's failure to immediately respond to the Complainant's request for invoices results in a violation of OPRA's immediate access provision at *N.J.S.A.* 47:1A-5(e). *See Herron v. Township of Montclair,* GRC Complaint No. 2006-178 (February 2007). ***Kohn v. Township of Livingston, No. 2011-329 (GRC February 26, 2013****)*

GRC determined that requests which ask questions or seek information rather than identifiable government records, are invalid under OPRA. *MAG Entertainment, LLC v. Division of Alcoholic Beverage Control,* 375 *N.J. Super*. 534, 546 (App. Div. 2005); *Bent v. Stafford Police Department*, 381 *N.J. Super*. 30, 37 (App. Div. 2005); *New Jersey Builders Association v. New Jersey Council of Affordable Housing*, 390 *N.J. Super*. 166, 180 (App. Div. 2007); ***Dooley v. City of Newark No. 2011-257 (GRC February 26, 2013)***

GRC determined that Custodian bore his burden of proof that fulfilling the Complainant's OPRA requests would require an extraordinary expenditure of time and effort, which warranted a special service charge pursuant to *Courier Post v. Lenape RegionalHigh School,* 360 *N.J. Super*. 191, 199 (Law Div. 2002) and *N.J.S.A*. 47:1A-5(c). GRC determined that the special service charge of $ 675 was reasonable pursuant to *N.J.S.A*. 47:1A-5(c) and *N.J.S.A*. 47:1A-5(d) because the Custodian certified that the contract administrator is the only New Jersey City University employee capable of locating, identifying and providing the records requested and that the fee assessed was based on the contract administrator's discounted rate of $20 per hour and the actual direct cost of $85 attributable to the vendor costs for retrieval and return of records stored off campus. ***Andes v. New Jersey City University No. 2011-219 (GRC February 26, 2013)***

GRC determined that the Custodian's failure to respond immediately to the Complainant's OPRA request for contracts results in a violation of OPRA's immediate access provision at *N.J.S.A.* 47:1A-5(e). *See* Herron v. Township of Montclair, GRC Complaint No. 2006-178 (February 2007). ***Kohn v. Township of Livingston, No. 2011-362 (GRC February 26, 2013)***

GRC determined that because the Newfield Fire Company was not created by the Borough of Newfield, it is not an "instrumentality or agency" of the Borough. The Fire Company is not a public agency subject to the provisions of OPRA pursuant to *N.J.S.A*. 47:1A-1.1. *Fair Share Housing Center, Inc. v. New Jersey State League of Municipalities*, 207 *N.J.* 489 (2011). *See also Chaves v. JFK Medical Center* (Middlesex), GRC Complaint No. 2009-217 (March 2011), *Nash v. Children's Hospital of New Jersey*, GRC Complaint No. 2006-13 (May 2006) and *Cole v. Newton Memorial Hospital*, GRC Complaint No. 2009-68 (February 2010). ***Carrow v. Borough of Newfield No. 2012-111 (GRC February 26, 2013)***

GRC determined that the Custodian lawfully denied access to the roll call sheets because such information could pose a significant risk to the safety of police personnel pursuant to *N.J.S.A*. 47:1A-1.1, *Rivera v. City of Plainfield, Police Department* (Union), GRC Complaint 2009-317 (May 2011). *See McElwee v. Borough of Fieldsboro*, 400 *N.J. Super*. 388 (App. Div. 2008). ***Alicea v. City of Hoboken Police Department No. 2011-103 (GRC February 26, 2013)***

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New Legislation

Requires the Higher Education Student Assistance Authority to develop and distribute a document containing student loan repayment information for school districts and nonpublic high schools to disseminate to students. **P.L.2013, c.1.** -see **A1083** Pamphlet Law 1 pages Approved 1/14/2013 **PDF Format HTML Format**

Updates provisions governing Board of Education Employees' Pension Fund of Essex County to comply with Internal Revenue Code. **P.L.2013, c.16.** -see **S2159** Pamphlet Law 6 pages Approved 1/25/2013 **PDF Format HTML Format**

Directs State Board of Education to promulgate regulations requiring school districts to develop a plan to establish stability in special education programming. **P.L.2013, c.19.** -see **A2739** Pamphlet Law 1 pages Approved 1/25/2013 **PDF Format HTML Format**

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New Regulations/Executive Orders

Child Nutrition Program; action on petition for rulemaking regarding cost of meals, 45 N.J.R. 57(a)

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United States Supreme Court

No education-related decisions found for November/December.

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3rd Circuit Court of Appeals

Employment Discrimination

Employee filed a complaint alleging that defendant Northfield Board of Education violated the New Jersey Law Against Discrimination ("NJLAD"), the New Jersey Conscientious Employee Protection Act ("CEPA"), plaintiff's procedural due process rights pursuant to *NLRB v. Weingarten*, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975), and plaintiff's rights under the First Amendment of the U.S. Constitution. Plaintiff has also alleged that defendant made defamatory statements about her. Plaintiff agreed to dismiss her NJLAD, CEPA and Weingarten due process claims, but requested leave to file an amended complaint regarding her remaining claims of First Amendment retaliation and defamation. Plaintiff will be permitted to file an amended complaint asserting a First Amendment claim. Certain defamation claims are time-barred, while those within 90 day limit will be permitted to move forward. Plaintiff will be permitted to file an amended complaint as to any non-dismissed claims. Plaintiff will be permitted to file an amended complaint as to any non-dismissed claims. ***Faust v. Northfield Bd. of Educ.*, No. 12-0274 (D.N.J. Sept. 4, 2012)**

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New Jersey District Court

ADEA

Summary judgment granted to defendant, Diocese of Trenton, in employment reduction in force. Plaintiff alleged that his termination violated the Age Discrimination in Employment Act and the New Jersey Law Against Discrimination. Plaintiff did not demonstrate that the school's reasons for dismissal were worthy of disbelief or that invidious discrimination was likely. Because the ADEA claim could not survive summary judgment, the LAD claim was dismissed. Plaintiff and school administration had philosophical differences regarding student discipline. No material facts in dispute. ***Bleistine v. Diocese of Trenton***, Civil Action No. 11-2138 (JBS/KMW), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2012 U.S. Dist. LEXIS 163072, Decided, November 14, 2012.

Due Process

Motion to dismiss denied. Plaintiff sufficiently alleged a malicious abuse of process claim that demonstrates Defendant's allegedly coercive ulterior motives. The "further acts" following the issuance of process include:(1) protracting the tenure litigation for false, pretextual, and spurious reasons in order to prolong and heighten the personal cost to Plaintiff; (2) Assigning plaintiff to "a rubber room" when his

cross examination was scheduled to begin; (3) Opposing Plaintiff's admission into Pretrial Intervention; (4) Attempting to undo Plaintiff's expungement after he was found not guilty in the criminal matter; and (5) Filing a DYFS complaint after Plaintiff's acquittal of criminal charges. ***Melillo v. Elizabeth Bd. of Educ***., Civil Action No. 11-4887 (SDW) (MCA), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2012 U.S. Dist. LEXIS 182018, Decided, December 27, 2012.

First Amendment

Speech relating to the tenure status of an employee does not rise to the level of public concern. The employee filed the appeal to challenge the board's determination that she did not have tenure, not to communicate with the public about the dispute, or to advance a political or social point of view beyond the context of her employment status. The employee's petition to the Commissioner of Education related to an inherently personal interest, not a matter of public concern. ***Milano v. Board of Education of the Borough of Franklin Township***, CIVIL ACTION NO. 11-6803 (MLC), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2012 U.S. Dist. LEXIS 161942, Decided November 13, 2012.

IDEA

District Court affirms ALJ's holding that Bayonne can offer student FAPE in the least restrictive environment. Mainstreaming the student — in accordance with the letter and intent of the IDEA — will provide him with the most beneficial setting for the development of his educational, social and life skills. Bayonne had challenged the Elysian Charter school's placement of first grade student with learning disabilities in a private day school, Community School. ***L.Y. v. Bayonne Bd. of Educ.***, Civil Action No. 10-5698 (CCC)(JAD), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2012 U.S. Dist. LEXIS 180361, Decided December 20, 2012.

Restitution

School district entitled to restitution in eight year scheme to defraud the school district through bribes and kickbacks involving insurance contracts. The Government established by a preponderance of the evidence, the School District's losses, a total amount of $4,336,987.91. Superintendent, who had previously forfeited $1 million, a 2010 Mercedes Benz and $8,950 in cash prior to sentencing, found to be jointly and severally liable for the full amount of restitution to the district. C-defendant found liable for only a portion of the total amount of restitution — $1,625,925.79 — because he was only involved in the scheme from 2002-2006. The Mandatory Victims Restitution Act ("MVRA") requires the Court to "order, in addition to . . . any other penalty authorized by law, that the defendant make restitution to the victim of the offense . . . ." 18 *U.S.C.* § 3663A(a)(1). The definition of "victim" includes "public institutions that receive government funding," like the school district. *United States v. Ritacco*, Criminal Action Nos. 10-cr-00713,10-cr-00697,11-cr-336,12-cr-220 (JAP), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2012 U.S. Dist. LEXIS 179663, Decided December 19, 2012.

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New Jersey Supreme Court

Civil Service

Supreme Court affirms Appellate Division dismissal of employee's complaint, but modifies the rationale. The paid vacation leave provisions of the New Jersey Civil Service Act, *N.J.S.A.* §§ 11A:1-1 to 11A:12-6, apply to career service, non-teaching staff employees of school districts which have adopted Civil Service for their non-certificated employee, such as the 10 month food service worker in the case in question. The Act and its implementing regulations establish a floor for the amount of leave to be provided to such school district employees. The employee received more than the statutory minimum

paid vacation leave, pursuant to a local collective bargaining agreement. ***Headen v. Jersey City Bd. of Educ***., A-17 September Term 2011, 068598, SUPREME COURT OF NEW JERSEY, 212 *N.J*. 437; 55 *A.3d* 65; Decided November 15, 2012, Reconsideration granted by, in part, Amended by *Headen v. Jersey City Bd. of Educ*., 2013 N.J. LEXIS 10 (N.J., Jan. 8, 2013)

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New Jersey Superior Court, Appellate Division

Employment Contracts

Appellate Division affirms trial court grant of summary judgment to board of education in matter involving employment contract dispute with school psychologist. Plaintiff contended that the judge erred by failing to consider parole evidence to interpret her employment contracts with the Board. Appellate Division disagreed. The contract terms were unambiguous, making plaintiff's assertions insufficient to warrant disregarding the clear language of the employment contracts. ***Vigneri v. Point Pleasant Beach Bd. of Educ***., DOCKET NO. A-1219-11T4, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 2670, Decided December 7, 2012.

Interdistrict Public School Choice Act

Board of education adopted a resolution limiting the number of its students that could enroll in a choice school district. Commissioner denied approval of the resolution stating that "the resolution is not accompanied by any credible evidence that supports the assertion that allowing unrestricted student participation in the choice program would have a negative impact on the students, operations, programs or fiscal condition of your district." The Appellate Division held that the Commissioner has the authority to require such information but not without giving prior notice of the obligation. The Commissioner's failure to provide prior notice of the obligation to provide supporting information, made the denial of approval of the limiting resolution solely on the ground that none was provided, arbitrary. ***Milford Borough Bd. of Educ. v. Cerf***, DOCKET NO. A-1584-11T2, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 2700,Decided December 12, 2012.

Labor Relations

Appellate Division affirms decision of Commissioner of Education that board of education, by adopting a July 1, 2009 resolution, which established salary guides for 2007-2008, 2008-2009, 2009-2010, and 2010-2011, exceeded its authority by binding itself and future boards for a total of four years in violation of *N.J.S.A.* 18A:29-4.1, and declared the fourth year of the salary policy null and void. A collective bargaining agreement (CBA) that provides for retroactive payment covering a two-year period and prospectively establishes the pay scale for the next two years is inconsistent with *N.J.S.A*. 18A:29-4.1. ***Bd. of Educ. of Ramsey v. Ramsey Teachers Ass'n,***DOCKET NO. A-1338-11T3, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 2566, Decided November 21, 2012.

Law Against Discrimination

Board of education and superintendent of schools appeal from a jury verdict, awarding plaintiff $147,630 for lost wages, $427,370 for future lost earnings, and punitive damages of $250,000 and a trial judge award of $237,843 in attorney's fees plus expenses of $7708.84. The jury found in favor of plaintiff on his causes of action for (1) discrimination under the New Jersey Law Against Discrimination (LAD), due to a disability or perceived disability for a work-related injury, and (2) wrongful discharge in retaliation for the filing of a petition seeking compensation under the Workmen's Compensation Act. Appellate Division reversed the jury's verdict and award of counsel fees as to the LAD and Workers Compensation claims. The court concluded that admitting certain statements violated the hearsay rule

and the admission was so prejudicial that a "manifest denial of justice resulted." Appellate Division affirmed trial court's decision dismissing employee's racial and ethnic discrimination claims. ***Pace v. Elizabeth Bd. of Educ***., DOCKET NO. A-4995-10T4, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 2683, Decided December 10, 2012.

OPRA

Appellate Division affirms trial court determination that board of education adequately and responsively complied with OPRA request for school records of attorney bills related to student's federal Rehabilitation Act claim against the school district. A prevailing party fee dispute was pending remand from the Third Circuit at the time of the request. ***M.G. v. E. Camden County Reg'l Sch. Dist. Bd. of Educ. Records Custodian***, DOCKET NO. A-1829-11T4, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 2767, decided December 19, 2012.

Appellate Division dismisses appeal of Law Division order denying plaintiff's application for "more narrowly redacted versions" of records she received from the board of education pursuant to an OPRA request. The court specified that plaintiff's application was denied "without prejudice." The order denying plaintiff's application without prejudice is not a final appealable order. Plaintiff has the right to seek relief after the parties' underlying claim has been concluded. ***D.F. v. Collingswood Bd. of Educ., D***OCKET NO. A-1668-10T1, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 2543, Decided November 19, 2012.

Reduction in Force

Appellate Division affirms Commissioner of Education denial of teacher's motion to reinstate her petition of appeal challenging her placement on the school district's seniority list, which she had previously withdrawn with prejudice. Teacher freely and knowingly withdrew her petition after consultation with counsel and a nearly year-long period of extensive discovery, wherein she had the opportunity to review the District's employment records as well as multiple drafts before the mutually-developed and agreed upon seniority list was finalized. ***Ashe v. State Operated Sch. Dist. of Paterson***, DOCKET NO. A-1307-11T3, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 2807, Decided December 26, 2012.

Appellate Division affirms Commissioner of Education decision finding that board of education's reduction of hours for tenured teachers and speech therapists did not constitute a RIF as described in *N.J.S.A.* 18A:28-9 since there was never any entitlement to a particular number of hours; no violation of tenure rights or OPMA. Tenured teachers and speech therapists were employed on an hourly basis by county special services school district to provide services in non-public schools. Employees alleged in consolidated suit that their hours for the 2010-2011 school year were improperly reduced by respondent in violation of their tenure and seniority rights, and should have been done according to seniority. ***Kourtesis v. Bergen County Special Servs. Sch. Dist.***, DOCKET NO. A-2139-11T4, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 2527, Decided November 19, 2012.

Superintendent Contract

Appellate Division affirms decision of Acting Commissioner that board of education was not legally bound to renew the superintendent's contract for three years and did not act to extend his existing contract for an additional one-year period. The Board gave legally valid notice to Negron that his contract would not be renewed, and the affirmative votes of five Board members were required to extend his contract. While no separate formal action to non-renew was undertaken by the Board, the Board ratified the board secretary's notice of non-renewal by its formal adoption of the two September 2010 resolutions confirming its decision not to renew the superintendent's employment. ***Negron v. Board of Education of South Plainfield,*** DOCKET NO. A-4406-10T1, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 2634, Decided December 3, 2012.

Tort Claims Act

Appellate Division affirmed trial court judgment after a jury trial dismissing parents' complaint for personal injuries their child suffered at an after-school Halloween event, hosted by the Home and School Association. While playing tag with other children, the child slipped and fell resulting in a displaced fracture of the femur, which required surgery. The jury determined that neither the conduct of the Home and School Association nor the board of education was the proximate cause of the injury. ***Vinci v. Clifton Bd. of Educ.***, DOCKET NO. A-4828-10T4, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 2572, Decided November 21, 2012.

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New Jersey Superior Court, Law/Chancery Division

Plaintiff parent brought an action on behalf of her minor autistic child and a putative class of all other similarly situated persons, against the board of education. Plaintiff parent sought, under the NJLAD, to enjoin the board from discriminating against kindergarteners who require special education services. Plaintiff parent alleged that members of the class are forced to attend a school other than the neighborhood school, without the board having given consideration to whether it is reasonable and appropriate to educate these children in their neighborhood school, as other kindergarteners are educated. The Chancery Division judge dismissed the action and entered judgment on behalf of the board of education. Plaintiff failed to establish a prima facie 'failure to accommodate' case under the NJLAD because it was not demonstrated that the board of education failed to reasonably accommodate A.T.'s learning disability, autism. The placement was fully ADA-compliant, and comported with the requirements of the IDEA and the Rehabilitation Act. The record was devoid of any proof of any damages to any of the students or to any members of the putative class. *J.T. v. Dumont Pub. Sch*., DOCKET NO. C-139-12 CIVIL ACTION, SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, BERGEN COUNTY, 2012 N.J. Super. Unpub. LEXIS 2834, Decided December 20, 2012.

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Commissioner of Education

Certification

Commissioner finds that the Board of Examiner's suspension of elementary teacher's certificate for one year was not supported by the evidence in the record and was unduly harsh. Modifies penalty to suspension for 2 months. While board proved that teacher's behavior was at times inappropriate, and that she violated administrative directive and school policy, the conduct did not establish that she is unfit to discharge the duties of her position, and her prior record contained several positive evaluations which the Board specifically recognized as an otherwise untarnished career. ***Matter of Gleim*, Commr 2012: Dec 21 (appeal of Board of Examiners).**

Choice

Commissioner dismisses with prejudice the petition of parent who appealed Board's decision not to accept her son under the School Choice program, where she failed to appear at the hearing. ***L.D., o/b/o minor child, D.F. v. Bd of Ed of Bound Brook*, Commr 2012: Dec 10.**

Graduation

Commissioner dismisses with prejudice the request of an adult student for emergency relief to permit

her to graduate and to attend commencement; petitioner received her high school diploma and finds that she has knowingly and voluntarily withdrawn her emergent relief application. ***Cheng v. North Bergen Bd. of Ed*., Commr 2012:Nov. 13.**

HIB (Harassment, Intimidation and Bullying)

Commissioner dismisses appeal as to some of the petitioner parents for failure to appear at hearing; parents had brought appeal of "bullying" charges against their children stemming from a single incident that occurred in March 2012, seeking downgrade to "inappropriate behavior," and asking that all references to bullying be removed from each student's file. ***B.B. and M.B., o/b/o K.B. et al,* Commr 2012: Dec 19 (Dumont)**

NJSIAA

The Assistant Commissioner upheld NJSIAA's decision stripping North Bergen High School of the State Football Championship for recruiting violations. North Bergen did not challenge the underlying recruiting violations, but rather contends that this matter that had been heard by the Controversies Committee, should not have then come before the Executive Committee, and that it was not afforded the requisite due process before the Executive Committee. However, the Assistant Commissioner found that the decision to allow Montclair to appeal the penalty to the Executive Committee even though Montclair was not a party to the original hearing, was not arbitrary or capricious; Montclair was an aggrieved party, having been the school that had lost the title to North Bergen, and its interest did not become real until after the Controversies Committee determined that North Bergen had cheated. ***Bd. of Ed. of North Bergen v. NJSIAA,* Commr 2012: Dec. 14.**

Public Contracts

Commissioner denies petition by resident and professional association to compel the school board to call for the forfeiture of a bid bond posted by a bus company that had posted the bond when submitting a bid for transportation services; and to compel the insurance company to pay the bond over to the district. As the bus company was not the lowest responsible bidder (its bid was non-responsive to the specifications as it failed to provide evidence of its ability to obtain the required insurance-- a material condition of the bid---and as the insurance certificate referenced in its bid did not name the bidder, but rather named other companies) there was no basis to warrant the forfeiture of the bid bond, which was posted to guarantee that a contract would be executed if the bid was accepted. ***Garden State School Bus Contractors and Pribyl v. Millstone Bd. of Ed*., et al., Commr 2012 Nov. 2**.

Pupil Residency

Commissioner dismisses residency matter as moot where parent provided driver's license/identification verifying her residence in Woodland Park. ***A.R., o/b/o A.V. v. Woodland Pk Bd. of Ed*., Commr 2012:Nov. 13.**

Commissioner dismisses *pro se* residency appeal for failure to appear.***M.K., o/b/o I.T.K. v. Clifton Bd. of Ed., Commr 2012:Nov. 21.***

Commissioner dismisses *pro se* residency as moot where the student had transferred out of the district and the board withdrew its counterclaim for tuition. ***J.P., o/b/o S.N. v. Clifton Bd. of Ed., Commr 2012:Nov. 21.***

Sister and mother of high school senior failed to demonstrate that the child was entitled to be educated in Hawthorne although sister alleged that child came to live with her in Hawthorne so she could complete her year at the Vo Tech, when her mother's house was damaged by Hurricane Irene; temporary guardianship agreement, not provided by a court of law, was insufficient where overwhelming evidence suggests that the child was residing with mother in Garfield during the period at issue – accordingly mother and sister are liable for the costs of educating the child for the period in question.

Commissioner rejects calculation of back tuition and remands for redetermination of total due the board. ***C.B., o/b/m, S.H. v. Hawthorne Bd. of Ed., Commr 2012:Nov. 27. Initial decision***

Parent who claimed she was homeless and challenged board's determination that her children did not reside in Burlington, ultimately presented acceptable proof of residency in Burlington, and as the Board dropped its challenge; matter is moot, petition is dismissed; tuition issues have been settled. ***T.H., o/b/o minor children, S.K., S.H. AND S.H. v. Bd. of Ed. Of Burlington, Commr 2012:Nov. 27.***

Although *pro se* parent filed residency appeal, Commissioner agrees with ALJ that the issue in this case is not a residency dispute but rather required a homelessness determination pursuant to *N.J.A.C.* 6A:17-2.6(h), also within the Commissioner's jurisdiction; however, although facts were in dispute where parent had signed a lease on an apartment in Audubon but lease was terminated before she could move in, and facts were in dispute, matter and counterclaim were dismissed without prejudice as parent failed to appear at hearing. ***G.H., o/b/o M.H., S.A. AND I.H. v. Bd of Ed of Gloucester, Commr 2012: Dec 21.***

Reduction in Force

Commissioner dismisses petition of RIF'd tenured Director of Curriculum and Instruction/Principal who claimed her tenure and seniority rights were violated when the school district failed to employ her in district-level position of Director of Special Education/Child Study Team, and also claimed that a staff member (intervenor) was unqualified for this position, and further claimed entitlement to a principal position. Commissioner holds that while petitioner was a backup to the building principal, her primary duties related to curriculum and instruction and it was not established whether she actually performed the duties of principal to become tenured in that position; the intervenor is qualified to hold the Director position under her administrative certificate with a principal endorsement and instructional certificate with a Teacher of the Handicapped endorsement; and there exists no principal vacancy to which petitioner could claim entitlement at the time the petition was filed. ***Jacqueline v. Dennis Twp, Commr 2012: Dec 21.***

Tenure Acquisition

Petitioning teacher had not acquired tenure and board did not violate her tenure rights when it failed to renew her contract, because during the 2010-2011 year she served in a position where there was no vacancy, which did not count toward acquisition of tenure; the teacher she replaced was on a leave of absence and serving in a temporary teaching position in the district funded through a federal grant; further, the petitioner was employed for that same year under a contract that advised that no tenure credit would accrue to her during the year. ***Platia v. Hamilton Bd. of Ed., Commr 2012:Nov. 2.***

Tenure Dismissal

Charter School Tenure: Tenure charges against business manager are settled, with terms of resignation agreement set on the record. ***Arbitration Between: Trenton Community Charter and Birnberg, DOE, Dec 1, 2011.***

Commissioner grants board's motion to dismiss petition of three teachers who claimed that board's failure to renew their contracts violated tenure rights; in fact they had served as replacements for specific teachers who were on maternity leave and therefore did not fill vacant positions; such time did not count towards acquiring tenure; argument for equitable estoppel fails because there is no evidence that the Board ever made a material representation to the teachers that their replacement time would count towards the attainment of tenure. ***Bridgewater-Raritan Ed. Ass'n v. Bd. of Ed., Commr 2012: Nov. 21****.*

Workers Compensation

Appeal asserting that the Board failed to pay full salary without loss of sick time for an injury sustained in

the course of employment, was placed on the inactive list pending resolution of a related Worker's Compensation case, and later dismissed for failure to prosecute.
Wallace v. Mount Olive Bd. of Ed., Commr 2012:Nov. 1.

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Arbitrator TeachNJ

Arbitrator Gifford finds that Board sustained its tenure charges of unbecoming conduct against tenured Teacher of the Year, who ran naked through parking lot and lied about it to the police. Board orders teacher's dismissal. ***Tenure Hearing of Bringhurst, Arb 2012:Nov.30 (Vineland).***

Inefficiency charges are dismissed; annual evaluation failed to adhere substantially to the evaluation process as it is internally contradictory with respect to actual classroom instruction; arbitrator notes "stunning facial contradiction on the annual performance review….shattering any norms of process" where narrative was "wondrous" but teacher got zero in 4 of 5 categories. ***Tenure Hearing of Williams, Arb 2012: Dec 8. (Newark).***(David Gregory, arbitrator)

Charges of incapacity, conduct unbecoming and neglect of duty are upheld, where teacher was chronically absent; teacher previously had increment withheld and earlier charges (due to 72 days absence in 2009-10; 63 days in 2010-11) had been resolved through settlement involving treatment in substance abuse program, but teacher continued to be absent from April 4 to end of year and provided no information about continued treatment; although he had days in his sick leave bank he had not requested a leave of absence according to board policy; did not attend EAP as per earlier settlement; provided no doctor note of claimed medical issues, Earlier settlement agreement of absenteeism charges did not exclude consideration of past absences for future matters. ***Tenure Hearing of Levine, Arb 2012:Dec 16 (Jersey City)*** (Randi E. Lowitt, arbitrator)

Arbitrator upholds charges of unbecoming conduct for teacher who used district internet to send thousands of romantic and sexually suggestive emails, but imposes suspension and increment withholding rather than dismissal, where teacher, after receiving official reprimand, immediately stopped sending sexually explicit email communications and double entendres. Although she continued to use district network for personal, albeit non-sexual communications, arbitrator finds that district's earlier reprimand did not clearly warn teacher about general use of the Network to send brief non-sexual personal email communications during non-instructional or free time, and in fact she received positive evaluations in each and every year. Teacher did engage in unbecoming conduct by taking an unauthorized break to browse internet shopping sites on five occasions during team teaching, creating the potential for harm to students in a combined gym class. ***Tenure Hearing of Buglovsky, Arb 2012:Dec 21 (Randolph)***(Joseph Licata, Esq., arbitrator)

Arbitrator accepts settlement of tenure charges, noting nature of charges, teacher's 13 years of service and fact that no child was harmed. ***Tenure Hearing of DePre, Arb. 2012:Dec 27*** (Daniel Brent, arbitrator)

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School Ethics Commission

No probable cause to credit allegation that board member violated *N.J.S.A*. 18A:12-24(c) of the School Ethics Act by attending closed session discussions relative to contract negotiations with the local bargaining unit prior to the tentative memorandum of agreement being signed while being a member of

the same statewide union teaching in another district. Complainant submitted nine certifications (from fellow members of the board and the business administrator) that indicate that he did not attend closed session when negotiations were discussed. ***Bleistine v. McShea, SEC 2012 Dec 18.***

SEC dismisses the complaint for failure to allege facts sufficient to maintain a claim that would be a violation of the Act. Board President did not violate *N.J.S.A*. 18A:12-24.1 (d), (c), and (f) when she voted against a project to restructure the playground and basketball courts because the suggested model was too large in scope for the limited area proposed. SEC found none of the indicia that would support a conclusion that the respondent violated any subsection of the Code. ***Clark v. Hansen SEC 2012 Dec 18.***

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State Board of Examiners

Certificate revoked where Teacher pled guilty in another state to one count of Possessing a Sexual Performance by a Child. Teacher was sentenced to sixty days' incarceration and ten years' probation. Other state's Commissioner of Education revoked teaching certificates. In New Jersey, teacher holds a Teacher of Physical Education certificate. Teacher filed no response to order to show cause. Board may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. Teacher's act of Possessing a Sexual Performance by a Child is inexcusable for any individual, teacher or not. ***Berke, Exam 2012: Nov 30***

Certificates voluntarily relinquished with the force and effect of a revocation. Teacher of Mathematics Certificate of Eligibility with Advanced Standing, Principal Certificate of Eligibility, and Teacher of Mathematics, Supervisor and Principal certificates are revoked effective immediately. ***Boxley, Exam 2012: Nov 30***

Teacher's certificates revoked after she pled guilty to Criminal Mischief. On June 17, 2011 Teacher was sentenced to two years' probation. As a result of the conviction, Teacher was also disqualified from public school employment pursuant to *N.J.S.A*. 18A:6-7.1 et seq. Teacher currently holds Teacher of Health and Physical Education and Teacher of Driver Education certificates, both issued in June 1977, a Supervisor certificate, issued in July 1999, a Principal Certificate of Eligibility, issued in July 1999 and a Principal certificate, issued in December 2000. Notwithstanding teacher's long unblemished career, revocation is appropriate where the Legislature has determined that such an offense disqualifies a person from public employment. ***Covely, Exam 2012: Nov 30***

Teacher accepted into Pretrial Intervention program (PTI). PTI agreement prohibited him from accepting a teaching potion in New Jersey during the term of the PTI. Teacher agreed to voluntarily relinquish his Teacher of Social Studies certificate, a Supervisor certificate, and a Principal Certificate of Eligibility. Relinquishment accepted with the force and effect of a revocation. ***Daniw, Exam 2012: Nov 30***

Following proposal accepted by Board of Examiners, Teacher of Elementary School Certificate of Eligibility, and Teacher of Elementary School and Supervisor certificates are relinquished with full force and effect of revocation. ***Gant, Exam 2012: Nov 30***

Following tenure dismissal for inefficiency, Board of Examiners revokes teacher's certificates citing his recalcitrance in seeking help or accepting it when offered for the past several years suggests that he was no longer suitable for the classroom. Teacher's conduct, in its totality, amply demonstrates his unfitness to continue to be a teacher. The Board therefore concludes that the only appropriate response to teacher's inefficiency is the revocation of his teaching certificate. ***Gilmer, Exam 2012: Nov 30***

Teacher of Health and Physical Education and Teacher of Elementary School certificates revoked

where he reported to work on two occasions under the influence of cannabinoids and cocaine, which was confirmed by urine drug screen tests. ***Henderson, Exam 2012:Nov 30***

Teacher of Elementary School certificate be suspended effective immediately following indictment for Aggravated Sexual Assault, Endangering the Welfare of a Child and Sexual Assault. If the charges are resolved in his favor, he shall notify the Board for appropriate action regarding the suspension order. ***Hildreth, Exam 2012: Nov. 30***

Teacher of Social Studies Certificate of Eligibility with Advanced Standing, and a Teacher of Social Studies certificate revoked where teacher convicted of Fourth Degree Aggravated Assault with Weapon and disqualified from public employment. ***Iurato, Exam 2012: Nov. 30***

Substitute credential revoked where teacher admitted into a Pre-Trial Intervention Program (PTI) after being charged with Endangering the Welfare of Children. As a condition of PTI, teacher signed a Consent Order in which he agreed the he was "prohibited from any future employment working with children, including any schools or day-care centers, or participating/volunteering in organized children's activities, such as coaching youth sports, Boy Scouts or other youth organizations." ***Janes, Exam 2012: Nov. 30***

Teacher of Music Certificate of Eligibility with Advanced Standing revoked where teacher pled guilty to Endangering the Welfare of a Child and was sentenced to three years' imprisonment, ordered to comply with the provisions of Megan's Law and ordered to forfeit his public employment. The court also forever disqualified teacher from holding any position of honor, trust or profit under this State or any of its administrative or political subdivisions pursuant to *N.J.S.A.* 2C:51-2d. As a result of the conviction, teacher was disqualified from public school employment pursuant to *N.J.S.A*. 18A:6-7.1 *et seq.* ***Jerinsky, Exam 2012: Nov 30***

Teacher of Music Certificate of Eligibility with Advanced Standing and Teacher of Music certificate revoked where teacher convicted in Pennsylvania of Possessing Instrument of Crime with Intent to employ it criminally and Recklessly Endangering another Person. As a result of the convictions, teacher was disqualified from public school employment in New Jersey pursuant to *N.J.S.A*. 18A:6-7.1 et seq. ***Kelly, 2012: Nov 30***

Teacher convicted of Endangering the Welfare of a Child (Possession of Child Pornography). Teacher of English certificate revoked. ***Kisselbach, 2012, Nov 30***

Teacher surrendered Pennsylvania Teaching Certificate in lieu of discipline after admitting to the abuse of children. New Jersey-issued Teacher of Latin certificate revoked. ***Leneweaver, 2012 Nov 30***

School Nurse's School Business Administrator Certificate of Eligibility and School Nurse, Teacher of Health and Physical Education, Supervisor, and Principal certificates suspended for six months effective immediately following discrepancies in her medical records and alterations of the School Health Visit Logs after-the-fact. ***Lentine, 2012 Nov 30***

Teacher pled guilty to Endangering the Welfare of a Child. Teacher was sentenced to five years' imprisonment and parole supervision for life upon release. As a result of the conviction, teacher was disqualified from public school employment pursuant to *N.J.S.A*. 18A:6-7.1 et seq. Teacher of Mathematics Certificate of Eligibility and Teacher of Mathematics certificate revoked. ***Lindo, 2012 Nov. 30.***

Teacher of English Certificate of Eligibility immediately revoked following resignation where teacher communicated inappropriately with student. "Friending" a student on Facebook rather than communicating about school matters on a district-sanctioned website might be a "lapse in judgment." Detailing explicit sexual desires to that student is not. Rather, it is willful behavior at its most outrageous and cannot be countenanced. ***Mifsud, 2012 Nov. 30***

Teacher of Industrial Arts, Student Personnel Services and Principal certificates revoked where teacher convicted of Endangering the Welfare of a Child. ***Ponsi, 2012 Nov 30***

Teacher of Elementary School and Teacher of the Handicapped certificates voluntarily relinquished with the force and effect of a revocation. ***Todzia, 2012 Nov 30***

Teacher's chronic and excessive absenteeism and tardiness, unbecoming conduct and insubordination results in the revocation of her Teacher of Elementary School, Teacher of Nursery School, and Teacher of the Handicapped certificates. ***True, 2012 Nov 30***

Business Administrator pled guilty to Conspiracy and False Representation for Government Contract. School Business Administrator certificate relinquishment accepted with the force and effect of a revocation. ***Berman, 2012 Dec 13***

Teacher of Mathematics Certificate of Eligibility with Advanced Standing, Teacher of Mathematics certificate, and a Supervisor certificate relinquished with the force and effect of a revocation where teacher pled guilty to Official Misconduct. ***Maucione, 2012 Dec 13***

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New Jersey Council on Local Mandates

There were no education-related decisions for November/December 2012.

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New Jersey Division on Civil Rights

There were no education-related decisions for November/December 2012.

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Election Law Enforcement Commission

There were no education-related decisions for November/December 2012.

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Government Records Council

Custodian provided access in timely manner to requested Certificate of Determination. ***Valdes v. NJ Department of Education No. 2011-372 (GRC 2012 Dec 18)***

Custodian has borne her burden of proving a lawful denial of access to the requested records because she provided the Complainant with the specific reasons for her inability to fulfill the request. The requested records are exempt from public access pursuant to *N.J.S.A*. 47:1A-9 and *N.J.S.A*. 18A:6-7.4 as criminal history record information which must be kept confidential by the Commissioner of

Education. ***Herron v. NJ Department of Education, No. 2011-363(GRC 2012 Dec 18)***

Custodian has borne her burden of proving a lawful denial of access to the requested records because she provided the Complainant with the specific reasons for her inability to fulfill the request and the Complainant provided no clarification. The requested records are exempt from public access pursuant to *N.J.S.A*. 47:1A-9 and *N.J.S.A*. 18A:6-7.4 as criminal history record information which must be kept confidential by the Commissioner of Education. ***Herron v. NJ Department of Education, No. 2011-364(GRC 2012 Dec 18)***

In seeking an extension of time, Custodian failed to specify an anticipated date on which access to the requested records would be granted or denied. Certain requested items are overly broad and are invalid under OPRA pursuant to MAG Entertainment, *LLC v. Division of Alcoholic Beverage Control*, 375 *N.J.Super*. 534 (App. Div. 2005). A proper request under OPRA must identify with reasonable clarity those documents that are desired, and a party cannot satisfy this requirement by simply requesting all of an agency's documents. A request for "Any and all Board minutes, documentation, e-mails, and/or any other written instrument" is insufficient as an OPRA request. ***Inzelbuch v. Hamilton Twp Board of Educ. No. 2011-220 (GRC 2012 Dec 18)***

Because a minimum GPA is required to obtain licensure from the Department of Education, the GPA is data contained in information which disclose conformity with specific experiential, educational or medical qualifications required for government employment or for receipt of a public pension pursuant to *N.J.S.A*. 47:1A-10. As such, the GPAs contained on the requested transcripts are public. Redaction of the individual grades contained in the requested transcripts is lawful. Complainant's argument that the only way to validate the authenticity of the requested transcripts is to view the originals, fails to override the potential harm for identity or financial fraud present with the disclosure of dates of birth or social security numbers. As such, the Custodian has lawfully denied access to the dates of birth and social security numbers pursuant to *N.J.S.A*. 47:1A-1. Custodian's denial of access to the original transcripts is lawful. ***Herron v. NJ Department of Education, No. 2011-268 and 2011-269 (GRC 2012 Dec 18)***

The requested settlement of a special education matter is a student record pursuant to *N.J.A.C*. 6A:32-1.1, and because *N.J.A.C*. 6A:32-7.5 provides that only authorized persons enumerated in the regulation shall have access to student records, and because the evidence of record reveals the Complainant is not such an authorized person, and because exemptions from disclosure provided by regulations promulgated under the authority of a statute apply to OPRA pursuant to *N.J.S.A*. 47:1A-9.a., the Custodian did not unlawfully deny the Complainant access to the settlement agreement. ***Popkin v. Englewood Board of Educ. No. 2011-263 (GRC 2012 Dec 18)***

Custodian did not receive request for records until complainant filed Denial of Access Complaint. Upon receipt of complaint, custodian provided requested records to the extent possible. Therefore, because the custodian certified that she never received a copy of the complainant's OPRA requests, the custodian has met her burden of proving that the failure to respond to the Complainant's request did not constitute an unlawful denial of access under OPRA. N.J.S.A. 47:1A-6. ***Herron v. River Vale Board of Educ. No. 2011-351 (GRC 2012 Dec 18)***

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New Legislation

P.L.2012, c.74. -see **A1902** Approved 12/3/2012 ***PDF Format***
"Tabitha's Law"; requires parent or guardian to notify school administrators if pupil will be absent; requires school to notify parent in event of unexcused pupil absence.

P.L.2012, c.75. -see **A2879** Approved 12/3/2012 ***PDF Format***

Prohibits requirement to disclose user name, password, or other means for accessing account or service through electronic communications devices by institutions of higher education.

P.L.2012, c.78. -see **S1328** Approved 12/7/2012 ***PDF Format***
Permits Type II district with board of school estimate to opt to move school election to November; eliminates board of school estimate's approval of budgets for such districts, except for proposals to spend above cap.

P.L. 2012, c. 80 –see **A3164** Approved 12/21/2012 ***PDF Format***
Requires State pay educational costs of students who reside in domestic violence shelter or transitional living facility outside district of residence for more than one year.

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New Regulations/Executive Orders

N.J.A.C. 6A:2 New organizational chart and reporting responsibilities for the Department of Education and the Commissioner of Education 44 N.J.R. 3061(b) 12/17/12

N.J.A.C. 6A:12 Adopted amendments, repeals and new regulations regarding interdistrict public school choice 44 N.J.R. 3064(a) 11/15/2012

N.J.A.C. 6A:30 Adopted amendments and new regulations regarding NJQSAC and District Performance Review 44 N.J.R. 3067(a) 11/15/2012

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United States Supreme Court

There were no education-related decisions for September/October 2012.

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3rd Circuit Court of Appeals

Employment Discrimination

Employment discrimination case dismissed where pro se plaintiff who was a substitute in district alleges discrimination in termination following altercation with student. Complaint alleged race and gender discrimination under Title VII; age discrimination under the ADEA; disability discrimination under the ADA; and violation of the IDEA. Plaintiff does not present a cogent legal argument to this Court. It is well settled that if an appellant fails to comply with the requirements to set forth an issue raised on appeal and to present an argument in support of it the appellant normally has abandoned and waived that issue on appeal and it need not be addressed by the court. The District Court correctly concluded that petitioner failed to set forth any facts that would support a claim of discrimination under Title VII; failed to exhaust his administrative remedies for his age, gender, and disability discrimination claims, lacked standing to litigate an IDEA claim, and made no attempt to remedy the defects in his complaint, despite notice and his familiarity with the pleading requirements. ***Jones v. Camden City Bd. of Educ.*, No. 12-1323 (3d Cir. Oct. 1, 2012)**

Special Education

To comply with the IDEA, a school district no longer responsible for educating a child can still be held responsible for its past transgressions. A claim for compensatory education is not rendered moot by an out-of-district move, even if that move takes the child out of state. ***D.F. v. Collingswood Borough Bd. of Educ.*, ___ F3d___ (2012)** (Sept 12, 2012).

District proposed in IEP that child be placed in kindergarten the following fall, but the parents urged that the child be placed in preschool for another year. Unable to resolve dispute, parents unilaterally placed the child in a preschool program. The district court found that the parents were not entitled to reimbursement. The IDEA authorizes tuition reimbursement for parents who unilaterally decide to place their child in an out-of-district school if the IEP proposed by the school district failed to offer the child a FAPE and the placement the parents chose was proper under the IDEA. District court erred in denying reimbursement on equitable grounds based on the parents' conduct since the parties reached an impasse based on the parents' insistence on preschool and the district's insistence on kindergarten, and the parents did not disregard their obligation to cooperate and assist in the formulation of an IEP. District Court must determine whether the IEP proposed by the District offered student a FAPE, and, if not, whether the placement by parents was proper under the IDEA. ***Upper Freehold Reg'l Bd. of Educ. v. T. W.*, No. 11-2151 (3d Cir. N.J. Sept. 7, 2012)**

Matter involves a case of first impression in Third Circuit on exceptions to IDEA statute of limitations. IDEA statute of limitations upheld unless it is shown that there were "specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint" or LEA

withheld information from the parent that was required to be provided to the parent. In order to satisfy these requirements of misrepresentation, plaintiffs must show that the school intentionally misled them or knowingly deceived them regarding their child's progress. In order to show that LEA withheld information plaintiffs can satisfy this exception only by showing that the school failed to provide them with a written notice, explanation, or form specifically required by the IDEA statutes and regulations. Establishing evidence of specific misrepresentations or withholding of information is insufficient to invoke the exceptions; a plaintiff must also show that the misrepresentations or withholding caused her failure to request a hearing or file a complaint on time. The terms "prevented from" and "due to" denote a causation requirement. Thus, where the evidence shows, for example, that parents were already fully aware of their procedural options, they cannot excuse a late filing by pointing to the school's failure to formally notify them of those safeguards. In instant case, plaintiffs failed to show that there was any error on part of LEA or SEA determination that plaintiffs were ineligible for exceptions to statute of limitations. Plaintiffs may not invoke common law equitable tolling doctrines where specifically enumerated exceptions governing federal statute are present; Student received FAPE and is not entitled to compensatory education award. ***D. K. v. Abington Sch. Dist.*, 696 F.3d 233 (3d Cir. 2012)**

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New Jersey District Court

Employment Discrimination

Employee filed a complaint alleging that defendant Northfield Board of Education violated the New Jersey Law Against Discrimination ("NJLAD"), the New Jersey Conscientious Employee Protection Act ("CEPA"), plaintiff's procedural due process rights pursuant to NLRB v. Weingarten, 420 U.S. 251, 95 S.Ct. 959, 43 L.Ed.2d 171 (1975), and plaintiff's rights under the First Amendment of the U.S. Constitution. Plaintiff has also alleged that defendant made defamatory statements about her. Plaintiff agreed to dismiss her NJLAD, CEPA and Weingarten due process claims, but requested leave to file an amended complaint regarding her remaining claims of First Amendment retaliation and defamation. Plaintiff will be permitted to file an amended complaint asserting a First Amendment claim. Certain defamation claims are time-barred, while those within 90 day limit will be permitted to move forward. Plaintiff will be permitted to file an amended complaint as to any non-dismissed claims. Plaintiff will be permitted to file an amended complaint as to any non-dismissed claims. ***Faust v. Northfield Bd. of Educ.*, No. 12-0274 (D.N.J. Sept. 4, 2012)**

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New Jersey Supreme Court

There were no education-related decisions for September/October 2012.

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New Jersey Superior Court, Appellate Division

Board of Education Authority

The language of N.J.S.A. 18A:38-7.8 is clear and unambiguous concerning residency of students on military base, and thus once district became designated under that provision, it became obligated to

provide a free public education to all school age children residing on base, regardless of any intent district might have harbored to limit its responsibility to Navy dependents only. Any relief to be afforded to district must come from the Legislature and not from the Commissioner or the courts. ***Tinton Falls Board of Educ. v. Colts Neck Board of Educ.*, No. A-1908-11T1 (App.Div. Oct. 22, 2012)**

Commissioner Authority

The salary cap did not exceed the authority delegated to the Commissioner by the Legislature in N.J.S.A. 18A:7-1 to -16 (L. 2007, c. 63, §§ 42-58) or violate the Separation of Powers Clause, N.J. Const. art. III, par. 1; The cap on salary does not conflict with the authority of a local school board to fix its superintendent's salary, N.J.S.A. 18A:17-19; application of the salary cap to superintendents whose contracts expired on June 30, 2011 is not precluded by N.J.S.A. 18A:17-20.1 or -20.2; The Commissioner did not violate the rulemaking provisions of the Administrative Procedure Act. N.J.S.A. 52:14B-1 to -24, by directing the ECSs to suspend review of renegotiated contracts pending adoption of the salary caps. There is nothing arbitrary, capricious or unreasonable in the Commissioner's effort to rein in spending with salary caps based on enrollment. ***New Jersey Ass'n of Sch. Adm'rs v. Cerf, ___ N.J. Super. ___* (App.Div. Oct. 25, 2012)**

Labor Relations

In dispute over interpretation of contract, arbitrator determined that calendar requiring that the last two days of the school year be shortened days for students only did not violate contract. Contract required that ""[t]he last two scheduled student days of school will be shortened days." Arbitrator found provision ambiguous and looked to longtime past practice and found that they were shortened for students only. Arbitrator did not exceed or imperfectly execute powers such that a definite award could not be made. Arbitrator's interpretation of the Agreement is reasonably debatable and entitled to court deference. ***Educ. Ass'n of Mt. Olive v. Mt. Olive Bd. of Educ.*, No. A-2144-11T2 (App.Div. Oct. 2, 2012)**

NJSIAA

Petitioner sought waiver of eight semester rule for participation in high school athletics. Commissioner affirmed NJSIAA decision that there were no "extraordinary circumstances" that warranted waiver from rule. Argument that student was being held back for academic reasons rather than athletic is not convincing. Petitioners voluntarily held student back one grade. Commissioner's decision was not arbitrary, capricious or unreasonable. Regarding educational matters, the New Jersey Supreme Court has cautioned that "the courts cannot supplant educators; they are not at liberty to interfere with regulatory and administrative judgments of the professionals in the field of public education unless those judgments are palpably arbitrary or depart from governing law." Decision affirmed. ***Board of Education of Summit v. NJSIAA*, No. A-5771-11T1 (Oct. 23, 2012)**

Reduction in Force

K-5 physical education teacher challenges RIF where seemingly less senior staff who taught in departmentalized program were retained. Under N.J.A.C. 6A:32-2.1, departmentalized seventh and eighth grade programs are treated differently from nondepartmentalized seventh and eighth grade programs. It appears entirely reasonable for the Commissioner to interpret the regulation to allow the sixth grade to be treated in the same fashion. A K-5 teacher has very different duties and responsibilities from a teacher in a departmentalized program. As such, there is ample reason to conclude that departmentalized teaching experience fell into a different category from nondepartmentalized experience. Moreover, nothing in the record suggests that the Commissioner's determination contradicted the legislative intent behind the statute controlling seniority rights and its implementing regulations. Commissioner's decision affirmed. ***Cozzolino v. Board of Educ. of West Orange*, No. A-5455-10T1 (App.Div. Sept. 12, 2012)**

School Ethics

School Ethics determination of frivolous complaint and imposition of $500.00 fine upheld where SEC determined that petitioner continued complaint solely for the purpose of harassment or malicious injury to board member. It made this finding based on the fact that petitioner knew or should have known that his complaint was without any reasonable basis in law or equity since he was unable to set forth any facts to support a claim of violation. It is well settled that an agency decision will be upheld on appeal unless it is shown to be arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence. A reviewing court should not alter a sanction imposed by an administrative agency unless it is "shocking" to the court's sense of fairness. Court found that there was ample support in the record for the determination and the fine. ***Valdes v. Morejon,* No. A-3894-10T3 (App.Div. Oct. 2, 2012)**

Special Education

The Office of Special Education within the Department of Education has authority to investigate a complaint alleging a violation of the special education rules and regulations. N.J.A.C. 6A:14-9.2. Student's parents filed a complaint in which they claimed the district was not complying with N.J.A.C. 6A:14-4.8 because it was not providing the student the required number of hours of instruction per week. The complaint raised no issue as to the substantive content of the instruction provided to the student. **New Jersey Department of Education Complaint Investigation** C2012-4341, No. A-1000-11T1 (App. Div. Oct 11, 2012)

State Monitor

State Monitor's decision overturning reinstatement of employee by board of education upheld where it was not arbitrary and capricious for the Commissioner to conclude that the "exposure to potential legal liability" provided "a valid fiscal rationale" for the action taken; that the monitor's decision was "related to the fiscal management of school funds, and thus falls within the statutory authority of a state monitor." ***Rankins v. Board of Educ. of Pleasantville*, No. A-1662-10T4, A-1697-10T4 (App.Div. Oct. 22, 2012)**

Tenure Acquisition

Court affirmed that petitioner could not earn tenure as a bus driver, and as a part-time utility worker with fixed term appointments, she qualified neither for tenure under N.J.S.A. 18A:17-3 nor the tenure benefit provided in the applicable collective bargaining agreement. The factual record was undisputed, and appellant has made no showing that the Commissioner failed to follow the law or that his action was otherwise arbitrary, capricious or unreasonable. ***Cross v. Bd. of Educ. of Elmwood Park*, No. A-0188-11T4 (App.Div. Oct. 3, 2012)**

Director of Administration was not a recognized title eligible for tenure. Though she performed some duties of business administrator, she neither possessed appropriate certification nor dedicated herself full time to business administrator duties as required by N.J.S.A. 18A:17-2(a). Appellate Division determined that Commissioner's finding that petitioner did not attain tenure was neither arbitrary nor unreasonable. Arguments challenging Board's actions in terminating her employment in district were wholly without merit. ***Cheloc v. Bd. of Educ. of Elizabeth*, No. A-1885-11T1 (App.Div. Oct. 3, 2012)**

Tort Claims Act

Bus aide who was also working as a school aide for another district brought suit charging the Board and its business administrator with malicious abuse and use of process, libelous defamation and negligently accusing her of theft in dispute where she was accused of presenting timesheets reflecting same hours to both districts. The trial judge dismissed her claims based on defamation and negligence for failure to file a timely notice of claim as required by the Tort Claims Act, N.J.S.A. 59:8-3 to 8-11. Subsequently, the judge granted summary judgment in favor of defendants on the malicious prosecution claims. Appellate Division affirmed. Arguments plaintiff presents to establish error, include no references to the record or legal authority, are without sufficient merit to warrant discussion in a written opinion. ***Ford-White v. Landgraf*, No. A-0685-11T1 (App.Div. Oct. 2, 2012)**

In case involving personal injury and student's IEP, the trial court reasoned that it would have been futile to grant plaintiff's motion to file a second amended complaint because the additional claims in the proposed complaint "were previously settled." Appellate Division concluded there was substantial credible evidence to support the trial court's decision, and there was no abuse of discretion. ***L.E.G. v. East Orange Bd. of Educ*., No. A-1178-10T4 (App.Div. Sept. 7, 2012)**

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New Jersey Superior Court, Law/Chancery Division

There were no education-related decisions for September/October 2012.

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Commissioner of Education

Board Authority

Board's decision to not hire long time district employee as Director of Student Personnel Services was neither arbitrary nor capricious. Board members' decision was based on the fact that employee had served in her current position, Department Chairperson of Basic Skills, for less than one year; the break in continuity would not be in the best interests of the students. Other concerns, including experience in the area, were expressed as well. It was demonstrated that each board member made a rational and reasonable decision regarding the hiring of the person for the position in question. ***Correnti,* Commissioner 2012:October 25**

Certification

Commissioner affirmed State Board of Examiners order revoking Teacher of Nursery School and Teacher of Elementary School certificates, of teacher who resigned from her teaching position after the district filed tenure charges alleging unbecoming conduct and other just cause in regard to her conduct toward students. Examiners found Judge Bass' recommendation for a two-year suspension of the certificates to be too lenient, noting that actions in humiliating and frightening young students in front of their peers cannot and should not be lightly dismissed. Record adequately supported SBE determination, which was not arbitrary, capricious or unreasonable. Unbecoming conduct was a pattern of conduct over a 13 year period from 1995 – 2008 which frightened and humiliated her kindergarten-age students including calling a student an idiot; directing other students to shout out the "idiot of the day;" angrily grabbing and brusquely moving students; yelling at the students; and bringing students to tears. ***Pitcher,* Commissioner 2012: September 13**. See also ***IMO Certificates of Pitcher,* Exam 2012:April 2.**

Increment Withholding

Commissioner upheld board of education withholding of increment from early child education teacher, employed in the school district since 1990. Teacher failed to sustain burden of proving that board's action was arbitrary, capricious or unreasonable. Teacher was evaluated twice in the 2011-2012 academic year by two different evaluators and was given notice of the standards and expectations on which she would be evaluated. Both evaluations found the teacher's performance needing of improvement in numerous areas. Notably, the second evaluation revealed no demonstrated improvement in the deficiencies found in the first evaluation. ***Martin,* Commissioner 2012:October 25**

NJSIAA

Commissioner upheld NJSIAA decision denying student request for a waiver of the athletic eligibility Eight Semester Rule. Family's decision to send student to Paraguay for his junior year was voluntary. While he did not play soccer during his year in Paraguay, student did not maintain academic standards, causing him to repeat his junior year on return to Bernards. Request did not meet the test of "truly extraordinary circumstances", which would warrant a waiver of the Eight Semester Rule. NJSIAA decision not arbitrary, capricious or unreasonable. ***Villagra,* Commissioner 2012: September 27**

Reduction in Force

RIF'd tenured teachers, each holding instructional certificate with a K-8 endorsement in elementary education, did not have bumping rights into pre-school positions held by non-tenured teachers. Board determined that RIF'd teachers were not qualified to teach Pre-K as they did not possess a P-3 endorsement and did not demonstrate that, along with their K-8 endorsement, that they had either two full years of experience teaching three and four year olds or were able to demonstrate appropriate content knowledge to teach preschool. The record was devoid of any evidence that the petitioners satisfied either the experience or content knowledge necessary for qualification. ***Fitzgerald, Scott, Watkins* and *Grimm,* Commissioner 2012: September 21**

Reduction in Force

Board of education did not violate rights of tenured principal when it reduced her salary as a result of a reduction in force. Along with being the full time principal of one campus, the principal was also the part time principal of the adult education program on another campus. When the adult education program was completely eliminated for reasons of economy and efficiency, the board of education properly reduced the principal's salary by the amount she was paid as the principal of adult education, $ 10,000. ***Stallone*, Commissioner 2012: October 25**

Commissioner determined that tenured teacher, who alleged that board violated her tenure and seniority rights when it terminated her employment as part of a reduction in force (RIF) abandoned her case. Teacher failed to appear for a hearing and attorney advised that she had an ongoing inability to reach her client. Attorney advised that client was unresponsive to additional attempts to contact her. ALJ concluded that teacher had abandoned the matter. ***Gutierrez,* Commissioner 2012: October 26**

Residency

Student of divorced parents, with joint custody agreement, eligible for free public education in Wood-Ridge, notwithstanding representation of father that student lived with him in Hasbrouck Heights. Facts reflected proof of Wood-Ridge domicile; mother was "parent of primary residence," student's driver's license and summer work history reflected a Wood-Ridge address. ***J.B., Wood-Ridge,* Commissioner 2012: September 17**

Seniority

Teacher's claim that board violated her tenure and seniority rights in a RIF, reinstated. Teacher had moved to new residence and had not received notice of hearing. Commissioner concluded that interests of justice and fair play dictated that petitioner's explanation for her failure to appear – supported by her certification – be accepted and petitioner be given an opportunity to have her claim against the Board litigated. ***Clayton*, Commissioner 2012: September 17**

Sick Leave

Commissioner denied retired teacher's request for restoration of 77.5 sick days used with respect to injuries allegedly sustained in January 2004 fall while in the course of employment in the school district. Teacher had settled two worker's compensation claims without any findings on the underlying merits.

Teacher failed to establish by a preponderance of the evidence that her neck injury was work-related. Medical evidence, given the lapse of time between the fall and the diagnosis of the neck injury, could not make a causal connection between the neck pain and the fall. ***Desai*, Commissioner 2012:October 12**

Student Discipline

Board's "24/7" policy which contained allowed board to deny student participation in extracurricular activities based on a student's drug and alcohol use off school grounds, exceeded the board's authority, was *ultra vires* and unlawful. Policy did not comport with the two prong test dictates of *N.J.S.A*. 6A:16-7.6. Board was directed to bring its policy into compliance with the requirements of *N.J.S.A.* 6A:16-7.6. ***Haddonfield*, Commissioner 2012: September 24**

Superintendent of Schools

Commissioner remands matter to the OAL for a determination on whether the placement of the superintendent of schools, who was employed under a three year contract, on paid administrative leave, was arbitrary, capricious and unreasonable. While the ALJ found that the board properly invoked the Doctrine of Necessity in making its decision, the Commissioner held that the intent and spirit of the Accountability Regulations, particularly regarding the section on early termination of the superintendent, requires a substantive finding that the board is acting in the best interests of the students of the district. ***Caffrey*, Commissioner 2012:October 25**

Tenure Acquisition

Commissioner rejects ALJ decision. Matter remanded to the OAL for a determination of the petitioner's tenure and seniority rights in the District based upon the fact that she received a valid Standard Certificate – Principal on August 11, 2010 with a September 2009 effective date. ALJ's determination that DOE practice of backdating certifications was an *ultra vires* act which violated rulemaking requirements under *Metromedia*, exceeded his authority. Petitioner was eligible to receive certificate in September 2009 as all requirements had been met. ***Francisco*, Commissioner 2012: September 14**

Tenure Dismissal

Board filed tenure charges of excessive absenteeism and insubordination against tenured secretary. Neither secretary nor any attorney acting on her behalf filed an answer to the petition. Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the charges of excessive absenteeism and insubordination may be deemed admitted and are sufficient to warrant termination of the respondent from her tenured secretarial position. ***Hart*, Commissioner 2012: September 27**

Commissioner concluded that tenure charges of unbecoming conduct, insubordination and other just cause against tenured physical education teacher were substantiated and that teacher must be terminated from employment. Charges alleged deceptive and untruthful conduct; inappropriate, defiant and insubordinate conduct; failure to follow administrative directives; failure to enroll in anger management classes; and disregard of corrective plans, relating to several specific incidents as well as ongoing issues involving respondent's consistently negative interactions with his supervising administrators. Actions involved unprofessional, inappropriate and combative interactions with the NJSIAA and numerous negative interactions with school administrators and voluminous "rebuttal" memoranda. Matter was referred to State Board of Examiners for action as may be appropriate. ***Harriman*, Commissioner 2012: October 12**

Board filed tenure charges of unbecoming conduct and other just cause against tenured secretary. Neither respondent nor any attorney acting on her behalf filed an answer to the petition. Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the charges of unbecoming conduct and other just cause may be deemed admitted and are sufficient to warrant termination of respondent from her tenured secretarial position. ***Loyal*, Commissioner 2012: October 26**

Board filed tenure charges of excessive absenteeism and incapacity against tenured teacher. Neither respondent teacher nor any attorney acting on her behalf filed an answer to the petition. Commissioner concluded that, pursuant to *N.J.A.C.* 6A:3-5.4(h), the charges of excessive absenteeism and incapacity may be deemed admitted and are sufficient to warrant termination of the respondent from her tenured teaching position. ***Stapleton*, Commissioner 2012: October 26**

Tenure Entitlements

Board violated tenured secretary's rights when it terminated her without cause in 2007. Secretary entitled to reinstatement, back pay and emoluments. Teacher did not accept board offered CST secretary position in 2009. Back pay and emoluments due to secretary from 2007 until 2009 when secretary position refused CST secretary position. Tenure rights forfeited at that point. Total award to petitioner including 4% pre-judgment interest: $79,190.29. ***Bush*, Commissioner 2012: September 27**

Withdrawal

Parents withdrew challenge to movement of their children to another school as part of a school district redistricting plan. ***V.L and C.L.*, Commissioner 2012: October 26**

Workers' Compensation

Matter dismissed for failure to prosecute. Employee claimed that board failed to pay full salary without loss of sick time for an injury suffered in the course of his employment. Matter was inactive, pending resolution of Workers' Compensation case. When matter was activated, employee failed to respond to telephone conference, settlement terms communication and ALJ letter. ALJ concluded case had been abandoned. Commissioner concurred. ***Weiss*, Commissioner 2012: October 26**

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School Ethics Commission

There were no education-related decisions posted for September/October 2012.

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State Board of Examiners

Teacher of English who violated a local ordinance and provided an Unsworn Falsification to Authorities, occurrences that took place within a few months of each other, while falling short of the behavior expected of a role model, did not warrant the revocation of her certificate given the totality of the circumstances at the time of each offense; Board orders 2-year suspension of Non-citizen Teacher of English certificate. ***IMO Certificate of Bracok*, Exam 2012: Sept. 21**

Where teacher agreed to relinquish his certificates with the force and effect of a revocation after pleading guilty to Criminal Attempt Sale/Obscene Material, Examiners orders relinquishment of his Teacher of Elementary School Certificate of Eligibility With Advanced Standing, Teacher of English Certificate of Eligibility With Advanced Standing, and a Teacher of Elementary School certificate. ***IMO Certificates of Brown,* Exam 2012:Sept 21**

Examiners orders revocation of Teacher of Social Studies Certificate and a Supervisor Certificate of former teacher who resigned from his teaching position after being accused of unbecoming conduct

involving his alleged interactions with female students; he made more than one female student uncomfortable and, on at least one occasion, maintained an inappropriate relationship with a student in direct contravention of his superiors' orders; evidence is sufficient without resolving issue of admissibility of certain testimony or appropriateness of including another student's e-mails. ***IMO Certificates of Brown,*** **Exam 2012: Sept 21**

Examiners revokes Teacher of Elementary School in Grades K-5 Certificate of Eligibility and Teacher of Elementary School in Grades K-5 Certificate, of teacher convicted of Endangering the Welfare of Children and disqualified from public school employment pursuant to N.J.S.A.18A:6-7.1 *et seq.* ***IMO Certificates of Cardenas*****, Exam 2012:Sept 21**

Examiners orders revocation of Substitute Credential in summary decision, where holder of credential pled guilty to one count of Criminal Sexual Contact and was sentenced to four years' probation and 180 days' confinement in jail. ***IMO Credential of Davis*****, Exam 2012: Sept 21**

Examiners orders suspension of Teacher of Music Certificate of Eligibility With Advanced Standing and a Teacher of Music certificate, indefinitely, pending resolution of the criminal charges against him. ***IMO Certificates of Ernst,*** **Exam 2012: Sept 21**

Examiners orders revocation of Teacher of Elementary School Grades K-5 Certificate of Eligibility With Advanced Standing in summary decision, where holder pled guilty to Endangering the Welfare of a Child and had been disqualified from public school employment pursuant to N.J.S.A.18A:6-7.1 *et seq.* ***IMO Certificate of Gallegos*****, Exam 2012: Sept 21**

Examiners orders revocation in summary decision, of holder's Teacher of Social Studies Certificate of Eligibility With Advanced Standing, Teacher of Elementary School Certificate of Eligibility With Advanced Standing, Teacher of Social Studies and Teacher of Elementary School certificates, and a Principal Certificate of Eligibility, where he pled guilty to Conspiracy and Arson. ***IMO Certificates of Giovanelli,*** **Exam 2012: Sept 21**

Examiners accepts teacher's relinquishment of Teacher of Elementary School Certificate of Eligibility, Teacher of Elementary School certificate, Principal Certificate of Eligibility, and Teacher of Spanish certificate with the force and effect of a revocation, where Office of Licensure and Credentials had determined that he had submitted a certificate to obtain employment that was not authentic. ***IMO Certificates of Gutierrez,*** **Exam 2012:Sept 21**

Examiners accepts teacher's relinquishment of Teacher of Physical Education Certificate of Eligibility With Advanced Standing, a Teacher of Physical Education certificate, a Teacher of Health and Physical Education certificate, and a Teacher of Driver Education certificate, with force and effect of a revocation, where he was convicted of Theft of Movable Property and had been disqualified from public school employment pursuant to N.J.S.A. 18A:6-7.1 *et seq*. ***IMO Certificates of Mannick*****, Exam 2012: Sept 21**

Examiners accepts teacher's relinquishment of Teacher of English Certificate of Eligibility With Advanced Standing, where he pled guilty to Sexual Assault, was sentenced to four years in prison with parole supervision for life and Megan's Law reporting and was ordered to forfeit his teaching license. ***IMO Certificate of Miltner*****, Exam 2012: Sept 21**

Examiners orders revocation of School Business Administrator Certificate of Eligibility and School Business Administrator certificate, of holder who was convicted of Attempted Criminal Sexual Contact and disqualified from public school employment pursuant to N.J.S.A. 18A:6-7.1 *et seq.* ***IMO Certificate of Papa*****, Exam 2012:Sept. 21**

Examiners accepts teacher's relinquishment of Teacher of Physical Education Certificate of Eligibility With Advanced Standing, with full force and effect of a revocation, where he pled guilty to Aggravated

Criminal Sexual Contact and Criminal Sexual Contact and was ordered to forfeit his teaching license, and sentenced to Parole supervision for life and Megan's Law reporting. ***IMO Certificate of Pecora*, Exam 2012:Sept 21**

Examiners suspends indefinitely her Speech Language Specialist certificate, until such time as she has had her certificates reinstated by the Board of Speech Pathologists and the Board of Examiners has made a final determination on the issue of whether her teaching certificates should be revoked or suspended. ***IMO Certificate of Pennypacker*, Exam 2012:Sept 21**

Examiners orders revocation of Teacher of Elementary School Certificate of Eligibility With Advanced Standing and Teacher of the Handicapped certificate where she was convicted of Theft of Movable Property ($54,102) and disqualified from public school employment pursuant to N.J.S.A. 18A:6-7.1 *et seq.* and despite her argument of mitigating circumstances. ***IMO Certificates of Perez*, Exam 2012:Sept 21**

Examiners orders revocation of Teacher of Music Certificate where holder was convicted of Official Misconduct-Unauthorized Act after having been charged originally with four counts of Sexual Assault-Supervisory and one count of Official Misconduct-Unauthorized Act, sentenced to three years' imprisonment, ordered to forfeit his public office and disqualified from public school employment pursuant to N.J.S.A. 18A:6-7.1 *et seq.* ***IMO Certificate of Planas-Borgstrom*, Exam 2012: Sept. 21**

Examiners orders revocation of Teacher of the Handicapped certificate, where holder was convicted of Attempted Rape in New York and surrendered in lieu of discipline his New York licenses. ***IMO Certificates of Portalatin*, Exam 2012:Sept 21**

Examiners increases ALJ's suspension of Teacher of Mathematics and Teacher of Elementary School certificates from 3 months to one year where teacher who engaged in unbecoming conduct by facilitating two lunchtime meetings between a student and a non-family visitor in contravention of school policy; the adult male was a former convict who had sent inappropriate messages to the student online. ***IMO Certificates of Sloan*, Exam 2012: Sept 21**

Examiners revokes Elementary School certificate, a Student Personnel Services certificate, a Supervisor certificate, and Principal and School Administrator Certificates of Eligibility, from guidance counselor who was removed on tenure charges from his position for unbecoming conduct, insubordination and other just cause for using profane, sexually explicit or inappropriate language in interactions with co-workers; although he claimed his "social filter" was affected by reliance on pain medication and that he was rehabilitated, revocation ordered since the purpose of this proceeding before Examiners is not to afford an opportunity to show rehabilitation. ***IMO Certificates of Young*, Exam 2012: Sept 21**

Examiners grants request to apply for certification after revocation. ***IMO Application for Certification after Revocation of Bellomo*, Exam 2012:Sept 25**

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New Jersey Council on Local Mandates

There were no education-related decisions for September/October 2012.

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New Jersey Division on Civil Rights

There were no education-related decisions for September/October 2012.

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Election Law Enforcement Commission

Use of campaign funds for legal fees and expenses in connection with a former officeholder's appeal of a decision in a civil action adjudging a violation of the Reporting Act falls within the scope of permissible use of campaign funds. **Advisory Opinion No. 02-2012** (Oct 26, 2012)

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Government Records Council

The Custodian violated OPRA by failing to provide a specific anticipated date upon which access to item would be granted, by failing to timely respond to address the Complainant's preferred method of delivery to request for another item; by merely directing the Complainant to charter school's website to obtain the requested agendas; however, other requests failed to specifically identify a government record sought. In addition Custodian timely complied with the Council's Interim Order and provided copies of the agendas responsive to the other requests. Therefore, Custodian's actions do not rise to the level of a knowing and willful violation under the totality of the circumstances. Statute is clear as to which specific records are classified as "immediate access" records (budgets, bills, vouchers, contracts, public employee salary and overtime information) so GRC declines to determine that meeting minutes and resolutions are also "immediate access" records. ***Chin v. Teaneck Community Charter School***, GRC No. 2010-340 (Sept. 25, 2012)

Where requester asked for a list of vendors bidding on the RFP,including bid amounts, for toll attendant services on the N.J. Turnpike, the Custodian lawfully denied access because providing such records would give an advantage to competitors or bidders; at the time of the records request, the Board's approval to award the toll attendant services bid and the expiration of the Governor's ten (10) day veto period was still pending. ***Pipa v. Turnpike Auth***, GRC No. 2011-107 (Sept. 25, 2012).

The Custodian violated OPRA by failing to respond immediately to the OPRA request for salary information, and because the Custodian should have retrieved the most comprehensive record that contained the requested information; However, the Custodian timely complied with the Council's Interim Order and provided a copy of a computer printout including the title, position, salary and length of service for the Custodian from 2003 through 2004 responsive to the request. ***Valdes v. Union City Bd. of Ed***., GRC No. 2011-64(Sept. 25, 2012).

Given conflicting evidence, GRC is unable to determine whether the record responsive to the Complainant's request is a post-decisional formula for interlocal agreements, or is a pre-decisional ACD document; not clear whether custodian reclassified the document as "work papers" in order to evoke the ACD exemption. Complaint is referred to the Office of Administrative Law for ahearing. ***Hendricks v. Cape May***, GRC No. 2011-338 (Sept. 25, 2012).

Although Custodian made a good faith effort to provide all records his response was insufficient because all responsive records failed to transmit successfully due to errors. The Custodian attempted to fax the actual responsive records four (4) times. No knowing or willful violation. ***Verry v. South Bound Brook***, GRC No. 2011-171(Sept. 25, 2012).

Former Custodian violated OPRA by failing to state the specific legal citations, which formed the basis for redactions made to the executive session minutes requested. She also failed to bear burden of proof that the denial of access to the portions of the executive session minutes were lawful. However, the present Custodian timely provided the GRC with legal certification, unredacted executive session minutes for the *in camera* inspection, and timely complied with the Council's order by subsequently providing the minutes to the Complainant. No willing violation under the circumstances; however, the Complainant is a prevailing party and entitled to an award of reasonable attorneys fee. ***Wolosky v. Vernon***, GRC 2010-311 (Sept. 25, 2012).

The Complainant's e-mail dated May 19, 2011 is not a valid OPRA request pursuant to *Renna v. County of Union*, 407 *N.J. Super*. 230 (App. Div. 2009) because the Complainant failed to clearly invoke the provisions of OPRA. Specifically, the Complainant's e-mail states that he *will be* or *may be* requesting records, not that he *is* requesting any records. ***Alvarez v. Northwest***, GRC 2011-205 (Sept. 25, 2012).

Custodian's insufficient written response failing to grant or deny access or request an extension of time or clarification to request seeking subpoenas served by prosecutor, resulted in a "deemed" denial. However, the GRC declines to order disclosure of the responsive records because the Custodian already disclosed the records. Nevertheless, the Custodian must either provide records or legally certify that no responsive records exist. No knowing violation. ***Verry v. South Bound Brook***, GRC 2011-161, 2011-162, 2011-163, 2011-164, 2011-165, 2011-166 & 2011-167 (Sept. 25, 2012).

Where Custodian violated OPRA by failing to respond in time in writing to the request for a digital copy of the budget for the years 2000 through 2011 –which should have been made immediately available – the custodian has been replaced, and the new custodian fully complied according to the Council's June 31, 2012 Interim Order. Custodian timely provided notice of the special service charge to convert the 3,000 pages to digital medium. ***Blaustein v. Lakewood Bd. of Ed***. , GRC 2011-109(Sept. 25, 2012).

Custodian violated OPRA by failing to timely provide response to request for resignation letter from borough counsel. Subsequently, Custodian complied with interim order to provide same with appropriate redactions. However, requestor is prevailing party for purpose of counsel fees. ***Verry v. South Bound Brook***, GRC 2011-173(Sept. 25, 2012).

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New Legislation

P.L.2012, c.51. -see **A1608**
"Janet's Law"; requires public and nonpublic schools to have automated external defibrillators and to establish emergency action plans for responding to sudden cardiac events.*
Pamphlet Law 2 pages Approved 9/19/2012 **PDF Format HTML Format**

P.L.2012, c.55. -see **A2313**
Clarifies requests for proposals of public entities implementing energy savings improvement program contracts.*
Pamphlet Law 33 pages Approved 9/19/2012 **PDF Format HTML Format**

P.L.2012, c.57. -see **A2647**
Requires employers post notice of worker rights under certain State and federal laws.
Pamphlet Law 1 pages Approved 9/19/2012 **PDF Format HTML Format**

P.L.2012, c.59. -see **A2741**
Provides that subcontractors who furnish non-specialty trade work shall not be named in local public bid documents.

Pamphlet Law 8 pages Approved 9/19/2012 **PDF Format HTML Format**

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New Regulations/Executive Orders

44 N.J.R. 2392(a), **N.J.A.C. 6A:9-18 Alternate-Route Programs for Mathematics and Science Certification**, effective September 14, 2012.

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The New Jersey School Boards Association, a federation of boards of education, provides training, advocacy and support to advance public education and promote the achievement of all students through effective governance.

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United States Supreme Court

There were no reported decision for July/August.

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3rd Circuit Court of Appeals

Employee Speech

Pennsylvania DOE high ranking official, who wrote article criticizing funding cuts and was then suspended and resigned, claims constructive discharge in retaliation for exercising First Amendment; Circuit Court affirms district court's grant of summary judgment to DOE, finding that the article was not protected speech because, although written as a citizen on a matter of public concern, its potential detriment to close working relationships and potential to interfere with the regular operation of the Department significantly outweighed her interest in free speech. **Hara v. Pa. Dept of Ed**., No 11-4115, 2012 U.S. App. LEXIS 17066 (3d Cir Aug. 15, 2012) (not precedential)

Special Education

In an IDEA case, a district court's entry of summary judgment in favor of the students on their claim for equitable relief was affirmed since, inter alia, a school district had denied the parents any meaningful participation in the development of the IEPs, and the court properly applied the modified de novo standard of review to the ALJ's decision. **L.B. v. Gloucester Twp. Sch. Dist**., No. 10-4630, 2012 U.S. App. LEXIS 14785) (3d Cir.)(July 19)

Student Speech

Court*, sua sponte*, orders rehearing *en banc*, in case where student's motion had been granted in and school enjoined from suspending, threatening to suspend, or otherwise disciplining the students for wearing cancer awareness bracelets that bore the slogan, "I love boobies." **B.H. v. Easton Area Sch. Dist.,** 2012 U.S. App. LEXIS 17201 (3d Cir. Aug. 16, 2012)

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New Jersey District Court

Counsel Fees

Court approved student's attorney's application for counsel fees where counsel spent significant time and resources in three-and-a-half-year-old case involving seven minor children, personally undertook substantial risk by covering the expenses of litigation while working on contingency and will undoubtedly incur many more hours of unpaid legal services by virtue of his role as Court liaison in the administration of Plaintiffs' trusts, and in light of his success in obtaining a settlement of the issues. J. G. v. Board of

Education of Camden Bd. of Ed., No. 10-1047 (JEI), 2012 U.S. Dist. LEXIS 115752 (August 7, 2012)

Disability

ALJ properly denied teacher's application for disability benefits. Rejects arguments that she was deprived of her right to a full and fair hearing, that the ALJ relied upon stale evidence; that the ALJ wrongly found that she was able to perform her past relevant work and that the ALJ failed to consider a doctor's evaluation. Benson v. Comm'r of Soc. Sec., 2012 U.S. Dist. LEXIS 106553 (July 31, 2012)

Drug Testing

District did not violate rights of school bus driver when it dismissed her for refusing to submit to submit to the random drug and alcohol test or complete a SAP ; Court grants district's motion for summary judgment on all seven counts: constitutional violations of privacy, equal protection, due process, unreasonable search and seizure, tortious violation of privacy, intrusion and false light, negligence/intentional misrepresentation/invasion of privacy/defamation, wrongful termination, breach of implied contract, discrimination under NJLAD and due process as well as state claims of defamation, slander, liable, and false light invasion of privacy. Freeman v. Middle Twp. Bd. of Educ., 2012 U.S. Dist. LEXIS 121195 (D.C. N.J. Aug. 27, 2012) (not for publication).

Special Education

Court denies motion for summary judgment brought by special education student and her parents, seeking either a rehearing of petition de novo, or remand to different ALJ than the one who had dismissed her petition for failure to comply with a pretrial order, and had denied her motion for sanctions against the board for failing to appear at a pre-trial conference. Grants board's cross-motion for summary judgment. **H.A. v. Camden City Bd. of Ed.,** No. 10-0733 (JBS/KMW), 2012 U.S. Dist. LEXIS 106524 (D. N.J. July 31, 2012)

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New Jersey Supreme Court

Public Meetings

New Jersey Supreme Court overturned an Appellate Division ruling that would have required public bodies, including school boards, to conclude open sessions of meetings before they could enter closed session. Absent proof of bad motive, courts should refrain from intervening in highly individualized decisions on how public body proceeds through its agenda. The Court also addressed other aspects of closed-session, including the content of a resolution to enter closed session, which must contain all the information known at the time, and the requirement that members of public bodies must ensure that they do not stray from the defined issues that may be addressed in a closed session. **Francis J. McGovern, Jr., Esq. v. Rutgers,** 211 N.J. 94 (2012) (July 25) (Sunshine Law issues, including sequencing of board meetings).

Public Records

Developer was not entitled to records of a public law school legal clinic relating to its cases, because the clinic's client-related documents, clinical case files, and information about the development and management of litigation were not subject to New Jersey's Open Public Records Act. **Sussex Commons Assoc's, LLC v. Rutgers,** 210 N.J. 531 (2012)(July 5)

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New Jersey Superior Court, Appellate Division

Contract

Court reverses in part and affirms in part, an order finding that construction company doing renovations did not materially breach a settlement agreement entered into between the parties, that the settlement agreement was binding, and compelling the parties to participate in a non-judicial arbitration proceeding. Remanded for a new trial to permit introduction of extrinsic evidence of the circumstances surrounding the formation of the settlement agreement as it pertains to scarification of the drainage basin in order to ascertain materiality of the breach. **Thomas Co. v. Tamburro Bros. Constr. Co**, NO. A-5345-10T3, 2012 N.J. Super. Unpub. LEXIS 1810 (App. Div. July 27, 2012)

Employment Discrimination

Teacher failed to establish prima facie case of discrimination; he failed to present evidence that school terminated his employment as a substitute teacher on the basis of his race. **Koger v. Allegheny Intermediate Unit**, No. 12-1815, 2012 U.S. App. Lexis 18220 (3d Cir.) (August 28, 2012)

Court affirms trial court's dismissal of French teacher's discrimination claim under NJLAD, as record contains plaintiff teacher's admissions of tardiness, failure to control his classroom, and failure to adhere to school policy. Further, the documentation supporting hiss termination resulted from a lawful RIF and his ineligibility for a grant of tenure was uncontroverted. His disagreement with his performance reviews or duty assignments does not reflect he was subjected to a hostile work environment. No facts support breach of good faith, and he failed to use the grievance procedures contained in the CNA. **Diallo v. E. Orange Bd. of Ed**., No. A-4460-10T1, 2012 N.J. Super. Unpub. LEXIS 2048 (App. Div. Aug. 28, 2012)

Indemnification

The Appellate Division overruled the Commissioner's finding that a board member was not entitled to be indemnified for her costs in fighting the Board's action to censure her. The Court determined that under the indemnification law, N.J.S.A. 18A:12-20, the Board member's challenge to the censure was a "legal proceeding." **Castriotta v. Bd. of Ed. of Roxbury**, A-52222-10T3, 2012 N.J. Super. LEXIS 138 (August 9, 2012) approved for publication

Retirement/Pension

Wife of principal appeals from a final decision of the Board of Trustees of TPAF denying her application for accidental death benefits pursuant to N.J.S.A. 18:66-46 upon the death of her husband, a highly respected school principal, who was killed when he left home early to pick up donuts with his own funds for his staff on Teacher Appreciation Day. Not entitled to additional benefits as accident did not occur "while in the performance of duties." (unconscionable ruling! ~D.K.) **Merce v. TPAF**, No. A-0540-11T2, 2012 N.J. Super Unpub. LEXIS 2049 (App. Div. Aug. 28, 2012)

Court affirms agency ruling that Director and BA of charter school violated the State's pension laws and regulations by working while he was simultaneously receiving a TPAF retirement pension; ALJ properly and comprehensively analyzed relationship under IRS factors and determined that he did not work as a consultant; was actually an employee subject to reenrollment in TPAF. Rejects laches and equitable estoppel arguments, and remanded for determination of amount to be refunded to TPAF and potential applicability of N.J.S.A. 18A:66-53.2(b). **Barckett v. NJ of Pensions and Benefits**, No A-3244-10T3, 2012 N.J. Super. Unpub. LEXIS 1625 (App. Div. July 9, 2012).

Student Discipline

Board exceeded its authority by adopting a broad policy that would restrict students from participating in sports and extracurricular activities for off-campus misconduct. A board may not adopt a policy that imposes consequences, including restrictions on extracurricular activities, for conduct violations that occur away from school grounds, unless there is a substantial nexus between the student's conduct and the safe and orderly operation of the school, and the conduct "materially and substantially" interferes with the discipline necessary to operate the school. Board is seeking certification from the N.J. Supreme Court. **G.D.M. and T.A.M. v. Ramapo Indian Hills Regional School District**,427 N.J. Super. 246 (App. Div. 2012) (July 24).

Superintendent Contract

Board sought administrative review of a decision of Executive County Superintendent voiding a new long-term contract of employment entered into between the CSA and the Board shortly before the effective date of the new regulations capping salaries, February 7, 2011. Commissioner dismissed the emergent applications, finding that DOE lacked jurisdiction over the matter in light of Commissioner's memorandum dated November 15, 2010 to all Executive County Superintendents and that only recourse was the court; Appellate reversed, and concludes that DOE has primary jurisdiction over the dispute of whether the new contract between was lawfully approved and executed before the effective date of the salary caps. Remanded to the Acting Commissioner of Education to adjudicate the emergent applications. **Dolan v. Centuolo**, A-2470-10T4, A-2710-10T4, 2012 N.J.Super Unpub. LEXIS 1627 (April 23, 2012)(App. Div.) (July 9)

Tax

Appellate Division affirms tax court judge's ruling rejecting arguments made by Jefferson Twp to the method of equalization of property values used by the Director of the Division of Taxation in determining the distribution of school aid for 2010 and 2011. Township had challenged the averaging step in the equalization process, arguing that as the result of using averaging in a declining real estate market, the Township's school aid is lessened and county taxes are unfairly increased. Township had failed to proffer definite evidence of what the impact would be of stopping the averaging, and thus could not demonstrate that the table was arbitrary, capricious, or unreasonable. **Township of Jefferson v. Director, Div. of Taxation**, 2012 N.J. Super. LEXIS 134 (August 6, 2012) (approved for publication in the New Jersey Tax Court Reports)

Motion judge did not err by sanctioning the Committee's decision to rely on the reduction in tax revenue for the school district, as a basis for finding significant injury to the Township sufficient to deny deannexation of Strathmere from Upper Township. **Citizens for Strathmere & Whale Beach v. Township Committee, A-1528-10T4,** 2012 N.J. Super. Unpub. LEXIS 1849 (App. Div. August 1, 2012).

Tenure Dismissal

Appellate Division affirms Commissioner's decision to sustain charges of conduct unbecoming and impose a penalty of suspension without pay for 240 days, as well as all increments for the 2011-2012 school year, for a teacher who slapped an 8-year old special education student in the face after the student slapped her. Appellate Division delays the loss of increments until the next year in which teachers receive increments, as requested by the Board, since teachers union had agreed to frozen salaries in current year. **Tenure Hearing of Craft**, No. A-0415-11T2, 2012 N.J. Super. Unpub. LEXIS 1600(App Div. July 5, 2012)

Court affirms Commissioner decision removing tenured cosmetology teacher from employment with the New Jersey Department of Corrections; he had improper relationship with inmate; **In re Coluccio**, No. A-0772-11T2 2012 N.J. Super Unpub. LEXIS 1883 (App. Div. August 6, 2012)

Court upholds dismissal of custodian for failure to follow attendance and reporting procedures; sleeping on the job; chronic absenteeism (fifty-three days in an eight-month period and sixty-two days in one

three-month period) ; and a pattern of neglect, misbehavior and other offenses. Although the ALJ recommended a six-month suspension as discipline, the Commissioner concluded that termination was appropriate, notwithstanding principles of progressive discipline. Court restates analytic paradigm to be applied in assessing issue of progressive discipline. **In re Dudley**, No A-1502-11T1, 2012 N.J. Super. Unpub. LEXIS 1941 (App. Div. Aug.9, 2012)

Tort

Court reverses and remands to provide both an opportunity to the parties for oral argument and for the judge to provide expanded reasons for his decision to allow plaintiff, a food service worker who had been wheel-chair bound since slipping in the school cafeteria, permission to file a late notice of claim against the board, pursuant to N.J.S.A. 59:8-9. **Barnes v. East Orange Bd. of Ed., et al v. Sodexo Management,** No. A-2609-10T4, A-1976-11T4, 2012 N.J. Super. Unpub. LEXIS 1996 (App. Div. August 22, 2012).

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New Jersey Superior Court, Law/Chancery Division

Superintendent Contract

Court grants board's motion to dismiss superintendent's complaint for lack of jurisdiction; superintendent's claims for breach of contract and breach of the implied covenant of good faith and fair dealing are part of the same "single, integrated dispute" as those involved in the tenure proceeding before the Commissioner and derive from the board's defendant's refusal to renew the superintendent's employment contract; Court is persuaded that dismissal of claims is proper because (1) jurisdiction rests with the Commissioner; (2) plaintiff has failed to exhaust his administrative remedies; and (3) plaintiff has failed to meet the timing requirements of N.J.A.C. 6A:3-1.3(i), which may not be avoided by simply filing a claim in a civil action. Moreover, the Commissioner would have primary jurisdiction even if the issues raised were not identical to the tenure issues; remedies before the Commissioner are the same that the Court could award noting that, in the absence of a contractual agreement to pay attorney fees, they are not available in breach of contract actions. Costanzo v. Leb. Borough Bd. of Ed., No. HNT-L-296-12, 2012 N.J. Super. Unpub. LEXIS 1729 (L. Div. July 13, 2012).

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Commissioner of Education

Board Action

Emergent Relief application dismissed concerning board's decision to deny participation in awards ceremony due to student's absence for 19 days due to illness. Student failed to appear at hearing without explanation. **Guarini, Cmmr, 2012: July 16**

Petitioner challenged Board's decision to transfer her from the position of school psychologist assigned to the child study team to a newly created elementary school psychologist position. Although petitioner knew of her reassignment in June 2011, she did not submit her appeal until November 10, 2011, which is beyond the 90 day limitation period. Petition dismissed as untimely. **Bruno, Cmmr 2012: Aug. 9**

Certification Revocation

State Board of Examiners revoked Teacher of the Handicapped certification in 2009 following guilty plea

for Assault by Automobile, N.J.S.A. 39:4-50, and Driving While Intoxicated. Appeal is out of time as final decisions of the Board of Examiners shall be filed within 30 days of the filing date of the decision from which appeal is taken. Filing appeal two years later is well beyond the 30 days. **Deckert, Cmmr 2012:Aug 7.**

Appellant was found guilty of insubordination towards his administrative superiors and inappropriate behavior towards students, parents and colleagues – the latter behavior having included a physical altercation with a fellow teaching staff member constituting unbecoming conduct warranting revocation of certificates. Claim that behavior caused by depression lacked factual support. Decision of Board of Examiners to revoke certificates upheld. **Taylor, Cmmr 2012: Aug. 17**

Increment Withholding

Board's action was not arbitrary, capricious unreasonable, or an abuse of its discretion when it withheld the increment of an early childhood education teacher where all three evaluations concluded that teacher's performance was below standard, unsatisfactory, and needed improvement. Teacher never submitted a written rebuttal stating why she should not have received an unsatisfactory evaluation, and never asked for or accepted assistance from staff or colleagues, although it was offered. **Martin, Cmmr 2012: Aug. 9**

Board's action was not arbitrary, capricious unreasonable, or an abuse of its discretion when it withheld the increment of a world language where teacher evaluations concluded that petitioner's performance was unsatisfactory and in need of improvement; petitioner's second and third evaluations reflected no improvement in targeted performance areas. **Rodriguez, Cmmr 2012: Aug. 17**

Board withholding of vice-principal's increment upheld where his unsatisfactory performance as Vice Principal was detailed in multiple memoranda from principal. Board held Donaldson hearing and declined to change its determination. Vice-principal clearly had notice that increment was being withheld, yet did not file appeal to Commissioner until after the 90 day limit had expired. Petition is dismissed with prejudice. **Campbell, Cmmr 2012: Aug. 30**

While tenured secretaries may "bump" into the secretarial positions of untenured employees at the time of a RIF – in the absence of contractual seniority for secretaries, a board of education is not obliged to maintain a seniority list and call a secretary back when a secretarial job opens up subsequent to the elimination of his or her prior position. Petition dismissed. **Biggiani, Cmmr 2012: Aug. 31**

Reduction in Force

While a teaching staff member may not unilaterally rescind her resignation after the school board accepts the resignation, the teaching staff member and the school board nevertheless may mutually agree to rescind the resignation after the school board accepts the resignation. When there is mutual agreement to rescind resignation, there is no break in service and no forfeiture of tenure and seniority rights. Subsequent RIF, while leaving staff member with less seniority in place, violated tenure and seniority rights. District directed to compensate petitioner for all salary, benefits, and emoluments, less mitigation, to which she was entitled As her social worker position was abolished by the Board in a second RIF, petitioner is entitled to be placed on the preferred eligibility list in accordance with her seniority rights as of that date. **Eberwein-O'Donnell, Cmmr, 2012: July 16**

Petitioner not entitled to be restored to position with Juvenile Justice Commission as there were others with greater seniority who also held the position at time of RIF. Previous employment with NJ Department of Corrections does not count toward seniority with Juvenile Justice Commission. **Troyanovich, Cmmr, 2012: July 19**

Tenured supervisor and director did not attain tenure as principal. However, charter school RIF of supervisor was improper as school replaced supervisor with non-tenured person. Because charter school is no longer operating, the Board cannot reinstate the petitioner; however, the Board remains

obligated to provide the petitioner with retroactive salary, benefits and emoluments as ordered by the ALJ. **Zydiak, Cmmr, 2012: July 30**

Board improperly RIFs tenured elementary school teacher by terminating her employment, but retaining teachers with less seniority. Board ordered to immediately reinstate her position of employment, and must be compensated for all lost salary, benefits and emoluments, less mitigation, retroactive to the date of her termination. **Bearg, Cmmr 2012:Aug 3**, **Meade, Cmmr 2012:Aug 3**, **Jones, Cmmr 2012:Aug 3**

Board's action was not arbitrary or capricious when it determined that petitioner's comprehensive business endorsement is not adequate for the technically oriented curriculum offered in the career academies. Such decision of board is within its discretionary powers, and case law provides that such a decision by a local board of education should be honored. RIF was proper where tenured individual held endorsements in General Business Studies and Elementary Education yet board required Teacher of Computer Science Technology (CST) endorsement which was required for teaching the rigorous curriculum offered in the Board's five specialized and selective Career Academies. **Slivka, Cmmr 2012: Aug. 8.**

Teacher was notified that her position of Director of Curriculum was to be eliminated in a reduction in force. Petitioner subsequently filed an appeal in asserting her tenure rights to reinstatement as a school principal or to one of two new administrative positions in respondent Board's school district. Board contended that petitioner waived her tenure rights when she was offered the position of high school principal or one of two other administrative positions, but rejected them. petitioner was never offered the position of high school principal because the Superintendent did not make a bona fide offer of employment that petitioner could rely upon; the District interpreted petitioner's preference for a middle or elementary school position as a rejection and never fulfilled its duty to actually offer her a position in accordance with her tenure and seniority rights; even after petitioner clarified her position by stating in writing that she would take the high school principal position if it was offered to her, the Board decided to terminate her by sending a letter accepting her resignation; waiver of tenure rights is only effective if the protected employee intended to relinquish them, and in this case petitioner clearly expressed her job preferences. Board to reinstate petitioner to the position of High School Principal or a similar position with back pay, seniority, and any other emoluments to she is entitled. **Tribbet, Cmmr 2012: Aug. 1**

Tenured teacher challenged Board's RIF of her position. Teacher failed to appear at hearing. Teacher's counsel also could not reach her. Commissioner concludes that the appeal has been abandoned, and dismisses the petition for petitioner's failure to prosecute. **Becker, Cmmr 2012:Aug. 29**, **Amento, Cmmr 2012: Aug. 29**, **Simmons Cmmr 2012:Aug. 29**

Student residency

Student was not eligible for free public education in district. Investigation revealed he lived in a different district. Commissioner remands for determination of actual tuition amount based on time student spent with mother or father who lived in the two different districts. **E.A.A., Cmmr 2012: July 11**

Student was not eligible for free public education in district. Despite producing a child support document, a federal student loan bill, and an independent business registration indicating residence in the district, petitioner failed to produce any proof of residency such as voter registration, licenses, or financial account information that might demonstrate a personal attachment to a specific location. A lengthy residency investigation by district revealed that students lived in another town. Petitioner ordered to reimburse the Board for tuition in the amount of $84.09 per day for 180 days, or $15,136.20. **J.V., Cmmr 2012: July 16**

Pro se residency appeal dismissed with prejudice where petitioner failed to appear without explanation. Board withdrew counterclaim for tuition. **M.D. and D.A., Commr 2012: July 16.**

Pro se residency appeal is dismissed where petitioner failed to appear without explanation. Board presented proofs that student was not a resident during the disputed time. Counterclaim for tuition in the amount of $6773.00 is granted. **O.C., Cmmr 2012: Aug. 8**

Parent claimed that students were transferred from one district to another pursuant to the Unsafe Schools Option under No Child Left Behind. However, there were no documents reflecting the alleged Unsafe School Choice Option transfer, nor any record of an agreement between the two districts on the education of petitioner's children. Petitioner must reimburse the Board for tuition in the amount of $76,223.40 for the period of her children's ineligible attendance in the district schools. **L.B., Cmmr 2012: July 16**

Aunt failed to provide proof of residence, provided proof of guardianship of student after three months had passed. Aunt also failed to appear at hearing. Petitioner must pay tuition for period of ineligibility in the amount of $2828.00. **Y.C., Cmmr 2012: Aug. 3.**

Student continued to attend district schools despite the fact that neither parent lived in district after separation. Parents ordered to pay tuition in the amount of $12,600 for the period of J.M.H.'s ineligible attendance in the district's schools. **J.M.H. Cmmr 2012:Aug. 10**

Tenure Dismissal

Teacher engaged in unbecoming conduct by failing to properly supervise his students during study hall, leading to a misuse of instructional time and the use of forbidden electronic devises by the students. Teacher also failed to report to duty and did not provide the school with notice before the start of his morning classes. Teacher also failed to notify the substitute service as required by policy. However, Board failed to prove that the respondent provided erroneous information at the time of his hire or prove that teacher shoplifted. Commissioner orders forfeiture one year of salary increment and the 120 days' salary withheld under N.J.S.A. 18A:6-14, plus an additional four months suspension without pay. **Colandriello, Cmmr 2012:July 30**

Tenured Custodian charged with unbecoming conduct, misbehavior, insubordination, and other just cause for operating vending machines in the schools without authorization, misappropriated public property by operating and receiving the proceeds from a vending machine, neglecting his duties as a custodian when he serviced these vending machines; and made intentionally false statements to the superintendent and his direct supervisors regarding his conduct. Commissioner determines that no evidence was presented to show that respondent was servicing the vending machines when he should have been working; respondent did, however, fail to disclose the fact that he had been operating a machine in one school when it became obvious that an investigation was ongoing regarding the machine in another. Respondent has an otherwise unblemished career of service in the District. Respondent's failure to disclose the existence of the second vending machine constituted an act of insubordination, but that the Board failed to meet its burden of proof on the other charges. Custodian ordered to forfeit 120 days of pay, and be returned to his tenured position as custodian. **Valladares, Cmmr 2012:Aug. 3**

Commissioner upheld determination of unbecoming conduct where tenured special education and physical education teacher gave student "light slap"; respondent's joking offer to give student "100s" for the rest of the year was inappropriate, as was teacher's tolerance of student provocation and horseplay; respondent's responses to his students' misbehaviors were improper for a teacher and in fact encouraged other students to misbehave. The ALJ concluded that – given current precedents and ongoing efforts through the anti-bullying laws to change how students conduct themselves in relation to each other – the loss of respondent's tenure was the appropriate penalty. Commissioner differed as to penalty. ALJ failed to conduct the requisite analysis of the factors to be taken into account in determining the appropriate penalty in a tenure case (In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967)). Commissioner determined that removal is an unduly harsh penalty given all of the circumstances existing in this matter, and is not justified because the proven conduct does not establish

respondent's unfitness to discharge the duties of his position, nor was respondent's behavior "premeditated, cruel or vicious, or done with the intent to punish." Loss of respondent's increment for one year, along with the 120 days salary withheld pursuant to N.J.S.A. 18A:6-14 following the certification of tenure charges, is a sufficient penalty to impress upon respondent the seriousness of his errors in judgment displayed in this matter. **Forman, Cmmr 2012: Aug. 8**

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School Ethics Commission

SEC dismissed complaint that board member violated *N.J.S.A.* 18A:12-24.1 (g) of the Code of Ethics for School Board Members when he disclosed protected information. The protected information had already been made public by third parties and the facts failed to disclose that the board member disclosed or revealed any confidential information. **Aiello v. Gottlieb**, SEC 2012: August 28

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State Board of Examiners

State Board of Examiners ordered revocation of Teacher of the Handicapped, Teacher of Elementary School, Teacher of Driver Education and Student Personnel Services certificates. Teacher pled guilty to Theft By Unlawful Taking, was sentenced to two years' probation and ordered to pay restitution of $37,820.92. Such conviction and disqualification constituted conduct unbecoming a certificate holder. The Commissioner has long held that teachers serve as role models for their students. A teacher convicted of Theft By Unlawful Taking cannot claim status as a role model to anyone. **IMO Certificates of Cummins,** Exam. 2012: July 26

State Board of Examiners ordered revocation of Substitute Credential. Person was convicted in October 2011 of one count of Endangering the Welfare of Children and one count of Wrongful Impersonation. As a result of the conviction for Endangering the Welfare of Children, he was disqualified from public school employment pursuant to N.J.S.A.18A:6-7.1 *et seq.* In enacting the Criminal History Review statute, N.J.S.A. 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger to them, such as individuals convicted of a crime such as Endangering the Welfare of a Child. This strong legislative policy statement is in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. A person convicted of Endangering the Welfare of Children cannot claim status as a role model. In addition his conviction for Wrongful Impersonation also warrants the revocation of his credential. **IMO Credential of Domaradsky,** Exam. 2012: July 26

State Board of Examiners ordered revocation of School Administrator Certificate of Eligibility and School Administrator certificate of former superintendent of schools. Former superintendent was admitted into a Pre-Trial Intervention Program (PTI) after being charged with Theft By Deception, a condition of which was to sign a Consent Order in which he agreed to "never seek nor accept employment in any New Jersey public school or public school system." The SBE determined that an individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. Where, as here, an individual is forever barred from public school employment in the State of New Jersey, revocation is the appropriate sanction. **IMO Certificates of Gallon,** Exam. 2012: July 26

State Board of Examiners ordered revocation of Substance Abuse Coordinator Certificate of Eligibility. Individual had been convicted of health care claim fraud, Medicaid fraud and misconduct. Such

conviction constituted conduct unbecoming a certificate holder and just cause to act against his certificate. The Commissioner has long held that teachers should serve as role models for their students. Acts of health care fraud, Medicaid fraud and misconduct are inexcusable for any individual, teacher or not. A teacher convicted of health care fraud, Medicaid Fraud and misconduct cannot claim status as a role model to anyone. Certificate revocation is the only appropriate sanction. **IMO Certificate of Martin,** Exam. 2012: July 26

State Board of Examiners accepted relinquishment with the effect of revocation of Teacher of Mathematics certificate of teacher whose Pennsylvania teaching certificates were revoked in 2000. **IMO Certificate of Milich,** Exam. 2012: July 26

State Board of Examiners ordered revocation of Teacher of Music Certificate of Eligibility with Advanced Standing. Teacher's Pennsylvania certificates had been revoked in 2001. Teacher surrendered his New York teaching certificates in 2008 based on sexual misconduct which did not result in a criminal conviction. A 2006 Pennsylvania federal court jury rendered a judgment against the teacher in a civil suit filed by a former student regarding involving a sexual relationship which started when she was 12. The teacher's conduct, the revocation of his Pennsylvania certificates and the surrender of his New York certificates, provide just cause to act against his New Jersey certificate. The acts of engaging in a sexual relationship with a student starting when she was 12 are inexcusable for any individual, teacher or not. The Commissioner has long held that teachers serve as role models for their students. Clearly, a teacher who has engaged in a sexual relationship with a student cannot claim status as a role model to anyone. Certificate revocation is warranted. **IMO Certificate of Nowotarski,** Exam. 2012: July 26

State Board of Examiners ordered indefinite suspension of Teacher of Mathematics Certificate of Eligibility With Advanced Standing and Teacher of Mathematics certificate of teacher until such time that the Board can make a final determination on the merits of the matter, following the completion of a hearing at which the teacher is able to participate in his defense. **IMO Certificate of Quartato,** Exam. 2012: July 26

State Board of Examiners accepted teacher's relinquishment with the force of revocation of Teacher of Health and Physical Education certificate. Teacher resigned from his teaching position after allegations that he had used his district-supplied laptop computer and the district network to access pornography during school hours. **IMO Certificate of Ranck,** Exam. 2012: July 26

State Board of Examiners ordered indefinite suspension of Teacher of the Handicapped certificate, Substance Awareness Coordinator Certificate of Eligibility With Advanced Standing, Principal Certificate of Eligibility and a Supervisor certificate, until such time that the SBE can make a final determination on the merits of the teaching certification matter. **IMO Certificates of Salaam,** Exam. 2012: July 26

State Board of Examiners ordered revocation of Teacher of Elementary Education certificate. In 2002, the Pennsylvania Professional Standards and Practices Commission revoked the teacher's Pennsylvania certificate due to his 2001 conviction for Indecent Assault, Endangering the Welfare of Children and Corrupting a Minor. He was sentenced to a maximum of 23 months in prison and five years' probation. SBE determined that his conviction and the revocation of his Pennsylvania licenses constituted conduct unbecoming a certificate holder and provided just cause to act against his certificate. The teacher's acts of Indecent Assault, Endangering the Welfare of Children and Corrupting a Minor are inexcusable for any individual, teacher or not. The Commissioner has long held that teachers serve as role models for their students. A teacher convicted of Indecent Assault, Endangering the Welfare of Children and Corrupting a Minor cannot claim status as a role model to anyone. Certificate revocation is warranted. **IMO the Certificate of Silverman,** Exam. 2012: July 26.

State Board of Examiners accepted teacher's relinquishment with the force of revocation of Teacher of Music Certificate of teacher whose Pennsylvania teaching certificates were revoked in November 1997. **IMO the Certificate of Snavely,** Exam. 2012: July 26

State Board of Examiners ordered revocation of Substance Awareness Coordinator Certificate of Eligibility, Substance Awareness Coordinator certificate, Supervisor certificate and Principal Certificate of Eligibility. Person had pled guilty to one count of Criminal Sexual Contact and one count of Sexual Assault-Victim 16-18 and was sentenced to three years' probation and 45 days confinement in the Passaic County Jail to be served on weekends. As a result of the conviction, person was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* SBE determined that the conviction and subsequent disqualification constituted conduct unbecoming a certificate holder and represented just cause to act against his certificates. In enacting the Criminal History Review statute, N.J.S.A. 18A:6-7.1 *et seq.* in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger to them. Individuals convicted of a crime such as Criminal Sexual Contact and Criminal Sexual Assault fall squarely within this category. The Commissioner has a long-standing belief that teachers must serve as role models for their students. A person who has been convicted of Criminal Sexual Conduct and Sexual Assault-Victim 16-18 cannot claim status as a role model to anyone. Nor should a person who has been disqualified from teaching in a public school be permitted to continue to hold himself out as a teacher. Certificate revocation is warranted. **IMO Certificates of Titmas,** Exam. 2012:July 26

State Board of Examiners ordered revocation of Teacher of Music Certificate. Teacher had pled guilty in South Carolina to Criminal Sexual Conduct with a Minor Victim under 16, 2nd degree, and was sentenced to six years in prison. As a result of the conviction, his teaching certificates were revoked in New York, North Carolina and South Carolina. SBE determined that teacher's conviction and the revocation of his New York, North Carolina and South Carolina licenses constituted conduct unbecoming a certificate holder and provided just cause to act against his certificates. The Commissioner has long held that teachers serve as role models for their students. A teacher convicted of Criminal Sexual Conduct With a Minor-Victim Under 16 Years of Age cannot claim status as a role model to anyone. Such acts are inexcusable for any individual, teacher or not. Certificate revocation is warranted. **IMO Certificate of Zeltman,** Exam. 2012: July 26.

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New Jersey Council on Local Mandates

There are no education-related decisions posted for July and August at this time.

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New Jersey Division on Civil Rights

There are no education-related decisions posted for July and August at this time.

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Election Law Enforcement Commission

There are no education-related cases for May or June.

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(to be included shortly)

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New Statutes

P.L.2012 c.37, approved 8/7/12–Provides supplemental appropriation of $4.141 million from Property Tax Relief Fund to DOE for aid to school districts with significant enrollment growth.

P.L.2012 c.26, approved 8/6/12–Teacher Effectiveness and Accountability for the Children of New Jersey (TEACHNJ) Act.

P.L.2012 c.24, approved 7/23/12–Revises certain solar renewable energy programs and requirements; provides for aggregated net metering of electricity consumption related to properties owned by certain governmental bodies and school districts.

P.L.2012 c.20, approved 7/12/2012–Requires school buses transporting certain disabled persons to use flashing lights and establishes penalties for drivers who fail to yield

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44 N.J.R. 2063(a) Charges under Tenure Employees' Hearing Act: action on petition for rulemaking

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United States Supreme Court

Equal Protection

School district student assignment redistricting plan was consonant with the Equal Protection Clause and passed constitutional muster. While the decision makers had discussed race, the plan did not select students based on racial classifications, did not use race to assign benefits or burdens in the school assignment process, did not apply the plan in a discriminatory manner, and did not have a racially discriminatory purpose. Strict scrutiny did not apply; rather the appropriate test of the redistricting plan was rational basis, which the district met. The plan was reasonably related to the goals of (a) equalizing the two high school populations, (b) minimizing travel time and transportation costs, (c) fostering educational continuity, and (d) fostering walkability. District Court Order affirmed. **Doe v. Lower Merion Sch. Dist**., No. 10-3824, 665 F.3d 524 (3rd Cir. 2011); Decided December 14, 2011. Writ of Certiorari denied.

Doe v. Lower Merion Sch. Dist., No. 11-1135, SUPREME COURT OF THE UNITED STATES, 567 *U.S*. ___ (2012) 80 U.S.L.W. 3690, Decided June 18, 2012

First Amendment

Public-sector labor union announced a special assessment/mid-year dues increase to defeat two ballot initiatives opposed by the union and elect certain candidates at the upcoming November election. The union's procedure, in the agency shop context, impinged on nonmembers' First Amendment rights. Under the First Amendment, when a union imposes a special assessment or dues increase levied to meet expenses that were not disclosed when the regular assessment was set, it must provide a fresh notice and may not exact any funds from nonmembers without their affirmative consent. Reversed and remanded. **Knox v. SEIU, Local 1000**, No. 10-1121, SUPREME COURT OF THE UNITED STATES, 567 U.S. ___ (2012), Decided June 21, 2012.

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3rd Circuit Court of Appeals

Attorney Fees

Court of Appeals affirmed District Court judgment. Plaintiff was not a prevailing party under the standard applied in Farrar and its progeny because he did not obtain any actual relief. The School District did not provide any new documents and plaintiff was unable to enforce the Review Panel's order. Accordingly, plaintiff was not entitled to attorney fees. **Public Interest Law Ctr. of Phila. v. Pocono Mt. Sch. Dist.,** No. 11-4096, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 2012 U.S. App. LEXIS 13021, Decided June 26, 2012.

Insurance

Court of Appeals affirms District Court judgment denying board's summary judgment motions for essentially the reasons set forth in the May 15, 2008 and March 17, 2011 District Court opinions. Matter involved insurer's duty to defend board in three construction litigation actions involving breach of contract and duty of good faith and fair dealing. Costs were taxed against the Board. **N. Plainfield Bd. of Educ. v. Zurich Am. Ins. Co**., Nos. 11-1961 and 11-2323, 467 Fed. Appx. 156; 2012 U.S. App. LEXIS 9909 Decided May 17, 2012. See also N. Plainfield Bd. of Educ. v. Zurich Am. Ins. Co., 2011 U.S. Dist. LEXIS 27718 (D.N.J., Mar. 17, 2011) **N. Plainfield Bd. of Educ. v. Zurich Am. Ins. Co., 2008 U.S. Dist. LEXIS 39555 (D.N.J., May 15, 2008)**

Special Education

Court of Appeals affirms District Court judgment granting summary judgment in favor of school district. Pre-school autistic student received FAPE in the least restrictive environment, as had been previously determined by the administrative law judge. After disagreeing with the child study team placement, parent had unilaterally placed student in a different school and sought due process. **L.G. v. Fair Lawn Bd. of Educ**., No. 11-3014, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 2012 U.S. App. LEXIS 13227, Decided June 28, 2012, affirming L.G. v. Fair Lawn Bd. of Educ., No. 2:09-cv-6456 (DMC) 2011 U.S. Dist. LEXIS 69232 (D.N.J. June 27, 2011)

Court of Appeals affirms District Court judgment that parents were entitled to neither compensatory education nor reimbursement for tuition or transportation expenses when they unilaterally placed student in private school for students with disabilities between the student's first and second grade years. District Court had reversed Due Process Hearing Officer's decision which had awarded parents compensatory education for the 2007-2008 school year, as well as reimbursement of tuition for the 2008-2009 school year, and reimbursement for transportation, finding that the school district's IEP denied FAPE. **Ridley Sch. Dist. v. M.R.,**No. 11-1447, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 680 F.3d 260; 2012 U.S. App. LEXIS 9908, Decided May 17, 2012.

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New Jersey District Court

Public School Contracts Law

District Court enters judgment in favor of school district in matter involving bids on fuel oil. Vendor claimed breach of contract based on challenge to bid award and rebidding by the board of education. ISO Bunkers, LLC v. Byram Twp. Bd. of Educ., Civil Action No. 09-cv-00607 (DMC)(JAD), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2012 U.S. Dist. LEXIS 69671, Decided May 18, 2012.

Special Education

District Court grants motion to supplement the record and remands matter to ALJ to reconsider finding that the School District offered a FAPE in consideration of the standardized test results proffered by Plaintiffs and E.S.'s previously undiagnosed learning disability as combined with the alleged severity of E.S.'s bipolar disorder. R.S. ex rel. E.S. v. Montgomery Twp. Bd. of Educ., Civil No. 10-5265 (AET), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2012 U.S. Dist. LEXIS 80321, Decided June 8, 2012.

Tort Claims Act

District Court grants school district's motion for judgment on the pleadings in matter alleging constructive discharge, tortious interference and harassment, intentional infliction of emotional distress, tortious interference with a contract, hostile work environment, and two Section 1983 claims, all resulting

from an incident where a teacher/coach riding in a caravan with the football team dangerously passed the team bus. **Woodend v. Lenape Reg'l High Sch. Dist.**, CIVIL ACTION NO. 11-5724 (JEI/JS), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2012 U.S. Dist. LEXIS 87795, Decided June 25, 2012.

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New Jersey Supreme Court

Administrative Regulations

Supreme Court reversed the Appellate Division and held that the former N.J.A.C. 6A:23A-3.1(e)(3) - (6) applied only to new contracts and amendments for superintendents, assistant superintendents, and other high-level officials; they did not affect existing agreements or alter terms of employment retroactively and were valid. N.J.S.A. 18A:30-3.6 did not supersede N.J.S.A. 18A:30-3.5. The New Jersey Legislature had the authority to modify terms and conditions of employment for future contracts for public employment in a manner that did not raise constitutional concerns; the laws that protected tenure rights did not prevent the Legislature's later actions; the Legislature properly exercised its power when it directed the Commissioner to issue the regulations; and the regulations were consistent with their respective enabling statutes, advanced the Legislature's goals, and protected benefits that employees had already accumulated. N.J.S.A. 18A:30-3.5, which capped sick leave payments, was not superseded and covered high-level employees, including superintendents and assistant superintendents; the more recent enactment, N.J.S.A. 18A:30-3.6, expanded the sick leave cap to cover all newly hired school employee. **New Jersey Ass'n of Sch. Adm'rs v. Schundler**, A-98 September Term 2010 066789, SUPREME COURT OF NEW JERSEY, 2012 N.J. LEXIS 511, January 18, 2012, Argued, May 3, 2012, Decided, Related proceeding at Dolan v. Centuolo, 2012 N.J. Super. Unpub. LEXIS 1627 (App.Div., July 9, 2012)

Certification

Petition for Certification of the judgment in A-001279-09 denied. Egg Harbor Twp. Bd. of Educ. v. Schaeffer Nassar Scheidegg Consulting Eng'rs, LLC, C-848 September Term 2011, 069944, 210 N.J. 479 (2012) 45 A.3d 984 (2012) decided June 19, 2012

Petition for certification of the judgment in A-003426-09 denied. Novembre v. Snyder High Sch., C-904 September Term 2011, 070141, 210 N.J. 262 (2012); 43 A.3d 1168 (2012); Decided May 22, 2012

Petition for certification of the judgment in A-001739-10 denied. Briel v. Board of Educ. of Madison, C-976 September Term 2011, 070227, SUPREME COURT OF NEW JERSEY, 210 N.J. 263 (2012); 43 A.3d 1168 (2012); Decided May 22, 2012.

Petition for certification of the judgment in A-002460-05 denied Bacon v. New Jersey State Dep't of Educ., C-902 September Term 2011, 070079, SUPREME COURT OF NEW JERSEY, 210 N.J. 218 (2012); 42 A.3d 890 (2012); Decided May 7, 2012.

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New Jersey Superior Court, Appellate Division

Arbitration

Appellate Division affirms Chancery Division enjoinment of arbitration in matter involving non-renewal of

technology support position; a position ineligible for tenure. Trial judge concluded that the contract non-renewal was not subject to the grievance procedure outlined in the contract between the parties and stayed the arbitration. Holmdel Twp. Bd. of Educ. v. Holmdel Twp. Educ. Ass'n, DOCKET NO. A-1961-11T1, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 1408, Decided June 19, 2012.

Appellate Division reverses trial court's vacation of arbitrator's award and remands for judgment confirming arbitrator's award. Arbitrator found that the Board violated the contract by requiring Senior and Administrative I secretaries to perform the duties of Administrative II secretaries without additional compensation and ordered compensation for the affected secretaries. The arbitrator's interpretation of the Agreement was both plausible and reasonably debatable. The arbitrator looked to the totality of the evidence presented and integrated it with a logical understanding of the Agreement. A judicial unwinding of the award was neither necessary or appropriate. **Trenton Educ. Secys Ass'n v. Trenton Bd. of Educ.,** DOCKET NO. A-5254-10T4, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 1034, Decided May 10, 2012.

CEPA

Appellate Division reverses and remands trial court order of summary judgment in matter involving complaint of former Supervisor of Curriculum and Instruction against her employer board of education and its superintendent, in which plaintiff supervisor alleged that her termination violated the Conscientious Employee Protection Act (CEPA), N.J.S.A. 34:19-1 to - 8. The record contains genuine issues of material fact about whether her termination was causally related to the discharge of her obligations as the affirmative action officer, specifically preparation of the CEP report, and precluded entry of summary judgment in favor of defendants. **Hallanan v. Twp. of Fairfield Bd. of Educ**., DOCKET NO. A-2585-10T1, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 969, Decided May 2, 2012.

Charter Schools

Appellate Division affirmed Commissioner's denial of charter school application. The DOE noted its concerns regarding special populations, assessments, facilities, governance, and admissions. In addition, as per the local school superintendent, the application had conflicting information regarding course requirements, did not fully address New Jersey's revised high school graduation requirements, and failed to specify a process for curriculum development in the nine areas of New Jersey's core curriculum content standards. Quest failed to demonstrate that Commissioner's decision was arbitrary, capricious or unreasonable. **In re Proposed Quest Acad. Charter Sch. of Montclair Founders Group,** DOCKET NO. A-3005-10T1, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 1129, Decided May 22, 2012.

Discovery

Appellate Division affirmed trial court denial of motion to suppress evidence of a telephone call between teacher and former student. Teacher was charged with first-degree aggravated sexual assault N.J.S.A. 2C:14-2(a)(2)(b)), second-degree sexual assault (§ 2C:14-2(c)(4)), and third-degree endangering the welfare of a child (N.J.S.A. 2C:24-4(a)). Court concluded that defendant had no expectation of privacy in his cell phone number, which had been given to the student, was included in the school staff directory and to multiple parties and students in connection with a school trip which defendant had chaperoned. School's SRO acted reasonably in requesting and obtaining the number from the principal's secretary. **State v. DeFranco,** 426 N.J. Super. 240 (App. Div. 2012); 43 A.3d 1253 (App. Div. 2012); Decided June 8, 2012.

Appellate Division found that trial court erred in appointing a discovery master in an action brought by a former board of education employee under the LAD and CEPA. In actions of these types, the trial judge must consider the remedial nature of the litigation as well as the ability of litigants to absorb the costs of

such relief. The appointment of a discovery master in fee-shifting remedial cases may impose a cost burden on litigants that creates a de facto bar to their access to the justice system. Matter reversed and remanded. **Zehl v. City of Elizabeth Bd. of Educ.** 426 N.J. Super. 129 (App. Div. 2012); 43 A.3d 1188 (App. Div. 2012), Decided May 31, 2012.

Due Process

Appellate Division reversed trial court, determining that plaintiff's substantive due process cause of action under the New Jersey Civil Rights Act, a non-tenured gym teacher who was terminated pursuant to an employment contract should have been dismissed at the conclusion of plaintiff's case. Plaintiff had no cognizable property right entitled to substantive due process protection. Matter was remanded for entry of judgment in favor of the school district. Plaintiff was a non-tenured physical education teacher who had been dismissed pursuant to a contractual 30-day termination clause. Trial court's judgment was in the amount of $175,286.75, including $31,392.63 in damages and pre-judgment interest and $ 143,894.12 in counsel fees. **Filgueiras v. Newark Pub. Schs**, 426 N.J. Super. 449 (App. Div. 2012) ; 45 A.3d 986 (App. Div. 2012); Decided June 18, 2012.

Indemnification

Appellate Division affirms trial court ruling awarding teacher counsel fees and costs in connection with a lawsuit filed on behalf of a student in which teacher was a defendant. Teacher had been represented by her NJEA insurance carrier. Teacher sought and was granted reimbursement pursuant to the employee indemnification statute N.J.S.A. 18A:16-6. Teacher paid for the coverage she received from the NJEA insurance policy through her union dues and Board failed to defend teacher in the underlying lawsuit, instructing her to contact the NJEA for legal representation. Tort Claims Act did not bar the insurer for reimbursement of costs and fees. **A.B. v. Montville Bd. of Educ.,**DOCKET NO. A-3498-10T3, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 1086, Decided May 17, 2012.

Labor Relations

Appellate Division affirmed trial court determination that mid-term termination of non-tenured teacher was not arbitrable. Trial Court correctly determined that grievance procedure in collective bargaining agreement did not apply to termination of non-tenured teacher. If teacher wished to challenge the Board's decision terminating her employment for education-based reasons, her remedy was to file an appeal with the Commissioner of Education. **Warren County Tech. Sch. Bd. of Educ. v. Warren County Tech Educ. Ass'n**, DOCKET NO. A-1757-11T4, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, Decided June 29, 2012.

Appellate Division affirms Law Division grant of motions for summary judgment in matter involving alleged violation of the Computer-Related Offense Act (CROA). Teacher/ Education Association member distributed email communications at an Association meeting; communications to which he was not a party, but of which he became aware through an open inbox on a school computer. Civil action claims under CROA, for which summary judgment was not granted, proceeded to a jury trial, with a verdict of no cause on both claims. **Marcus v. Rogers**, DOCKET NO. A-2937-09T3, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, Decided June 28, 2012,

Open Public Records Act

Appellate Division affirms trial court ruling ordering school district to provide requesting Education Association with access to the following information existing as of June 18, 2010: Names of teachers reemployed for the 2010-2011 school year, their certifications issued by the New Jersey Board of Examiners and their employment information to the extent allowable by N.J.S.A. 47:1A-10 along with reasonable attorneys' fees. The record was devoid of any evidence that providing access to Board records as provided in the trial order would create an undue burden to the Board, and there is no provision in OPRA sheltering access to a government record accessible through other sources.

Elizabeth Educ. Ass'n v. Elizabeth Bd. of Educ., DOCKET NO. A-4717-10T1, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 1245, Decided June 5, 2012.

Appellate Division affirms trial court order denying plaintiff's OPRA request for various records and attorney fees. Request for "all documents (whether electronic or paper) and objects in your, your attorney's, agent's, employees' or students' possession which make reference to" herself or her child was "overly broad and improper." Plaintiff's blanket request for "all documents" referencing either herself or her child was without specification or description. Her "open-ended" demand required the Board to identify every single document mentioning herself or her child without any limitation. Given the vast number of persons and places where the requested documents could be located, as well as the requestor's lack of specificity as to types of records sought and their timeframes, the Appellate Division concluded that plaintiff's request was overbroad and therefore rightfully rejected. **L.R. v. Camden Bd. of Ed**., DOCKET NO. A-4712-10T3, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 1140, Decided May 23, 2012.

Reduction in Force

Appellate Division affirms Commissioner's decision concluding that the Board did not violate secretary's tenure rights when it reduced her time and compensation pursuant to a reduction in force while maintaining a non-tenured incumbent in the position of administrative assistant. The jobs did not include "identical responsibilities," the position was secretarial and while the administrative assistant position included secretarial work, it also required supervisory tasks, including the coordination of school-wide and district-wide administrative activities. **Burger v. Bd. of Educ.,** DOCKET NO. A-5223-10T4, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 1244, Decided June 5, 2012.

TPAF

Employees who worked three additional days beyond the contractual 183 day work year were entitled to pension credit for the three additional days. The additional days were mandated by the contract and that the work described and performed by the employees on those days was a permanent and integral part of their regular responsibilities and work, not extra duties or temporary work. **Morris Hills Reg'l Dist. Educ. Ass'n v. Board of Trs. of the Teachers' Pension & Annuity Fund**, DOCKET NO. A-3474-10T3, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 1090, Decided May 17, 2012

Unemployment Benefits

Part-time non-tenured paraprofessional teacher aide who received notice in May of her reappointment for the following school year but did not receive an actual contract until August was not entitled to unemployment benefits. Employee had "reasonable assurance" of returning to work " in any such capacity" in the succeeding academic year. Boland v. Board of Review, DOCKET NO. A-2334-10T3, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2012 N.J. Super. Unpub. LEXIS 1411, Decided June 19, 2012.

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New Jersey Superior Court, Law/Chancery Division

There are no education-related decisions for May or June.

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Commissioner of Education

Admissions

Board did not act in an arbitrary, capricious or unreasonable fashion when it declined to permit a child to enter kindergarten where the child missed the October 1 cutoff date for entry into the current kindergarten class by one day; board provided appeal by hearing before board but did not change its mind, and student may advance to first grade should his assessment test scores and other criteria indicate that such advancement is in his interest upon entry into kindergarten in September 2012. **L.G., o/b/o. D.G., Commr 2012: May 23.** (North Brunswick)

Bus Drivers

Commissioner upholds the Department's determination to suspend a bus driver's school bus endorsement for six months pursuant to N.J.S.A. 18A:39-28 et seq. after an alleged incident in which a child was left on her school bus in July 2011. Driver unreasonably relied on bus aide's representation that the bus was empty at the end of the route, despite her statutory obligation to visually inspect the bus and the fact that she admitted that she had not observed her bus aide walk the aisle and perform the mandated visual inspection of the bus. **Rodriguez, Commr 2012: May 3.**

Certification

Acting Commissioner affirms that State Board of Examiners' order revoking Teacher of English certificate, Teacher of Elementary School certificate, and his Teacher of Students With Disabilities Certificate of Eligibility. Teacher had sent and received entirely inappropriate emails, largely involving matters related to sex and personal relationships, but, importantly, also including references, both of a general and a particular nature, to students, while at school and on school equipment and on the school account. Teacher's conduct was inappropriate and involved "an apparent breach of trust regarding personal information about a student that had in some manner come into [the teacher's] possession." His conduct negated his status as a role model for students. **IMO Certificates of Voza, Exam. 2012: January 19,** » **SEC Decision** » **OAL Decision**

Commissioner dismisses as untimely the appeal of pro-se petitioner, who initially submitted a procedurally deficient appeal of the denial of his application for principal and school business administrator endorsements for failure to meet the requirements in N.J.A.C.6A:9-12.5 and N.J.A.C. 6A:9-12.7; he did not submit a proper petition until approximately three months after the applicable ninety-day rule expired, and there was no compelling reason to relax the rule. **DeMario, Commr 2012: May 11.**

Pro-se petitioner untimely filed his appeal of the Examiners' May 2011 denial of his application for issuance of a School Counselor certificate. Petition is time-barred under the ninety-day rule and no compelling reason was presented for relaxation of the rule. Petition is dismissed. **Benson, Commr 2012: June 27**

Pro-se petitioner untimely appealed the Examiners' September 2010 denial of his application for issuance of Teacher of Students with Disabilities and Teacher of Elementary School (K-5) instructional certificates. Petition is time-barred under the ninety-day rule and no compelling reason was presented for relaxation of the rule. Petition is dismissed. **Evans, Commr 2012: June 27.**

Evidence failed to demonstrate that non-tenured math teacher is guilty of ceasing to perform her duties before the expiration of the term of her employment within the meaning of N.J.S.A.18A:26-10, as to justify the suspension of her teaching certificate; where teacher did not receive an offer or a notice of nonrenewal by the statutory date; even acknowledging that the absence of a nonrenewal letter constituted an offer of employment, she did not timely accept said offer by May 15 so as to create a

contract. She was not offered a contract until August by which time she was actively pursuing an employment opportunity elsewhere and declined to return to employment with the board; had the Board wanted her to be committed to teach, it could have required her to take action to either accept or decline a written contract of employment before August 2010. **Matter of Certificate of Carreno, Commr 2012:June 14 (Bergen Cty Vo Tech)**

Elections

Citizen contended that the Board violated N.J.A.C.6A:23A-5.2(e) when it hired a consulting firm to allegedly launch a campaign to pass the Board's school budget. Petitioner argued that the Board should be enjoined from compensating the firm and should be required to reimburse monies already paid to the consultant. The ALJ found, and the Commissioner agreed that N.J.A.C.6A:23A-5.2(e) prohibits promotional efforts to advance a particular position on school elections or any referenda; that there was no evidence that the board presented any one-sided, biased promotion; and "bare-bones" allegation of misconduct could have been uncovered in discovery, which petitioner elected to forego; summary decision is unwarranted. **Louie, Commr 2012:May 17(Glassboro)**

Graduation

Commissioner upheld district's determination that, due to absenteeism and loss of credit, and failure of a course, and failure to finish the district's summer credit completion program following his junior year, a student had not satisfied requirements for graduation, and therefore could not march in the processional or otherwise participate in high school graduation ceremonies in June 2012. A local board of education has broad discretionary powers pursuant to N.J.A.C. 6A:8-5.1 and has the authority to prescribe graduation requirements for a State-endorsed diploma; student's unjustified incarceration does not excuse him from complying with the attendance requirements of the school district, and there was no indication that the board acted in an arbitrary, capricious or unreasonable fashion. Accordingly, the ALJ concluded that the petition in this matter must be dismissed. **Stevens, Commr 2012: June 8.**

Indemnification

Board was obligated to reimburse an employee for the cost, under N.J.S.A. 18A:16-6.1, of his defense in a criminal action that was dismissed; fact that NJEA financed the defense does not relieve the board of education of its obligation; however, without testimony or certification of the other attorneys other than the lead attorney who billed hours to petitioner, a preponderance of evidence does not exist that the hourly rates they charged were reasonable and accordingly, those expenses cannot be reimbursed. Commissioner orders reimbursement of $18,755.28 for reasonable counsel fees and expenses. **Salaam, Commr 2012: June 25 (Irvington)**

Jurisdiction

Commissioner dismissed for lack of jurisdiction the allegations of a non-tenured director of building and grounds that his employment was improperly terminated and that the actions of the Board were arbitrary, capricious and unreasonable. Matter raises contract claims that fall outside of the Commissioner's jurisdiction. **Lewicki, Commr 2012: May 3.**

Leaves of Absence

Board violated rights of tenured special education teacher when it involuntarily placed her on an unpaid extension of her six week maternity leave two weeks before end of school year. Although the Board asserted that it was not in the best interests of the students to allow her to return to the classroom late in the school year, Commissioner agrees with ALJ that board provided no factual support, nor written policies nor collective bargaining agreement to authorize an involuntary, unpaid extension to a maternity leave for tenured staff; the Board's disruption argument was a pretext for saving the district money; Board's decision amounted to a suspension of a tenured teacher on "flimsy" reasons and violated N.J.S.A. 18A:6-10. Commissioner notes that because it was not possible to conclude the within litigation

before June 1, 2012, the board must pay her the full salary and benefits that she would have received had she been allowed to return to the classroom on that date. **Amorin, Commr 2012:June 25 (Elizabeth)**

NJSIAA

The Commissioner upheld the NJSIAA's decision not to grant a student's request from waiver of the Eight Semester Rule – which limits a student's eligibility for high school athletics to eight consecutive semesters following his or her entrance into the 9th grade; student was not allowed to participate in sports during his senior year where he had played baseball and football as a freshman in Maryland prior to his family's relocation to Summit, and had, at the request of his family, repeated 9th grade so he could mature physically and otherwise in light of the disparity between him and his peers. NJSIAA determined that his case was not distinguishable from traditional "red shirting." Commissioner finds NJSIAA's decision was not arbitrary, capricious or unreasonable. **Summit o/b/o Ryan, Commr: 2012: June 25.**

Nurses

Paterson Education Association had standing in matter where it alleged that the school district failed to employ the proper ratio of school nurses to provide services for every preschool child in the District under N.J.A.C.6A:13A-4.5-- which mandates that there be one school nurse for every 300 preschool children—and improperly sought to meet the needs of its preschool students through the use of medical assistants; Deputy Commissioner remands to the OAL for specific findings about the number of preschool students in the district, the number of qualified nurses, and whether the ratio has or has not been satisfied. Paterson Education Association had standing to bring the action. **Paterson Ed. Ass'n, Commr 2012: May 24.**

Reduction in Force (RIF)

Commissioner grants summary judgment to petitioning employee who had served for many years as a secretary and was promoted to Assistant BA in July 1, 2009, and who claimed that the termination of her employment pursuant to a RIF in 2011 violated her tenure and seniority rights. Commissioner determines that she had acquired tenure as a secretary district, and that in the context of promotions or voluntary reassignments, the waiver of tenure protection requires that the tenured employee voluntarily relinquish his or her tenure rights, which she had not done; and she was promoted in part based on her thirty-five years of loyal service, as well as her experience in prior secretarial positions. Upon termination of her Assistant BA position she should have been returned to a clerical or secretarial position held by a non-tenured employee. If there are no secretarial positions held by non-tenured employees, she must be placed on a recall list; and, further, she is entitled to back pay less mitigation if, at any time since the RIF, there were secretarial positions held by non-tenured employees and those positions were not offered to her. **DiNapoli, Commr 2012: June 7 (Verona)**

While board claimed to have dismissed teacher in a RIF for reasons of economy, but made it clear in later filings that petitioner was actually dismissed because of allegations of misconduct, the board did not initiate the RIF in good faith, but rather as a ruse to avoid the expense and inconvenience of filing tenure charges pursuant to N.J.S.A. 18A:6-10 *et seq.* Accordingly, the ALJ concluded that petitioner must be immediately reinstated to his position and compensated for all lost salary, benefits and emoluments, less mitigation, retroactive to June 30, 2011. **Schwartz, 2012: May 18 (Elizabeth)**

Tenured instructor of electricity/electronics, employed since 1993, claimed that board violated his tenure and seniority rights when he was RIF'd, since the district hired or retained individuals who were non-tenured or lacked seniority over him. Acting Commissioner finds that he has no entitlement to position of Electrical Trades Instructor; his endorsement of Skilled Trades –Electricity/Electronics is no longer issued, but the expertise and skills previously included in this endorsement are now subsumed in the CIP Program Category #47:Mechanic and Repair Technologies/Technician cluster, whereas the

Electrical Trades Instructor falls under the Construction Trades cluster and requires a certificate in Electrical Trades and experience as an electrical contractor, electrical wiring contractor, or electrician which petitioner does not possess. Petitioner failed to establish that his seniority rights were violated. **Biasi, Commr 2012: June 14 (Morris Cty Vo Tech)**

School Ethics

Commissioner agrees with SEC that a board member violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members when he unilaterally directed the issuance of a RICE notice to the interim superintendent. SEC found it was the board's prerogative to issue the RICE notice or to determine who has the authority to issue a RICE notice, and that by taking such unilateral action, the board member took private action beyond the scope of his duties and responsibilities of a board member that not only had the potential, but did compromise the board. SEC dismissed the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (c) and (d). Commissioner adopts recommended the penalty of reprimand. **Persi v. Woska, Commr 2012:June 22 . (Brick)** » **SEC Decision**

Sending/Receiving

Where neither Sea Isle City nor Ocean City opposed the Commissioner's Order to Show Cause why the Commissioner should not 1) determine that Sea Isle cannot operate effectively and efficiently in order to enable students to achieve the core curriculum content standards, and direct the closure of the Sea Isle School District, or 2) recommend to the State Board that it order Ocean City to expand the send/receive relationship with Sea Isle pursuant to N.J.S.A.18A:38-8, Commissioner therefore orders that the Sea Isle City School District be closed effective June 30, 2012, and further requests the State Board of Education to order the expansion of the send/receive relationship between Sea Isle City and Ocean City to include grades kindergarten through third pursuant to N.J.S.A. 18A:38-8. **Matter of Closing of Sea Isle City School District, Commr 2012: May 7**.

Student Residency

Parent fails to appear in *pro se* residency appeal on behalf of her child; dismissed with prejudice. **V.O., o/b/o O.O. Commr 2012: May 3 (Orange)**

Deputy Commissioner grants summary judgment to board, in matter where parent appeals board's determination that her son was not eligible to attend the Regional High School for the 2011-2012 school year, on grounds that she was not properly notified of the district's decision to disenroll her son. Deputy Commissioner agrees with ALJ that neither of the divorced parents reside in the district, and there is no hardship to qualify for affidavit pupil status; and she was on notice of board's determination since board afforded her an opportunity to participate in a hearing to set forth her position, pursuant to N.J.A.C. 6A:22-4.2. **A.P., o/b/o M.M., Commr: 2012:June 14 (Hunterdon Voorhees)**

Tenure Acquisition

Tenured teacher, who was certified only as an athletic trainer and held no proper teaching certificate when initially hired in 2001, and who subsequently earned standard instructional certificates in health and physical education through the alternative route program, challenged the board's decision to terminate her employment claiming violation of her tenure and seniority rights. Deputy Commissioner agrees with ALJ that the administration was fully aware of the petitioner's certification status at the time of her hire, she made no misrepresentations, and the board enabled her to complete the alternate route program; Deputy Commissioner held that the action terminating her employment was without basis in law, and ordered that she be reinstated as a teaching staff member together with retroactive salary, benefits, and emoluments. **Sakewicz Bower, 2012:June 11 (Salem)**

Teacher who served three academic years, was then non-renewed, and then, in January served to replace a teacher on maternity leave, did not acquire tenure; filling in for a position that is not vacant does not count towards tenure. **Harris v. Bridgeton, Commr 2012: May 3**.

N.J.S.A.18A:17-3 was not applicable to petitioner's employment; petitioner did not earn tenure; and the Board did not act in contravention of her statutory rights when it terminated her employment; although she was never appointed for a fixed term and claimed to be a janitor, she did not serve as a janitor; although she performed some janitorial tasks, these appear to have been assigned to keep her busy and cannot be considered her primary duties, which was as a maintenance/driver/aide in District's transportation department. **Roberts, Commr 2012: May 18**

Tenure Dismissal

Teacher who was sentenced to five years in prison for sexual relationship/assault of student and terms of negotiated plea required him to be subject to Megan's Law upon completion of his incarceration, and to forfeit his teaching position, was removed on tenure charges; his removal is statutorily mandated under N.J.S.A. 18A:6-7.1. **Tenure Hearing of Lindo, Commr: 2012: May 21. (Union City))**

Commissioner finds that tenure charges of excessive absenteeism and insubordination against respondent, a tenured special education teacher, are deemed admitted and are sufficient to warrant termination of the teacher from her tenured position, where teacher filed no answer denying the charges. **Tenure Hearing of Robinson, Commr 2012: May 3 (Camden)**

Allegations of chronic and excessive absenteeism and conduct unbecoming against a tenured Spanish teacher, are deemed admitted as they are not contested, and Commissioner enters summary decision granting board's petition to terminate his employment with the district, and forwards a copy of this decision to the State Board of Examiners for action against his certificate as that body deems appropriate. **Tenure Hearing of Economou, Commr 2012: June 14 (Metuchen)**

Commissioner agrees with ALJ that board's tenure charges of conduct unbecoming and insubordination against tenured teacher of industrial arts should be sustained and teacher should be dismissed, following an incident in which he threatened a student with a knife-- albeit without intention to harm student-- in violation of various school policies including the prohibition against possession of a weapon on school grounds, and where in previous incidents he made physical contact with students and/or disobeyed Board policy, resulting in prior discipline and increment withholdings. **Tenure Hearing of Zawadzki, Commr 2012:June 14 (Old Bridge)**

Commissioner rejects ALJ's finding that elementary teacher's excessive absenteeism constituted incapacity, but otherwise concurred with ALJ that excessive absenteeism constituted incapacity, unbecoming conduct and just cause warranting her removal, where she was absent for 197 days over a six year period; absences likely impacted the education of her students; her salary increment was withheld three times; she failed to demonstrate that she or her child had a chronic health condition that cause her absences; and she had ample warning of dissatisfaction with her attendance through written evaluations and withholding of increments. **Tenure Hearing of Dugan, 2012:June 14 (Jersey City)**

Matter dismissed as moot due to teacher's death. In earlier case, Commissioner agreed that absences of a teacher of culinary arts at the Juvenile Justice Commission's Training School were excessive where he failed to return from an approved leave of absence, but that school had not established that absences were sufficient grounds for dismissal under White and similar cases; Commissioner denied board's motion for summary decision, granted teacher's motion for a ruling that he did not abandon his position; and ordered that the record of this matter be developed. **Tenure Hearing of Amodei, Commr 2012: June 14.**

Commissioner--- disagreeing with ALJ recommendation for suspension, loss of increment, anger management training and other penalties-- orders removal of special education teacher with otherwise unblemished record, after incident of unbecoming conduct where teacher disparaged, intimidated and harassed a student in front of the class, in violation of Board's HIB policy; derogatory remarks were surreptitiously video recorded on a cell phone and demonstrated a lack of discretion, judgment, and maturity in dealing with students. Egregious nature of the conduct and effects on students overshadow

teacher's remorse. **Tenure Hearing of Roth, Commr 2012: June 25 (Gloucester)**

Tenure charge adjudication in which former teacher was dismissed from her position on February 8, 2012 for unbecoming conduct and insubordination, rendered moot the issue of whether the board properly withheld her 2011-12 salary increment, as she is no longer an employee of the district and can therefore no longer claim any right to restoration of an employment increment for service which has been determined to be unsatisfactory. Teacher's petition is dismissed. **Toorzani, Commr 2012: June 27 (Elmwood Pk)**

Commissioner finds insufficient basis to approve the proposed settlement, as there is no resolution in the file evidencing petitioner's ratification of the agreement, no signature by her attorney, and no evidence that the State Monitor has signed off on the settlement – as required by the settlement. Moreover, it purports to resolve both the instant tenure matter and an action for overtime pay, although the settlement contains no papers relating to the latter litigation. Matter remanded to OAL to perfect the settlement and Initial Decision, or for further proceedings as appropriate. **Tenure Hearing of Morales, Commr 2012: June 27 (Pleasantville)**

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School Ethics Commission

Board Member did not violate N.J.S.A. 18A:12-24(c) by participating in closed session discussions concerning contract negotiations with the local bargaining unit since her sister-in-law is a fourth grade teacher in the district and a member of the local bargaining unit. The Act defines "relative" as a spouse, natural or adopted child, parent or sibling of a school official. The respondent's sister-in-law is not a "relative," as defined by the School Ethics Act. In Advisory Opinion A08-98 (June 2, 1998), the Commission advised that a Board member with a sister-in-law who was in the local bargaining unit may participate and vote on the contract with that unit without violating N.J.S.A. 18A:12-24(c). Complaint dismissed for failure to state a claim. **Bleistine v. Cunningham, SEC 2012: May 29**

Dismissal where complainant failed to factually establish a violation of N.J.S.A. 18A:12-24.1(e) where there was no evidence that board president made personal promises or took action beyond the scope of his or her duties such that, by its nature, had the potential to compromise the board. Board president was alleged to have notified superintendent search consultant that a formal vote was taken on a superintendent candidate, when in fact no vote had been taken. **Hewitson v. Delguidice, SEC 2012: June 27**

A Board member who has an immediate family member (as defined in N.J.S.A. 18A:12-23) or a relative (as defined in N.J.S.A. 18A:12-23) employed in the district may not participate in the search, selection and/or vote for a new Superintendent, *irrespective of whether there is an in-house candidate being considered for the position* because the Commission maintains that the Board member's g the search, discussion and/or vote for a new Superintendent under such circumstances would constitute a violation of N.J.S.A. 18A:12-24(c). To the extent the Commission's past advisories dealing with the search for, and selection of, a new Superintendent are inconsistent with this determination, those advisories are no longer considered valid guidance. **Martinez v. Albolino, SEC 2012: June 27**

No probable cause to credit allegation that board member violated N.J.S.A. 18A:12-24(c), when he allegedly participated in discussions in closed session concerning the superintendent search where an internal candidate was considered, even though he had a daughter working in district. Although board member participated in the vote to go into closed session, no proof presented that he actually participated in closed session. SEC applies this statute to situations where board members have involvement with relatives, even though the language of the statute is limited to "immediate family." **Fisher v. Tola, SEC 2012: June 27**

Motion to dismiss granted where complainants alleged that board members violated N.J.S.A. 18A:12-24.1(a) and (e) of the Code of Ethics for School Board Members when they gave the superintendent a raise that was approved by the Executive County Superintendent. Complainants alleged that the president violated N.J.S.A. 18A:12-24.1(a) initiated and prepared a letter and outbound phone campaign designed to mislead residents with respect to the Superintendent's employment contract, and she misused school funds without Board authorization in order to do so. However, Complainants proffer no law, regulation, court decision or rule of court that was violated. N.J.S.A. 18A:12-24.1(e) was allegedly violated when there was "previous verbal agreement" to provide a salary increase to the Superintendent of Schools, and the Board awarded the Superintendent a retroactive salary increase in the amount of $12,500 in his employment contract. The Commission does not find this to be "private action" within the intent of N.J.S.A. 18A:12-24.1(e). The Commission maintains that the School Ethics Act does not empower it to supplant the decisions of duly elected or appointed local board members when they are acting in their capacities as board members. To the extent the complainant believes that the Board has acted in a manner that is arbitrary and capricious, or otherwise contrary to law or regulation, any such claim must be brought before the Commissioner of Education. **Demiris v. Lent, SEC 2012: June 27**

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State Board of Examiners

Substitute credential revoked where holder pled guilty to Criminal Sexual Contact. **DeFeo, Exam 2012: May 17**

Teacher of Handicapped certificate revoked where teacher pled guilty to three counts of Falsifying or Tampering with Records. Unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. In this instance, DeMatteo's conviction for Falsifying or Tampering with Records resulted in a lengthy probation and a permanent disqualification from public employment. Although tea claims of unfair treatment by both her district and her ex- husband, if true, are outrageous, the fact remains that her guilty plea was made knowingly. Moreover, her subsequent public employment ban militates in favor of revocation. **DeMatteo, Exam 2012: May 17**

Teacher presented a proposal to the Board in which her certificate would be voluntarily relinquished with the force and effect of a revocation. Teacher did not admit the allegations in the Order to Show Cause. Teacher of Elementary School certificate is hereby revoked. **Gordon, Exam 2012: May 17**

Substitute credential revoked where teacher pled guilty to Abuse of Child-Cruelty-Neglect in April 2011. As a result of the conviction, teacher was disqualified from public school employment pursuant to N.J.S.A. 18A:6-7.1 et seq. **Johnson, Jr. Exam 2012: May 17**

Teacher of Social Studies certificate is hereby suspended until teacher's successful completion of his court-ordered PTI. **Miers, Exam 2012: May 17**

Teacher surrendered his Florida teaching certificates following allegations of inappropriate contact with students. Teacher currently holds a NJ Teacher of Music certificate, issued in May 1968. Teacher agreed to relinquish his certificate with the force and effect of a revocation and all attendant consequences. **Morrison, Exam 2012: May 17**

Teacher of Comprehensive Science certificate is suspended pending final agency action on an order to show cause. **Norton, Exam 2012: May 17**

Teacher convicted of Insurance Fraud sentenced to one year of probation. The court forever barred

teacher from holding public employment pursuant to N.J.S.A. 2C:51-2(a)1. Teacher of the Handicapped certificate, a Supervisor certificate, and a Principal certificate are revoked. **Wright-Stafford, Exam 2012: May 17**

Teacher convicted of Corruption of Minors, Harassment/Stalking by Communicating Lewd/Obscene etc., False Imprisonment, Luring Child Into Motor Vehicle, Involuntary Deviate Sexual Intercourse by Threat of Forcible Compulsion, Simple Assault, Aggravated Assault and Kidnapping for Ransom cannot claim status as a role model to anyone. Teacher's convictions therefore warrant revocation. Teacher of Social Studies Certificate of Eligibility With Advanced Standing revoked. **Booher, Exam 2012:June 21**

Teacher was convicted of Manufacturing/Distributing CDS, CDS on School Property and Conspiracy to Knowingly Commit Health Care Fraud. As a result of the conviction, teacher was disqualified from public school employment pursuant to N.J.S.A. 18A:6-7.1 *et seq.* Teacher of Elementary School Certificate of Eligibility with Advanced Standing revoked. **Cardinali, Exam 2012:June 21**

Teacher convicted of Indecent Assault, Indecent Exposure, Corruption of Minors, Involuntary Deviate Sexual Intercourse and Statutory Sexual Assault. Teacher of Comprehensive Science certificate revoked. **Dickinson, Jr. Exam 2012: June 21**

Teacher pled guilty to Sexual Assault-Victim Between 13 and 16. Teacher was sentenced to five years in prison and parole supervision for life. Teacher of Industrial Arts certificate revoked. **Farris, Exam 2012: June 21**

Teacher resigned from her teaching position after the district filed tenure charges alleging unbecoming conduct, insubordination and other just cause for dismissal. The district alleged that teacher humiliated students by sending them out of the classroom to the office to phone their parents when they were missing assignments and refused to discontinue the practice even after being reprimanded by her principal; failed to properly supervise students; using her cell phone and accessing personal dating websites in class; ignored administrative directives to keep 9/11 remembrances low key and instead allowed her students to view a CD that was upsetting; assigned extra-credit projects involving the viewing of R rated movies by sixth grade students; engaged in several incidents where she publicly humiliated students; discussed matters of a personal nature regarding students with other individuals and had angry outbursts in the hallway or in the principal's office in front of other individuals, including students. In assessing the appropriate penalty, ALJ "vehemently disagreed" that revocation warranted. The ALJ observed that teacher should not "have lost her tenure, much less her certificate." ALJ found that, at most, teacher should have suffered a loss of her increment, not the loss of her tenure as conduct unlikely to occur again. ALJ determined Order to Show Cause should be dismissed with prejudice. Examiners disagreed. Actions, both insubordinate and conduct unbecoming, cannot and should not be lightly dismissed. Thus, Board determines that a one year suspension of Teacher of Elementary School certificate is the appropriate penalty. **Gleim, Exam 2012: June 21**

Teacher was convicted in July 2011 of 2nd degree Death By Auto pursuant to *N.J.S.A.* 2C:11-5. As a result of the conviction, Keno was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* In enacting the Criminal History Review statute, N.J.S.A. 18A:6-7.1 et seq. in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as Death By Auto fall squarely within this category. This strong legislative policy statement is in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. Teachers are professional employees to whom the people have entrusted the care and custody of school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. Substitute credential revoked. **Keno, Exam 2012: June 21**

Teacher of General Business certificate and a Principal certificate revoked for guilty plea to Attempted Sexual Assault, 1st degree and failure to disclose that information. Teacher agreed to relinquish his certificates with the force and effect of a revocation and all attendant consequences. **Roth, Exam**

2012:June 21

Teacher of Mathematics Certificate of Eligibility With Advanced Standing and Teacher of Mathematics certificate are hereby suspended for a period of two and one-half years in accordance with settlement. **Ruiz, Exam 2012:June 21**

Examiners suspends Teacher of Elementary School Certificate of Eligibility With Advanced Standing for a period of six months following failure to disclosed forgery conviction. Act of misrepresenting his prior conviction status on his New Jersey application for certification, while falling short of the behavior expected of a role model, does not warrant the revocation of his certificate. Given the totality of his circumstances at the time of his initial crime, his unblemished record in the intervening years and his disclosure to his employer of his prior conviction revocation not warranted. **Weindorfer, Exam 2012: June 21**

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New Jersey Council on Local Mandates

Council holds that portions of the "Anti-Bullying Bill of Rights" (P.L. 2010, c.122) impose unfunded mandates in violation of the State Constitution and N.J.S.A. 52:13H-2.1; namely the sections that require districts to: adopt a policy for responding to incidents of HIB including "an appropriate combination of counseling, support services, intervention services, and other programs;" establish bullying prevention programs and provide training of school personnel therein; appoint a "district anti-bullying coordinator" and a "school anti-bullying specialist" and a "school safety team" in each school. **In The Matter of a Complaint filed by Allamuchy Township Board of Education,** Council on Local Mandates (argued and decided January 27, written opinion May 1, 2012).

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New Jersey Division on Civil Rights

There are no education-related decisions for May or June.

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Election Law Enforcement Commission

There are no education-related cases for May or June.

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Government Records Council

Subcommittee police report was used as the basis for deliberations which resulted in the negotiation, preparation, and execution of a Retirement and Separation Agreement with the Borough's former Police Chief, such report is therefore a predecisional record the disclosure of which would reveal the nature of the deliberations that occurred during that process. The requested subcommittee policy report, as well

as the factual components thereof, is therefore exempt from disclosure under OPRA as advisory, consultative and deliberative material. N.J.S.A. 47:1A-1.1. **Sarafin v. Hightstown, GRC No. 2011-122 (May 29, 2012)**

Custodian failed to provide a written response to the Complainant's OPRA request for minutes of particular meetings that granted access, denied access, sought clarification, or requested an extension of time to produce the requested records within the statutorily mandated seven(7) business days, resulting in a "deemed" denial of the Complainant's OPRA request pursuant to N.J.S.A. 47:1A-5.g., and N.J.S.A. 47:1A-5.i., the Custodian did not unlawfully deny the Complainant access to the requested records because the Custodian certified that the requested records do not exist within the Board of Education. **Valdes v. Union City Board of Education, GRC No. 2011-47 (May 29, 2012)**

A copy of health insurance coverage for all members of the elected governing body is not a request for an identifiable record and constitutes an invalid OPRA request. W2s and/or 1099s are employee tax information that is prohibited from release pursuant to U.S.C. § 6103 (2004), thus the Custodian did not unlawfully deny the Complainant access to those records. **Gelber v. City of Hackensack, GRC No. 2011-148 (June 26, 2012)**

Requestor sought copies of every e-mail in former Charter School director e-mail account from the time he retired until specified date. Custodian has certified that no records responsive to the Complainant's OPRA request exist. Because there is no evidence in the record to refute the Custodian's certification, the Custodian did not unlawfully deny the Complainant access to those records. **Schooley-Wank v. Teaneck Community Charter School, GRC No. 2011-175 (June 26, 2012)**

Board ordered to release record of minutes in response to request. Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. **Valdes v. Union City Board of Education, GRC No. 2010-285 (June 26, 2012)**

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New Legislation

P. L.2012, c.5. -see **S375**

Establishes standards of practice for providers of clinical nursing services for medically fragile students.* Pamphlet Law 2 pages Approved 5/2/2012 **PDF Format**

L.2012, c.6. -see **S852**

Provides immunity from civil liability to certain individuals who acquire or use an automated external defibrillator. Pamphlet Law 3 pages Approved 5/2/2012 **PDF Format**

P. L.2012, c.10. -see **S1027**

Extends for 18 months application submission deadline to EDA for review and approval of certain construction projects involving public institutions of higher education Pamphlet Law 3 pages Approved 5/2/2012 **PDF Format**

P. L.2012, c.11. -see **A2311**

Establishes program in DOE to address State's shortage of mathematics and science teachers. Pamphlet Law 2 pages Approved 5/9/2012 **PDF Format**

P. L.2012, c.18. -see **S2013**

Appropriates $31,741,467,000 in State funds and $12,368,238,000 in federal funds for the State budget for fiscal year 2012-201 Advance Law 271 pages Approved 6/29/2012 **PDF Format**

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There are no education-related cases for March or April.

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3rd Circuit Court of Appeals

Employment Discrimination

Third Circuit affirms district court grant of summary judgment for defendant who was alleged to have terminated plaintiff from substitute position because of ancestry. Plaintiff did not marshal any evidence or make any showing on the merits of his claims. Filings instead consist largely of plaintiff's extraneous assertions about the United States educational system in general and his "Gravity Buoyancy Technology." Nacer v. Caputo, No. 12-1052 (3d Cir. N.J. Apr. 19, 2012)

Third Circuit affirms dismissal of complaint as sanction for failing to give court valid mailing address. Plaintiff had alleged discrimination in employment at NJDOE. McLaren v. N.J. State Dept. of Educ., No. 11-4585 (3d Cir. N.J. Mar. 1, 2012)

Fourteenth Amendment

Plaintiff filed suit alleging that the New Jersey Department of Education ("NJDOE") violated the Fourteenth Amendment by failing to issue him a high school diploma. District court did not abuse discretion in denying motion for summary judgment. Crisdon v. N.J. Dep't of Educ., No. 11-4436 (3d Cir. N.J. Mar. 1, 2012)

Special Education

A school district is only required to continue developing IEPs for a disabled child no longer attending its schools when a prior year's IEP for the child is under administrative or judicial review. Because the court examines the adequacy of the IEP as of the time it is offered to the student and not at some later date, Third Circuit agree with the District Court that, without notification of an intent to reenroll in public school, the school district was under no obligation to update IEP. D.P. v. Council Rock Sch. Dist., No. 11-2747 (3d Cir. Pa. Apr. 27, 2012)

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New Jersey District Court

Employment Discrimination

Cheerleading coach brings suit alleging subjected to a hostile work environment

and retaliation due to sex discrimination. After viewing the facts in the light most favorable to the plaintiff, the plaintiff has not provided any factual assertions of intentional discrimination by defendants. White v. Cleary, No. 09-4324 (D.N.J. Mar. 16, 2012)

Pensions and Benefits

Motion to dismiss granted to State over challenge to Chapter 78 of Public Law 2011 requiring increase in employee pension contributions and the elimination of cost-of-living adjustments for retirees. Suit barred by Eleventh Amendment. N.J. Educ. Ass'n v. New Jersey, No. 11-5024 (D.N.J. Mar. 5, 2012)

Public Contracts

Bidder on construction project makes various claims including civil rights, tortious interference, defamation against school district's and agents' actions arising out of a breach of contract. Because remaining claims are state law claims, federal court declines to exercise supplemental jurisdiction. D & D Assocs. v. Bd. of Educ. of North Plainfield, No. 03-1026 (D.N.J. Mar. 30, 2012)

Special Education

Motion for summary judgment grant to parents where residential placement was shown to be in the least restrictive environment. Plaintiff to submit request for attorney's fees and costs. T.R. v. Cherry Hill Twp. Bd. of Educ., No. 11-2547 (D.N.J. Apr. 17, 2012)

Following special education litigation with district, court grants prevailing party attorney's fees with a 5 percent reduction in the lodestar amount. T.B. v. Mount Laurel Bd. of Educ., No. 09-4780 (D.N.J. Mar. 30, 2012)

Private Schools for handicapped claimed discrimination because of end of program where school received federally subsidized meals for financially eligible students even though the schools are for-profit entities. The Court concludes that the Plaintiff-Schools have carried their burden of establishing Article III standing to sue on behalf of themselves and their students, and that summary judgment should be denied as to the Rehabilitation Act, Americans with Disabilities Act, and Administrative Procedure Act claims. Deron Sch. of New Jersey, Inc. v. United States Dep't of Agric., No. 09-3477 (D.N.J. Mar. 30, 2012)

Plaintiff challenged placement of kindergarten special education students in inclusion class as violative of IDEA, Rehabilitation Act and NJLAD. Summary judgment granted to school district on IDEA and Rehabilitation Act. NJLAD claims dismissed for lack of subject matter jurisdiction. J.T. v. Dumont Pub. Sch., No. 09-4969(D.N.J. Mar. 28, 2012)

Student Discipline

In constitutional challenge to school district's 24/7 drug and alcohol policy, plaintiff seek class action status. Motion for class action status denied without prejudice; Plaintiffs have failed to show commonality prong of Federal Civil Procedure Rule 23. D.O. v. Haddonfield Bd. of Educ., No. 10-cv-631 (D.N.J. Mar. 21, 2012)

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New Jersey Supreme Court

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New Jersey Superior Court Appellate Division

Administrative Procedures Act
Plaintiff sought order compelling NJ Schools Development Authority to adopt regulations governing the delegation of school facilities projects to eligible SDA school districts. Court has jurisdiction to consider an appeal from agency inaction, Court exercises its power to compel agency action sparingly, mindful of the general deferential standard of review of agency action, and the separation of powers. Court can overturn only those administrative determinations that are arbitrary, capricious, unreasonable, or violative of expressed or implicit legislative policies If SDA fails to submit a notice of adoption of its rule proposal by April 18, 2012, its rule proposal will expire, as eighteen months will have elapsed since the publication of its original rule proposal. N.J.S.A. 52:14B-4.10(e) requires that a rule proposal, followed by a notice of substantial changes, shall expire eighteen months after the date of publication of the notice of proposal. If the rule proposal expires, then SDA will need to re-commence the rule-making process. Education Law Ctr. v. New Jersey Dep't of Educ., No. A-5191-09T3 (App. Div. Apr. 3, 2012)

Board Policy
Board's drug testing policy was flawed to the extent it did not provide the level of specificity required by the regulations. Nevertheless, the policy was not violative of the statute, which was more narrowly drawn than the regulations. Application of the policy to student was not arbitrary, unreasonable, or capricious. K.Q. & L. v. Bd. of Educ. of the Gateway Reg'l High Sch. Dist., No. A-4282-10T4(App.Div. Apr. 16, 2012)

Certification-Suspension
Teacher appeals suspension of certificates following settlement of tenure charges and resignation from district for filing a claim of abuse, pursuant to N.J.S.A. 9:6-8.9 that did not involve sexual or harmful conduct and was not filed immediately. Teacher admitted he did not have reason to suspect his colleague abused students and acted in "anger" because he was "upset" by his colleague's criticism of his work. In separate appeals, teacher argued that Board of Examiners decision was arbitrary, capricious and not supported by the record. Court affirmed determination of Board of Examiners that suspension for conduct unbecoming was warranted, and the findings do not establish grounds to afford teacher statutory immunity. Teacher was estopped from pursuing separate suit against same parties alleging that he was entitled to statutory immunity. Paraskevopoulos v. State Bd. of Examiners (In re Certificates of Paraskevopoulos), No. A-1026-10T2, A-3657-10T2(App.Div. Apr. 18, 2012)

Eminent Domain
Included within the Eminent Domain Act's scheme is the mandate that a condemnor engage in bona fide negotiations with the owner of real property prior to filing a complaint. The Eminent Domain Act further imposes on a government entity seeking condemnation the overriding obligation to deal forthrightly and fairly with property owners in condemnation actions. When government is unwilling or unable to comply with N.J.S.A. 20:3-6, dismissal of its condemnation complaint is not a product of a hyper-technical application of the law. The condemning authority's obligation to conduct good faith negotiations does not end with the furnishing of a written appraisal. Affirmed in part and remanded for dismissal without prejudice. New United Corp. v. Essex County Vocational-Technical Bd. of Educ., No. A-2014-10T2, A-2302-10T2 (App.Div. Apr. 3, 2012)

Nonrenewals
Non-renewals of non-tenured custodians for poor attendance not subject to arbitration. If the union intended to negotiate tenure rights for its otherwise non-tenured contract-employee members, in the form of a "last in, first out" clause applicable outside a traditional "layoff" situation, it should have negotiated a provision specifically so providing. Freehold Reg'l High Sch. Dist. Bd. of Educ. v. Freehold Reg'l High Sch. Custodial & Maint. Ass'n, No. A-0125-11T3 (App.Div. Apr. 25, 2012)

Residence
The State Facilities Education Act presents a distinct statutory scheme from N.J.S.A. 18A:38-1. SFEA and accompanying regulations requires the district of residence to be determined annually only. The statutory scheme is designed to address the needs of a small number of students. The Legislature and the agency charged with overseeing the legislation determined this scheme to be reasonable. The regulations have been in effect since 2002 without legislative intervention. The Commissioner's construction of the statute and regulation is reasonable in the context of the SFEA statutory scheme. Piscataway Board of Education v. NJDOE and the Dunnellen Board of Education, No. A-1916-10T4 (App.Div. Apr. 19, 2012)

Sending-Receiving
Citizen challenges expansion of sending-receiving relationship where district sends all of its students to neighboring district. Receiving district agrees to lease sending district building to accommodate expanded relationship. By renting the school sender was seeking to discontinue, receiver would be able to accommodate all the pupils of both districts as follows: kindergarten classes held in one receiver school; first and second grade classes held in the sender school leased to and operated by receiver; and all third through fifth grade classes in another receiver school. In recognizing the existence of sending-receiving relationships that leave a non-operating district and directing merger of non-operating districts, the Legislature did not amend Chapter 38 of Title 18A to prohibit arrangements that result in creation of a non-operating district. Rather, the Legislature addressed the consequences in a way that provides another avenue for reaching the goal of consolidation through mergers that are consistent with the thorough and efficient education of children. N.J. Const. art. VIII, § 4, para. 1. The Commissioner concluded that this arrangement was within the authority expressly and impliedly delegated to the Boards. Court affirms. Edmondson v. Board of Educ. of Elmer, 424 N.J. Super. 256 (App.Div. 2012)

Tenure Dismissal
In order to sustain tenure charges for excessive absenteeism, a board must show (1) that it considered the number of days and the particular circumstances of the absences; (2) the impact the absences had on the district; and (3) that the appropriate warning was given. The Acting Commissioner's decision to adopt the findings of the ALJ was not arbitrary or capricious. In light of all the circumstances, teacher's termination for excessive absenteeism and unbecoming conduct stemming from an act of insurance fraud, is not "shocking to one's sense of fairness." In re Tenure Hearing of Castro, No. A-4875-10T3 (App.Div. Apr. 25, 2012)

Court affirms dismissal of reading specialist for unbecoming conduct, where she resisted implementing the district's balanced literacy program, in particular the teaching of BSI as remediation rather than as an enrichment program. Superiors met repeatedly with her in vain attempts to overcome her obstructionism toward the ESL program. Her failure to cooperate with several classroom teachers and her public displays of intransigence and hostility demonstrated an inability or unwillingness to understand and to correct her misconduct, and thus the

likelihood that she would continue to repeat it. The school district gave appellant ample opportunity for corrective action that was never followed. In Re Tenure Hearing of Ziznewski, No. A-0083-10T1 (App.Div. Apr. 13, 2012)

Tort Claims Act
Summary judgment in favor of defendant jointure commission where plaintiff's expert failed to explain basis for student's prognosis, failed to differentiate student's present condition from his preexisting condition; and he failed to state that student's injury was permanent. Therefore, plaintiffs were unable to satisfy the requirements of N.J.S.A. 59:9-2(d) and defendants were entitled to summary judgment as a matter of law. Kowaleski v. Wolff, No. A-5173-10T4 (App.Div. Apr. 26, 2012)

Plaintiff did not file the notice of tort claim within ninety days of the happening of the accident, did not demonstrate the "extraordinary circumstances" required by N.J.S.A. 59:8-9 and did not file her cause of action against BOE within two years of the happening of the accident, which is the outermost time limit for filing suit against a public entity. Plaintiff did not act with reasonable diligence in investigating whether defendant was in the course of her employment with BOE at the time of the collision. The deposition occurred more than three years after the accident occurred. Court cannot countenance such potentially unlimited liability exposure on the part of a public entity. The Tort Claims Act requires otherwise. Lugo v. Kennedy, No. A-4493-10T1 (App.Div. Apr. 4, 2012)

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New Jersey Superior Court, Law/Chancery Division

There are no education-related cases for March or April.

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Commissioner of Education

Certification/endorsement
Commissioner confirms the State Board of Examiners denial of candidate's application for the issuance of a Principal Certificate of Eligibility (PCE). She had not met requirement of N.J.A.C. 6A:9-12.5(a)1iii, that she complete a post-master's program; petitioner had to meet the requirement that she complete a post-master's program, not just acquire credits toward completion of the program. Crespo, 2012: Commr March 28.

Charter Schools
Commissioner grants summary judgment to board and holds that there is no legal prohibition against a board of education spending public funds in efforts to defeat a charter school including zoning challenges and lobbying activities, and issuing public statements in opposition to the establishment of a charter school; however, such authority is not unfettered, and must be in furtherance of a *legitimate* board interest; opposition to an application of a charter school is circumscribed by N.J.S.A.18A:36A-4c, but they are not prohibited from challenging implementation issues, as was the case here. Princeton International Academy Charter Sch., Commr 2012:April 2.

Contracts

Board did not violate the Public School Contracts Law when it awarded a contract for school uniforms to a vendor in 2006, and finds unwarranted the Department of Education, Office of Compliance Investigation's demand that petitioner refund State aid in the amount of $594, 217.10. Although the winning vendor was not the lowest bidder, it submitted the lowest bid that complied with the criteria set forth in the bid specification documents. Elizabeth Bd. Of Ed., Commr 2012:March 29, OAL Elizabeth

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Discrimination
Board actions were not arbitrary, capricious or unreasonable, where the board appointed a Board attorney to investigate a grievance that a vice principal filed after being denied a promotion. The vice principal's grievance claimed racial and gender discrimination, as well as improper favoritism by the superintendent, and was filed with the Board's affirmative action officer – who recused herself from investigating this matter because she had served on the interview committees that had rejected the petitioner for promotion. N.J.A.C. 6A:7-1.5(a)(2)(iii) does not require that the affirmative action officer personally conduct any grievance investigation and thus the superintendent and the affirmative action officer retain the discretion to discharge their duties; a dissatisfied grievant may file a formal complaint with the Division of Civil Rights, as the petitioner rightfully did. Plummer, 2012: April 20.

Indemnification
Commissioner dismisses request for indemnification without prejudice, finding that he has no jurisdiction over the question of whether a civil settlement of in a Superior Court civil action alleging sexual assault and harassment by the board's security officer, which was settled in August 2010, resolved all of the issues including indemnification. Alexander and Horace Mann Ins. Commr 2012: April 27 (Trenton)

Non-tenured
Petition of former non-tenured employee who challenged the Board's decision to terminate her employment, is dismissed as untimely filed under N.J.A.C. 6A:1.3(i). The ALJ concluded that petitioner's appeal was not timely filed with the Commissioner within 90 days of the date when her Superior Court complaint was dismissed on jurisdictional grounds. Accordingly, the ALJ granted the Board's motion to dismiss. Maranon, Commr 2012: March 29.

Private School
Private school for the handicapped (PSH) appealed five audits conducted by DOE from 1994-95 through 1998-99, in which the DOE disallowed approximately $9 million in non-allowable costs and expenses and ordered these tuition overcharges returned to the sending districts. Many unresolved issues and partial decisions—protracted litigation. Commissioner rejects the recommended decision of the OAL and remands to the OAL for revision so that final decision contains– by presentation, not by way of incorporation through the attachment of charts prepared by others – ALJ's recommendation as to the appropriate disallowances and finding as to the amount of money to be returned to the sending public school districts. Archways, Commr 2012: March 14 (DOE, Pemberton, Ewing) (Consolidated)

Reduction in Force
Commissioner holds that clerical aide who had held various titles since 1999, including data processing technician or operator, aide, secretary, and data processor, did not have tenure as a secretary and therefore no rights to a secretarial position, and her termination pursuant to a RIF was not arbitrary, capricious or unreasonable; she never joined labor union that existed for

secretaries, and all but one contract identified her duties as those of a clerical aide or a data processor; the fact that petitioner performed some of the duties of a secretary who had retired did not change her job title; and petitioner considered herself an hourly employee and left the building when other aides left on early dismissal days, rather than remaining at work with the secretaries until the principal authorized their departure. White, Commr 2012 April 16(Glassboro) » OAL Decision

The lack of qualifications for a standard SAC endorsement bar the petitioner from claiming tenure in respondent's district and, in turn, preclude petitioner from any "bumping rights" in the wake of the RIF. Ruiz v. Bd. of Ed, 2012: Commr March 27(on remand)

Commissioner finds that the tenure rights of a principal who was tenured as an assistant principal, were not violated when her annual salary was reduced in consequence of the change from a 12-month to a 10-month position following a RIF which eliminated the 12-month principal position she held at an elementary school. She contends that she was reassigned from her 12-month principal position to a 12-month high school assistant position as a result of the RIF, and that the Board then transferred her of its own volition to the 10-month elementary assistant principal position, thereby illegally reducing her salary. Commissioner determined that the Board first assigned her to a newly created 12-month high school assistant principal position but when she expressed dissatisfaction with that reassignment, it changed the assignment to a 10-month assistant principal position in an elementary setting which she seems to have wanted, at her base salary, pro-rated for ten months. The board's transfer was as a result of a RIF and did not violate her tenure rights. Moore, Commr 2012: March 5(Willingboro)

Commissioner finds that the board violated the seniority rights of a tenured assistant principal employed at the middle when it failed to rehire him to his former vice principal position following a reduction in force (RIF). Board offered the position to another former vice principal who had a greater number of years of service in the district, but no seniority as a vice principal in the middle school. The petitioner had served in the category of "Junior high school vice principal or assistant principal," *see,* N.J.A.C. 6A:32-5.1(l)(14), while the other employee had served primarily in the category of "High school vice principal or assistant principal. The Commissioner concurs with ALJ order for board to reinstate the assistant principal to his former position with back pay and benefits. Palmer, Commr 2012: March 5 (Pleasantville)

Residency

Aunt who appeals *pro se* from board's determination to remove her niece, is ordered to pay tuition for 2 month period of ineligible enrollment of her niece. Aunt contended that she was awaiting a court date for proceedings that would grant her custody of the child who is living with her in Union. Subsequent to testimony presented on the first day of hearing, the Board agreed to settle the matter for a payment of $1,000 but petitioner failed to pay the amount agreed to in the settlement; board requested a judgment in its favor for the full amount of tuition owed, $2,634, and dismisses aunt's appeal. M.M-C., obo, T.C. , Commr 2012: March 16 (Union)

Pro se residency appeal dismissed with prejudice for failure to appear. P.N., Commr 2012: April 3 (Orange)

Residency appeal dismissed with prejudice for failure of mother to appear. M.H., Commr 2012: April 17 (Orange)

Parents appealed the determination of the respondent Board that their minor children are not entitled to a free public education in the South Hackensack school district, where the parents own a home in Hackensack in which they reside but they also own a property that straddles the border between

Hackensack and South Hackensack, and they pay taxes to both municipalities. Commissioner rules that petitioners are domiciled in Hackensack, not South Hackensack, even if they eventually intend to live in their South Hackensack house; the children have never attended school in South Hackensack and are not entitled to a free public education in South Hackensack schools V.A. and J.A., Commr 2012: March 5.

Commissioner agrees with parent that she and her daughter are domiciled in West Orange. She produced a driver's license and a PSE&G bill which both bore a West Orange address. ALJ found that based on the testimony and documentation, mother and her daughter live in an apartment in West Orange with mother's spouse, W.S.; the lease for the apartment is in spouse's name; no evidence was presented to show that any of them have resided elsewhere during the 2011-2012 school year; credible testimony was presented. Child is entitled to a free public education; West Orange is ordered to re-enroll the child. J.A.E., obo K.H., Commr 2012: March 12 (West Orange)

Children who resided in West Orange since February 2011 in a house owned by their grandmother, were not entitled, pursuant to N.J.S.A. 18A:38-1(b), to a free public education in West Orange during the 2010-2011 school year because they were not supported by their grandmother gratis during that time. T.K., obo D.K., Y.K. AND A.K., Commr 2012:April 27

Although child's aunt living in West Orange had custody of nephew by court order , he was not entitled to a free education there because he started each school day at his mother's house in Montclair; and was not domiciled in West Orange during the 122 school days he had attended school in West Orange. Tuition reimbursement ordered. R.F., Commr. 2012: April 27 (West Orange)

Salary

Commissioner dismisses as untimely, a teacher's petition for back pay differential, leave benefits and pension credits in connection with his employment in the district prior to the issuance of his certificate of eligibility with advanced standing (CEAS) in September 2004; teacher had accepted a teaching position beginning in September of 2003 based on a contingency employment agreement with the expectation that his CEAS would be issued imminently, but it was not, and district paid him salary rate of per diem sub. Pinsl, Commr 2012: March 16 (Irvington)

School Ethics Act

SEC found that board member who voted for the reappointment of his mother, a district elementary teacher, and on the reappointment of his mother's supervisor, the school principal, violated N.J.S.A. 18A:12-24(c). He later acknowledged that he had voted in error and changed his vote to an abstention. SEC recommended the penalty of reprimand. I/M/O Joseph Raines, C36-11, 2012: February 28 . Commissioner concurs with penalty. Commr: 2012: April 17.

SEC agreed with the ALJ that board member violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A:12-24.1(e) when he contacted a TD Bank employee by email, without the Board's knowledge or authority, and asked the employee to provide the Board with information to make the bank more appealing as the board's primary depository. He attempted to obtain an unwarranted privilege or advantage for TD Bank, which bid on the board's RFP for banking services, in violation of N.J.S.A. 18A:12-24(b), which provides that "[n]o school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family *or others.*" It was of no moment that the board member himself was not the intended beneficiary of the unwarranted privilege or advantage. He also took private action beyond the scope of his duties as a board member that had the potential to compromise the board, so as to violate N.J.S.A. 18A:12-24.1(e).

SEC adopted the ALJ's recommended penalty of censure. I/M/O Sanford Student, C40-09, SEC 2012: February 28; OAL decision (Evesham); Commissioner concurs with penalty of censure. Commr 2012: April 16.

SEC finds that board member violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members and dismisses the allegations that the board member violated N.J.S.A. 18A:12-24.1(a), (c), (d), (f), (g), (i) and (j). SEC recommends penalty of reprimand. Board member called the District's Business Administrator and told him to change the bus pass of the complainant's child to another residence without the complainant's consent. Board member took private action that was outside the scope of her duties as a board member. No factual evidence of violation of the other sections was shown. The Commissioner concurs with finding of violation and penalty of reprimand. Zirkle, SEC 2011: September 27 ; Commisioner affirms penalty of reprimand. G.M.B. v. Zirkle, Commr 2012: March 29.

Board member violated N.J.S.A. 18A:12-24.1(i) when she inferred that the superintendent is a "terrorist" on board member Facebook page. The Commission finds that the statement may reasonably be considered as undermining, opposing, compromising or harming the Superintendent in the proper performance of her duties. When a sitting Board member makes such a judgmental proclamation, it is likely to be credited far more than a statement offered by an ordinary citizen. However, no violation found of N.J.S.A. 18A:12-24.1(g) for other posting that was a combination of fact and personal opinion. Additional statements in newspaper article that amounted to personal opinion were neither a violation of N.J.S.A. 18A:12-24.1(g) nor N.J.S.A. 18A:12-24.1(i). Commissioner revises penalty of censure to reprimand, as this is first violation. Bey v. Brown, SEC 2011: Dec. 21 (Camden).Commr: 2012: March 20.

SEC finds that board member acted in his official capacity in a matter where he had an indirect financial involvement which a reasonable person could perceive to impair his objectivity so as to violate N.J.S.A. 18A:12-24(c) when he: (1) participated in Board discussion regarding the possible return of the Interim Superintendent; (2) made a motion to approve the appointment; and (3) voted on the appointment. Interim CSA serves on the Board of Chosen Freeholders and board member was a seasonal employee of the Election Board in Ocean County; despite board attorney opinion, SEC rejects argument that the independent status of the Board of Elections insulates board member from any perceived conflict; while Board of Elections has the sole authority to appoint its employees, the enabling statute nevertheless makes the compensation for Board of Elections employees subject to the approval of the Board of Chosen Freeholders, creating an indirect financial involvement. Pellecchia, SEC 2011: September 27. (Berkeley) The Commissioner concurs with SEC's recommended penalty of reprimand. Pellecchia, Commr 2012:April 5. » SEC Decision

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Sending-Receiving

Chesilhurst's petition for severance of its sending relationship with the Winslow (respondent) receiving district, and return of its pre-kindergarten through sixth grade students to its elementary school are appropriately dismissed as a consequence of a referendum on the November 2011 General Election Ballot in Chesilhurst, wherein the community voted 77 to 58 to continue to send Chesilhurst kindergarten through sixth grade students to Winslow Township Public Schools; the outcome of this referendum has rendered petitioner's appeal moot. Chesilhurst, Commr. 2012: April 17. OAL Decision

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Superintendent Contract

Where CSA's four-year contract began July 1, 2007, and was set to expire on June 30, 2011, and where the board failed to provide notice of non-renewal one year in advance as required by the terms of the contract, the CSA was deemed reappointed for another four-year term on July 1, 2011. The Board correctly

adjusted her salary as of July 1, 2011 pursuant to revised regulations that became effective in February 2011 which limit the maximum CSA salary according to the number of students enrolled in the school district. The reduction in salary did not violate her tenure rights, as – pursuant to N.J.A.C.6A:23A-3.1(c) and N.J.S.A.18A:7-8(j) – her reappointment contract was not enforceable until the Board submitted the contract for review and approval by the Executive County Superintendent. Bacher v. Mansfield Bd. of Education, Commr 2012: March 5.

Commissioner adopts ALJ ruling that where Board failed to give Superintendent one year notice of an intent to terminate his contract under the contract's termination provision, and no new agreement was successfully negotiated prior to July 1, 2010, petitioner's contract was renewed on that date – by operation of law, N.J.S.A. 18A:17-15 *et seq.* – for another three years, with the salary provisions that were contained in the previous contract; therefore, any attempt to apply the salary limitations contained in N.J.A.C. 6A:23A-3.1 – which was not in effect until February 2011 – would involve a retroactive application of the regulation. The salary caps would apply if the contract is renewed in the future, whether by operation of law or negotiations. Marciante,Commr 2012:April 9 (Manalapan-Englishtown) » OAL Decision

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Tenure Dismissal
Commissioner dismisses special education teacher on tenure charges of unbecoming conduct, neglect of duty and insubordination against respondent, as teacher fails to deny charges and they are deemed admitted.

Commissioner denies appeal to reopen the tenure litigation that was concluded against employee him resulting from petitioner's failure to answer the tenure charges. It had been 933 days since the Commissioner issued final decision at issue in this matter; petitioner presented no excusable justification for such a delay. Kous,Commr 2012:April 3.

Commissioner disagrees with ALJ recommendation of lesser penalty. Video evidence. Orders dismissal on charges of unbecoming conduct, neglect of duty, and insubordination of a tenured special education teacher for allegedly striking a student with a computer cord, failing to take the student to the nurse after observing the child's injured back, using inappropriate language toward his students, and failing to properly aid in the investigation of the incident in question. Tenure Hearing of Goodwater, 2012:April 27 (Camden)

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School Ethics Commission

SEC finds that board member did not violate the School Ethics Act even if it had been factually established that as member of a Steering Committee he urged the hiring of a candidate for principal to the committee prior to receiving the Superintendent's recommendation. SEC also determines that board members did not violate the Act when they hired/appointed a District Project Manager and a head custodian, individuals who had served as challengers for the board members' recent campaign. Further, there were insufficient facts to establish that board member violated the Act by allegedly calling a school principal, allegedly telling him who to recommend for several teacher positions, telling him to distance himself from another teacher who would not be renewed since her father did not donate or attend a political fundraiser as he was instructed to do.) Vellon v. Longo et al., SEC 2012 :March 27 (Belleville)

The mere fact that a board member accepted private contact and engaged in a

private conversation with a candidate for an interim superintendent position before the Board's interview, did not violate N.J.S.A. 18A:12-24(b) or N.J.S.A. 18A:12-24.1(e). There was no allegation that the member tried to influence the Board or receive a benefit for himself or another, or that he made any promises to the candidate, as the candidate initiated the contact and the board member in fact did not attend the Board meeting so as to exert any potential influence over the Board, and the candidate withdrew his name from consideration priorto the Board's selection of an Interim Superintendent. Fisher v. Hamilton, SEC 2012:March 27 (Hamilton).

SEC dismissed complaint that by directing the Superintendent to conduct RIFs by seniority, board members effectively took action on a personnel matter without the recommendation of the chief school administrator in violation of N.J.S.A. 18A:12-24.1(h) and became involved in the administration of the schools in violation of N.J.S.A. 18A:12-24.1(d). Even assuming that this complaint was timely filed, the complainants challenge an action effectuated by the Board as a whole, and to the extent complainants believe the Board acted in an arbitrary and capricious manner or violated board or law/ regulation, such claim must be brought before the Commissioner. Cureton et al. v. Albolino et al., SEC 2012:March 27 (Hackensack)

SEC dismisses allegations that board members on the facilities committee violated N.J.S.A. 18A:12-24.1(c), (d), (e), (i) and (j) by engaging in the supervision, criticism and evaluation of an employee; even assuming that they participated in the Board's discussion and vote regarding a settlement pertaining to the employee, insufficient facts were alleged to support a finding that the members violated the act, especially because the discussion and vote regarding the settlement was before the entire board. Fisher v. Tola et al., SEC 2012:April 24.

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State Board of Examiners

Examiners orders Teacher of English Certificate of Eligibility suspended pending the submission of proof of successful completion of PTI, for teacher who was convicted of Aggravated Assault; charges deemed admitted where teacher failed to respond to order to show cause.IMO Certificate of Arpaia, Exam 2012:March 1.

Examiners orders revocation of School Psychologist certificate for individual who had his certificates and licenses revoked in Pennsylvania after pleading guilty to Indecent Assault and Endangering the Welfare of Children, and had been sentenced accordingly. IMO Certificate of Batoff, Exam 2012:March 1.

Examiners orders revocation of substitute credential of individual who was convicted of second degree Theft by Deception IMO Credential of Gendel, Exam 2012:March 1.

Examiners orders revocation of Teacher of Health and Physical Education certificate, of individual who pled guilty to Theft by Deception. Theft by Deception demonstrates a dishonesty that falls far short of the role model status expected of teachers. IMO Certificate of Gross, Exam 2012:March 1.

Examiners orders revocation of Substitute credential of individual who pled guilty to Contempt-Judicial Order in October 2010; her repeated violation of a court order when she had previously been charged with Stalking, resulted in a lengthy probation; behavior falls far short of the role model status expected of teachers. IMO Credential of Johnson, Exam 2012: March 1.

Examiners orders revocation of French Certificate of Eligibility for individual who pled guilty in Pennsylvania to Corruption of Minors and surrendered his certificates there. IMO Certificate of Key, Exam 2012:March 1.

Examiners accepts relinquishment of Teacher of Biological Science Certificate of Eligibility With Advanced Standing, and a Teacher of Biological Science certificate for individual convicted of four counts of Endangering the Welfare of Children who agreed to forfeit his teaching certificates and who agreed to relinquish his certificates with the force and effect of a revocation. IMO Certificate of Melchiorre, Exam 2012:March 1.

Examiners orders revocation of Teacher of Elementary certificate, for individual whose Pennsylvania certificate was revoked after he pled guilty to Homicide By Vehicle and was later diagnosed with Acute Obstructive Sleep Apnea and had taken early retirement. IMO Certificate of Skipper, Exam 2012:March 1.

Examiners orders revocation of School Business Administrator certificate of individual who was sentenced to seven years' imprisonment for Official Misconduct after 30 years of service, and who forfeited his public employment pursuant to N.J.S.A. 2C:-51-2A a, and was barred from future public employment. Acts of dishonesty fell far short of the role model status expected of teachers. IMO Certificate of Steele, Exam 2012:March 1.

Examiners orders revocation of Teacher of English Certificate of Eligibility With Advanced Standing and a Teacher of English certificate, where individual's certificates were revoked in Pennsylvania after she pled guilty to Corruption of Minors, Unlawful Contact or Communication With a Minor, Selling or Furnishing Liquor or Malt or Brewed Beverage to a Minor, and pled Nolo Contendere to Indecent Assault-Forcible Compulsion. She cannot claim status as a role model to anyone. IMO Certificate of Winkis, 2012: March 1.

Examiners orders revocation of Teacher of Reading certificate and Reading Specialist certificate of individual who surrendered his certificates in Pennsylvania in lieu of discipline after pleading guilty to ten counts of Possession of Child Pornography and three counts of Dissemination Photo/Film of Child Sex Acts and was sentenced to prison. He cannot claim status as a role model to anyone. IMO Certificates of Zaleski, Exam 2012: March 1.

Examiners orders revocation of Teacher of Elementary School Certificate of Eligibility and Teacher of Elementary School certificate where individual pled guilty to Sexual Assault and was disqualified from public school employment pursuant to N.J.S.A.18A:6-7.1 *et seq.*. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. IMO Certificates of Bordenabe, Exam 2012: April 2.

Examiners orders revocation of Teacher of Elementary School certificate of individual who pled guilty in federal court to Possession of Child Pornography and was disqualified from public school employment pursuant to N.J.S.A. 18A:6-7.1 *et seq.* An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service.IMO Cholowinski, Exam 2012:April 2.

Examiners orders two year suspension of Teacher of Business: Finance/Economics/Law Certificate of Eligibility, School Business Administrator Certificate of Eligibility, and Teacher of Business: Finance/Economics/Law certificate, in matter where, pursuant to N.J.A.C. 6A:9-17.4, the teacher had resigned from his tenured position after being suspended for inappropriate communications with a student, and where teacher presented and board accepted a settlement proposal for the two-year suspension of the certificates. IMO Certificates of Bienvenido, Exam 2012: April 2.

Examiners orders revocation of Teacher of Elementary School and Teacher of Social Studies Certificates of Eligibility, Teacher of Elementary School and Teacher of Social Studies Certificates of Eligibility With Advanced Standing, Teacher of Elementary School certificate, and a Principal Certificate of Eligibility for individual convicted of Falsifying or Tampering with Records in the fourth degree who was sentenced to two years' probation and ordered to forfeit his public employment, was forever barred from holding public office pursuant to N.J.S.A. 2C:51-2d and disqualified from public school employment pursuant to N.J.S.A. 18A:6-7.1 *et seq.*-- notwithstanding his vociferous arguments against revocation. IMO Certificates of Maurer, Exam 2012:April 2.

Examiners voted to accept individual's relinquishment of Teacher of Elementary School Certificate of Eligibility With Advanced Standing, Teacher of Students With Disabilities Certificate of Eligibility, and Teacher of Elementary School certificate pursuant to N.J.A.C.6A:9-17.8, where teacher plead guilty to Endangering the Welfare of Children. IMO Certificates of Peverada, Exam 2012:April 2. Examiners orders revocation of Teacher of Nursery School and Teacher of Elementary School certificates, of teacher who resigned from her teaching position after the district filed tenure charges alleging unbecoming conduct and other just cause in regard to her conduct toward students. Examiners finds Judge Bass' recommendation for a two-year suspension of the certificates to be too lenient, noting that actions in humiliating and frightening young students in front of their peers cannot and should not be lightly dismissed. IMO Certificates of Pitcher, Exam 2012:April 2.

Examiners orders revocation of Teacher of Health and Physical Education certificate for individual who was convicted in N.J. of Simple Assault and Stalking in Pennsylvania and where he had been sentenced to jail for 90 days, fined, ordered to forfeit his public position.and was forever disqualified from holding future public positions pursuant to N.J.S.A. 2C:51-2d. IMO Certificates of Rushing, Exam 2012:April 2.

Examiners orders revocation of Teacher of Mathematics Certificate of Eligibility and Teacher of Mathematics certificate for individual convicted of Endangering the Welfare of Child-Duty and had been sentenced to a four year suspended sentence, parole supervision for life, Megan's Law registration, forfeiture of his public employment, and who as a result of the conviction, was disqualified from public school employment pursuant to N.J.S.A. 18A:6-7.1 *et seq.* IMO Certificates of Tippie, Exam 2012:April 2.

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New Jersey Council on Local Mandates

There are no education-related cases for March or April.

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Election Law Enforcement Commission

There are no education-related cases for March or April.

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New Jersey Division on Civil Rights

There are no education-related cases for March or April.

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New Jersey Government Records Council

Custodian received no records request. Bell v. Paterson Public Schools (Passaic) No. 2012-39 (GRC March 27, 2012).

Denial of access complaint is denied. President of Inside on the Outside is prohibited from having any contact with any present or former employees or officials of the Borough of Stanhope except to mail tax and utility payments or call 911 in an emergency, pursuant to Judge Dana's December 3, 2008 Judgment; therefor he is precluded from filing a Denial of Access Complaint against the Borough ; Council dismisses his complaint . Caggiano v. Stanhope , No. 2012-25(GRC March 27, 2012).

Request for "travel" and "expense" records of Governor Christie and staff, was not sufficiently specific as "'travel records' and 'expense records' are not requests for a specific identifiable government record but are broad and generic. Burton v. Office of the Governor No. 2010-320, 2010-321 &2010-322 (GRC March 27, 2012).

Request for "(a)ny and all New Jersey State or federal fiscal, managerial, or educational audits, reviews, monitoring reports or anything of a similar nature " received during specific period by the Lakewood Board, as well as "all correspondence relating to any such audits, reviews.. .monitoring reports" fails to specify identifiable government records sought and would require the Custodian to conduct research outside the scope of the Custodian's duties; request is invalid under OPRA. Hersh v. Lakewood Bd. of Ed., No. 2010-283(GRC March 27, 2012).

Where requestor asked for copies of OPRA requests made to custodian, the custodian did not unlawfully deny access when she redacted the telephone numbers, or home and email addresses; a custodian does not have a duty to determine what telephone numbers are unlisted and what telephone numbers are listed; moreover, privacy rights of individuals who submitted OPRA requests to the Township in their names, e-mail addresses, and home addresses in the OPRA request forms and log sheets outweighed the complainant's need for such information under common law right of access balancing test. Wolosky v. Parsippany Troy Hills, No. 2010-317 (GRC March 27, 2012).

Where custodian verbally responded to the requestor that she was not required to answer question but failed to provide a written response within the statutorily mandated time period and where the request was not for a specific identifiable government records and was invalid under OPRA, the custodian's improper response did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. Urbay v. West Orange, Complaint No. 2011-01(GRC March 27, 2012).

Where custodian certified in the Statement of Information that no notice responsive to the request could be located, and no credible evidence was presented in the record to refute the Custodian's certification, the Custodian did not unlawfully deny access to the requested public notice. Valdes v. Union City Bd. of Ed., No. 2011-27 (GRC March 27, 2012) Custodian's response to OPRA request for a copy of the original GRC Request Form sent to DOE for a specific request in 2010 indicating the reason for the denial, was lawful because it was timely, it was signed and dated by the Custodian, it provided a lawful basis for the denial of access and was the only record responsive to the request. Valdes v. NJDOE, No. 2010-256 (GRC March 20, 2012).

Although the custodian did not provide a lawful basis for the denial of access to the requested records, he certified in the SOI that the executive session minutes could not be located; in the absence of competent, credible evidence to refute the certification, there was no unlawfully denial of access to the requested executive session minutes; no conscious or intentional wrongdoing ; no unreasonable denial of access under the totality of the circumstances. Valdes v. Union City Bd. of Ed., No. 2010-2018 (GRC March 20, 2012).

The Custodian denied access to the requested bid proposal contents. However, OPRA does not provide the Council with the authority to develop and monitor a corrective action plan for the Township with specific attention to the Custodian's responsibilities and the handling of and responds to OPRA requests, as requested by the complainant/requestor. Steinhauer-Kula v. Down Twp, No. 2010-197(GRC March 27, 2012).

Request for contracts, agreements and other documents regarding attorney's services, including "compensation to Ms. Amana and related companies, " was overly broad and unclear and would require Custodian to conduct research; further, the term "related companies" does not identify with reasonable clarity specific government records. GRC must conduct an *in camera* review of monthly billing invoices to determine the validity of the Custodian's assertion that the redacted portions of the records constitute attorney-client privileged information. Rivera v. Camden, No. 2010-182(GRC March 27, 2012).

Approved executive session minutes for September, October, November and December 2008 were disclosed with redactions for ACD (pre-decisional issues), student issues, potential litigation and contract negotiation; complainant withdrew his complaint as the matter settled; referred to the Office of Administrative Law for the determination of reasonable prevailing party attorney's fees. Wolosky v. Andover Reg. School Dist. No. 2009-94(GRC March 27, 2012).

Custodian corrected the following OPRA violations, in matter where he had failed to provide an anticipated date upon which the records responsive to the request for executive session minutes would be provided; responded to the request for a copy of the Township's official OPRA request form by referring the Complainant to the Township's website instead of scanning the form and providing an electronic copy as requested; had a practice of requiring requestors to provide a portable USB drive to obtain electronic copies of audio recordings; charged $1.00 for the CD to make the requested audio recording of the most recently recorded regular public meeting rather than the "actual cost" of duplicating the record; Failed to use the Complainant's preferred method of delivery (e-mail), and instead provided the requested OPRA request form as a paper copy. Also, Township's official OPRA request form was deficient in several respects. However, custodian was correct to deny access to the unapproved, draft executive session minutes as they constitute draft advisory, consultative, or deliberative material and are exempt from the definition of a government record and from disclosure as they were not approved by the governing body at the time of the request. Violations were not willing and purposeful. Remanded for determination of counsel fees. Wolosky v. Denville, No. 2010-191 (GRC March 27, 2012).

Request for "correspondence (e-mails, letters, memos, faxes) to the board members, administrative staff or employees of the BOE regarding the standards based grading system from 2009-2010" and for "the proposal from the BOE employee responsible for bringing the standards based report card system to Middletown Elementary School" was invalid because it is broad and unclear and fails to name identifiable government records with reasonable specificity. Brunt v. Middletown Bd. of Ed. No. 2011-13(GRC April 25, 2012).

Custodian violated OPRA by failing to timely respond to the Complainant's OPRA request for meeting minutes and video and audio CD/DVD copies of

meetings but items were provided 16 days after request; not knowing and willful violation. Request for “any and all reports pertaining to the mold problem at the Leeds Avenue School” is invalid because it fails to identify a date the report was prepared, who authored the report, or to whom the report was disseminated and would require the Custodian to conduct research to locate a responsive record; unnecessary to decide if attorney client privilege protected disclosure. . Not a prevailing party; no counsel fees awarded. Babiak v. Pleasantville Bd. of Ed., No. 2010-326 (GRC April 25, 2012).

Where request was for signed or unsigned copy of the draft Certificate of Determination relevant to the tenure charges filed against the complainant, the custodian did not violate OPRA as the charges were never signed because board of education did not determine whether there was probable cause; an unsigned copy of the draft Certificate of Determination relevant to tenure charges is considered advisory, consultative and deliberative and is therefore exempt from disclosure. Request for executive session minutes where tenure charges were discussed, had been previously provided. Valdes v. Union City Bd. of Ed., No. 2010-329 (GRC April 25, 2012).

Where requestor asked for copies of signed contracts of all Shore Riptide Hockey League members, OPRA specifically required the Custodian to redact those portions of the 80 contracts that he believed to be exempt from disclosure and to provide the remainder of each record to the Complainant; however, he instead opted to disclose records that were not responsive to the OPRA requests. Custodian violated OPRA. Not a knowing and willful violation. Lakavitch v. Toms River, Complaint No. 2010-230(GRC April 25, 2012).

Where request was for cell phone bills, including itemized list of phone calls, for all Borough employees, and hotel receipts from 2002 to the present, and audio tape of a council meeting, Custodian improperly redacted phone bills as to city and state of locations of calls received; further, charge of $5.00 each for two audio recordings of the requested meeting was not authorized and was unreasonable and in violation of N.J.S.A. 47:1A-5.b.; and request for hotel receipts was invalid as it would have required the Custodian to conduct research. Livecchia v. Mt. Arlington, Complaint No. 2008-80(GRC April 25, 2012).

Because the Custodian failed and refused to disclose to the Complainant the records ordered for disclosure pursuant to the terms of the Council’s Interim Order, the GRC shall immediately commence an enforcement proceeding in New Jersey Superior Court against the Custodian in accordance with N.J. Court Rule 4:67-6. Records requested were for detailed information regarding personnel hires, grants, and job responsibilities of a list of named employees, overtime information and lists of provisional, temporary and unclassified employees Andrews v. Irvington, No. 2008-232(GRC April 25, 2012)matter settled, Andrews v. Irvington, No. 2008-243.

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New Legislation

04/05/2012 – Signed by the Governor P.L.2012, c.2--Establishes "VETeach Pilot Program" in DOE to facilitate the teacher certification of veterans

03/26/2012 – Signed by the Governor P.L.2012, c.1--Provides that a school district may implement bullying prevention programs and anti-bullying training programs at no cost through various entities; and appropriates $1 million

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New Regulations/Executive Orders

N.J.A.C. 6A:2-2.4 Reporting Responsibilities; Organization Strategy for the NJ Department of Education, effective 3/22/2012.

N.J.A.C. 6A:30-1.2, 2.2, 3.1, 3.2, 3.3, 4.1, 5.7, 6.2, 6.6, and 7.2 Evaluation of the Performance of School Districts, Quality Single Accountability Continuum, effective 4/16/2012

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United States Supreme Court

Free Speech

The Supreme Court denied certiorari of two cases that had been resolved in favor of the students, addressing the question of when, under the First Amendment, schools can discipline students for offensive speech created off-campus on the Internet that targets school officials. J.S. v. Blue Mountain School District and Layshock v. Hermitage School District 132 S. Ct. 1097 (2012) (Jan. 17)

The Supreme Court denied certiorari in case affirming grant of summary judgment to school district in challenge to school district's teacher mailbox policy. Policastro v. Tenafly Bd. of Educ., 182 L. Ed. 2d 164; 2012 U.S. LEXIS 1615; 80 U.S.L.W. 3475 (February 21, 2012)

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3rd Circuit Court of Appeals

Special Education

Circuit court affirms District Court's judgment that student possessed no learning disability and was not entitled to any special education services, and rejected parent's request for reimbursement for their independent educational evaluation (IEE) as there was an administrative hearing during which the School District was able to show that its examination was "appropriate." See Warren G., 190 F.3d at 87; 34 C.F.R. § 300.502(b)(2). Council Rock School District v. Bolick, II , USDC for the E. Dist Pa., D.C. Civil No. 09-cv-05604 (Feb 7, 2012)(not precedential)

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New Jersey District Court

Discrimination

Court dismisses disability discrimination suit under Rehabilitation Act, ADA, and NJLAD, brought against school board, nurse and principal by parent whose 3-year old developed a peanut allergy and was advised he could no longer participate in the free Child Development Lab, due to a concern that his safety could not be ensured A.E. v. Freehold Reg'l High Sch. Dist. Bd. of Educ., Civil Action No. 11-2923 (JAP), 2012 U.S. Dist. LEXIS 23265, (D.N.J. Feb. 23, 20123) (not for publication)

Overtime

Court grants school board's motion for reconsideration of the Court's denial of its motion for summary judgment regarding former occupational therapist's claims

that the board violated the New Jersey State Wage and Hour Law when it failed to pay her for alleged overtime work. The board argued that the statute of limitations had run for claims arising prior to July 29, 2008. Court agrees, finding that similar to the accrual of claims for overtime pay under the FLSA, each failure to pay overtime begins a new statute of limitations period as to that particular event for NJWHL purposes. Accordingly, Plaintiff's NJWHL claims arising prior to July 29, 2008 (two years prior to the date on which she filed her Complaint) are time-barred by N.J.S.A. 34:11-56(a)25.1, and are dismissed. In its Guenzel v. Mount Olive Bd. of Educ., 2012 U.S. Dist. LEXIS 21583 (Feb 16, 2012)

Special Education
Parents sought reimbursement of tuition and other costs associated with their unilateral placement of their son at a private school during the 2009-2010 academic year, claiming that Board failed to offer their son a plan that complied with IDEA; Court grants summary judgment to school district, finding that the ALJ's determination that the parents failed to collaborate with district, as well as her finding that the District showed that the IEP was proper under the IDEA, was amply supported by the record. The proposed IEP would have conferred a meaningful educational benefit in the least restrictive environment, and was reasonably calculated to provide FAPE, which defeats the parents' claim for reimbursement. L.W. v. Norwood Bd. of Educ., 2012 U.S. Dist. LEXIS 20511 (D.N.J. Feb 17, 2012) (not for publication)

Court grants motion to remand to state court a lawsuit under the NJLAD, brought by student with disabilities through his mother; the lawsuit, relating to a school board's failure to provide an appropriate education to a student with disabilities, had been removed from state court to federal court by the school district; however, court finds that while allegations regarding the IEP *could* give rise to a cause of action under the IDEA, parent has chosen not to state such a claim or pursue a theory of liability predicated on the IDEA and thus the federal court lacks subject matter jurisdiction. A.K. v. Northern Burlington Reg'l Sch. Dist., 2012 U.S. Dist. LEXIS 12160 (Feb. 1, 2012)(not for publication)

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New Jersey Supreme Court

Labor
The Supreme Court denied certification of appellate ruling affirming a PERC decision requiring the Board to arbitrate a grievance filed by the Association concerning the elimination of summer work hours for four groups of employees who were members of the Association. Flemington-Raritan Reg'l Bd. of Educ. v. Flemington-Raritan Reg'l Bd. of Ed., 209 N.J. 100 (2012)(Jan 24)

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New Jersey Superior Court Appellate Division

Certification
The Court affirms the decision of the Department of Education approving the recommendation of the State Board of Examiners that the teaching and supervisory teaching certificates of former middle school teacher be permanently revoked because he engaged in a longstanding "inappropriate and reprehensible," albeit not sexual, personal relationship" with two 14-year old female students. The department found that Castell's misconduct was sufficiently intertwined with his teaching responsibilities as to require the revocation of his certificates. The panel reject teacher's arguments that the agency decision was

unsupported by the substantial and credible evidence and that the penal was excessive and unwarranted. In re Certificates of Castel, No. A-1552-10T1, (App. Div. Feb. 21, 2012) (per curiam) (unpublished).

Counsel Fees
Board challenges award of counsel fees to plaintiff following settlement of NJLAD claim insofar as award included a 25% contingent fee enhancement, arguing that court erred both in ascertaining the proper lodestar amount and in imposing an enhancement; court finds no merit in board's arguments and affirms award. Briel v. Madison Bd. of Educ., A-1739-10T4, 2012 N.J. Super. Unpub. LEXIS 298 (App. Div. Feb. 14, 2012)(unpublished)

Finance
Court finds that former Commissioner disregarded Congress's prohibition against considering Federal Impact Aid to reduce state aid to local districts, when Commissioner withheld state aid to Regional district under Executive Order 14's mandate that the state place in reserve necessary funds to balance the State's budget, and targeted districts' budget surplus funds. Court reverses Commissioner and remands for further proceedings to determine extent to which federal impact aid was the source of the district's reserve funds withheld. N. Burlington County Reg'l Sch. Dist. Bd. of Ed., v. Schundler, No. A-0607-10T3, 2012 N.J. Super. Unpub. LEXIS 224 (App. Div. Feb. 3, 2012)(per curiam)

Increments
Court affirms Commissioner decision which upheld school board's decision to withhold a salary increment for the 2008-09 school year; court concludes that the arguments presented by appellant that the Commissioner's decision should be reversed because the Board failed to comply with its stated policies and regulations are without sufficient merit to warrant discussion in a written opinion. Spells v. Matawan-Aberdeen Reg. Board of Educ., No. A-4786-10T3, 2012 N.J. Super. Unpub. LEXIS 406 (App. Div. Feb 27, 2012)(unpublished)

Insurance
Court affirms prior order for summary judgment in favor of defendant/third-party plaintiff Board of Education, ruling that insurance company is obligated, under the terms of a 2006-2007 premises pollution liability insurance policy issued to the School Alliance Insurance Fund (SAIF) on behalf of the Board, to defend and indemnify the Board with respect to alleged bodily injury claims and remediation costs arising out of pesticide contamination discovered at middle school. The court construed ambiguous contract language; coverage is available for the "discovery" of pesticide contamination where the contaminants existed on the premises prior to the Policy's July 1, 2005 Retroactive Date but were not discovered until after that Retroactive Date. Ackley et. al v. Paramus Bd. of Educ., No. A-2492-10T4, 2012 N.J. Super. Unpub. LEXIS 452 (App. Div. Feb. 29, 2012) (unpublished)

Labor
Court confirms payment to custodian of back pay for the period from his initial termination on November 16, 2005 until his reinstatement on August 24, 2008, less pay for the ten-day suspension ordered by the arbitrator, plus counsel fees. Court rejects board's position that since custodian's name was omitted from the list of renewed employees, he was only entitled to back pay up to the date of nonrenewal, and the Association's failure to grieve the omission of his name from the list terminated his right to continued employment at the end of 2005-06. Court finds that the omission of custodian's name from the list may have simply reflected the fact that he was not a current employee of the board as a result of his termination, and finds further that the board waived its right to raise the

Association's failure to file the grievance by not raising it in the arbitration hearing or the action to vacate the arbitration award. Linden Bd. of Educ. v. Linden Educ. Ass'n, 2012 N.J. Super. Unpub. LEXIS 416 (App. Div. February 28, 2012) (unpublished).

Non-union Information Technology Manager whose individual employment contract was tied to benefits in the administrators' collective bargaining agreement, claimed that upon retirement he was entitled to pay for unused vacation days where, although the union contract did not explicitly provide for same, they were provided to union members through past practice. Court holds that the broad language in his individual contract (all benefits…. provided to all employees pursuant to the policies and procedures of the Board and as agreed to in the contract) did not support the notion, espoused by the trial judge, that a non-union member may not be entitled to the benefit of past practices. Order of summary judgment to board is reversed for determination of whether past practice existed. Degroot v. Linden Bd. of Ed., No. A-3629-10T4, 2012 N.J. Super. Unpub. LEXIS 199 (App. Div. Feb 1, 2012)(per curiam).

Pension

Court affirms final decision of TPAF that confirmed a 17-month disqualification of the creditable service time of a retired superintendent, and prospectively reduced her pension benefits; she had entered into a contract addendum with the board by which she resigned and was placed on a 17- month leave of absence until the end of her contract term in 1998, during which she was paid a salary although provided no services. Facts contradict that she was on a paid leave of absence, which would have been creditable compensation, as she had no intent to return and had signed a letter of resignation when executing the addendum. Only prospective reduction of her benefits is equitable because of the Fund's earlier delay in adjusting her actual creditable service. Bossart v. Bd. of Trustees of TPAF, No. A-0754-10T1, 2012 N.J.Super Unpub.LEXIS 50 (App. Div. Jan 11, 2012) (per curiam)

Public Records

Mailing list of the names and addresses of self-identified "senior citizens" was subject to the dissemination provision of the Open Public Records Act (OPRA). Appellate panel rejects argument that the senior citizens' privacy interests precluded disclosure of this information under OPRA. and affirms the order requiring defendant to provide an unredacted list, but urges the use of a disclaimer informing those who voluntarily submit their names and addresses for such a list, that such listing is subject to disclosure under OPRA. As to the counsel fees, the panel remands for further proceedings. Renna v. County of Union, No. A-1811-10T3 (App. Div. Feb. 17, 2012) (per curiam) (unpublished).

Restraining Order

A restraining order that barred a man from being anywhere near his ex-wife — a proviso he violated by attending his child's soccer game — was beyond the domestic violence statute's scope. The language at issue required the defendant to stay away from his ex-wife's home and place of employment and "any other place where [she] is located." Because the order did not specify the other places that were off limits but generally required the defendant to stay away from his ex-wife — a restriction "virtually impossible ... to obey at all times" — it was invalid, the court held in a precedential decision. State v. S.K. No. A-1488-10T1 (App. Div. Jan 17, 2012).

Torts

In a matter brought by a New Jersey Nets patron over injuries suffered when one of an unruly group of high school students fell on her at the Izod Center, the jury did not find that negligence by the Sports and Exposition Authority, or negligent

supervision by the students' high school, which sponsored their outing, was the proximate cause of her injuries. The "excited utterance" exception to the hearsay rule did not allow admission of a spectator's statement indicating the teenager had been pushed. Novembre v. Snyder High School, A-3426-09 (App. Div. Jan 17, 2012) (unpublished)

Court affirms prior order granting partial summary judgment to board of education, in matter brought by visitor to school who fell down the school stairs; her complaint for pain and suffering under the Tort Claims Act had been dismissed on grounds that she had not shown by objective medical evidence that she sustained a permanent loss of a bodily function that is substantial. Tyree v. Orange Bd. of Educ., No. A-3695-10T2, 2012 N.J. Super. Unpub. LEXIS 282 (App. Div. Feb. 9, 2012)(unpublished)

Workers Compensation

Court affirms orders that were issued by a judge of compensation requiring the school board to pay a 25% statutory penalty to injured teacher, where the board unilaterally decided, without the approval of the compensation judge, to refuse to issue any further payments of previously-ordered workers' compensation temporary disability payments. Court rejects argument that teacher's receipt of SSD benefits entitled the board to refuse to pay workers' compensation benefits; further, record does not indicate that the award of benefits for the summer created a windfall (see Outland). Ferguson v. Trenton Bd. of Ed., No. A-3053-10T4, 2012 N.J. Super. Unpub. LEXIS 227 (App. Div. February 3, 2012)(per curiam) (unpublished)

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New Jersey Superior Court, Law/Chancery Division

There are no education-related decisions posted for January/February at this time.

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Commissioner of Education

Certification/Endorsements

One year suspension of teaching certificate ordered for non-tenured teacher who, claiming abysmal teaching environment in the charter, resigned to take another teaching job without providing required 60-day notice to charter school; he failed to put the interests of his students before his own interests by his sudden resignation that could not help but be disruptive to his students' education; suspension to commence at the conclusion of the 2011-2012 school year in order to avoid disruption in the education of respondent's current students. Matter of Suspension of Certificate of Creekmur, Commr 2012:Jan 4. » OAL Decision

Teacher had not met requirements for additional endorsement as a Teacher of Students with Disabilities (TSD) through the alternate route program; regulations require that an applicant for the TSD endorsement receive a verification of program completion from an institution of higher education. McQuilken, Commr 2012:Jan 27

Commissioner affirms Examiners denial of request for the issuance of a Teacher of Career and Technical Education: Carpentry Certificate of Eligibility for failure

to attain a passing score on the required Praxis I exam. Cea v. Examiners, Commr 2012: Jan 30

Commissioner affirms Department's determination to suspend for 6 months a school bus driver's school bus endorsement pursuant to *N.J.S.A.* 18A:39-28 after incident in which a child was left on the school bus because driver failed to conduct the mandated visual inspection at the end of his route. Department was directed to notify the Motor Vehicle Commission of its obligation to suspend petitioner's school bus endorsement pursuant to *N.J.S.A.* 18A:39-28 et seq., and to notify petitioner's employer that he is ineligible for the period of suspension for continued employment as a school bus driver. Graham, Commr 2012:Jan 30

Commissioner affirms Office of Criminal History Review's determination to suspend for six months the driver's school bus endorsement for leaving a kindergarten student on the bus for 3 minutes after a 12:15 drop-off at an elementary school. ALJ had found that the endorsement should not be suspended due to ambiguity in definitions, "end of transportation route" nor "vicinity of the school bus" and based on mitigating circumstances; however Commissioner determines that "end of route" pursuant to *N.J.S.A.* 18A:39-26 terminates at the point where all of the children in a particular group leave the bus to enter their school and before the driver moves on to her next route, and remorse cannot mitigate the severity of the breach. Klein, Commr 2012: Feb 2.

Consent Order
Consent order rejected; remanded for correction of deficiencies. J.C., Commr 2012: Jan 11 (Fort Lee)

Contracts
Board did not act in an arbitrary, capricious or unreasonable manner as alleged by unsuccessful bidder, when it awarded the bid for voice, data and telecommunication services to another bidder. Commissioner finds that Board properly evaluated proposals in accordance with the methodology described in the RFP, and in all ways complied with the requirements of Public School Contracts Law; the winning proposal received the highest score of all the interested vendors, and provided the maximum benefit to the District. Business Automation Technologies, Commr 2012: Feb 10 (Bernards Twp)

Commissioner upholds decision by Department of Education Office of Fiscal Accountability and Compliance that board of education violated the Public School Contracts Law and must return $326,004.47 in state aid. Commissioner finds that Board improperly failed to solicit bids when it awarded a contract for construction management to Tri-Tech Engineering (Tri-Tech) that exceeded the two-year provision of N.J.S.A. 18A:18A-42. The multi-year exception for "any single project" pursuant to N.J.S.A.18A:18A-42(k) did not apply as the subsequent work was for a different project approved by the voters, and upon the expiration of the two year contract any further payments were made without the solicitation of bids. Nutley, Commr 2012:Feb 27 OAL Decision

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Graduation
Where former student files petition eleven months after he received notification that he did not have enough credits to graduate due to loss of credit for absenteeism, Commissioner relaxed the 90-day timeframe in the interest of fundamental fairness and remanded the matter to the OAL for a full hearing on the merits. Brophy, Commr. 2012: Jan 18 (Gloucester) » OAL Decision

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Harassment, Intimidation and Bullying (HIB)
Commissioner disagrees with ALJ, and rejects parent's request for reimbursement for student's senior year tuition at an out-of-district high school

after the parent unilaterally withdrew her son from prior to the beginning of his senior year 2009, alleging that the District failed to address persistent intimidation, harassment and bullying based on perceived sexual preference of the boy during his junior year. Parent failed to prove by a preponderance of the competent and credible evidence that the alleged bullying took place, that timely notice of the harassing conduct was provided to the district, that under all of the circumstances the Board failed to take actions reasonably calculated to remediate and end the conduct, that petitioner exhausted all available administrative remedies with the district and had no alternative but to remove the student and did so at a specific cost. J.K., obo P.B, Commr 2012: Feb 9. OAL Decision

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Private Schools

Private school for children with disabilities (PSD) may not include in its tuition charges for the 2007-08 school year the undisputed amount of $10,360 incurred to provide student lunches. Commissioner concluded that NJDOE's disallowance of the food services fee as a component of tuition costs was not arbitrary, capricious or unreasonable. Disallowance is justified pursuant to N.J.A.C. 6A:23A-18 *et seq.* The costs of meals for students is disallowed, unless the PSD meets the criteria set forth in N.J.A.C. 6A:23-4.2(a)20; i.e., two separate school board resolutions from a majority of the school districts that send students to the PSD in that fiscal year, the first resolution declaring that those districts do not require the PSD to apply for and receive funding from the State's Child Nutrition Program, and the second declaring that those district boards do not require the PSD to charge students for reduced and/or paid meals. Commissioner finds that only one district of the five sending districts under contract had submitted both resolutions, by operative date of June 30, 2007. Representations of individual board members or administrators are insufficient to bind a board to a particular course of action and that a board can only be bound by official board action; BA's cover letter in lieu of formal resolution was not sufficient. Delaware Valley School for Exceptional Children, Commr: 2012: Feb 17.

Reduction in Force

Board did not violate tenure rights of Supervisor for Grant Acquisition and Management was eliminated in a reduction in force (RIF). Prior service in his various Director positions did not earn time toward tenure, where he only possessed a principal's endorsement which did not authorize him to fulfill the district-level responsibilities with which he was charged; he should have possessed an administrative certificate with an endorsement as a school administrator; fact that the District's job descriptions required a supervisor endorsement is not controlling for purposes of whether or not petitioner earned tenure. Perna, Commr: 2012:Jan 4 (Paterson) OAL Decision

Employee's claim that his employment was terminated by the respondent in a reduction in force, in violation of his tenure and seniority rights is dismissed for failure to appear. Mendez, Commr 2012:Jan 11 (Paterson)

Commissioner finds that petitioners had no standing and dismisses matter brought by tenured members of the respondent Board's child study team who challenged the Board's abolishment of the CST and its decision to enter into an agreement with the Sussex County Educational Services Commission (Commission) to provide CST services. Petitioners have not shown that they have a sufficient stake, or would be directly affected by the outcome of this controversy; courts have consistently ruled that a RIF, if done for reasons of economy, is entirely within the authority of the board; petitioners alleged that the agreement contains no maximum cost and is in violation of applicable statutes and regulations, which rendered the abolition of their positions invalid. McKenna and MacMurren, Commr: 2012: Jan 17 (Andover Reg.) » OAL Decision

Employee's claim that his employment was terminated by the respondent in a reduction in force, in violation of his tenure and seniority rights is dismissed for failure to appear. Thomas, Commr 2012:Jan 11. (Paterson)

Commissioner determines tenure entitlements to non-separately- enumerated positions of director, assistant director and supervisor after four tenured administrators whose positions were eliminated in a RIF during reorganization asserted entitlement to administrative positions currently held by non-tenured teaching staff members, including several new positions created during reorganization (Assistant Director positions, Director of Curriculum and Testing and Athletic Director.) Smith, Richburg, Kohn, Gray v. Commr 2012:Feb 1 (Consolidated)» OAL Decision

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Renewal/Reappointment

Phys ed teacher was not reappointed as head soccer coach when four of the nine Board members voted in his favor and five members abstained from voting. N.J.S.A.18A:27-4.1 requires the recommendation of the chief school administrator and a recorded roll call majority vote of the full membership of the board and the Board's bylaws also provide that a majority vote of the full board is required for appointment of a staff member. Reid, Commr 2012:Jan 23 (Jefferson)

Board's decision to non-renew teacher was not arbitrary, capricious or in bad faith. Local boards of education have an almost complete right to terminate the services of a non-tenured teacher. Trisuzzi, Commr 2012: Jan 23 (Kinnelon)

Residency

Where school district sought to remove child, parent's petition was filed beyond the 21-day window for the filing of appeals to a residency determination by the board and accordingly is dismissed. Commissioner grants board's counterclaim for tuition. T.K., Commr 2012: Jan 5 (West Orange)

Where parent failed to appear in challenge to district's residency determination, matter is dismissed. Commissioner remands to the OAL for supplementation of the record for amount of tuition owed for period of ineligible attendance. Y.C., Commr 2012: Jan 10. (S. Plainfield)

When student' mother moved out of the district where she and her children had been living with her mother, and left the child behind to continue residing with her grandmother, the child was ineligible to receive a free public education in Orange, as no hardship was demonstrated to qualify as an affidavit student under N.J.S.A. 18A:38-1(b). H.T., obo, T.A. , Commr 2012:Jan 17 (Orange)

Children were not domiciled in the district; upholds board's determination to remove the children from the Bayonne school system and orders parent to reimburse the Board for 94 days each of tuition at the rate of $50 per day per child. E.Z., obo B.J.C. and E.J.C. , Commr 2012 (Jan 24) (Bayonne)

Commissioner rejects claim by Freehold Regional that Bergenfield Board is obligated to share its cost of educating disabled twin brothers who have been in a residential placement since 2001. Parents are separated and the father has continuously resided in Bergenfield since 2004, while the mother remains at the family home in Howell (Freehold Reg). N.J.A.C. 6A:22-3.1(a) provides that separated or divorced parents living in different communities can – by written agreement –designate a district for school attendance; although no such written agreement exists in this case, the intent of the twins' parents is clear through their conduct and depositions that they want the house in Howell to serve as the twins' home since it is where they grew up and continue to spend the majority of their time when not in school and it appears that the twins' mother is the parent most actively engaged in the boys' care. Freehold Regional, Commr 2012:Feb 6

» OAL Decision

Pro se residency appeal is dismissed with prejudice for failure to appear. O.B. obo A.B., Commr 2012: Feb 21. (Orange)

Commissioner adopts ALJ ruling that her triplets were not eligible for a free public education in the Highlands school district. Mother argued that she is a resident of Rumson, but intended to live temporarily in Highlands in a property owned by her and her husband while her Rumson residence was being renovated, and that she was honest about this with Highlands, which never alerted her to a possible tuition obligation to the fact that she might end up owing tuition. Commissioner finds that since her permanent home is in Rumson, not Highlands; and was ordered to pay tuition in the amount of $20,211 for the period of her children's ineligible attendance. K.B., on behalf of minor children, T.B., T.B., and I.B., Commr 2012: Feb 21.

Matawan/Aberdeen Regional sought a determination that respondent Hazlet is responsible for the cost of educating a student receiving special education services in a residential placement for the 2010-2011 school year. Since parents divorced in 2001, parents had joint legal custody under the divorce decree which also designated his mother as the residential custodian and primary caretaker, and indicated parents' intention that their son continue to be educated in Hazlet. In 2009, child was placed by DCF in residential school. In 2010 when child was 18, father who resides in Aberdeen, filed for permanent sole legal guardianship for legal and financial matters, but guardianship did not mention living arrangements. The parties filed cross motions for summary decision as to which board is responsible for the cost of educating the student. Held: summary judgment granted to Matawan; Hazlet is responsible; child's district of residence is his mother's present district of residence in Hazlet because he lived with her prior to placement and she is the custodial parent; the divorce decree and not the guardianship order is determinative; the guardianship order did not terminate residential custodial rights as it was executed pursuant to a judgment of incapacity that declared K.M. guardian over J.M.'s legal and financial issues. Matawan-Aberdeen Reg v. Hazlet., Commr 2012: Feb 21. » OAL Decision See also, decided concurrently, Hazlet v. NJDOE, Commr. 2012: Feb 21. (Hazlet appeals determination of NJDOE that it is responsible for the costs.)

Standing

The Commissioner agrees with the ALJ's conclusion that a Korean-American taxpayer had no standing to challenge the provision of State funds to the New Jersey Japanese School (NJJS), a nonpublic school, by the local board of education and the DOE for textbooks and nursing services, or the designation of NJJS as a nonpublic school recognized by the Department. Choi v. New Jersey Japanese School Board of Ed., Commr 2012: Feb 17 (Oakland)

Student Discipline

Commissioner remands to the OAL for further disposition of matter where mother whose son was suspended wished to litigate the issue of home bound instruction, but failed to appear at the hearing; she filed hand-written exceptions to the ALJ's decision dismissing the matter explaining that her failure to appear was beyond her control and that she was waiting for an attorney to assist her. R.W., obo, J.W. , Commr 2012: Jan 23. (Wash Twp-Gloucester)

Tenure Dismissal

Giving due consideration of her lengthy and previously discipline-free career, Commissioner nonetheless dismisses teacher of business education on tenure charges of unbecoming conduct, for lack of professionalism, and failure to respect the privacy rights of students, against respondent – a teacher of business education – for, *inter alia*, behavior that included allowing the display of

inappropriate photographs in the classroom, discussing a student's family finances in inappropriate circumstances; and referring to classified students in a derogatory manner. Tenure Hearing of Forsell, Commr 2012: Jan 9

Tenure charges are sustained and teacher is dismissed for stealing cash and checks in the amount of $250 from a classroom; security videotape entered into evidence showed that she and the special education teacher who had been collecting the money in question for a school fundraising activity, were the only two persons in the classroom during the period in which the money went missing. Tenure Hearing of Perella, Commr 2012:Jan 11(Bridgeton)

Indictment on 33 counts of Aggravated Sexual Assault, Sexual Assault and Endangering the Welfare of a Child for incidents involving students at his school – may be deemed admitted and are sufficient to warrant termination of the respondent from his tenured position. Matter of Tenure Hearing of Derek, Commr 2012: Jan 23 (Lawrence)

Board established unbecoming conduct where teacher employed by the district for more than 30 years made misrepresentations concerning medical and psychiatric examinations requested by the Board, exhibited a pattern of tardiness, insufficient class preparation and engagement, lack of communication, and incomplete paperwork related to field trips. Conduct did not rise to the level necessary for termination in light of overall successful teaching history and nature and relatively brief period of her problematic conduct. She was suspended for a period of one year without pay; will forfeit her salary increments for the year in which she returns to service; and was ordered to produce a medical report certifying her readiness to return to work prior to her reemployment. Tenure Hearing of Bruno, Commr 2012: Jan 30 (South Hunterdon Reg.)

Commissioner approves consensual withdrawal of tenure dismissal case against administrator alleging altering school records, as administrator is currently on medical leave for a chronic illness and has advised the District that she will resign and apply for retirement at the end of her leave, effective December 31, 2012. Referred to State Board of Examiners. Tenure Hearing of Leon, Commr 2012: Feb 24 (Elizabeth)

Commissioner sustains six of seven tenure charges charges of conduct unbecoming and excessive absenteeism brought against tenured secretary employed by the district since 1993, where she conducting personal business on board's computer during school hours; printed out personal information about another District employee without permission; smoked on school grounds; unsatisfactory work performance; and abuse of leave by taking days off before and after holidays, vacations, and on pay days. Tenure Hearing of Banks, Commr 2012:Feb 6.

Board established good cause that between 2003 and 2011, math teacher repeatedly conducted herself in an insubordinate manner, and met its burden of proving that respondent repeatedly engaged in conduct unbecoming a teacher where she repeatedly criticized the district administration and her colleagues by challenging their honesty and integrity, refused to obey directives, and showed a combativeness that undermined the morale and efficiency of the district's high school. Tenure Hearing of Toorzani, Commr 2012:Feb 8. (Elmwood Pk)

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School Ethics Commission

SEC dismisses complaint for failure to prosecute. Parties failed to appear for a December OAL hearing. Where a party fails to appear for a hearing at the OAL,

regulations provide the administrative law judge (ALJ) with the discretion to return the case to the transmitting agency for appropriate disposition, with notice to the parties, which may result in a summary dismissal of the case. N.J.A.C. 1:1-14.4(a). Although provided an opportunity to explain their nonappearance to the SEC, the parties failed to do so. Silva v. Silver, C09-11, SEC 2012: January 24

SEC dismisses complaint. Complainant alleged that the respondent violated N.J.S.A. 18A:12-24.1(a), (c), (e) and (f) of the Code of Ethics for School Board Members when she solicited monies from local businesses on behalf of the Board, but did so without Board approval, then never deposited the checks. No evidence was presented that there had been a final decision from any court of law or administrative agency of this State demonstrating that the respondent failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools or that the respondent brought about changes through illegal or unethical means. No sufficient factual basis was provided to conclude that respondent's actions were actions outside of the scope of her duties as a Board member and that these actions were of such a nature that they had the potential to compromise the Board. No proof was provided to establish that respondent's actions constituted a breach of her duty to limit her board action to policy making, planning, and appraisal. No evidence was presented that the funds were misappropriated, used for personal gain or for the gain of a friend. Dagostino v. Kennedy, C17-11, SEC 2012: January 24

SEC determined that respondent violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members when he directed the issuance of a RICE notice to the superintendent. It is the board's prerogative to issue the RICE notice or to determine who has the authority to issue a RICE notice. By taking such unilateral action, respondent took private action beyond the scope of his duties and responsibilities of a board member that not only had the potential, but did compromise the board. SEC dismissed the allegations that the respondent violated *N.J.S.A*. 18A:12-24.1(a), (c) and (d). Commissioner recommended the penalty of reprimand. Persi v. Woska, C25-08, SEC 2012: February 28

SEC agreed with the ALJ that board member violated N.J.S.A. 18A:12-24(b) and N.J.S.A. 18A: 12-24.1(e) when he contacted a TD Bank employee by email, without the Board's knowledge or authority, and asked the employee to provide the Board with information to make the bank more appealing as the board's primary depository. He attempted to obtain an unwarranted privilege or advantage for TD Bank, which bid on the board's RFP for banking services, in violation of N.J.S.A. 18A:12-24(b), which provides that "[n]o school official shall use or attempt to use his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family *or others.*" It was of no moment that the board member himself was not the intended beneficiary of the unwarranted privilege or advantage. He also took private action beyond the scope of his duties as a board member that had the potential to compromise the board, so as to violate N.J.S.A. 18A:12-24.1(e). SEC adopted the ALJ's recommended penalty of censure. I/M/O Sanford Student, C40-09, SEC 2012: February 28
OAL Decision

Where board member did not reply to a parent's email threatening litigation, but in fact, sent his reply only to the board and CSA indicating that he would bring up the parent's issues at the next meeting, he did not violate the Ethics Act. The facts fail to demonstrate that the respondent: (1) gave a direct order to school personnel or became directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district under N.J.S.A. 18A:12-24.1(d); (2) made personal promises or took action beyond the scope of her duties such that, by its nature, had the potential to compromise the board under N.J.S.A. 18A:12-24.1(e); or (3) acted on, or attempted to resolve a complaint, or conducted an investigation or inquiry related

to a complaint prior to referral to the chief administrative officer or at a time or place other than a public meeting and prior to the failure of an administrative solution under N.J.S.A. 18A:12-24.1(j). Dimon v. Skinner, C11-10, 2012: February 28

SEC found that board member violated *N.J.S.A*. 18A:12-24(c) when he voted for the reappointment of his mother, an elementary school teacher in the District, and his mother's supervisor, the school principal. Board member later acknowledged that he had voted in error and changed his vote to an abstention. SEC recommended the penalty of reprimand. I/M/O Joseph Raines, C36-11, 2012: February 28

Former candidate for CSA position alleged, among other things, that board members violated the Act by seeking to undermine her candidacy for the position, that a board member surreptitiously participated in the search, interview and hiring of the superintendent despite a private advisory that advised that he abstain because of his daughter's familiarity with an internal candidate. SEC dismissed complaint that board members violated N.J.S.A. 18A:12-24.1(a), (c), (d), (e), (f), (g), (i) and (j) and, although not properly pled, N.J.S.A 18A:12-24(c). Count 1 is time barred as it is beyond the 180-day limitation period for filing a complaint and there are no extraordinary circumstances in this matter that would compel relaxation. Some facts not established. Even assuming that the facts set forth by complainant are true, they would not constitute a violation of the named statutes or would fail to prove such a violation. Hence, Counts 2,3,4,5 are also dismissed. Frascella v. Tola & DelGiudice, C42-11, 2012: February 28

Click here for School Ethics Commission decisions.

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State Board of Examiners

State Board of Examiners ordered the revocation of employee's Substitute Credential. Substitute pled guilty to one count of Offensive Language/Disorderly Conduct after originally being charged with harassment (Offensive Touching) and was sentenced to evaluation and counseling, ordered to have no contact with the victim or the victim's family and was fined. Such conduct and conviction constituted conduct unbecoming a credential holder. The Commissioner has long held that teachers should serve as role models for students. Employee's conviction for Offensive Language demonstrates behavior that falls far short of the role model status expected of teachers. SBE found that revocation is the appropriate sanction. IMO the Credential of Bhatt: Exam. 2012: January 19

State Board of Examiners ordered the revocation of teacher's Teacher of Spanish Certificate of Eligibility With Advanced Standing, issued, Teacher of Spanish certificate, and Teacher of Students With Disabilities Certificate of Eligibility. In September 2009, Commissioner of Education in New York had revoked teacher's certificates there due to an inappropriate relationship that teacher had with a female student and inappropriate contact with another female student. Teacher had lied on his application for New Jersey teaching certification and had submitted a forged letter of recommendation. Teacher agreed to relinquish his certificates with the force and effect of a revocation to the State Board of Examiners, which accepted same. IMO the Certificates of Cuevas: Exam. 2012: January 19

State Board of Examiners ordered that teacher's Teacher of Elementary School Certificate of Eligibility With Advanced Standing and Teacher of the Handicapped and Teacher of Elementary School certificates be suspended pending resolution of the criminal charges pending against the teacher. The Commissioner has long held that teachers should serve as role models for students. Teacher had been indicted on charges of Murder, Conspiracy to

Commit Murder, Tampering with Physical Evidence, Disturbing or Desecrating Human Remains, Conspiracy to Disturb or Desecrate Human Remains, Financial Facilitation of Criminal Activity, Conspiracy to Commit Financial Facilitation of Criminal Activity, and Attempted Murder demonstrating behavior that falls far short of the role model status expected of teachers. IMO the Certificate of Dorsett: Exam. 2012: January 19

State Board of Examiners revoked teacher's Teacher of Social Studies certificate. Teacher had been found guilty of unbecoming conduct as a teacher and was removed from his tenured employment. Charges against the teacher included placing a seventh grade student at substantial risk of harm by directing and allowing the student to retrieve a book from a slanted roof approximately 20 feet over paved ground, violating school policy by removing a student's "hoodie" in the hallway, showing an R-rated movie to his class, allowing students to play cards in class during instructional time, failing to have his roll book with him during a fire drill, failing to pick up his students from the cafeteria in a timely manner, permitting more than one student out of his class at a time, failing to meet requirements of the Learning for Learning checklist and leaning on a student's desk, causing it to overturn and send the student to the floor. It was also alleged that the teacher's work attendance did not meet district guidelines and that his classroom was in violation of various fire codes. Teacher's unbecoming conduct and subsequent loss of tenure constituted conduct unbecoming a certificate holder. There can be no dispute that the teacher's conduct, in its totality, including the roof incident, amply demonstrates his unfitness to continue to be a teacher. SBE concluded that the only appropriate response is the revocation of the teaching certificate. IMO the Certificate of Dougherty: Exam. 2012: January 19

State Board of Examiners ordered revocation of teacher's Teacher of Students With Disabilities Certificate of Eligibility and Teacher of Social Studies Certificate. Teacher had been arrested for Endangering the Welfare of a Child and had been accepted into a Pretrial Intervention Program. Teacher had allegedly inappropriately touched a 15 year old girl and during his police interview, had admitted to sexual contact with another 16 year old girl. As part of a settlement proposal regarding his teaching certification, teacher agreed to voluntarily relinquish his certificates with the full force and effect of a revocation. SBE accepted the proposal. IMO the Certificates of Loiseau: Exam. 2012: January 19

State Board of Examiners ordered revocation of teacher's Teacher of Social Studies Certificate. Teacher had pled guilty in federal court to Conspiracy to Deal in the Business of Firearms, was sentenced to 40 months in prison and fined $100,000. As a result of the conviction, he was disqualified from public school employment pursuant to N.J.S.A. 18A:6-7.1 *et seq*. Such conviction and disqualification constituted conduct unbecoming a certificate holder. The Commissioner's long-standing belief is that teachers must serve as role models for their students. An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. IMO the Certificate of Mayes: Exam. 2012: January 19

State Board of Examiners ordered revocation of employee's Teacher of Health and Physical Education Certificate of Eligibility, Substance Awareness Coordinator Certificate of Eligibility, School Social Worker certificate, Principal Certificate of Eligibility, School Administrator Certificate of Eligibility, and Supervisor and School Counselor certificates. Employee had pled guilty to Arson and Insurance Fraud and was sentenced to 364 days' imprisonment in county jail, one year of probation and fined. Such conviction and disqualification constituted conduct unbecoming a certificate holder. The employee's acts of Arson and Insurance Fraud demonstrate a dishonesty that falls far short of the role model status expected of teachers; the employee cannot lay claim to that status. His conviction resulted in a prison term and probation, demonstrating

egregious behavior that warrants revocation. IMO the Certificates of O'Bryant: Exam. 2012: January 19

State Board of Examiners ordered revocation of teacher's Teacher of Elementary School Certificate. Teacher had pled guilty in New York federal court to one count of Possession of Child Pornography and was sentenced to 78 months in federal prison. SBE agreed to accept teacher's relinquishment of certificate with the full force and effect of a revocation pursuant to *N.J.A.C.* 6A:9-17.8. IMO the Certificate of Reiner: Exam. 2012: January 19

State Board of Examiners ordered revocation of teacher's Teacher of Elementary School in Grades K-5 Certificate of Eligibility and his Teacher of Elementary School in Grades K-5 and Teacher of Elementary School With Subject Matter Specialization: Mathematics in Grades 5-8 certificates. Teacher pled guilty to Aggravated Assault with Bodily Injuries and was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* Such conviction and disqualification constituted conduct unbecoming a certificate holder. IMO the Certificates of Ricardo: Exam. 2012: January 19

State Board of Examiners ordered revocation of Teacher of Students with Disabilities Certificate of Eligibility, Teacher of English Certificate and Teacher of Elementary School Certificate. Teacher had sent and received entirely inappropriate emails, largely involving matters related to sex and personal relationships, but, importantly, also including references, both of a general and a particular nature, to students, while at school and on school equipment and on the school account. Teacher's conduct was inappropriate and involved "an apparent breach of trust regarding personal information about a student that had in some manner come into [the teacher's] possession." His conduct negated his status as a role model for students. IMO Certificates of Voza, Exam. 2012: January 19

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New Jersey Council on Local Mandates

CLM dismissed the complaint for lack of jurisdiction. The Springfield Board of Education filed a complaint with the Council alleging that N.J.S.A. 18A:39A-1 and 1a impose unfunded mandates insofar as they "increased the amount local boards of education are required to pay for the transportation of nonpublic school students . . . without a corresponding increase in state aid specifically earmarked for this transportation." N.J.S.A. 18A:39-1, enacted in 1967 and last amended in 1990, mandates that school districts provide transportation to both public and nonpublic school students attending school within specified distances; it also directs that the per pupil payment for nonpublic school transportation shall be determined as set forth in N.J.S.A.18A:39-1a and that if transportation cannot be provided at that cost, the district must make the required payment to the parent or other legal custodian of the nonpublic school student. The Council determined that it did not have jurisdiction to consider the issues projected in the complaint because the challenged statutes were enacted prior to January 17, 1996. See N.J. Const. Art. VIII, §2, par 5(a); N.J.S.A. 52:13H-2. In the Matter of a Complaint Filed by the Springfield Township Board of Education, CLM 2012: February 15

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Election Law Enforcement Commission

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New Jersey Division on Civil Rights

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New Jersey Government Records Council

ALJ ratified settlement agreement approved by GRC in matter regarding Executive Session minutes from September to December 2008. Because the complaint brought about a change in the custodian's conduct (revision of OPRA request form) complainant was a prevailing party with the matter being forwarded to the OAL for a determination of reasonable attorneys fees. Wolosky v. Township of Vernon, No. 2009-57 (GRC February 24, 2011)

Motion for reconsideration granted as earlier GRC decision was based upon a "palpably incorrect or irrational basis." While e-mail in question was contained in a chain of e-mails which concerned official business of the Robbinsville Public School District, and which were therefore government records as defined in OPRA, the contents of this specific e-mail did not concern official business of the School District and therefore said e-mail constituted a personal message which was not "made, maintained or kept on file… in the course of official business." As such, the subject e-mail was not a government record pursuant to N.J.S.A. 47:1A-1.1 and was therefore not disclosable under OPRA. Lewen v. Robbinsville Public School District, No. 2008-211 (GRC February 24, 2011)

Custodian certified that no records responsive to the Complainant's OPRA request for an official copy of the Superintendent's transcript from Virginia Polytechnic Institute and State University existed in the district files. There was no credible evidence in the record to refute the Custodian's certification. Accordingly, the Custodian did not unlawfully deny the Complainant access to the requested records. Simon v. Margate City School District, No. 2010-140 (GRC February 24, 2011)

Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the handwritten student notes to determine the validity of the Custodian's assertion that the record contains advisory, consultative or deliberative material which is exempt from disclosure under OPRA pursuant to N.J.S.A. 47:1A-1.1. Complainant stated that the responsive student notes contained factual information obtained by the School District during the course of a non-criminal investigation and thus should not be considered exempt from disclosure under OPRA as ACD material. Sage v. Freehold Regional High School District, No. 2010-108 (GRC February 24, 2011)

Accumulated sick time is considered to be part of a payroll record which is subject to disclosure under N.J.S.A. 47:1A-10. *See* Jackson v. Kean University, GRC Complaint No.2002-98 (February 2004). Roarty v. Secaucus Board of Education, No. 2009-221 (GRC January 25, 2011)

Because the requested records comprise notes used by a board member as a memory aid to facilitate comments made to the public during a Board of

Education meeting, and because such notes are not the official record of the meeting, the requested records are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O'Shea v. West Milford Board of Education, GRC Complaint No. 2004-93 (April 2006). *See also* Lucente v. City of Union City (Hudson), GRC Complaint No. 2008-119 (November 2009). Schiavoni v. Sparta Township School District, No. 2010-73 (GRC January 25, 2011)

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New Legislation

Establishes procedures for districts, municipalities, or voters to opt to move the annual school election to November and eliminates vote on school budgets for such districts, except for separate proposals to spend above cap. 01/17/2012 – Signed by the Governor P.L. 2011, c. 202

Prohibits soliciting of campaign contributions on any public property by elective public office candidates; prohibits persons from making contributions to such candidates on any public property. 01/17/2012 – Signed by the Governor P.L.2011, c.204.

"Urban Hope Act"; provides a process to permit authorized entities to build, operate, and manage "renaissance school projects" as public schools in no more than three identified failing districts. 01/12/2012 – Signed by the Governor P.L.2011, c.176

Requires DOE to include cheerleaders in the student-athlete head injury safety program. 01/05/2012 – Signed by the Governor P.L.2011, c.168

Allows students with disabilities to bring service animal to school. 01/05/2012 – Signed by the Governor P.L.2011, c.156

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United States Supreme Court

There are no education-related decisions posted for November and December at this time.

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3rd Circuit Court of Appeals

Equal Protection

School district student assignment redistricting plan was consonant with the Equal Protection Clause and passed constitutional muster. While the decision makers had discussed race, the plan did not select students based on racial classifications, did not use race to assign benefits or burdens in the school assignment process, did not apply the plan in a discriminatory manner, and did not have a racially discriminatory purpose. Strict scrutiny did not apply; rather the appropriate test of the redistricting plan was rational basis, which the district met. The plan was reasonably related to the goals of (a) equalizing the two high school populations, (b) minimizing travel time and transportation costs, (c) fostering educational continuity, and (d) fostering walkability. District Court Order affirmed. Doe v. Lower Merion Sch. Dist., No. 10-3824, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 665 F.3d 524 (3rd Cir. 2011); Decided December 14, 2011.

IDEA

In a parent initiated action under the IDEA, the Court of Appeals affirmed the District Court's determination that multiply handicapped student's IEP was appropriate and reasonably calculated to enable the student to receive meaningful educational benefits. Tuition reimbursement for parents who had unilaterally removed student from the Cranbury School and placed student in private school was denied. School district had complied with all IDEA procedural requirements and the IEP was appropriate. Fact that IEP did not incorporate all of parents' expert witness instructional recommendations did not violate the IDEA. G.S. v. Cranbury Twp. Bd. of Educ., No. 11-2439, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 450 Fed. Appx. 197; 2011 U.S. App. LEXIS 22609, Decided November 8, 2011.

Section 1983

In a former employee's Section 1983 action, the Court of Appeals affirmed the District Court's summary judgment in favor of the mayor and council. Employee did not have a constitutionally protected property interest in payment for unused sick leave. New Jersey law did not establish a legitimate claim of entitlement to payment for unused sick leave for municipal administrators and the local employee handbook did not create a protectable property interest. School law cases which addressed sick leave accumulation and payment as a protected property interest were not applicable. Pence v. Mayor & Twp. Comm. of

Bernards Twp., No. 10-3496, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 453 Fed. Appx. 164; 2011 U.S. App. LEXIS 22206, Decided November 2, 2011.

Title VII

In a Title VII Civil Rights Act of 1964 action, the Court of Appeals affirmed the District Court's order permanently enjoining North Hudson Regional Fire and Rescue's residency requirement as it had a disparate impact on African-American applicants. While residency requirements are permissible under New Jersey's Civil Service laws, North Hudson's requirement had a disparate impact on the 3.4% African-American community. Only 2 African-American firefighters (0.62% of the firefighter population) had been hired in the more than 10 years of the Regional District's existence. The District's business necessity arguments failed as they were not tied to minimum firefighter qualifications and less discriminatory alternatives were available.
NAACP v. N. Hudson Reg'l Fire & Rescue, No. 10-3965, No. 10-3983, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 665 F.3d 464 (3rd Cir. 2011) Decided December 12, 2011.

In a Title VII Civil Rights Act of 1964 and Pennsylvania Human Rights Act action, the Court of Appeals affirmed the District Court's grant of summary judgment in favor of the school district. Employee's hostile work environment claim failed as he failed to exhaust administrative remedies and the two comments of which the employee complained did not create an atmosphere of harassment; a continuous period of harassment was not demonstrated. Employee's retaliation claim failed as the sexual harassment investigation instituted by the principal was not causally connected to the employee's complaint of the principal's racially charged remarks. Huggins v. Coatesville Area Sch. Dist., No. 10-4484, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 452 Fed. Appx. 122; 2011 U.S. App. LEXIS 23112, Decided November 17, 2011.

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New Jersey District Court

Child Abuse

District Court granted defendant school district's motion to dismiss claims arising out of child abuse reporting because under New Jersey law, N.J.S.A. 9:6-8.10, the School Defendants were required to report allegations of child abuse to DYFS and, pursuant to N.J.S.A. 9:6-8.13, were entitled to statutory immunity from any civil or criminal liability for reporting allegations of child abuse to DYFS or testifying in any judicial proceeding. Melleady v. Blake, Civil No. 11-1807 (NLH/KMW), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2011 U.S. Dist. LEXIS 144834, Decided December 15, 2011.

Fair Labor Standards

In matter involving the payment of overtime pay for a part-time occupational therapist, summary judgment granted in part and denied in part. Claim for overtime was not a continuing violation but a series of individual violations. Claims more than two years old were time barred. Mount Olive did not come forward with payroll data to defeat the inference of the employee's facts. FSLA and NJWHL claims survive summary judgment. Guenzel v. Mount Olive Bd. of Educ., Civil Action No. 10-4452 (SRC), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2011 U.S. Dist. LEXIS 132102, Decided November 16, 2011. Filed, Reconsideration granted by, Different results reached on reconsideration by, Summary judgment granted by, in part Guenzel v. Mount Olive Bd. of Educ., 2012 U.S. Dist. LEXIS 21583

(D.N.J., Feb. 16, 2012)

IDEA

In a parent initiated action under the IDEA for their SLD dyslexic child, the District Court affirmed the ALJ's determination that the school district's IEP did not meet the student's educational needs, did not provide the student with FAPE and did not provide for placement in the LRE that would provide the student with a meaningful educational benefit. Unilateral placement by parents in a private school was reasonable. School district ordered to reimburse parents for the cost of private placement, transportation costs and attorney's fees, to be agreed upon by the parties. J.M. v. Morris Sch. Dist. Bd. of Educ., Civil Action No. 10-cv-06660 (SDW), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2011 U.S. Dist. LEXIS 148670, Decided December 23, 2011.

Indemnification

Appellate Division affirms the Commissioner's determination that a school employee who is represented by his union and who relies on his union's insurance company for his litigation defense, is entitled to indemnification pursuant to N.J.S.A. 18A:16-6 and 6.1, even when the reimbursement monies will ultimately be paid to the defending insurer rather than the employee. Any other result would undermine the statutory purpose. Board was ordered to reimburse plaintiffs. Waters v. Bd. of Educ. of Toms River, DOCKET NO. A-4706-10T1, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2011 N.J. Super. Unpub. LEXIS 3083, November 9, 2011, Decided December 22, 2011.

New Jersey Law Against Discrimination

Plaintiff's motion to dismiss granted in part, denied in part. Defendant's motion to dismiss granted in part, denied in part. Plaintiffs LAD claims not barred by CEPA waiver provision. As non-tenured employee, plaintiff had no expectation to future employment. Substantive due process claim fails. Courts should not readily expand the protections of substantive due process. No evidence that board arbitrarily or capriciously denied reemployment. Breach of contact claim not barred by the LAD. Confidentiality clause of settlement agreement void as against public policy in New Jersey. (See Asbury Park Press v. County of Monmouth, 201 N.J. 5, 986 A.2d 678, 679 (N.J. 2010).) Goldberg v. Egg Harbor Twp. Sch. Dist., Civil No. 11-1228 (RBK/KMW), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2011 U.S. Dist. LEXIS 131390, Decided November 14, 2011.

PERS

District Court held that plaintiff's claim of entitlement to wife's death benefit when wife designated son and daughter-in-law as life insurance beneficiaries was barred due to Eleventh Amendment immunity. PERS is an arm of the state and is entitled to Eleventh Amendment immunity, provided the State has not waived its immunity and that Congress has not abrogated it. The Eleventh Amendment grants a State immunity from suit in federal court by citizens of other States, and by its own citizens as well. Jones v. Public Empl. Ret. Pensions Div., Civil Action No. 09-5894 (SDW), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2011 U.S. Dist. LEXIS 136502, Decided, November 29, 2011.

Section 1983

In a Section 1983 action brought by numerous public employee affiliated groups challenging the changes to the state retirement system laws brought about by P.L. 2011, 78, motion to dismiss brought by state legislative defendants, the New Jersey Senate and the New Jersey General Assembly was granted. Plaintiffs

alleged that the legislative changes were unconstitutional because they impaired pre-existing contracts, violated the Due Process Clause, and violated the Takings Clause. Plaintiffs further allege that these changes violate provisions of the New Jersey State Constitution and that Defendants are liable on a theory of promissory estoppel. State legislators are immune from liability under section 1983 and the Eleventh Amendment sovereign immunity prevents a suit against the state by citizens of the state. N.J. Educ. Ass'n v. New Jersey, Civ. No. 11-5024, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2011 U.S. Dist. LEXIS 142301, Decided December 12, 2011. Motion granted by N.J. Educ. Ass'n v. New Jersey, 2012 U.S. Dist. LEXIS 28683 (D.N.J., Mar. 5, 2012)

Stay

Motion for stay of civil proceeding pending outcome of criminal proceeding granted. High school principal accused of engaging in a continuing pattern of extremely inappropriate, unwelcome, harassing, and sexually suggestive communications with Plaintiff. Defendant is charged with multiple criminal offenses included multiple counts of lewdness, sexual contact and aggravated sexual contact, criminal coercion, and luring and/or enticing. Colombo v. Bd. of Educ. for the Clifton Sch. Dist., Civil Action No. 11-00785 (CCC), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2011 U.S. Dist. LEXIS 127771, Decided November 4, 2011.

Title VII

In a Title VII Civil Rights Act of 1964 action, the District Court granted defendant's motion to dismiss the claim that Plaintiff's removal from the substitute list was the result of discrimination on the basis of his race, ethnicity, and ancestry, related to his Cuban heritage. Individual employees are not liable under Title VII and defendant Nacer did not name the school district as a defendant. No prima facie case of discrimination was established and plaintiff was removed as a substitute teacher for not being effective. Nacer v. Caputo, Civil Action 2:10-cv-04494 (DMC)(JAD), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2011 U.S. Dist. LEXIS 137200, Decided November 30, 2011, Affirmed by Gomez v. Caputo, 2012 U.S. App. LEXIS 7903 (3d Cir. N.J., Apr. 19, 2012)

Whistleblower

Application for preliminary injunction denied. Whistleblowers sought injunction temporarily and permanently enjoining school district from conducting an investigation to determine the identities of those who had disclosed the fact that children of a board member and two employees were receiving free lunch benefits to which they were not entitled. Plaintiffs failed to demonstrate the likelihood of success on a CEPA claim, first amendment claim or contract claim. Whistleblower 1 v. Bd. of Educ. of Elizabeth, Civil Action No. 11-6480 (SDW) (MCA), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2011 U.S. Dist. LEXIS 135203, Decided, November 22, 2011.

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New Jersey Supreme Court

There are no education-related decisions posted for November and December at this time.

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New Jersey Superior Court Appellate Division

Arbitration

Appellate Division affirmed trial court determination that, in light of the disciplinary action the board imposed on employee only two months before the letter of non-renewal, employee was entitled to arbitrate the question of whether he was terminated without "good cause," especially in light of the statutory presumption that disputes arising under public sector collective negotiation agreements shall be submitted to arbitration. See N.J.S.A. 34:13A-5.3. Salem Cmty. College v. Salem Cmty. College Support Staff Ass'n, DOCKET NO. A-1812-10T4, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2011 N.J. Super. Unpub. LEXIS 3169, Decided December 21, 2011.

Charter Schools

Appellate Division affirmed Commissioner's approval of charter school. Board of education argued that charter school had not met its requirement of 90% enrollment as of the applicable date and was thus ineligible to receive final approval. Commissioiner did not abuse his discretion in relaxing the enrollment requirement and in granting approval to Hatikvah to operate a charter school for an initial four-year period commencing July l, 2010. In re Approval of Hatikvah Int'l Acad. Charter Sch., DOCKET NO. A-5977-09T1, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2011 N.J. Super. Unpub. LEXIS 3144, Decided December 21, 2011, Certification denied by In re Approval of Hatikvah Int'l Charter Sch., 2012 N.J. LEXIS 389 (N.J., Mar. 26, 2012)

Child Abuse

Appellate Division reversed decision of Acting Commissioner of Department of children and Families that special education teacher had neglected D.G., a student in her class, within the definition of N.J.S.A. 9:6-8.21(c)(4)(b) by failing to properly supervise student. Teacher had mistakenly left six year old autistic student at fast food restaurant while on class trip to theater. Appellate Division found that Acting Commissioner erred in her application of the law to the facts and thus the determination of substantiated child neglect was unsupportable. While the Appellate Division did not condone teachers's failure to follow the head count policy, it concluded, under the circumstances that arose at the time, that teacher, although negligent, was not grossly negligent or reckless. Department of Children & Families v. M.A., DOCKET NO. A-5085-09T1, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2011 N.J. Super. Unpub. LEXIS 2917, Decided December 1, 2011.

Criminal Matters

Appellate Division affirms trial court denial of motion to dismiss indictment. Following denial of motion, defendant pled guilty to one count of invasion of privacy and was sentenced to a suspended sentence of 18 months imprisonment and fines and penalties. Matter involved defendant, after ending of dating relationship with teacher, sending nude pictures of teacher to superintendent of schools and to school at which teacher taught. State v. Parsons, DOCKET NO. A-3856-10T3, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2011 N.J. Super. Unpub. LEXIS 2972, Decided December 8, 2011.

Forfeiture

Fifth grade public school teacher, who was swim coach at parochial high school, entered a negotiated plea agreement at which she pled guilty to charges of fourth-degree criminal sexual contact, N.J.S.A. 2C:14-3(b), and third-degree witness tampering, N.J.S.A. 2C:28-5(a). Matter involved sexual relationship with

member of swim team, who, at the beginning of the relationship, was six months shy of her 18th birthday. The plea agreement resulted in a sentence of serving 364 days in the county jail, avoiding all contact with the student, refraining from any unsupervised contact with females under the age of eighteen, successfully completing psychological counseling, complying with all registration requirements of Megan's Law, N.J.S.A. 2C:7-2, an order requiring her to forfeit her teaching certificate for life and to forever forfeit the right to hold public employment. Teacher objected to the permanent forfeiture of her right to hold public office because the offense in question did not "involv[e] or touch on [her] public office," as required by N.J.S.A. 2C:51-2(d). It occurred in a parochial school setting, outside her public employment context. Appellate Division agreed and remanded for resentencing, at which time the portion of defendant's sentence requiring the permanent forfeiture of her right to hold any public office would be vacated. In all other respects, defendant's conviction and sentence are affirmed. State v. Blessing, DOCKET NO. A-1306-10T1, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2011 N.J. Super. Unpub. LEXIS 2762, Decided November 4, 2011, Certification denied by State v. Blessing, 2012 N.J. LEXIS 486 (N.J., Apr. 5, 2012)

Law Against Discrimination

Appellate Division affirmed trial court's dismissal of all claims in matter which alleged racial discrimination, retaliation, harassment and bullying during student's high school years. Claims arose initially in student's sophomore year when the school failed to nominate her for several commendations and school administrators did not act on family's unrelenting inquiries and persistent complaints. Family asserted that student suffered humiliation and emotional distress due to actions and omissions of school. Plaintiffs' contentions were unpersuasive and not supportable by law. J.C. v. Goger, DOCKET NO. A-1577-09T2, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2011 N.J. Super. Unpub. LEXIS 2995, Decided December 12, 2011.

OPRA

Parent appealed from a Trial Court decision dismissing his claim that the board of education violated OPRA and his common law right of access to public records. Parent had sought access to school records regarding alleged incidents of bullying against his children. Appellate Division affirmed in part, reversed in part and remanded for a determination of attorney fees. The notes in question were privileged from disclosure under the work product doctrine, and therefore, the Board was not required to disclose them to plaintiff in response to either his OPRA or common law requests. Parent partially prevailed as, after plaintiff filed this lawsuit, the Board released one redacted document to plaintiff that reported the disciplining of another student for violent conduct against plaintiff's son. K.L. v. Evesham Twp. Bd. of Educ., 423 N.J. Super. 337 (App. Div. 2011) 32 A.3d 1136, Decided December 12, 2011. Certification denied by K.L. v. Evesham Twp. Bd. of Educ., 2012 N.J. LEXIS 477 (N.J., Apr. 3, 2012)

Policy

Appellate Division affirms General Equity Part determination dismissing parent's complaint seeking to enjoin enforcement of the board's drug and alcohol policy to the extent that it governed non-school related conduct that takes place off of school grounds at any time day or night. Plaintiffs had failed to exhaust their administrative remedies before the Commissioner. Matter remanded for entry of an order retaining jurisdiction pending completion of the administrative process. Doe v. Haddonfield Bd. of Educ., DOCKET NO. A-3412-09T1, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2011 N.J. Super. Unpub. LEXIS 2870, Decided November 21, 2011.

School Funding
Appellate Division affirms final decision of the Commissioner of Education concluding that the Board violated N.J.A.C. 6A:13-3.1, a class size regulation promulgated pursuant to the 2008 New Jersey School Funding Reform Act (SFRA), N.J.S.A. 18A:7F-43 et. seq. Appellate Division concluded that the regulation was not an unfunded mandate, and the OAL, the Commissioner and the judiciary have jurisdiction over the subject matter of the dispute, that respondents have standing, and the Commissioner acted properly in adopting the summary decision of the AOL. There was no basis on which to determine that the Commissioner acted in an arbitrary or capricious manner. Elizabeth Educ. Ass'n v. Board of Educ., DOCKET NO. A-5506-09T3, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2011 N.J. Super. Unpub. LEXIS 3065, Decided December 16, 2011.

Appellate Division affirms Commissioner's decision, which reinstated and certified the School Funding Reform Act statutorily required minimum tax levy for the Elizabeth school district. Governing body had, in its review of the voter defeated budget, reduced the tax levy below the statutory required minimum. Appellants contend the Commissioner's decision was unconstitutional because it abrogates the statutory right of the voters to reject the budget proposed by the Board of Education and the statutory right of the City's governing body to recommend cuts in the school budget. The Commissioner's decision was essentially a ministerial one required by the SFRA; no discretion existed under the law to reduce the budget below the mandated statutory minimum. Bollwage v. Schundler, DOCKET NO. A-5736-09T1, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2011 N.J. Super. Unpub. LEXIS 2966, Decided December 7, 2011. Certification denied by Bollwage v. Schundler, 2012 N.J. LEXIS 391 (N.J., Mar. 26, 2012)

Workers Compensation
Appellate Division affirms Workers Compensation Court dismissal of plaintiffs' 2004 petition for workers compensation benefits as time barred. Plaintiff was employed by the board between 1990 and 1993 while the asbestos remediation program was underway in schools in which he worked. There is no requirement that the WCJ consider expert testimony before granting a motion to dismiss based on the statute of limitations. Russo v. Hoboken Bd. of Educ., DOCKET NO. A-1861-10T4, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2011 N.J. Super. Unpub. LEXIS 2910, Decided November 29, 2011.

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New Jersey Superior Court, Law/Chancery Division

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Commissioner of Education

Board Policy
Commissioner dismisses as time barred by N.J.A.C. 6A:3-1.3, a suit by sports club that alleged the school district arbitrarily classified the club as a "Group Four" organization pursuant to the Board's facilities usage policy, requiring it to pay a fee. Mustang Travel, 2011:Dec. 1 (Mountainside)

Tenured teachers and speech therapists employed on an hourly basis by county special services school district to provide services in non-public schools alleged in consolidated suit that their hours for the 2010-2011 school year were improperly reduced by respondent in violation of their tenure and seniority rights, and should have been done according to seniority. Commissioner finds that board's reduction of hours did not constitute a RIF as described in *N.J.S.A.* 18A:28-9 since there was never any entitlement to a particular number of hours; no violation of tenure rights or OPMA. Kourtesis, 2011:Dec 5 (Bergen Co Spec Serv) (consolidated)

Certification

Employee serving as substance awareness counselor (SAC) failed to meet the requirements for a SAC endorsement to his Educational Services certificate; although he held a SAC Certificate of Eligibility, was hired as a substance awareness counselor, acquired a provisional certificate as a SAC, completed a residency in accordance with *N.J.A.C.* 6A:9-13.2(e), and his residency supervisor recommended him as "approved" for standard certification as a SAC, board of Examiners was correct to deny him the standard certification as he failed to satisfy the third requirement of *N.J.A.C.* 6A:9-13.2(e), *i.e.,* completion of a graduate curriculum approved by the Department of Education. Ruiz, 2011: Dec. 23

Where principal challenged Board's determination that other principals had greater seniority than he when he was terminated in a RIF, Commissioner determined that when he was hired as a principal he possessed a certificate of eligibility as a principal, but had not obtained the provisional certificate until later; he was somehow allowed to work as a principal with only a certificate of eligibility even though this is prohibited by law; his seniority did not accrue until he obtained his provisional certificate, and therefor had less seniority than any other principal retained by respondent Board. Feldman, 2011:Dec. 23 (Branchburg)

Non-Tenured

Charter school teacher did not violate N.J.S.A. 18A:26-10 when she gave only two weeks' notice of departure during the first 60 days of her employment; the language in her contract created two separate terms of employment by establishing a 60-day probationary period during which her employment would be reviewed and after which a permanent position would be offered based on satisfactory performance. Matter of Certificate of Walker, 2011: Nov. 10 (Central Jersey Arts Charter)

Procedure

Matter dismissed for failure to prosecute. Serber, 2011:Dec. 13. (Paterson)

Reduction in Force

Matter dismissed for failure to prosecute, where teacher contended that the board violated her tenure and seniority rights when it terminated her employment in a reduction in force, but failed to appear at the hearing. Kaminsky, 2011:Nov. 23 (Paterson)

Petitioner, who contended that her employment was terminated in a RIF in violation of her tenure and seniority rights, failed to appear at the hearing; Commissioner dismisses for failure to prosecute. Vilchez, 2011: Nov. 23 (Paterson)

Petitioner, who contended that his employment was terminated in a RIF in violation of her tenure and seniority rights, failed to appear at the hearing; Commissioner dismisses for failure to prosecute. Rose, 2011: Nov. 23 (Paterson)

Petitioner, who contended that her employment was terminated in a RIF in violation of her tenure and seniority rights, failed to appear at the hearing; Commissioner dismisses for failure to prosecute. Constable, 2011:Dec. 13 (Paterson)

Petitioner, who contended that her employment was terminated in a RIF in violation of her tenure and seniority rights, failed to appear at the hearing; Commissioner dismisses for failure to prosecute. Leonardo, 2011: Dec. 13 (Paterson)

Petitioner, who contended that her employment was terminated in a RIF in violation of her tenure and seniority rights, failed to appear at the hearing; Commissioner dismisses for failure to prosecute. Pelosi, 2011: Dec. 13 (Paterson)

Tenured teachers and speech therapists employed on an hourly basis by county special services school district to provide services in non-public schools alleged in consolidated suit that their hours for the 2010-2011 school year were improperly reduced by respondent in violation of their tenure and seniority rights, and should have been done according to seniority. Commissioner finds that board's reduction of hours did not constitute a RIF as described in *N.J.S.A.* 18A:28-9 since there was never any entitlement to a particular number of hours; no violation of tenure rights or OPMA. Kourtesis, 2011:Dec 5 (Bergen Co Spec Serv) (consolidated)

Board violated tenure rights of tenured school psychologist who held a school social worker endorsement on her educational services certificate, when it abolished her position of school psychologist in a RIF and subsequently employed a non-tenured individual as school social worker without first offering the position to her; however, she did not have seniority as a social worker since she never held the title, and does not have superseding seniority rights over other tenured social workers in the district. Henshaw, 2011: Dec. 9 (Hammonton)

Residency

Where grandmother obtained custody of child and board therefore withdrew its objections to child's attendance in the Bayonne schools and request for tuition, matter was dismissed with prejudice. E.I. o.b.o. R.C., Commr 2011: Nov. 1 (Bayonne)

Parent failed to prosecute her residency appeal despite being afforded every opportunity to do so; therefor, Board's counterclaim for tuition for both children in the amount of $25,591.92 is granted. F.O., o.b.o. D.O. and R.O. V. 2011: Nov. 10 (Waldwick)

Commissioner rejects Tinton Falls request for ruling that it is responsible only for the education of dependent children of Navy personnel residing at NWS Earle, and that all other children residing on the base must be educated in the district where the housing is physically located.
While the legislative history supports that the legislation was created and passed with Tinton Falls and the future NWS Earle children in mind, nothing supports that the designation made pursuant to *N.J.S.A.* 18A:38-7.8 was one for the education of Navy children only, and any such remedy rests with the legislature. Tinton Falls, 2011:Nov. 17 (Tinton Falls, Colt Neck, Monmouth Reg., Freehold Reg)

Residency appeal is dismissed with prejudice where pro se parent who contended that the family was homeless and living with her son in Orange, failed without explanation to appear at the hearing despite having received appropriate notice. V.M., o/b/o, C.J. , 2011: Dec. 16 (Orange)

School Ethics
Board member violated N.J.S.A. 18A:12-24.1(g) when he released confidential information to a newspaper that pertained to a legal bill for complainant's representation in another matter. Although the bill might, at a later date, have become a matter of public record, it was still confidential when he released the information. However, the record did not support the allegation that the board member acted independently by directing payment of $82,107 to the architect in advance of the board's meeting; rather, it appears that the decision was a joint decision between the administration and the Facilities Committee. The Commissioner adopted the Commission's recommendation that the board member be reprimanded. Campbell, 2011:Dec. 12 (Kearny)

Settlements
Commissioner declines to approve a settlement as neither the file nor agreement contained a copy of the board's resolution approving the settlement, and where the agreement is not signed by the board attorney, the board's duly authorized representative in litigation. D'Amelio, 2011:Dec. 12 (Hoboken)

Student Discipline
Parents challenged the Board's decision to suspend their son from varsity basketball games and scrimmages as discipline for under-aged consumption of alcohol off school grounds. Matter was dismissed as moot where, in the interim, student served his suspension from the basketball team, participated in balance of the basketball season, and graduated. Commissioner declines to hear case despite parent's argument that underlying issues are likely to reoccur, but capable of evading review. Temporary exclusion from the privilege of extracurricular athletics flowed not just from respondent's policies, but also from a contract between parties. S.N.K. and S.K., 2011:Nov 17 (Highlands Reg)

Emergent relief denied to student athletes challenging board decision prohibiting their participation in extra-curricular activities including football game, where pending criminal charges were filed against them after physical altercation off school grounds after a party and where administrator's certification demonstrates nexus and impact on operation of the schools regarding administrative time and concern for student safety. Crowe standards not met with respect to settled nature of claim, likelihood of success or equities. L.A., o.b.o. R.A. et al. 2011:Dec. 2 (Wayne).

Emergent relief denied to student athlete who is also plaintiff in companion case challenging suspension from extra-curricular activities relative to a separate incident; Commissioner rejects his due process arguments and his retaliation argument; student fails to meet Crowe standards. Monaghan, 2011:Dec. 2 (Wayne)

Suspension of Endorsement/Certification
Bus driver challenged determination to suspend his school bus endorsement for 6 months pursuant to N.J.S.A.18A:39-28 et seq. where he failed to do a walk-through of the bus and a child was left; Commissioner concurred with the ALJ that the Office of Criminal History Review (CHR) is entitled to summary decision dismissing the bus driver's petition; CHR was directed to notify the MVC of its obligation to suspend the endorsement and to notify his employer. Durant, 2012:Dec. 13.

Tenure Acquisition
Commissioner finds that Petitioner did not accrue tenure in her Director of Administration position and thus no tenure rights were violated when the board terminated her; no evidence that this was an approved title or that it required a

certificate; nor did it provide her tenure as a business administrator since the duties performed by the Director of Administration were not similar to those performed by a BA, with the exception of some insurance work; nor did she at any point devote full time to the responsibilities of a business administrator. In Cheloc, 2011: Nov. 23(Elizabeth)

Tenure Dismissal
Teacher guilty of single incident of making stereotypical and derogatory racial and ethnic statements to an honors chemistry class during a lesson on percent abundance of isotopes was guilty of unbecoming conduct; Commissioner disagreed with ALJ's recommendation of suspension without pay and loss of increments, and instead upheld the charges and ordered termination of teacher. Tenure Hearing of Chaki, 2011:Dec. 12 (Franklin Twp)

Teacher's Facebook comments were not protected by the First Amendment rights, as they were not intended to address a matter of genuine public concern but rather were a personal expression of job dissatisfaction; her thoughtless comments on Facebook showed a disturbing lack of self-restraint and inappropriate behavior which was detrimental to her role as a professional educator; Despite teacher's otherwise unblemished service, Commissioner upholds tenure charges and orders termination of teacher from Paterson school system. Commissioner declines to address charges of libel and slander for lack of jurisdiction. Tenure Hearing of O'Brien, 2011:Dec. 12 (Paterson)

Tenure Rights
Where secretary was reduced from a twelve month to a ten month position, and asserted tenure right to an administrative assistant position held by a non-tenured person, Commissioner remanded to OAL the question of whether the secretary had the requisite skills to execute the more complex and varied responsibilities of the administrative assistant position, noting that the written job descriptions were vastly different although the job qualifications for the two positions were very similar. Salimbene , 2011: Nov. 10 (Dennis Twp)

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School Ethics Commission

Motion to dismiss granted where attorney who volunteered, but gave no money to board candidates' campaign, was later appointed as board attorney. Board members who voted to appoint and approve attorney bills did not violate N.J.S.A. 18A:12-24(c). Any suggestion of a potential benefit for the respondents is, at best, speculative as the complainants allege that the personal involvement between attorney and the respondents provides an expectation of similar support in future campaigns. Wallace SEC 2011: Nov 22

Inferring superintendent is a "terrorist" on board member Facebook page is a violation of N.J.S.A. 18A:12-24.1(i). The Commission finds that the statement may reasonably be considered as undermining, opposing, compromising or harming the Superintendent in the proper performance of her duties. When a sitting Board member makes such a judgmental proclamation, it is likely to be credited far more than a statement offered by an ordinary citizen. However, no violation found of N.J.S.A. 18A:12-24.1(g) for other posting that was a combination of fact and personal opinion. Additional statements in newspaper article that amounted to personal opinion were neither a violation of N.J.S.A. 18A:12-24.1(g) nor N.J.S.A. 18A:12-24.1(i). Bey v. Brown SEC 2011: Dec. 21

Commission dismisses the complaint for failure to prosecute. Complainant failed to appear at hearing before the ALJ and failed to give any explanation for

nonappearance. Silva v. Seitler SEC 2011: Dec. 21

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State Board of Examiners

Teacher of the Handicapped certificate revoked after teacher was accepted into a Pretrial Intervention program (PTI) in 2007 after being charged with Aggravated Assault, Possession of a Weapon, Obstructing the Administration of Justice and Resisting Arrest. Although the ALJ acknowledged that Barnes had a long, blemish-free career other than this one incident, she noted that "nevertheless, the severity of his conduct on the night in question was so egregious as to cast doubt on his fitness to serve as a teacher." Teacher offered nothing by way of mitigation of his conduct. Rather, he focused only on his successful completion of PTI, which is a necessary prerequisite to having the charges dismissed. purpose of this proceeding is "to permit the individual certificate holder to demonstrate circumstances or facts to counter the charges set forth in the Order to Show Cause, not to afford an opportunity to show rehabilitation." The fact that teacher may have a stellar record post arrest, while a step in the right direction, has no bearing on the decision the Board of Examiners must make with regard to his certification. In Re Barnes, Exam 2011: Nov. 1

Following conviction for official misconduct due to missing funds and mismanagement in student activity account, Examiners revokes Teacher of Social Studies Certificate of Eligibility With Advanced Standing and a Teacher of Social Studies certificate. Teacher failed to respond to order to show cause, despite opportunities to do so. "Teachers… are professional employees to whom the people have entrusted the care and custody of … school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." Under given circumstances, Board believes that the only appropriate sanction in this case is the revocation of certificates. In Re Belton, Exam 2011, Nov. 1

Following plea agreement after charge for Endangering the Welfare of Children, teacher was required to forfeit his teaching certificates. Teacher of Medical Assisting Certificate of Eligibility and Teacher of Medical Assisting certificate were revoked. In Re Forman, Exam 2011, Nov. 1

Following allegations of submitting fraudulent teaching certificates to the district, teacher agrees to forfeit his legitimately-held teaching certificates with the force and effect of revocation. Teacher of Health and Physical Education and Teacher of Driver Education certificates a Principal Certificate of Eligibility, and a Principal certificate are revoked. In Re Franks, Exam 2011, Nov. 1

After pleading guilty to Sexual Assault and Criminal Sexual Contact, teacher was required to forfeit his teaching certificates as a condition of his plea agreement. Teacher of English As a Second Language Certificate of Eligibility With Advanced Standing, a Teacher of Elementary School Certificate of Eligibility With Advanced Standing, and Teacher of English As a Second Language and Teacher of Elementary School certificates relinquished with full force and effect of revocation. In Re Levy, Exam 2011, Nov. 1

Teacher pled guilty in May 2010 to 2nd degree Theft by Deception. As a result of the conviction, Matarese was disqualified from public school employment pursuant to N.J.S.A. 18A:6-7.1 et seq. In enacting the Criminal History Review statute, in 1986, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger. Individuals convicted of a crime such as Theft by Deception fall squarely within this category. Teacher of

General Business Certificate of Eligibility, and a Teacher of General Business certificate revoked. In Re Matarese, Exam 2011, Nov. 1

Teacher was convicted in December 2010 of Threatening to Kill. Teacher of Collision Repair Technology Certificate of Eligibility and a Teacher of Collision Repair Technology Provisional Certificate were revoked by Board of Examiners. In Re Rodriguez. Exam 2011, Nov. 1

Music teacher resigns following allegations of sexual relationship with student. Teacher agreed to relinquish Teacher of Music Certificate of Eligibility With Advanced Standing and a Teacher of Music certificate with full force and effect of revocation. In Re Russell, Exam 2011, Nov. 1

Teacher removed from its substitute teacher list after he was found to have sent inappropriate notes to a seventh grade student. Teacher agrees to relinquishment of his Teacher of Elementary School Certificate of Eligibility and a Teacher of Social Studies Certificate of Eligibility with full force and effect of revocation. In Re Cluggish, Exam 2011, Dec 16

Teacher was indicted for Attempted Murder, Conspiracy to Commit Murder, Tampering with Physical Evidence, Financial Facilitation of Criminal Activity, and Conspiracy to Commit Financial Facilitation of Criminal Activity. A teacher's behavior outside the classroom may be relevant in determining that person's qualifications and continued fitness to retain her Teacher of Elementary School certificate. Certificate suspended pending outcome of proceedings. If the charges are resolved in her favor, she shall notify the Board of Examiners for appropriate action regarding the suspension order. In Re Dorsett, Exam 2011, Dec. 16

Teacher surrendered his teaching certificates in Pennsylvania in June 2010 in lieu of discipline after he pled guilty in March 2010 to Corruption of Minors and Endangering the Welfare of Children. Examiners issues order to show cause on New Jersey certificates. Teacher currently holds a Teacher of Mathematics Certificate of Eligibility with Advanced Standing and a Teacher of Mathematics certificate. The Commissioner has long held that teachers serve as role models for their students. Clearly, a teacher convicted of Corruption of Minors and Endangering the Welfare of Children cannot claim status as a role model to anyone. Teacher's conviction therefore warrants revocation. In Re Hawkins, Exam 2011, Dec 16

Teacher of Elementary School Certificate of Eligibility with Advanced Standing and Teacher of Elementary School certificates revoked following conviction for lewdness. In Re Socrates, Exam 2011, Dec. 16

Teacher pled guilty in December 2010 to one count of Endangering the Welfare of a Child-Duty. Teacher of Psychology Certificate of eligibility and a Teacher of Elementary School Certificate of Eligibility revoked by Examiners. In Re Villapiano, Exam 2011 Dec. 16.

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New Jersey Council on Local Mandates

Mandate requiring training for election technicians in "seal-use protocols" held to be unfunded mandate. In Re Atlantic County, Nov. 16, 2011

Council held that the municipal dumpster-covering obligation is an unfunded mandate and thus void, but that the retrofitting obligation is not an unfunded mandate. In Re Roxbury Township, Dec. 21, 2011

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Election Law Enforcement Commission

There are no education-related decisions posted for November/December at this time.

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New Jersey Division on Civil Rights

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New Jersey Government Records Council

Although the Complainant's request provided a specific range of dates in which the requested e-mails were transmitted, the request failed to name a specific identifiable sender and recipient: the request seeks e-mails from and to a specific class of employee (specifically, Municipal Clerks) and not individually identified senders and recipients. Custodian's duty to discern which e-mails in her possession have been received by or sent to a Municipal Clerk. A search for the individual employees' names and related e-mail addresses would constitute research that is not the statutory duty of a Custodian. The Complainant's request is invalid under OPRA because it fails to specifically name identifiable individual senders and recipients and because the request requires research beyond the scope of a custodian's duties pursuant to MAG Entertainment, LLC v. Division of Alcoholic Beverage Control, 375 N.J. Super. 534 (App. Div. 2005). Wolosky v. Jefferson Twp. GRC 2011, Nov. 29

District failed to respond within seven days as required by OPRA. However, once district did respond, they could find no records that were responsive to the request. There was no unlawful denial of access to the records themselves. Herron v. Montclair Board of Educ., GRC 2011, Dec 20.

Complaint administratively dismissed where requester filed complaint with GRC only six days after making a request to records custodian. Scheer v Franklin Twp. Fire District, GRC 2011, Dec. 20

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New Legislation

P.L. 2011, c. 139 (A2786). Approved 111/7/2011. Permits local units to participate in cooperative purchasing agreements.

P.L. 2011, c. 140 (A2806). Approved 11/10/2011. Permits the conversion of high-performing nonpublic schools located in failing school district into charter schools.

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New Regulations/Executive Orders

N.J.A.C. 19:38D
New Jersey Schools Development Authority Procurement of Goods and Services 43 N.J.R. 3168(a), 12/5/11

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New Jersey Schools Development Authority Procurement of Architectural, Engineering, Land Surveying, and Related Professional Consulting Services 43 N.J.R. 3153(a), 12/5/11

N.J.A.C. 17:12
Treasury – General – Division of Purchase and Property Purchase Bureau and Contract Compliance and Administration Unit; Surplus Property Unit, Computer Distribution Program 43 N.J.R. 3308(a), 12/19/11

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New Jersey Schools Development Authority Procedures for Price and Other Factors Procurement of Construction Contracts for New School Facilities Projects 43 N.J.R. 3462(a), 12/19/11

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3rd Circuit Court of Appeals

Contracts

Breach of contract counterclaims by a board of education against a contractor involving the construction of a running track were properly dismissed by the district court, because the delivered track met the contract specifications, and the contractor was not liable for costs incurred as a result of an inaccurate survey by a company after the track was completed. Boro Constr. Inc. v. Lenape Reg'l High Sch. Bd. Of Ed. No.11-1200 (3d Cir. Sept 19, 2011)(not precedential)

Discrimination—Employment

Court affirms evidentiary ruling following trial judgment in favor of the defendant school district on former district administrator's claim that district's credit and payment for only 25% of his unused, accrued sick leave was racial discrimination. It was not error for court to exclude evidence of historic inequality in pay between employees of different races, where employee failed to exercise his opportunity to challenge this ruling on his first appeal, and where the court had discretion to find that the probative value of the evidence was outweighed by the potential for prejudice and confusion. Houston v. Easton Area School Dist, , No. 10-4330 (3d Cir. Sept 13)(E.D. Pa.)(not precedential)

Section 1983

Court affirms district court's summary judgment in favor of the district and principal on student's claim that district is liable under the Fourteenth Amendment and 42 U.S.C. § 1983 for violations of her right to bodily integrity under the state-created danger doctrine, in matter arising out of sexual assault by five students upon her in school during lunch hour; court finds that district took no affirmative action to place student in danger or make her more vulnerable to the assault than she otherwise would have been. Brown v. School District of Philadelphia, No. 10-4184 (3d Cir. Sept 20)(E.D. Pa.) (not precedential)

Special Education

In an IDEA case, a district court's grant of a school board's motion for a judgment on the administrative record was affirmed in matter brought on behalf of student who had completed 12th grade and was seeking compensatory remedies; 14th Amendment claim against OAL was barred by the 11th Amendment; the IEP team was not deficient as district was not required to provide a cerebral palsy

expert educator; and procedural flaws (failure to develop objectively measurable goals; imperfect description of transition plan) in the IEP did not affect a student's or her parent's substantive rights, as student passed the NJHSPA, received high grades, and parents were not deprived of the opportunity to participate in the decision making process. Rodrigues v. Fort Lee Bd. Of Ed., No. 11-1467(3d Cir. Sept 9, 2011)(not precedential)

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New Jersey District Court

Special Education

Court grants students' motion for summary judgment on counsel fees and costs as prevailing parties under the ALJ-issued Consent Orders, under the fee-shifting provisions of the IDEA and section 504; applying the two-prong test used by the Third Circuit, court found that, although brought on motion for emergent relief, it cannot be deemed "interim relief' for which attorney's fees are not warranted since final relief was achieved on the settlement; board's cross-motion to reduce fees is denied. K.N. & B. v. Passaic City Bd. Of Ed., No. 11-399(JLL) (D.N.J. Oct 27, 2011)(not for publication).

Court grants school board's cross-motion for summary judgment, and denies parent's motion, and thereby upholds ALJ's decision that affirmed the board's declassification of a student with a "specific learning disability" requiring special education; although student had weaknesses, no longer showed a "severe discrepancy between her intellectual ability and achievement" and thus did not have a "specific learning disability." Nor was IEP deficient in outlining measurable goals-- since student was educated in the regular curriculum, the use of examinations, grades, progress reports, standardized testing and advancement to the next grade level was a proper substitute for a more elaborate set of goals in the IEP. Nor did parents show that lack of a special education teacher for approximately two months lead to a loss of educational opportunity or benefit. H.M. v. Haddon Heights Bd. Of Ed., No. 09-4293(NLH) (AMD)(D.N.J. Sept. 27, 2011)

In matter where advocacy groups allege that DOE and school numerous school districts have systematically failed to comply with IDEA, the court denies advocacy groups' motion seeking enforcement of subpoenas seeking classroom observations by unsupervised observers, of certain students with disabilities. Plaintiffs have not clearly articulated their need for the observations, and court is concerned about safety and disruption of the classroom. Disability Rights N.J. v. N.J. Dep't of Educ., No. 07-2978 (MLC), 2011 U.S. Dist. LEXIS 109665 (D.N.J. September 26, 2011).

Parents of an autistic child were entitled to private school tuition reimbursement because plaintiff school district denied FAPE when it declined to test the child and develop an IEP due to the child's private school enrollment; residency, rather than public school enrollment, triggered the district's obligations under the IDEA; district must ensure that a reevaluation is conducted if the child's parents request it, and develop an IEP, even if child is enrolled in private school. Court declines to give deference to DOE's FAQ posted on its website, to the extent it suggests a contrary interpretation of a board's obligation. Moorestown Twp. Bd. of Educ. v. S.D., No. 10-0312(RMB/JS), 2011 U.S. Dist. LEXIS 104744 (D.N.J. September 15, 2011).

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New Jersey Supreme Court

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New Jersey Superior Court Appellate Division

Court affirms trial court's dismissal on summary judgment of student's lawsuit seeking penalty for injuries she sustained when she slipped and fell on ice on school playground before school started; trial court dismissed plaintiff's claims based on the common law immunity conferred upon public entities in connection with snow removal activities, and dismissed claims against snow removal company because the record showed it complied with all of its contractual obligations. Negligent supervision was not adequately pleaded. Coehlo v. Newark Bd. of Ed., No. A-3073-09T1 (App. Div. Sept. 19, 2011) (unpublished)

Court affirms final determination of the Board of Review, which found that she was ineligible for unemployment compensation benefits for the period of summer recess-- June 14, 2009, through September 5, 2009-- where she worked as a substitute teacher in 2008-9 and had a "reasonable assurance" of employment as a substitute teacher for 2009-10. Fact that she had worked as a full-time teacher in earlier year and had no "reasonable assurance" of employment as a full-time teacher, had no bearing on her eligibility. Michener v. Board of Review, A-5823-09T3 (App. Div. Oct. 11, 2011) (unpublished)

Unemployment compensation statute permitted retired school administrator appointed to a temporary position in a school district for one year to collect unemployment benefits at the conclusion of the contract, while simultaneously receiving his pension benefits as well as contractual compensation; rejects board's public policy argument. Midland Park Bd. of Ed. V. Bd. of Review, A-0235-10T4 (App. Div. Sept. 29, 2011) (unpublished)

N.J. Dept of Children and Families v. W.G., A-5894-08T1 (App. Div. Sept. 29, 2011) (unpublished)

Court affirms termination of teacher for incidents of unbecoming conduct such as inappropriate language and losing his temper with students leading to use of physical force. Tenure Hearing of Alvarez, A-5223-09T3 (App. Div. October 31, 2011)(unpublished)

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New Jersey Superior Court, Law/Chancery Division

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Commissioner of Education

Board Membership

School board appointments made by outgoing mayor were invalid and violated *N.J.S.A.* 18A: 12-7 and 8; one board member's term was invalid as he was already a sitting member when he was appointed to another seat on the Board, and the other appointment violated the express terms of *N.J.S.A.* 18A:12-8 as he was appointed to a full term outside of the statutory time of April 1-15; however, appointment did not violate *N.J.S.A*. 40:73-5 as that is applicable only to "second class cities." Roque, Commr 2011:September 19.

Certification Revocation/Suspension

Commissioner affirms State Board of Examiners' order revoking teacher of elementary school in grades K-5 certificate of eligibility with advanced standing and teacher of elementary school in grades K-5 certificate; rejects argument that revocation was too severe a penalty based on teacher's documented psychiatric illness that she alleges contributed to her conduct, as Examiners was aware of the illness, provided her due process and record supported revocation. Merkakis, Commr 2011: Sept 19. (appeal of SBE decision)

Commissioner upholds the determination of the State Board of Examiners to deny petitioner's application for a Certificate of Eligibility (CE) as a Teacher of Mathematics, where he failed to meet minimum grade point average (GPA) requirements; neither waiver of, nor substitution for, requirements of passing score, are permitted under *N.J.A.C.* 6A:9-17.16. Mandelbaum, Commr 2011:September 23.

Commissioner affirms determination by DOE Criminal History Review that bus driver's school bus endorsement must be suspended for 6 months pursuant to *N.J.S.A.* 18A:39-28 after she left two children on her bus in September 2010 after failing to conduct the mandated visual inspection at the end of her route. Lazo, Commr 2011:September 26.

Disqualification

Teacher is permanently disqualified from employment in any position within a school district as a result of his 1989 criminal conviction in South Carolina on charges of possession of cocaine; his pardon in 2002 does not remove his criminal record. New Jersey courts have no jurisdiction to expunge South Carolina convictions and thus his argument that his record be deemed purged because New Jersey allows the expungement of convictions for simple possession of controlled substances, fails. Palmer, Commr 2011:September 22.

Commissioner affirms DOE's Office of Criminal History Review that fourth grade teacher is permanently disqualified from employment based on her guilty plea to assault by auto, a third degree crime, where she was driving recklessly while intoxicated, and caused serious bodily injury (disapproving of Parshelunis to the extent it is inconsistent).Markakis, Commr 2011:September 1.

Nonrenewal

Board was well within its rights to decline to rehire a non-tenured social worker, as she did not request a statement of reasons within 90 days; May 13 letter informing staff of budgetary non-renewals, not board's subsequent decision not to rehire her in another position because of performance concerns, triggered 90 day period. Rudd, Commr 2011:September 1.

Commissioner finds that non-renewal of tenured teacher holding a standard instructional certificate with endorsements as an Elementary School Teacher and a Teacher of Italian violated her tenure rights; she was tenured after continuous employment as teacher of Italian, resolution to effectuate a reduction in force was not passed, and even if it had, she should have been retained as an elementary school teacher based upon the tenure law as the district retained non-tenured elementary teachers. District ordered to reinstate

her to a full-time teaching position, reimburse her within 60 days for lost salary and payments made for medical, dental, and prescription insurance coverage, provide her with seniority credit, and make the requisite contributions to the pension fund and Social Security for the entire period of petitioner's illegal termination. Gillikin, Commr 2011:Oct 17 (Garfield)

Reduction in Force
Board did not violate the tenure rights of a secretary during a RIF; she had not acquired tenure through her prior position in the school district as an assistant traffic coordinator (ATC), as her responsibilities in that prior job went well beyond the secretarial/clerical. Therefor, she had no claim to employment based on tenure rights Kopko, Commr 2011:September 7. (Middletown)

Residency
Commr grants board's request for entry of judgment on docket of the Superior Court pursuant to *N.J.S.A.* 2A:58-10, for $7,527.80 representing the 140 days that, pursuant to earlier Commissioner summary decision, were owed to district for illegal student attendance, and where respondents had failed to make payment. Burlington, Commr 2011: Oct 20

Student was entitled to a free education in the district as an affidavit pupil living with grandparents who resided in the district; family hardship was based on fact that grandparents removed student from his mother's care because of violence and emotional strife that the student was inflicting upon his mother and siblings, finding that the emotional discord and financial insecurity resulting from the long illness and subsequent death of child's stepfather clearly qualified as family hardship. Commissioner rejects district's motion to reopen the record based on fact that student subsequently went to live with biological father in New York. M.E.M.,Commr 2011:Oct.7(S. Plainfield).

Commissioner determines that student and her mother were homeless during the 2010-2011 school year (forced to vacate apartment for lack of funds) and therefor, under *N.J.S.A.* 18A:7B-12(c), entitled to be educated by the last district of residence prior to their becoming homeless (Mainland Regional). It was irrelevant whether student and mother were staying temporarily in or outside the district. K.N. o/b/o A.N., Commr 2011:Sept.19.

Pro se residency appeal is dismissed due to petitioner's failure to appear. A.B. obo B.N.W Commr 2011:Oct 14. (Orange)

Pro se residency appeal is dismissed due to petitioner's failure to appear. K.W. obo J.B, Commr 2011:Oct 21. (Orange)

Salary Policy
Board's settlement of expired contract, which encompassed two years of retroactive salary and two years of prospective salary increases, violated N.J.S.A. 18A: 29-4.1, under which a board of education of any district may adopt a one, two or three year salary policy. Ramsey, Commr 2011: Oct 21.

School Calendar
Education Association appealed board's determination to set a school year start date of August 24, 2011, seeking start date on or after September 1. Board made decision at September 21, 2010 public meeting, making petition untimely. Bethlehem Ed. Ass'n, Commr 2011:September 22

Sending-Receiving
Commissioner dismisses petition brought by receiving school (Northern Highlands) for tuition rate adjustment to cover the cost of a full-time aid it

provided for a special education student from sending school (Saddle River) who graduated in 2006, and for reimbursement for the cost of one-to-one instruction in English for another special education student currently enrolled in the receiving school; summary decision granted to sending district as petition is out of time pursuant to *N.J.A.C.* 6A:23A-17.1(f)(6) as to graduated student, and under the parties' current send-receive agreement, charging for one-to-one instruction in English is not permitted, as it is part of the student's educational program and not a related service. Northern Highlands Reg., Commr 2011:September 26.

Standing

Commissioner dismisses matter for lack of standing, where petitioning parent initiated the appeal of board's determination to exclude her son from Honor Society, but where son turned 18 during pendency of matter and student neither submitted a Certification of Substitution nor placed on the record his desire to have his mother proceed as his representative. I.C.W. obo J.W. Commr 2011:Oct 14 (Mountain Lks)

Tenure Acquisition

Secretary, hired August 13, 2007, whose annual contract was renewed for a fourth year in 2010-11 but was terminated on July 21, 2010 under the 30 day notice of termination clause, did not acquire tenure under N.J.S.A. 18A:17-2 as she had not served as a secretary in the district for three consecutive calendar years. Miller, Commr 2011:Sept. 21.

Tenure Dismissal

Loss of tenure was excessive penalty against special education teacher with otherwise unblemished record, for single incident of unbecoming conduct in which she slapped a handicapped student across his face after student had slapped her, claimed she acted reflexively and was remorseful; Commr agrees with ALJ recommendation for forfeiture of employment and adjustment increases for one year and forfeiture of the 120 days of pay, but modifies ALJ recommendation to also add suspension for 4 months without pay in light of seriousness of her errors. Tenure Hearing of Craft, Commr 2011:September 1. (Franklin Twp)

Tenure charges were sustained against science teacher in accelerated program, where she was excessively absent or tardy for over one quarter of the total days each year during a 4-year period, and where board demonstrated the negative effect of her absenteeism on pupils, and had provided ample warning of its dissatisfaction with her attendance through written evaluations and the withholding of three consecutive annual salary increments. Tenure Hearing of Rosa, Commr 2011:September 1 (Jersey City)

Tenure charges against special education teacher in alternative education program who allegedly engaged in unbecoming conduct of instructing boys on how to engage in sex, were dismissed as moot based on the teacher's resignation; board is ordered to notify the State Board of Examiners through its Superintendent pursuant to the requirement of *N.J.A.C.* 6A:9-17.4 (requiring that if a tenured staff member resigns while accused of unbecoming conduct, the Board must notify Examiners). Tenure Hearing of Salaam, Commr 2011:Sept 26. (Irvington)

Tenure charges and challenge to withholding increments, are mooted by death of teacher. Tenure Hearing of Cornforth, and Cornforth (consolidated), Commr 2011:Oct 7.

Commissioner dismisses physical education teacher, for unbecoming conduct where she placed tape on second grader, allowed and/or encouraged other

students to follow her lead which humiliated the student, and when she falsely denied her role in the incident; teacher dismissed despite her 21 years' experience and claim that she acted in the spirit of fun. Tenure Matter of Parezo, Commr 2011:Oct. 12 (Lakehurst)

Commissioner agrees that absences of a teacher of culinary arts at the Juvenile Justice Commission's Training School were excessive where he failed to return from an approved leave of absence, but that school had not established that absences were sufficient grounds for dismissal under *White* and similar cases; Commr denies board's motion for summary decision, grants teacher's motion for a ruling that he did not abandon his position; and ordered that the record of this matter be developed to allow a full application of the required legal analysis for time period specified in the tenure charges. Tenure Hearing of Amodei, Commr 2011:Oct 13/14

Commr disagrees with ALJ recommendation of lesser penalty, and orders dismissal of custodian who violated procedures related to time off, was caught sleeping on the job, and was chronically absent; custodian had reason to be aware of the district's rules and expectations, and there is no statutory mandate in tenure matters to impose progressive discipline. Tenure Hearing of Dudley Commr, 2011:Oct. 21(Neptune)

Student Discipline

Commissioner grants board's motion to dismiss petition as petitioning student and his counsel failed to appear; Petitioner's counsel's explanation, namely that he did not want to appear because his request for an adjournment and his request to brief an issue had been denied, were not sufficient cause to excuse the failure to appear. Matter involved petition for expungement from student's record of a one-day out-of-school suspension, reinstatement to the hockey team, and removal from his school record of all disciplinary actions relative to a "swirly" incident. Masini, Commr 2011:Oct 21 (Hunterdon Central)

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School Ethics Commission

SEC finds that board member violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members and dismisses the allegations that the board member violated N.J.S.A. 18A:12-24.1(a), (c), (d), (f), (g), (i) and (j). SEC recommends penalty of reprimand. Board member called the District's Business Administrator and told him to change the bus pass of the complainant's child to another residence without the complainant's consent. Board member took private action that was outside the scope of her duties as a board member. No factual evidence of violation of the other sections was shown. Zirkle, SEC 2011: September 27

SEC finds that board member acted in his official capacity in a matter where he had an indirect financial involvement which a reasonable person could perceive to impair his objectivity or independence of judgment so as to violate N.J.S.A. 18A:12-24(c) when he: (1) participated in Board discussion regarding the possible return of the Interim Superintendent; (2) made a motion at the February 23, 2011 meeting to approve the appointment of the Interim Superintendent; and (3) voted on the appointment at the February 23, 2011 meeting. Interim Superintendent was a member of the County Board of Freeholders. The Commission recommends a penalty of reprimand. Pellechia, SEC 2011: September 27. (Berkeley)

SEC dismissed complaint that board member violated N.J.S.A. 18A:12-24.1 (c),

(e) and (g) when during the Executive Session of a regularly scheduled meeting, he was discovered taping the session without asking permission. SEC determines that respondent's action in taping a Board session does not implicate his duties and functions as a Board member sufficiently to characterize his conduct as "board action" within the intendment of N.J.S.A. 18A:12-24.1(c). SEC finds that there are no facts set forth in the complaint to support a conclusion that this action had the potential to compromise the Board so as to violate N.J.S.A. 18A:12-24.1(e). No breach of confidentiality was shown. Gidwani, SEC 2011: September 27(Winslow)

Complainant failed to factually establish a violation of the Code of Ethics for School Board Members. Gardner, SEC 2011: Oct 25 (Hackensack)

Board president/facilities committee chair violated the Act when he released confidential information to the press pertaining to a legal bill for which the invoice was presented in the Board's closed session discussions, although the bill may have become public record at a later date. However, complainant fails to show that respondent's involvement as facilities committee chair violated N.J.S.A 18A:12-24.1(c) (confining board action to policy making, only after consulting those affected) as the record shows that paying the architect in advance of approval at the board meeting in order not to lose a 22 million dollar grant, was a joint decision between the facilities committee and the administration. SEC recommends reprimand. Stevenson, SEC 2011: Oct 25 (Kearny)

SEC dismisses teacher's complaint that school administrators violated N.J.S.A. 18A:12-24(a), (b), (d) and (e) when they allegedly placed false information in her files to damage her reputation and would not permit her to mail reports that she had prepared for parents. Even assuming the facts as asserted are true, they do not support a finding of violation. Tomko, SEC 2011: Oct 25. (Elmwood Pk)

Click here for School Ethics Commission decisions.

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State Board of Examiners

Teacher of Physical Education Certificate of Eligibility With Advanced Standing and Teacher of Physical Education and Teacher of Driver Education certificates are revoked where teacher falsified information by cutting and pasting from her roommates' certificate to obtain her certificate and her job; however, matter is dismissed against teacher from whom the theft took place as she showed no complicity. IMO Guagliardo and Ramos, Exam: 2011:Sept. 22.

Examiners orders revocation of Teacher of Elementary School and Teacher of Mathematics certificates where teacher agreed to relinquish them after being charged with Child Abuse and Endangering the Welfare of Children, and having been accepted into a Pretrial Intervention Program for which forfeiture of the teaching certificates was a condition of entering the program. IMO Ivan, Exam 2011:Sept 22.

After entering a plea to Endangering the Welfare of Children, and being required to forfeit his r Teacher of English Certificate of Eligibility With Advanced Standing, and a Teacher of English certificate, Examiners accepts relinquishment with full effect of revocation. IMO Rokosz, Exam 2011:Sept. 22.

Notwithstanding her community service, numerous letters of support and her contentions of remorse and rehabilitation, Examiners revokes Teacher of Elementary School in Grades K-5 Certificate of Eligibility With Advanced Standing, Teacher of Preschool Through Grade 3 Certificate of Eligibility With Advanced Standing, and Teacher of Preschool Through Grade 3 and Teacher of Elementary School in Grades K-5 certificates of teacher who had consumed alcohol and prescription medication was convicted of Knowingly Leaving a

Motor Vehicle Accident with Serious Bodily Injury. IMO Pickul, Exam: 2011:Sept.22.

Examiners orders revocation of Teacher of General Business Certificate of Eligibility With Advanced Standing and Teacher of General Business certificate, where teacher was convicted of Criminal Attempt/Endangering the Welfare of Children and disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* IMO Seiler, Exam: 2011:Sept. 22.

Examiners orders two year suspension of Teacher of Speech Arts & Dramatics Certificate of Eligibility, Teacher of Elementary School and Teacher of English Certificates of Eligibility, and Teacher of Speech Arts & Dramatics, Teacher of Elementary School and Teacher of English certificates, pursuant to a settlement proposal, where teacher had resigned following allegations that she had engaged in inappropriate sexual discussions with students, discussed her prior marijuana use in class, met with students away from school on a one-to-one basis and taught a theater class where students presented sexually explicit content. IMO Young, Exam: 2011:Sept 22.

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New Jersey Council on Local Mandates

In re Complaint filed by the Allamuchy Township Board of Education (9-11). Board President alleged that NJ Laws 2010, chapter 122, portions of which are known as the "Anti-Bullying Bill of Rights is an unfunded mandate.

Click here for New Jersey Council on Local Mandates decisions.

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Election Law Enforcement Commission

There are no education-related decisions posted for September/October at this time.

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New Jersey Division on Civil Rights

No Director's Orders or Findings issued during September/October 2011.

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New Jersey Government Records Council

The complainant failed to establish that the filing of his complaint with the GRC was the "catalyst" for the voluntary action of … a change to the fee in the new Ordinance to the actual cost of the CD and jacket. The Township began discussing an amendment to the CD fee prior to having knowledge of the complaint, and the Complainant never objected to the $5.00 fee initially charged and instead chose to simply file a complaint with the GRC. Therefor, he is not a prevailing party entitled to attorney fees. Wolosky v.Township of Stillwater (Sussex), No. 2009-22 (GRC Sept 27, 2011)

The Custodian violated N.J.S.A. 47:1A-5.b. by not offering the Complainant an opportunity to review and object to the actual cost to convert the records requested to the medium specified, and the CFO violated the Act by failure to timely respond; however, the Custodian complied with later orders. Violations did not constitute knowing and willful violations nor an unreasonable denial of access. Reasonable attorney fees are granted as the complaint brought about a change in the custodian's conduct; however, enhancement of the lodestar fee was not warranted. Wolosky v.Borough of Morris Plains (Morris), No. 2010-165(GRC Sept 27, 2011)

Custodian's failure to respond in writing within seven (7) business days resulted in "deemed denial" of OPRA request; however documents were subsequently provided without objection from the Complainant. Custodian certified she failed to respond due to inattention, and can offer no excuse and further certifies that it was a mistake and not in any way intentional. Therefore, it is concluded that her actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial. Complainant was prevailing party entitled to reasonable attorney fees. Luers, Esq.(on behalf of Gwen Franklin) v. Township of West Orange (Essex),No. 2009-327 (GRC Sept 27, 2011)

Consolidated complaints are dismissed; complainants withdrew their complaints from the Office of Administrative Law. Jung v.Borough of Roselle (Union), No. 2007-299/ O'Halloran v. Borough of Roselle (Union), No.2007-307 (GRC Sept 27, 2011)

Uunapproved, draft executive session meeting minutes were inter-agency or intra-agency advisory, consultative, or deliberative material and thus were not government records and were exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1 and Parave-Fogg v. Lower Alloways Creek Township. Although custodian failed to respond to the request for records within the 7 days required but provided records she was required to disclose within 9 days, no willing violation found; further, Custodian acted independently of the filing and therefor was not catalyst and no attorney fees are warranted. Wolosky v. Stillwater Township (Sussex), No. 2009-30 (GRC Sept 27, 2011)

Custodian was not required to conduct the research that would be required to respond to a request for a "copy of every letter submitted since July 1990 by (4 named individuals) associated with the receipt of their annual/bi-annual contractual medical benefits," nor was custodian required to conduct research where another part of the request referred to types of records but not specifically identifiable records. In light of these findings, as well as finding that another part of the request was for records that did not exist, there was no denial of access, nor grounds for an award of attorney fees. Verry v.Borough of South Bound Brook (Somerset), No. 2010-135 (GRC Sept 27, 2011)

Custodian complied with earlier order requiring that township either adopt GRC request form or revise its own deficient request form; however, Custodian's reply to request stating that as to certain items the Custodian would respond on a "later date, " provided an openended timeframe in violation of OPRA; failure to charge the Complainant the actual cost for the reproduction of the requested "audio recording of the most recent regular public meeting of the governing body" onto a CD-ROM was a violation, as was the failure to provide check registry data and tables in the requested medium or another medium meaningful to the Complainant. Violations were not knowing or willful; however, Complainant is entitled to a reasonable attorney fee as he achieved "the desired result because the complaint brought about a change… in the custodian's conduct." Wolosky v. Chester (Morris), No. 2010-184 (GRC Sept. 27, 2011)

Where request for an audio recording of Borough Council meeting required a substantial amount of manipulation or programming of information technology not within ability of Borough, who must utilize its vendor to do so at a rate of

$195.00/hr. plus $3.50 for the tape, the Custodian carried her burden of proof that the proposed reproduction charge was reasonable. Borough ordered to amend its OPRA request for as it contains an incomplete recitation of exemptions to disclosure which renders it deficient. Jesse Wolosky v.Borough of Victory Gardens (Morris), No. 2010-187 (GRC Sept 27, 2011)

Where requestor asked to examine all records regarding construction project, specifically the minutes of the prebid meeting, along with any RFI submitted by any bidders, the Custodian's failure to respond in writing within seven business days results in a "deemed" denial. Response provided was legally insufficient because it failed to designate and respond to each record individually and provide a specific reason for denial for each; Custodian could have denied the request as being overly broad pursuant to MAG and its progeny, or by seeking clarification of such request. However, he responded by disclosing the requested records and thus had a duty to respond to each requested item individually. Custodian must disclose correspondence between the contractor and the architect related to the Change Order as there was no proof it was exempt from disclosure. Colasante v. County of Bergen, No. 2010-18 (GRC Sept 27, 2011)

Custodian did not fully comply with interim order by providing requestor with the records ordered to be disclosed with appropriate redactions, and the GRC with a legal certification, nine copies of the unredacted records requested for the *in camera* inspection and a document index within the time required. While request for certain email correspondence was a valid request, Custodian lawfully denied access to the discussion portion of the requested e-mail chain between and among the Board Attorney and School Leader and Board members; the e-mail chain is exempt from disclosure as attorney-client privileged material and ACD material (pre-decisional and deliberative.) Custodian must disclose all other portions of the requested e-mails (i.e. sender, recipients, date, time, subject, and closing salutations). Request for personnel meeting minutes and executive session meeting minutes for particular topics would require the custodian to conduct research and was thus an invalid request; Failure to respond within 7 days was a "deemed" denial but left open determination of whether it was a knowing and willful OPRA violation. Ray v.Freedom Academy Charter School (Camden), No. 2009-185 (GRC Sept 27, 2011)

Custodian's failure to comply with prior order requiring redaction of documents did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access; complainant was prevailing party entitled to counsel fees; however, matter is dismissed as withdrawn pursuant to a settlement between the parties. John Paff v. Lavallette (Ocean), No. 2007-209 (GRC Sept. 27, 2011)

Additional charge of $5.00 for City service charges to provide a recording (CD), did not represent part of the actual cost and must be refunded; matter referred to AOL for hearing as to whether custodian denied access to the recording. Edwards v.City of Plainfield Planning Board (Union), No. 2010-17 (GRC October 25, 2011)

The Complainant submitted a non-form written request that, because it did not reference OPRA, was not a valid OPRA request. The GRC's authority is limited to adjudicating denial of access complaints based on valid OPRA requests. Roundtree v. New Jersey Department of State, Division of Elections, No. 2011-305(GRC Oct. 25, 2011)

Requests for certain e-mails were invalid requests under OPRA as they failed to name "specifically identifiable" records, failed to name the senders and/or recipients of the e-mails sought, and failed to identify a specific date range sought; these requests would require research beyond the scope of a custodian's duties. Custodian had denied access on basis that these documents were "pre-decisional" ACD communications containing advice and recommendations of the Township Administrator. Kaplan v. Township of

Winslow (Camden), No. 2010-202(GRC Oct. 25, 2011)

Request for a "copy of each and every e-mail sent or received by the Municipal Clerk's office to or from each and every other Municipal Clerk in Morris County regarding Jesse Wolosky and/or his OPRA request from June 29, 2010 [through] June 22, 2010" was invalid under OPRA because it failed to specifically name identifiable senders and recipients, and because the request required research beyond the scope of a custodian's duties. Complainant was not a prevailing party entitled to an award of a reasonable attorney's fee. Wolosky v.Borough of Riverdale (Morris), No. 2010-192 (GRC Oct. 25, 2011)

Although the Custodian provided an insufficient response to the Complainant's request by failing to respond to each request item individually, and failed to bear his burden of proving a lawful denial of access to the records at issue, his actions did not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances where he gathered the requested records and faxed them but the fax machine was not working properly and he made several attempts to fax them. Complainant was not a prevailing party entitled to an attorney's fees because the Custodian disclosed the records in response to an unrelated OPRA request and not as a product of the filing of the complaint. Verry v.Borough of South Bound Brook (Somerset), No. 2010-86 (Oct. 25, 2011)

Custodian violated OPRA by failing to provide immediate access to contract and salary information of municipal clerk, immediate access required although part of larger request including items allowing 7 day response; although requestor did not use township request form, there was no evidence that requestor failed to properly invoke OPRA and therefor denial on that basis was improper; custodian must provide year end gross income, financial disclosure statement and vendor activity report with redactions as detailed in redaction index; counsel fee decision is deferred. Wolosky v.Township of East Hanover (Morris),No. 2010-205(GRC Oct. 25, 2011)

Custodian violated OPRA for failing to immediately provide salary information for employees and failing to provide access to employee list within 7 days, pursuant to a request for "(a)ny record or set of records which sets forth ….for each Borough employee employed as of September 30, 2009: name of employee, department within which the employee works, total remuneration as reported to the Internal Revenue Service for the most recent reporting period. " Although Borough did not maintain a record containing the specific information requested, the request could be fulfilled by providing *any record or set of records* which contained the information requested, such as a Borough Employee List with annual salaries for the 2008 tax year, or employee's personnel file or pension records, employment contracts and collective negotiation agreements. Thus, $35.00 special service charge requested for submitting request to Borough's CASA Payroll Services to produce a record, was unwarranted and must be refunded. Culver v. Borough of Lawnside (Camden), No. 2010-15 (GRC Oct. 25, 2011)

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New Legislation

P.L.2011, c.128. -see A1561
Permits diversionary program for juveniles who are criminally charged for "sexting" or posting sexual images.*
Pamphlet Law 2 pages Approved 9/16/2011 PDF Format HTML Format

P.L.2011, c.130. -see A2260
Lengthens service life of certain school buses to 15 years. Pamphlet Law 1 pages Approved 9/16/2011 PDF Format HTML Format

P.L.2011, c.132. -see A3399
Allows the parent of a public school pupil eligible for transportation services to waive pupil's right to those services for the school year.
Pamphlet Law 1 pages Approved 9/16/2011 PDF Format HTML Format

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New Regulations/Executive Orders

Student Transportation 43 N.J.R. 2306(a) Amends N.J.A.C. 6A:27-4.1, 4.2 and 6.4 and adopts new rules at: N.J.A.C. 6A:27-4.3, 4.4 and 4.5

Notice of Availability of the Mildred Barry Garvin Prize for New Jersey Teachers, Guidance Counselors, and School Librarians: 43 N.J.R. 2535(b)

Division of Pensions and Benefits: Notice of increase to the minimum annual base salary required for participation in the Public Employees' Retirement System. 43 N.J.R. 3052(a)

Notice of increase to the minimum annual base salary required for participation in the Teachers' Pension and Annuity Fund. .43 N.J.R. 3052(b)

Division of Purchase and Property: Notice of means to access State contracts predicated on Federal supply schedules and other Federal procurement programs..43 N.J.R. 3053(a)

Division of Local Government Services: 43 N.J.A.R. 2305(a) Enacts procedures for certain contracting units without a qualified purchasing agent to temporarily increase their bid threshold to $ 26,000-- administrative correction regarding incorrect website address.....

Public Employment Relations Commission, 43 N.J.R.2370(a). Scope of Negotiations Proceedings. Readoption with Amendments: N.J.A.C. 19:13

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United States Supreme Court

There are no education-related decisions posted for July/August at this time.

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3rd Circuit Court of Appeals

Discrimination

District court's grant of summary judgment affirmed in favor of district respondents on discrimination claims that districts violated Section 504 of the Rehabilitation Act, Title II of the ADA and IDEA by not providing special education services to student. There are insufficient allegations that these district defendants withheld from student any educational services or benefits they owed to him because of his disabilities and that they excluded student from any school programs or activities available to other students. Dutkevitch v. PA Cyber Charter Sch., No. 09-2393 (3d Cir. M.D. Pa. July 21, 2011). (not precedential)

District court's grant of summary judgment affirmed in favor of district respondent on age, race discrimination and retaliation claims. While plaintiff established *prima facie* claim of race discrimination, district proffered non-discriminatory reasons to hire someone other than plaintiff. Others had more experience or had demonstrated greater knowledge of position. Norman v. Reading Sch. Dist., No. 10-2147 (3d Cir. E.D. Pa. Aug. 2, 2011) (not precedential)

Third Circuit remands to District Court for determination on whether a Pennsylvania Charter School can sue under Section 1983, following claims that local district which revoked school's charter, discriminated against it, parents and students of the charter school. Third Circuit determines that charter school is not a political subdivision but leaves it to lower court to determine exact relationship with state to determine capacity to sue the state. Pocono Mt. Charter Sch. v. Pocono Mt. Sch. Dist., No. 10-4478 (3d Cir. M.D. Pa. Aug. 25, 2011) (not precedential)

First Amendment

Teacher disciplined for violating policy requiring teachers to seek permission before distributing personal correspondence through the mailboxes at his school, challenges policy on constitutional grounds. Third Circuit affirms grant of summary judgment for board. Policy is valid provided that it is justified without reference to the content of the regulated speech, is narrowly tailored to serve a significant governmental interest, and that it leaves open ample alternative channels for communication of the information. Policastro v. Tenafly Bd. of Educ., No. 10-2479 (3d Cir. N.J. July 20, 2011) (not precedential)

Court ruled that the school board carried out its practice of praying in an atmosphere that contained many of the same indicia of coercion and involuntariness that the U.S. Supreme Court had recognized elsewhere in its

school prayer jurisprudence. The school board used its regular meeting to recognize student accomplishment of various types, which had the effect of ensuring student attendance at nearly all the board meetings that took place during the school year. Further, the meetings took place on school property and the board was involved in every aspect of the prayer. Nor can a board of education take advantage of the legislative body exception under Marsh v. Chambers, 463 U.S. 783 (1983). Doe v. Indian River Sch. Dist., No. 10-1819 (3d Cir. Del. Aug. 5, 2011) (not precedential)

Tenure

To the extent that plaintiff's 42 U.S.C.S. § 1983 claim asserted that the tenure charges should have been certified by the local school board of education, rather than defendant State District superintendent of State operated school district, the claim was unsustainable. The statute of limitations on any substantive due process claim had expired, and plaintiff could not show that the conduct of any named defendant was arbitrary, capricious, or so egregious as to shock the conscience (an administrative regulation explicitly authorized the superintendent's actions). Dismissal without leave to amend was warranted because tenure charge proceedings were still pending; because plaintiff was on leave without pay status when the tenure charges were filed and remained on that status to date, any Fourteenth Amendment procedural due process claim was premature. The district court also properly dismissed as time-barred plaintiff's remaining claims for fraud, retaliation and discrimination in violation of § 1983, and breach of contract. Gillespie v. Janey, No. 10-2013 (3d Cir. N.J. Aug. 16, 2011) (not precedential)

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New Jersey District Court

Discrimination

In suit alleging race discrimination caused by school district, court dismisses all claims against township. One plaintiff's claims are dismissed in entirety for failing to file a notice of tort claim. Section 1981 claims dismissed with prejudice as to all school district defendants claims for intentional and negligent infliction of emotional distress permitted to continue for minor students' claims.) A v. Gloucester Twp. No. 10-4062 (D.N.J. July 21, 2011

In employment discrimination suit, federal court declines to exercise supplemental jurisdiction over state law claims. Judicial economy, convenience, and fairness do not balance in favor of exercising supplemental jurisdiction. Remand to state court granted. Schwinge v. Deptford Twp. Bd. of Educ., No. 09-5964 (D.N.J. July 28, 2011)

Special Education

Request for an order protecting plaintiff from defendant board of education discovery requests denied. Plaintiff has failed to show that motion meets the criteria set out in Rule 26(c). H.A. v. Camden City Bd. of Educ., No. 10-0733 (D.N.J. July 28, 2011)

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New Jersey Supreme Court

Certification Petition

Petition for certification denied. Tuck-Lynn v. State-Operated Sch. Dist. of Newark, 207 N.J. 189; 23 A.3d 414 (2011)(July 14)

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New Jersey Superior Court Appellate Division

Arbitration

Appellate Division affirms Law Division confirmation of arbitrator's award. Arbitrator determined that board had insufficient performance-based reasons for non-renewal and failed to prove just cause for dismissal of non-tenured employee. Arbitrator awarded full pay for the 2008-09 school year. Board maintained employee demonstrated pattern of offending conduct toward female students and co-workers, which was frequent, severe and deemed to have interfered with the workplace. Trenton Business-Technical Emples. Ass'n v. Trenton Bd. of Educ., No. A-4212-09T4, 2011 N.J. Super. Unpub. LEXIS 1947 (App. Div. July 20, 2011).

Discrimination

Appellate Division affirms trial court's grant of summary judgment as to Supervisor of Special Services' failure to accommodate in violation of the LAD claim but reversed as to retaliation claim. Employee's claim that the Board retaliated against him by withholding money from his paycheck was sufficient to survive summary judgment.
Formica v. Atlantic City Bd. of Educ., No. A-2505-09T2, 2011 N.J. Super. Unpub. LEXIS 2091 (App. Div. August 2, 2011).

Funding

Appellate Division affirms General Equity judge's motion of summary judgment dismissing Village of Loch Arbour's complaint. The School Funding Reform Act's repeal of the Kiely bill, *N.J.S.A.* 18A:8-1.1, which carved out an exception for the Village by capping the Village's school contribution to the Ocean Township School District at $300,000, was not unconstitutional, an infringement of equal protection rights, an impairment of the right to contract and a violation of the Fifth Amendment's Takings Clause. Loch Arbour v. Township of Ocean, No. A-3136-09T3, 2011 N.J. Super. Unpub. LEXIS 1872 (App. Div. July 13, 2011).

Section 1983 Actions

Lease of Property

Appellate Division affirms in part and reverses in part jury award of $1,000,000 plus interest — $900,000 plus interest on its claim that defendant school district breached a warranty clause in a lease agreement, and $100,000 plus interest on its claim of legal malpractice by defendant law firm. The total award was equivalent to plaintiff's initial non-refundable deposit on a contract to purchase a building in downtown Newark plus interest paid on the loan taken to secure it. Plaintiff alleged it lost that money because 1) the school district breached its warranty of compliance with the laws and procedures governing its authority to lease the building once plaintiff acquired it, and 2) the law firm provided a legal opinion letter stating that the school district had met those obligations. The judgment against the district was vacated in its entirety because plaintiff did not prevail on its claim of breach. 570 Escuela Partners, L.L.C. v. State-Operated Sch. Dist. of Newark, No. A-6329-08T3, A-6372-08T3, 2011 N.J. Super. Unpub. LEXIS 2321(App. Div. August 30, 2011).

Negligence

Appellate Division reversed trial court's granting of defendant's motion for summary judgment. Based on facts of defendant's employees regarding the school's sprinkler system, plaintiff could establish a prima facie case of negligence that required submission to the jury. As a matter of law, defendant was not entitled to summary judgment.

New Jersey Sch. Bds. Ass'n Ins. Group v. East Coast Fire Prot., No. A-1414-10T3, 2011 N.J. Super. Unpub. LEXIS 2163 (App. Div. August 10, 2011).

Appellate Division affirms summary judgment order to defendant EIA regarding negligence claim bur reverses summary judgment order to defendant NJSDA dismissing the indemnification claim. The indemnification claim was found in the contract between NJSDA and EIA and was assignable as a matter of law. The appeal arose from a school construction project in Harrison, Hudson County, funded by defendant New Jersey Schools Construction Corporation, n/k/a New Jersey Schools Development Authority (NJSDA). Horizon Group of New Eng., Inc. v. New Jersey Sch. Constr. Corp., No. A-5934-09T1, 2011 N.J. Super. Unpub. LEXIS 2271 (App. Div. August 24, 2011).

New Jersey Charitable Immunity Act

Appellate Division reversed trial court denial of summary judgment in favor of parochial high school, diocese and track coach in matter of personal injuries of student-athlete resulting from an auto accident. Auto accident occurred while being driven to a school-sponsored track meet by fellow student-athlete. The immunity granted under §2A:53A-7(a) to an associated charitable entity, such as a school or diocese, applied to these individuals and did not affect the rulings regarding the driver and the car owners, his parents. Hehre v. DeMarco, 421 N.J. Super. 501; 24 A.3d 836 (App. Div. 2011)(August 18).

Non-renewal

Appellate Division affirms Commissioner's holding that board's decision to non-renew teacher was not arbitrary, capricious or otherwise unlawful. Teacher failed to prove there were any documents missing from his personnel file, or that the file was manipulated or "papered" with false or unnecessary documents so as to prevent an adequate assessment of his performance as a teacher and drama director. Eisenberg v. Bd. of Educ. of Fort Lee, No. A-3810-09T2, 2011 N.J. Super. Unpub. LEXIS 189 (App. Div. July 15, 2011).

Pensions

Appellate Division determined that Board of Trustees of PERS erred when it determined that public employee's deferred retirement benefits were forfeited due to employee's conviction of two counts of assault by auto, a third-degree crime. Where employee's termination was for reasons not related to her work, the employee was entitled to her vested deferred retirement allowance. Matter reversed and remanded for consideration of employee's entitlement to retirement benefits. In re Hess, No.. A-2408-09T1, 2011 N.J. Super. LEXIS 171 (App. Div. August 30, 2011).

Appellate Division reverses determination of PERS Board of Trustees that employee's retirement was not bona fide as he did not observe the required 30-day break in service before beginning a PERS-covered part-time teaching position. Trustees required repayment of all pension payments made for the 16 month period in question, $32,479.95 and a reduction in life insurance from $ 12,875 to $1,000. Appellate Division found matter to be one not of manipulation of the system, but a misunderstanding of the applicable regulations and required restoration of salary earned in part-time position, $8,775 , restoring him to full pension status and a recalculation of life insurance. Chiappini v. Board of Trs., No.. A-3983-09T2, 2011 N.J. Super. Unpub. LEXIS 2062 (App. Div. July 29, 2011).

Appellate Division affirms determination of Board of Trustees of TPAF denying employee's application for accidental disability retirement benefits. Employee did not experience a traumatic event and was not permanently and totally disabled. Determination was supported by the record as throughout the several years that this matter was pending administratively, appellant continued to regularly work three days a week as a college teacher. Janetta v. Teachers' Pension & Annuity Fund, No. A-5653-08T2, 2011 N.J. Super. Unpub. LEXIS 2073 (App. Div. August 1, 2011).

Appellate Division reverses determination of Board of Trustees of the TPAF that members were not entitled to pension credit for compensation they received for serving as content specialists and program coordinators. The stipend at issue here met both requirements of N.J.A.C. 17:3-4.1(j). The stipend was paid through regular payroll checks and the duties are "integral to the effective functioning of the school curriculum."
East Windsor Reg'l Sch. Dist. v. Board of Trs., No. A-3655-9T4, 2011 N.J. Super. Unpub. LEXIS 2135 (App. Div. August 8, 2011).

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New Jersey Superior Court, Law/Chancery Division

There are no education-related decisions posted for July/August at this time.

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Commissioner of Education

Certificates—Suspension/Revocation
Respondent violated N.J.S.A. 18A:26-10 when she informed board that she would not report for duty, and refused to teach for sixty days or until such time as a replacement could be secured. Commissioner imposed one year suspension of certificates. I/M/O Certificates of Sierpowski, 2011 Commr July 14

Time within which petitioner could have applied for reconsideration of the 2007 revocation has expired, and that petitioner may not be recertified unless he satisfies the current requirements for a teacher of students with disabilities endorsement. Petition was dismissed. Staton, Commr, 2011 Aug. 31

Discipline-Students
The Commissioner determined that Regulation 6145 as revised does comply with the requirements of N.J.A.C.6A:16-7.1 and N.J.A.C. 6A:16-7.6, finding, *inter alia*, that the key inquiry relating to the suspension from extracurricular activities based on off-school-grounds conduct is not whether the conduct was unlawful or whether the student was arrested, but rather whether the suspension is reasonably necessary to protect the well-being of the student, other students or the school staff, and whether the conduct interferes with the requirements of appropriate discipline in the operation of a school. G.D.M. and T.D.M., Commr 2011 Aug 22.

Employment Disqualification
N.J.S.A. 18A:6-7.1 is clear in its requirement that a school cannot employ a staff member if that individual has a disqualifying criminal history record; petitioner's criminal history record check revealed at least nine convictions for crimes which

are permanently disqualifying for employment in schools; the statute applies prospectively, and contains no waiver or appeal process to determine whether an individual is rehabilitated. Perry, 2011 Commr. Aug 17.

Finance—State Monitor
State –appointed monitor has the power to override board's rejection of a proposed settlement. State monitors have the authority – pursuant to *N.J.S.A.* 18A:7A-55(b)(5) – to override a vote of the board of education in order to achieve fiscal stability. Pleasantville, 2011 Commr July 13

Procedure
Difficulties in contacting respondent in tenure dismissal proceeding do not warrant default judgment against respondent. ALJ and parties to establish protocol for communication; the OAL and petitioner shall use only that contact information to communicate with respondent, and respondent will not be excused if she fails to reply to notices, pleadings and communications sent to the phone numbers and addresses that she provides. Gillespie, 2011 Commr Aug 3.

Reduction In Force
Tenured Secretaries who were riffed not entitled to bump into positions of Accounts Payable Assistant or Payroll/Benefits Assistant. Petitioners' tenure rights extend only to secretarial positions. Such placement would constitute a promotion with responsibilities and duties that were not attendant in their secretarial positions; and it is well settled that tenured school employees asserting priority over non-tenured employees must be fully qualified for the positions sought. Petition Dismissed. Harrington and Hiller, 2011 Commr July 7

Resignation
Petition dismissed where employee who resigned has lost standing to appeal rescission of a previously granted discretionary extension of maternity/child care leave. Petitioner's resignation was not made under duress, but rather was a reasoned decision made in order to spend more time with her child and, therefore, the resignation was binding; petitioner relinquished any rights she had as a teaching staff member upon resignation, thereby rendering the instant proceedings moot; the petitioner did not have a vested right to the extended maternity leave once it was granted, as the board retained the right to reconsider this exercise of discretionary power; and petitioner has not demonstrated that the Board's discretionary exercise of power was arbitrary, capricious or unreasonable. DeKenipp 2011 Commr July 15

School Ethics
SEC determined that school board member violated N.J.S.A. 18A:12-24(c) when he voted to approve the contract of the School Business Administrator to whom his spouse, a secretary in the school district, reported. A board member whose spouse works in the school district may not participate in discussions or vote on employment issues concerning the employee's supervisors. SEC recommended the penalty of reprimand. Commissioner agreed. Minniti, Commissioner 2010: July 12

Special Education-- Private Schools for the Handicapped
Private School for the Handicapped(PSH) is granted a tuition increase of 17.39% for 2008-2009. The clear intent of N.J.S.A. 18A:46-21 is that the tuition charged by PSHs be fair and related to the educational services actually provided by the PSH, and regulations were promulgated by the Department to implement this statutory intent. N.J.A.C. 6A:23A-18.2(a)(2), requires PSHs to timely notify

sending districts when proposed tuition increases will exceed 10%. N.J.A.C. 6A:23A-18.2(a)(2) does not expressly require formal approval of a PSHs' financial report prior to proposing a rate increase, and concluded that Brookfield substantially complied with the regulatory requirements. Accordingly, summary decision in favor of petitioner ordered. Brookfield Schools, 2011 Commr July 28.

Petitioners challenged the Department's determination to restrict its 2008-2009 tuition rate to a 10% increase over its tentative per diem rate. Each school had established a tentative per diem tuition rate at the beginning of the 2008-2009 school year, but final certified tuition rates that exceeded their tentative rates by more than 10 percent. The Department contends that its action in restricting the tuition rate was warranted by the failure of these private schools to timely comply with N.J.A.C. 6A:23A- 18.2(a)(2), which requires PSHs to notify sending districts in a timely manner when proposed tuition increases will exceed 10%. The petitioners contend that the Department has imposed requirements that are not clearly expressed in the regulatory language, and that they have complied with the letter and spirit of the regulation. The Department has penalized the petitioning schools for violating what it perceives to be a rule of general application, and if it requires that these schools notify sending districts when year-to-date figures exceed 10% of the tentative rate, rather than only when they intend to actually "propose" a tuition increase, it needed to say so in clear and unambiguous language. Petitioners' respective requests for tuition increases of between 11.61 and 29.43% for the school year were granted. Celebrate the Children, Commr 2011 Aug 29

Student Placement

Petitioner sought a determination that child was not appropriately identified as an eighth grade student for placement as a freshman into the respondents' Advanced Placement Academy. Boards of education are granted discretionary authority under Title 18A of the New Jersey Statutes to adopt policies and rules for the management of public schools; appropriate deference must be given to professionals in a school district when assessing the appropriate placement of a student; Student. failed to meet board criteria, and was therefore not admitted to the Academy; petitioner has not proven that the Board acted in an arbitrary, capricious or unreasonable manner in determining that student was not qualified for placement in the Academy; and the Board did not violate N.J.A.C. 6A:8-3.1, as the District does have a gifted and talented program in place which is separate and apart from the optional Academy program. D.R., 2011 Commr July 28

Boards of education are granted discretionary authority under N.J.S.A.18A:4-24 to adopt policies and rules for grade promotion; appropriate deference must be given to professionals in a school district when assessing the appropriate placement of a student;
the Commissioner will not substitute his judgment for that of the board of education unless the board's action is shown to be arbitrary, without rational basis or induced by improper motives; in the instant matter, class placement was based on the advice of experienced education professionals who were motivated only by genuine concern for the child's happiness and educational growth; and, accordingly, petitioner has not met his burden of proving arbitrary, capricious or unreasonable Board action. Petition dismissed. A.T., Commr 2011 Aug 17

Student Residency

Petitioner filed a pro se residency appeal on behalf of student contending that family was homeless. Executive County Superintendent determined that the family was homeless and the district of residence pursuant to N.J.S.A. 18A:38-1(f) and N.J.S.A. 18A:7B-12.1(c). Following ECS determination, board withdrew counterclaim for tuition.
Petition was dismissed with prejudice following petitioner's failure to attend

phone conference. V.W. 2011 Commr July 14

Complaint dismissed with prejudice where respondent filed a motion to dismiss in lieu of an answer, asserting that the appeal was not timely filed, that petitioner lacks standing as she does not have primary custody of the children, and additionally does not reside in the district. Additionally, plaintiff failed to appear at hearing and gave no explanation for nonappearance. F.O., 2011 Commr, July 28

Petitioner filed a pro se residency appeal on behalf of her minor child, contending that the family did in fact live in district. Petitioner received appropriate
notice of the hearing, but failed to appear and provided no explanation for nonappearance. Commissioner ordered student disenrolled from respondent's school district and dismissed the petition. R.S. Commr 2011 Aug 31.

Tenure Acquisition
Petitioner challenged RIF as violation of tenure; threshold issue in this case is whether the petitioner earned tenure as a teaching staff member in accordance with N.J.S.A. 18A:28-5; to earn tenure, an employee must work for at least three consecutive years and hold a "proper certificate in full force and effect"; petitioner worked for more than three years as a SAC, but held only a provisional certificate, which is not a "proper certificate" for the position; petitioner's failure to earn a standard certificate as a Student Assistance Coordinator is fatal to his tenure claims; accordingly, the petitioner was not employed under tenure at the time of his reduction in force; the Commissioner remanded the matter for factual findings concerning whether or not petitioner satisfied the conditions of provisional certification and the requirements for standard certification. The Commissioner found that although prior case law, Anson v. Bridgeton Bd. of Ed., 1972 S.L.D. 638 – held that service under provisional certification might count toward tenure, such tenure was contingent upon the employee's satisfaction of the conditional requirements of that provisional certification. Ruiz, 2011 Commr Aug 17.

Tenure Dismissal
Special Education teacher in district dismissed following the board substantiating its charges of excessive tardiness and leaving early, using demeaning language with her students, leaving students unattended in the hallway, pushing one of her students, and disobeying a directive from the superintendent. True, 2011 Commr Aug 15

Tenured teacher dismissed for inefficiency where he showed poor teaching performance, including unsatisfactory pedagogical technique, inadequate classroom management, and failure to meet professional obligations such as, inter alia, timely submission of lesson plans, management books, and report cards. Board carried its burden of proving the tenure charges of inefficiency against respondent. Gilmer, 2011 Commr July 28

Following Appellate Division remand, Six month suspension without pay, served prospectively, is the appropriate penalty for charge of unbecoming conduct against respondent, principal of Daylight/Twilight High School, for failing to properly administer the attendance policy of the District. Tracy, 2011 Commr July 21

Teacher of Cosmetology at correctional institution dismissed for conduct unbecoming after having an improper and unauthorized relationship with an inmate. Commissioner disagrees with ALJ's penalty of one year suspension and imposes penalty of dismissal. I/M/O Coluccio 2011 Commr July 5.

Termination

Complaint dismissed where Commissioner determined that petitioner could not earn tenure as a bus driver, and as a part-time utility worker with fixed term appointments, she qualified neither for tenure under N.J.S.A. 18A:17-3 nor the tenure benefit provided in the applicable collective bargaining agreement. Cross, 2011 Commr July 28.

Custodian under a series of one-year contracts is not entitled to a *Donaldson* hearing upon termination. Such a hearing only applies to non-renewal of employment. Wonsetler, 2011 Commr. Aug 17.

Unrecognized Titles
Board acted arbitrarily in creating the new position of Director of Pupil Personnel Services (PPS), which is not a recognized title in the regulations, was not approved by the County superintendent, and required a "Principal Certificate" – a certificate which does not exist in regulations; pursuant to N.J.A.C.6A:9-13.7, the Board should have required an Administrative Certificate with an appropriate endorsement for the new position, which includes in its duties district- wide oversight of the administration of special education; neither tenure nor seniority applies across certificates; and accordingly, the petitioner who was a Director of Guidance and Counseling was not entitled to hold the position of Director of PPS as it currently exists. Giardina, 2011 Commr Aug 19

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School Ethics Commission

No violation
SEC dismissed complaint that board member violated N.J.S.A. 18A:12-24.1 (c), (e) and (g) when during the Executive Session of a regularly scheduled Board meeting, he was discovered taping the proceedings of the session without asking permission to do so and he did not inform the Board of his intentions prior to taking action. SEC determines that respondent's action in taping a Board session does not implicate his duties and functions as a Board member sufficiently to characterize his conduct as "board action" within the intendment of N.J.S.A. 18A:12-24.1(c). Further, if such action constituted private action, or action beyond the scope of the respondent's duties, the SEC finds that there are no facts set forth in the complaint that would support a conclusion that this action was of such a nature that it had the potential to compromise the Board so as to violate N.J.S.A. 18A:12-24.1(e). No breach of confidentiality was shown. Gidwani, SEC 2011: September 27

SEC determined that board member who wrote letter to the editor in support of three candidates who were running for the board did not violate the School Ethics Act. No facts were alleged that, if true, would establish that the letter to the editor had the potential to compromise the board. N.J.S.A. 18A:12-24.1(e). Writing the letter in support of the incumbent candidates was fairly within the board member's role as a private citizen. No evidence was presented that the board member surrendered her independent judgment to a special interest or partisan group or used the schools for personal gain or the gain of friends. N.J.S.A. 18A:12-24.1 (f). Board member's employment as a senior clerk typist in the Elmwood Park Tax Department did not violate the Act. Sproviero, SEC 2010: August 31

SEC determined that no probable cause existed to credit the allegations that the respondents violated N.J.S.A. 18A:12-24(b), (c) and (f) of the School Ethics Act and, therefore, dismissed the complaint. Respondents' votes on the payment of

legal fees on the dates in question were not a means of using or attempting to use their positions for something to which they were not entitled; no probable cause to credit the allegation that the respondents violated N.J.S.A. 18A:12-24(b). U*nder the unique factual circumstances of this case*, a five member board with three persons potentially in conflict, which would trigger the doctrine of necessity, the Commission finds no probable cause to credit the allegation that the respondents violated N.J.S.A. 18A:12-24(c) by voting on the items in question. Respondents did not use, or allowed to be used, their respective public offices for the purpose of securing financial gain for themselves, any member of their immediate families or for any business organization with which they are associated; no probable cause to credit the allegation that the respondents violated N.J.S.A. 18A:12-24(f). Granata, Granitir, Calcado, SEC 2011:July 26

SEC determined that the complainant failed to factually establish that the respondent violated *N.J.S.A.* 18A:12-24.1(a), (d), (e) or (j) of the Code of Ethics for School Board Members and dismissed the complaint. Board member was alleged to violate the Code of ethics when she entered a classroom, removed a student to the hallway and confronted the student about a bullying situation between the student and her child. Complainant alleged violation of board policy over which SEC had no jurisdiction. No direct order was ever given to school personnel. No personal promises were made to anyone. C.B., SEC 2011: July 26

SEC determined that the complainant failed to factually establish that the respondent violated N.J.S.A. 18A:12-24.1(e) and (f) of the Code of Ethics for School Board Members and dismissed the complaint. Board member wrote letters to two newspapers regarding Governor Christie's capping of superintendent salaries in which she did not identify herself as a board member. While such action was not consistent with Advisory Opinion A03-07, in Rukenstein, C13-08, July 22, 2008, the SEC clarified that A03-07 only applied to matters that have been before the Board for consideration. Hartman, SEC 2011: July 26

SEC dismissed complaint that alleged that the respondents violated N.J.S.A. 18A:12-24.1(b) and (c) of the Code of Ethics for School Board Members when they filed a complaint against two fellow board members. Allegations were not factually established; the SEC agreed that the essence of the complaint was that the Code of Ethics was violated because respondents filed complaints against plaintiff. Riley and Parks, SEC 2011: July 26

SEC determined that the complainant failed to factually establish that the respondent violated N.J.S.A. 18A:12-24.1(e), (g), (h) and (i) of the Code of Ethics for School Board Members with respect to statements made in a closed session board meeting and dismissed the complaint. Board member stated that she had obtained QSAC scores for the District and she wanted the Director of Curriculum to be fired because of the District's failing score. No confidential information was disclosed to the public, no inaccurate information was provided, no personal promises or private action was taken that could compromise the board. Shelen, SEC 2011: August 23

SEC dismissed complaint that superintendent violated N.J.S.A. 18A:12-24(b) and (e), as well as N.J.S.A. 18A:12-24.1(f) of the Code of Ethics for School Board Members when he attended a fundraiser in support of incumbent candidates for the Board of Education. Facts were insufficient to support a finding that the respondent used, or attempted to use, his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others in violation of N.J.S.A. 18A:12-24(b). No showing was made that superintendent accepted anything of value based upon the understanding that they would influence him in the discharge of his duties in violation of N.J.S.A. 18A:12-24(c). Superintendents are not subject to the Code of Ethics for School Board Members. Bandlow, SEC 2011: August 23

SEC dismissed complaint that assistant superintendent violated N.J.S.A. 18A:12-24(b) and (e), as well as N.J.S.A. 18A:12-24.1(f) of the Code of Ethics for School Board Members when he attended a fundraiser in support of incumbent candidates for the Board of Education. Facts were insufficient to support a finding that the respondent used, or attempted to use, his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others in violation of N.J.S.A. 18A:12-24(b). No showing was made that assistant superintendent accepted anything of value based upon the understanding that they would influence him in the discharge of his duties in violation of N.J.S.A. 18A:12-24(c). Assistant superintendents are not subject to the Code of Ethics for School Board Members. Engravalle, SEC 2011: August 23

SEC dismissed complaint that school business administrator violated N.J.S.A. 18A:12-24(b) and (e), as well as N.J.S.A. 18A:12-24.1(f) of the Code of Ethics for School Board Members when he attended a fundraiser in support of incumbent candidates for the Board of Education. Facts were insufficient to support a finding that the respondent used, or attempted to use, his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others in violation of N.J.S.A. 18A:12-24(b). No showing was made that school business administrator accepted anything of value based upon the understanding that they would influence him in the discharge of his duties in violation of N.J.S.A. 18A:12-24(c). Assistant superintendents are not subject to the Code of Ethics for School Board Members. Ballato, SEC 2011: August 23

SEC dismissed complaint that board member violated N.J.S.A. 18A:12-24(b) and (e), as well as N.J.S.A. 18A:12-24.1(f) of the Code of Ethics for School Board Members when he attended a fundraiser in support of incumbent candidates for the Board of Education. Facts were insufficient to support a finding that the respondent used, or attempted to use, his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others in violation of N.J.S.A. 18A:12-24(b). No showing was made that board member accepted anything of value based upon the understanding that they would influence him in the discharge of his duties in violation of N.J.S.A. 18A:12-24(c) No facts to indicate that board member took action on behalf of, or at the request of, a special interest group or partisan political group; nor are there any facts to indicate that the board member used the schools in order to acquire some benefit for himself a member of his immediate family or a friend. Luppino, SEC 2011: August 23

SEC dismissed complaint that board member violated N.J.S.A. 18A:12-24(b) and (e), as well as N.J.S.A. 18A:12-24.1(f) of the Code of Ethics for School Board Members when he attended a fundraiser in support of incumbent candidates for the Board of Education. Facts were insufficient to support a finding that the respondent used, or attempted to use, his official position to secure unwarranted privileges, advantages or employment for himself, members of his immediate family or others in violation of N.J.S.A. 18A:12-24(b). No showing was made that board member accepted anything of value based upon the understanding that they would influence him in the discharge of his duties in violation of N.J.S.A. 18A:12-24(c) No facts to indicate that board member took action on behalf of, or at the request of, a special interest group or partisan political group; nor are there any facts to indicate that the board member used the schools in order to acquire some benefit for himself a member of his immediate family or a friend. Suh, SEC 2011: August 23

SEC dismissed complaint that board member violated N.J.S.A. 18A:12-24(b) and (e), as well as N.J.S.A. 18A:12-24.1(f) of the Code of Ethics for School Board Members when he attended a fundraiser in support of incumbent candidates for the Board of Education. Facts were insufficient to support a finding that the respondent used, or attempted to use, his official position to secure unwarranted

privileges, advantages or employment for himself, members of his immediate family or others in violation of N.J.S.A. 18A:12-24(b). No showing was made that board member accepted anything of value based upon the understanding that they would influence him in the discharge of his duties in violation of N.J.S.A. 18A:12-24(c) No facts to indicate that board member took action on behalf of, or at the request of, a special interest group or partisan political group; nor are there any facts to indicate that the board member used the schools in order to acquire some benefit for himself a member of his immediate family or a friend. Stux-Ramirez, SEC 2011: August 23

Violation found
In consent order approved by the ALJ and SEC board member acknowledged: (1) that she engaged in communication both publicly and by email that was improper for a Board member; (2) that she made improper comments at Board meetings on June 8, 2010 and August 23, 2010; and (3) that she engaged in conduct and communication regarding the hiring of personnel that was improper; said conduct violating N.J.S.A. 18A:12-24.1(b), (d), (e), (f), (g) and (i) of the Code of Ethics for School Board Members. The parties agreed that the board member would be subject to a penalty of reprimand. Bembry, SEC 2011: August 23

SEC finds that board member violated N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members and dismisses the allegations that the board member violated N.J.S.A. 18A:12-24.1(a), (c), (d), (f), (g), (i) and (j). SEC recommends penalty of reprimand. Board member called the District's Business Administrator and told him to change the bus pass of the complainant's child to another residence without the complainant's consent. Board member took private action that was outside the scope of her duties as a board member. No factual evidence of violation of the other sections was shown. Zirkle, SEC 2011: September 27

SEC finds that board member acted in his official capacity in a matter where he had an indirect financial involvement which a reasonable person could perceive to impair his objectivity or independence of judgment so as to violate N.J.S.A. 18A:12-24(c) when he: (1) participated in Board discussion regarding the possible return of the Interim Superintendent; (2) made a motion at the February 23, 2011 meeting to approve the appointment of the Interim Superintendent; and (3) voted on the appointment at the February 23, 2011 meeting. The Commission recommends a penalty of reprimand. Pellechia, SEC 2011: September 27

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State Board of Examiners

SBE ordered revocation of Teacher of Social Studies and Teacher of Psychology Certificates of Eligibility With Advanced Standing and Teacher of Social Studies and Teacher of Psychology for teacher who pled guilty to third degree theft and was court-ordered to forfeit her teaching certificates. In the Matter of the Certificates of: Karen B. Binder, Exam 2010: July 22

SBE ordered revocation of Teacher of English, Principal and Supervisor Certificates of Eligibility and his Teacher of English and Supervisor certificate of teacher who had been dismissed from his tenured position for unbecoming conduct, including corporal punishment of students. In the Matter of the Certificates of R.A., Exam 2011: July 28

SBE ordered revocation of Teacher of Art, Principal and Supervisor certificates

of teacher who pled guilty to Aggravated Sexual Assault-Victim Under 13, and was sentenced to seven years in prison. In the Matter of the Certificates of Lawrence J. Butler, Jr., Exam 2011: July 28

SBE ordered revocation of School Business Administrator Certificate of Eligibility and School Business Administrator certificate of school business administrator who resigned from his position after it was alleged that he viewed sexually oriented pictures of young males on his district computer. SBE accepted settlement proposal from school business administrator in which he would relinquish his certificates with the force and effect of a revocation. In the Matter of the Certificates of Alan Chadrjian, Exam 2011: July 28

SBE ordered revocation of School Business Administrator Certificate of Eligibility and School Business Administrator certificate of school business administrator who issued Request for Disbursement Vouchers for two school construction projects and certified them to be accurate and in compliance with Department of Education standards, even though the expenditures exceeded the amounts approved by voters. SBE accepted settlement proposal from school business administrator in which he would relinquish his certificates with the force and effect of a revocation. In the Matter of the Certificates of Morris Gartenberg, Exam 2011: July 28

SBE ordered revocation of Teacher of Social Studies Certificate of Eligibility With Advanced Standing and her Teacher of Social Studies certificate of teacher who pled guilty to Theft By Deception, was sentenced to 18 months' probation and ordered to relinquish her teaching position. Pursuant to *N.J.S.A*. 2C:51-2d, teacher was also permanently disqualified from ever holding any office, position of honor, trust or profit in the State of New Jersey or any of its administrative or political subdivisions. In the Matter of the Certificates of Megan Laboy, Exam 2011: July 28

SBE ordered revocation Teacher of Business: Finance/Economics/Law Certificate of Eligibility of person who was convicted of Lewdness, disqualifying him from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* In the Matter of the Certificates of Stephen Legler, Exam 2011: July 28

SBE ordered revocation of Teacher of Elementary School Certificate of Eligibility and Teacher of Elementary School certificate of teacher who had been dismissed from his tenured position for unbecoming conduct, including verbal altercation with female special education student, calling her N "untamed beast", insubordination toward his supervisor, leaving class unattended, calling another student "stupid and retarded", refusing to speak with parent in a conference, physical altercation with another faculty member. In the Matter of the Certificates of Brian Taylor, Exam 2011: July 28

SBE ordered revocation of Teacher of Music Certificate of Eligibility With Advanced Standing and Teacher of Music certificate of teacher who, after being charged with Endangering the Welfare of Children, entered a plea agreement and was required to forfeit his teaching certificates. In the Matter of the Certificates of Russell Tybus, Exam SBE 2011: July 28

SBE ordered revocation of Teacher of Elementary School in Grades K-5 Certificate of Eligibility and Teacher of Students With Disabilities Certificate of Eligibility of person who pled guilty to Criminal Sexual Contact and was court-ordered to forfeit her teaching certificates. In the Matter of the Certificates of Monique Ucelli, Exam, 2011: July 28

SBE ordered revocation of Principal Certificate of Eligibility and Teacher of English and Supervisor certificates of teacher who pled guilty to two counts of Fraudulent Use of Credit Card, was sentenced to three years' probation, ordered to relinquish her teaching position and barred her from future public employment. In the Matter of the Certificates of Jill Zell, Exam 2011: July 28

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New Jersey Council on Local Mandates

State Police failure to increase coverage when municipality reduced the hours of part-time local police coverage did not constitute an unfunded mandate. In re Complaint filed by the Township of Blairstown, CLM 2011: July 8

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Election Law Enforcement Commission

There are no education-related decisions posted for July/August at this time.

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New Jersey Division on Civil Rights

No Director's Orders or Findings issued during July/August 2011.

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New Jersey Government Records Council

Custodian lawfully denied access to the discussions in the requested e-mail chain between and among the Board Attorney, previous School Leader and Board members pursuant to N.J.S.A. 47:1A-6 because the e-mail chain discussions are exempt from disclosure as attorney-client privileged material pursuant to N.J.S.A. 47:1A-1.1. However, the Custodian must disclose the following information contained in the e-mail chain: (1)To: (2) cc: (3) From: (4) Subject: (5) Closing salutations and electronic signature information. Miguel Mendes v. Freedom Academy Charter School, No. 2009-184 (GRC August 24, 2010)

Complainant requested copies of the 2009-2010 invoices for Individuals with Disabilities Education Act ("IDEA") and American Recovery and Reinvestment Act ("ARRA"), support services out of district and other Local Education Agency ("LEA") tuitions. Because the custodian failed to provide all of the requested records by the extended date, or ask for an additional extension, the failure constituted a "deemed denial" of the OPRA request. Because of the volume of materials requested and the fact that the approximately 500 invoices were provided within two weeks after the extended date, no willful violation of OPRA was found and no attorney fees were awarded. Jesse Wolosky v. Sparta Board of Education, No. 2010-189 (GRC July 26, 2011)

Complainant requested copies of Detail profit and loss statement as of June 30, 2010, Detail balance sheet as of June 30, 2010, Schedule of capital equipment as of June 30, 2010, List of all computers, printers, projectors, televisions, DVD players, VHS players, cameras and copiers as of June 30, 2010. Because custodian failed to provide all of the requested records within seven business days, or ask for an extension, the failure constituted a "deemed denial" of the OPRA request. Additionally custodian mistakenly advised, due to an insufficient search, that no records responsive to the fourth request existed. Materials were

eventually provided. No willful violation of OPRA was found. Luisa D. Erich-Carr v. Plumstead Township School District, No. 2010-168 (GRC July 26, 2011)

Complainant sought copy of the Juris Doctor degree for a Labor Analyst with the New Jersey Civil Service Commission; a mandatory requirement and educational qualification for his employment. Pursuant to the GRC's holding in Bonanno v. Garfield Board of Education, GRC Complaint No. 2006-62, the Juris Doctor degree is a government record pursuant to N.J.S.A. 47:1A-10 because it exhibits the employee's educational qualifications to hold the position of Labor Analyst. The Custodian unlawfully denied access. No willful or knowing violation of OPRA was found. Edward J. Guz v. New Jersey Civil Service Commission, No. 2010-33 (GRO July 26, 2011)

Complainant alleges that the board of education's official OPRA request form is not compliant with OPRA as it contains boxes that are too small to comfortably write in the name of the records sought. Such an allegation does not rise to the level of a denial of access to a government record pursuant to Martin O'Shea v. Township of West Milford (Passaic), GRC Complaint No. 2007-237. No denial of access at issue. Jesse Wolosky v. Sparta Board of Education, No. 2010-224 (GRC June 28, 2011)

Complainant alleges that the board of education is in violation of the Open Public Meetings Act ("OPMA") by failing to make public meeting minutes available after two (2) weeks. The Complainant also states that the board of education has violated OPMA by not posting proper notification of meetings on the public announcement board at the board of education building. However, Complainant did not file an OPRA request. No denial of access at issue. Baruch B. Blaustein v. Lakewood Board of Education, No. 2011-210 (GRC June 28, 2011)

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New Legislation

P.L. 2011, c.108 Authorizes credit unions to serve as public depositories of public funds; requires credit unions to provide certain funds for financial literacy education. Approved 8/18/2011

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New Regulations/Executive Orders

N.J.A.C. 6A:2-2.2, 2.4 and 2.5, 43 N.J.R. 2170(a), adopted July 22, 2011—Concerns reorganization of Department of Education.
N.J.A.C. 6A:9-12.4, 43 N.J.R. 2176(a), effective August 15, 2011—Permits non-certified persons to apply to be chief school administrators for state-operated districts or those designated as districts in need of improvement

N.J.A.C. 17:3-2.7, 43 N.J.R. 1899(a), effective August 1, 2011-- Enrollment following deferred retirement in TPAF.

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United States Supreme Court

First Amendment

Supreme Court vacated and remanded Third Circuit Court of Appeals award of compensatory damages to police chief who alleged that borough council directives and denial of overtime were in retaliation for protected First Amendment right to petition the government for a redress of grievances. A government employer's allegedly retaliatory actions against an employee do not give rise to liability under the Petition Clause unless the employee's petition relates to a matter of public concern. The Third Circuit's conclusion that the public concern test does not limit public employees' Petition Clause claims was incorrect. The framework used to govern public employees' Speech Clause claims, when applied to the Petition Clause, protects both the government's interests and the employee's First Amendment right. If a public employee petitions as an employee on a matter of purely private concern, his First Amendment interest must give way, as it does in speech cases. If he petitions as a citizen on a matter of public concern, his &_butType=4&_butStat=0&_butNum=75&_butInline=1&_butinfo=U.S. CONST. AMEND. 1&_fmtstr=FULL&docnum=8&_startdoc=1&wchp=dGLbVzt-zSkAW&_md5=">First Amendment interest must be balanced against the government's countervailing interest in the effective and efficient management of its internal affairs. Borough of Duryea v. Guarnieri, 131 S. Ct. 2488 (2011)(June 20, 2011)

Fifth Amendment

The Supreme Court reversed the judgment of the North Carolina Supreme Court and remanded. 13-year-old student confessed during questioning by police at school, without receiving Miranda warnings prior to the commencement of questioning. Remand was warranted because, the Supreme Court determined, a child's age properly informs the *Miranda* custody analysis. Whether a suspect is "in custody" for *Miranda* purposes is an objective determination involving two discrete inquires: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave." A reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. Courts can account for that reality without doing any damage to the objective nature of the custody analysis.
J. D. B. v. North Carolina, 131 S. Ct. 2394 (2011)(June 16, 2011)

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3rd Circuit Court of Appeals

Discrimination - Employees

Court of Appeals affirms District Court's grant of summary judgment to school district on plaintiff's age discrimination and retaliation claims. Teacher did not

establish a prima facie case of age discrimination. Principal's negative statements about veteran and returning teachers did not evidence discrimination. Teacher failed to demonstrate that school district had a practice of retaliating against older teachers or that school district's stated reasons for firing her were pretextual. Phillis v. Harrisburg Sch. Dist., No. 10-2127, 2011 U.S. App. LEXIS 11821(3d Cir. M.D. Pa., June 10, 2011) (not precedential)

Court of Appeals affirms District Court's summary judgment dismissal of African-American cafeteria, breakfast and bus aide's claim of racial discrimination under Title VII. Aide's position was eliminated in a reduction in force. While aide had established a prima facie case of racial discrimination, she was unable to demonstrate that the board's proffered legitimate, nondiscriminatory reasons for reducing her hours and transferring her were pretextual. Mentor v. Hillside Bd. of Educ., No. 09-363, 2011 U.S. App. LEXIS 10524 (3d Cir. N.J. May 23, 2011)(not precedential)

Court of Appeals affirmed District Court's summary judgment dismissal of employee's Title VII claim of racial discrimination regarding his termination. Employee's evidence could not overcome the school district's race neutral reason for his termination, his continued violation of the school district's substance abuse policy. Employee's First Amendment retaliation claim failed as well, given the reason for his termination, violation of the school district's substance abuse policy. Young v. Sch. Dist. of Phila., No. 10-3536, 2011 U.S. App. LEXIS 9682 (3d Cir. Pa., May 11, 2011)(not precedential)

Section 1983 Claims

Court of Appeals affirms District Court dismissal of school board member's 42 U.S.C.S. § 1983 action. School board member alleged that her right to privacy was invaded when her comments regarding the credibility of testimony of her grand-niece were released to the press. No constitutionally protected Fourteenth Amendment right to privacy was found. She may not have intended widespread dissemination of the information, but it was voluntarily shared non-intimate information. Nor could it be characterized as the kind of information regarding fundamental and life altering decisions where courts have recognized a privacy right for independent personal decision-making. Malleus v. George, No. 10-3539, 2011 U.S. App. LEXIS 10724(3d Cir. May 26, 2011.) Motion granted by, amended by Malleus v. George, 2011 U.S. App. LEXIS 11457 (3d Cir. E.D. Pa., June 6, 2011)

Court of Appeals affirmed District Court's dismissal of parents' 42 U.S.C.S. 1983 claim against school district. Student was killed in an auto accident when he was riding as a passenger in the car of another student. Parents alleged that school district's lack of enforcement of closed campus policy serve as the catalyst of their child's death and that school district's actions placed the student in harm's way. Parents failed to demonstrate that the school district violated the 14th Amendment due process clause pursuant to a "state-created danger" theory. Grau v. New Kensington-Arnold Sch. Dist., No. 10-4166, 2011 U.S. App. LEXIS 10802 (3d Cir. W.D. Pa., May 26, 2011) (not precedential).

Special Education

Court of Appeals affirmed district court judgment which affirmed ALJ decision that an after-school program was necessary under 20 U.S.C.S. § 1412 of the IDEA to provide autistic child with a free appropriate public education. The ALJ found that home programming was needed to allow the child to benefit from his education. The ALJ did not apply an incorrect legal standard requiring generalization of skills. Appropriate deference was given to the ALJs factual findings. New Milford Bd. of Educ. v. C. R., No. 10-3189, 2011 U.S. App. LEXIS 12244 (3d Cir. N.J. June 14, 2011)(not precedential).

Student Discipline
After en banc rehearing, Court of Appeals affirms District Court's findings and grant of summary judgment in favor of student on Section 1983 First Amendment violation. District violated student's First Amendment freedom of speech rights when it disciplined student for creating fake My Space.com internet profile of high school principal using his grandmother's computer. No foreseeable and substantial disruption of the school environment found; Student's "cut and paste" use of district website did not constitute entering the school. Court grants summary judgment in favor of district on parents' substantive due process claim regarding nurture and care of student. Layshock v. Hermitage School District No. 07-4465, 2011 U.S. App. LEXIS 11994 (3d Cir. Pa. June 13, 2011)(precedential) See 2010 U.S. App. LEXIS 2384 (3d Cir. Pa. Feb 4, 2010) (precedential) (vacated by, and rehearing en banc granted by, 2010 U.S. App. LEXIS 7362 (3d Cir. Pa. Apr. 9, 2010)

After en banc rehearing, Court of Appeals reversed District Court's summary judgment to school district. Board violated student's First Amendment free speech rights by punishing her for creating, on her home computer, a MySpace.com Internet profile of her principal. Profile contained his photograph and profanity-laced statements insinuating that he was a sex addict and pedophile. Profile did not cause substantial disruption in the school. Access was limited to student's friends and was not taken seriously. J.S. v. Blue Mt. Sch. Dist., No. 08-4138, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 2011 U.S. App. LEXIS 11947, Decided June 13, 2011. See J.S. v. Blue Mountain School District et al. 2010 U.S. App. LEXIS 2388 (3d Cir. Feb. 4, 2010) (precedential). (vacated by, and rehearing en banc granted by, 2010 U.S. App. LEXIS 7342 (3d Cir. Pa. Apr. 9, 2010).

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New Jersey District Court

Civil Procedure
District Court dismisses plaintiff's action due to failure to appear for depositions by school district. Toorzani v. Elmwood Park Bd. of Educ., No. 09-4262, 2011 U.S. Dist. LEXIS 55043 (D.N.J. May 19, 2011)

Discrimination-Employees
District Court grants school district's summary judgment to dismiss for 13 counts of Spanish teacher's 15 count complaint, regarding her employment in the school district and, in some instances, her ongoing battle with breast cancer. The complaint alleged that the school district retaliated against her, failed to grant her reasonable requests for accommodation in light of her medical conditions, and that she was illegally discriminated against on the basis of her Hispanic ethnicity. Summary judgment was granted on all counts except Count 6, failure to accommodate, and Count 8, ethnic discrimination, the Court will exercising supplemental jurisdiction over these remaining state law claims. Diaz v. Lezanski, No. 9-223 (WJM), 2011 U.S. Dist. LEXIS 56009 (D.N.J. May 26, 2011). Reconsideration granted in part, denied by, modified in part, by Diaz v. Lezanski, 2011 U.S. Dist. LEXIS 92367 (D.N.J., Aug. 18, 2011)

District court granted school district's summary judgment motion and dismissed terminated school bus driver's allegations of employment discrimination on the basis of disability and gender, and illegal search and seizure regarding school district drug testing. Plaintiff's HIPAA claims were dismissed for lack of subject matter jurisdiction. Plaintiff was terminated following three at-fault accidents while driving a school bus, five late arrivals for work and failing a drug test. Hove v. Cleary, No. 10-1876 (GEB), 2011 U.S. Dist. LEXIS 61122, (D.N.J. June 6,

2011).

District Court dismissed female basketball official's claim that school district discriminated against her on the basis of gender in violation of Title IX. Title VII and Title IX claims against basketball officials association were similarly dismissed. Covington v. Int'l Ass'n of Approved Basketball Officials, No. 08-3639 (GEB), 2011 U.S. Dist. LEXIS 70131 (D.N.J. June 29, 2011).

Non-Renewal

District Court grants board's motion to dismiss non-renewed part-time teacher's detrimental reliance claim. Teacher had asserted claims against the board for detrimental reliance, gender discrimination, and age discrimination, based on non-renewal of her employment contract. Plaintiff's detrimental reliance claim was based exclusively on representations made by non-members of the Board and plaintiff failed to plead a viable theory of vicariously liability regarding those representations. Millar v. Pitman Bd. of Educ., No. 10-4104 (RBK/JS), 2011 U.S. Dist. LEXIS 63962 (D. N.J. June 13, 2011)

Section 1983

District Court granted school district's motion for summary judgment. New Jersey law does not create a property interest under the Due Process Clause for the lowest responsible bidder prior to the acceptance of the bid. New Jersey contracts law requires public contracts to be awarded to the lowest responsible bidder, is intended for the sole benefit of the public, and therefore, unsuccessful bidders cannot sue for damages arising from the rejection of their bids. As Plaintiff's bid was never accepted, Plaintiff failed to establish a cognizable § 1983 claim. Fariello Bus Serv., LLC v. Old Bridge Bd. of Educ., No. 09-4200 (FLW), 2011 U.S. Dist. LEXIS 65498 (D.N.J. June 17, 2011)

Special Education

District Court granted summary judgment, dismissing suit against school district, administrators and staff members by parents of autistic student for failure to exhaust administrative remedies. Suit claimed violations of the IDEA, U.S. Constitution and the Law Against Discrimination. Parents failed to demonstrate that New Jersey's administrative procedures could not address the IDEA issue. Court declined to exercise jurisdiction over the remaining state claims. MG v. Caldwell-West Caldwell Bd. of Educ., No. 09-1869 (KSH), 2011 U.S. Dist. LEXIS 70693 (D.N.J. June 30, 2011)

District Court granted summary judgment in favor of school district. Pre-school autistic student received FAPE in the least restrictive environment, as had been previously determined by the administrative law judge. After disagreeing with the child study team placement, parent had unilaterally placed student in a different school and sought due process. L.G. v. Fair Lawn Bd. of Educ., No. 2:09-cv-6456 (DMC) 2011 U.S. Dist. LEXIS 69232 (D.N.J. June 27, 2011).

District Court denied defendant's motion to dismiss attorney's fee-shifting claim and to punish Plaintiff for fraud on the court. Court declined to exercise supplemental jurisdiction over the NJLAD claim, mooting Defendant's Rule 12(c) motion. Finding that Plaintiff was the prevailing party before the OAL, the Court granted Plaintiff summary judgment on the fee-shifting claim. T.B. v. Mount Laurel Bd. of Educ., Civil No. 09-4780 (JBS/KMW), 2011 U.S. Dist. LEXIS 66682 (D.N.J. June 20, 2011)

District Court grants school district's summary judgment motion and denies parent's motion. The present dispute was rendered moot by the family's move from New Jersey to Georgia. While cases have held that compensatory education claims which seek redress for past harms are not rendered moot by a child's move out of a school district, on the facts of this case, the Court could not

grant the relief that plaintiff sought. As to attorney fees, plaintiff was not a prevailing party as there was no causal connection between the litigation and the relief sought. D.F. v. Collingswood Pub. Sc, No. 10-594 (JEI/JS), 2011 U.S. Dist. LEXIS 55275(D.N.J. May 23, 2011)

District Court grants plaintiff's motion for summary judgment and awards, pursuant to 20 U.S.C. § 1415(i)(3)(B) ,$16,152.50 in attorneys' fees and $613.99 in related costs to prevailing party parent in IDEA matter. D.I. v. Phillipsburg Bd. of Educ., No. 10-2602 (MLC), 2011 U.S. Dist. LEXIS 53884 (D.N.J. May 18, 2011)

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New Jersey Supreme Court

Certification Petition
Petition for certification denied. Malinconico v. State-Operated Sch. Dist. of Newark, 207 N.J. 227 (2011); 23 A.3d 934 (June 3).

School Funding
The Supreme Court granted Plaintiffs' motion in aid of litigants rights, based on the State's failure to fully fund the School Funding Reform Act of 2008 (SFRA). The Supreme Court held that the Appropriations Clause created no bar to judicial enforcement under the circumstances presented in the case. The funding to the Abbott districts in FY 2012 must be calculated and provided in accordance with the School Funding Reform Act of 2008. Relief is limited to the plaintiff class of children from Abbott districts for whom the Court has a historical finding of constitutional violation and for whom the Court has had specific remedial orders in place through *Abbott XX.* Abbott v. Burke, 206 N.J. 332 (2011); 20 A.3d 1018 (May 24).

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New Jersey Superior Court Appellate Division

Arbitration
Appellate Division affirms decision of the Public Employment Relations Commission (PERC) that required the Board to arbitrate a grievance concerning the elimination of summer work hours for four groups of employees who were members of the Association. Board's arguments regarding the three exceptions to the unit work rule rejected as board was determined to have not raised the issue before PERC. In re Flemington-Raritan Reg'l Bd. of Educ., A-1167-10T4, 2011 N.J. Super. Unpub. LEXIS 1671 (App. Div. June 27, 2011)

Appellate Division upholds Chancery Division order holding enforceable contract provision for invocation of arbitration clause, at sole option of the vendor, in the event of any dispute or controversy arising under the agreement. Lyndhurst Bd. of Educ. v. Network Billing Sys., LLC, A-3908-09T2, 2011 N.J. Super. Unpub. LEXIS 1533 (App. Div. June 15, 2011).

Appellate Division affirms two Chancery Division orders confirming an arbitrator's award in a school construction contract dispute in favor of the prime electrical contractor and dismissing the board's complaint to dismiss the award. Wash. Twp. Bd. of Educ. v. Sal Elec., Inc., A-3279-09T2, A-3280-09T2, 2011 N.J. Super. Unpub. LEXIS 1134 (App. Div. May 4, 2011.)

Certification
Appellate Division affirms Commissioner of Education decision suspending non-tenured charter school teacher's teaching certificate for one year, determining appellant wrongfully resigned from her charter school teaching position by giving less than the required 60 days notice. In re Teaching Certificate of Danielle Ponti, A-4951-09T3, 2011 N.J. Super. Unpub. LEXIS 1105 (App. Div. May 3, 2011).

Civil Service
Appellate Division affirmed trial court's granting of board of education's motion for partial summary judgment. While the school district had adopted civil service for employees, such as the food service worker in question, the requirements of N.J.S.A. 11A:6-3 regarding vacation leave for 10 month employees, was not intended to include school district employees, whose leave was determined pursuant to a collective bargaining agreement. Said statute applied to full-time state and political subdivision employees, not school district employees. Headen v. Jersey City Bd. of Educ. A-5947-09T1, 420 N.J. Super. 105 ; 18 A.3d 1072 (App. Div. May 12, 2011).

Public School Contracts Law
In a matter involving a defective transportation bid, Appellate Division rejected the Commissioner's decision that the Education Services Commission (ESC) could not demand the forfeiture of the bid bond, simply because the ESC did not tender a contract to the transportation company. The repudiation of the bids on 6 of the 8 routes constituted a refusal to perform. Actual tendering of a contract would have been a futile act. Commissioner decision reversed and remanded. Garden State Sch. Bus Contrs. Ass'n v. Board of Dirs. Educ. Servs. Comm'n, A-1383-10T4, 2011 N.J. Super. Unpub. LEXIS 1669 (App. Div. June 27, 2011).

Retaliation
Appellate Division affirms trial court summary judgment dismissal of CEPA complaint against board, N.J.S.A. 34:19-1 to -8, because it was filed more than one year beyond the actionable event as required by N.J.S.A. 34:19-5. The CEPA action stemmed from a transfer and change in job assignment. The court rejected the suggestion that plaintiff experienced daily retaliatory conduct. Principals in the schools to which plaintiff was assigned attempted to best use her skills at a time when the schools had no need for a classroom science teacher. The fact that she found these assignments unsatisfactory was not actionable. Goode v. City of Camden Bd. of Educ., A-6161-09T3, 2011 N.J. Super. Unpub. LEXIS 1161 (App. Div. May 6, 2011).

Tenure Dismissal
Appellate Division affirms decision of Commissioner of Education, finding that principal had engaged in unbecoming conduct by failing to properly administer the board of education attendance policy. Appellate Division reverses Commissioner imposition of a six-month suspension effective on the date of the final agency action and remands for further consideration of the discipline imposed. Commissioner did not indicate whether the six month suspension was to be prospective or retroactive. In re Tenure Charges Against Tracy, A-4569-08T3, 2011 N.J. Super. Unpub. LEXIS 1089 (App Div. May 2, 2011).

Tort Claims Act
Appellate Division reverses Defendant, Law Division order granting plaintiff's motion for permission to file a late notice of tort claim under the Tort Claims Act. A reasonable investigation would have disclosed that the grammar school at which plaintiff was injured was owned and operated by the Board-- a separate entity from the City of Union City. Plaintiff's failure to serve the required notice on

the Board in a timely manner did not constitute the extraordinary circumstances required for the relaxation of the ninety-day time frame for the service of notice under the Act. Potosi v. Union City Bd. of Educ., A-0898-10T1, 2011 N.J. Super. Unpub. LEXIS 1656 (App. Div. June 24, 2011).

Appellate Division affirms trial court order dismissing plaintiff's motion for permission to file a late notice of tort claim under the Tort Claims Act. Plaintiff unsuccessfully argued that filing of accident report constituted de facto notice. Trial court judge found that not only were there were no extraordinary circumstances, there were no circumstances whatsoever that would support relaxation of the ninety-day time frame for the service of notice under the Act. Camidge v. Manasquan Bd. of Educ., . A-0970-10T4, 2011 N.J. Super. Unpub. LEXIS 1550 (App. Div. June 15, 2011)

Appellate Division reverses and remands for new trial. Plaintiffs appealed from a jury verdict in their favor that effectively awarded a six-year-old $15,000 in net compensatory damages for a fractured skull and its permanent sequelae. The injuries were sustained while the youngster was crossing the street between her school bus and home. Trial court committed several material errors of law, which erroneously deprived plaintiffs the ability of having the jury properly consider the issues presented by the parties. VanMeter v. Pierce, A-2715-09T3, 2011 N.J. Super. Unpub. LEXIS 1083 (App. Div. May 2, 2011).

Transportation

Appellate Division reverses and remands for further proceedings. Appellant insurer sought reimbursement from driver of school bus and his employer for PIP benefits paid to persons injured in auto accident as a result of bus driver's negligence. Although N.J.S.A. 39:6A-9.1 precluded appellant from pursuing recovery of PIP payments from respondent, N.J.S.A. 17:28-1.6, which requires owners and operators of motor buses to maintain medical coverage, expressly excluded school buses from the definition of "motor bus." While respondent maintained medical expense coverage, it was not required to do so and the fact that it did so did not preclude recovery. Drive N.J. Ins. Co. v. Gisis, A-0951-10T1, 420 N.J. Super. 295 (App. Div. 2011); 21 A.3d 216 (App. Div. June 29, 2011).

Workers Compensation

Appellate Division affirms in part, dismisses in part, three orders from the Division of Workers Compensation. All orders are dismissed except the order denying the recusal of the judge, which is affirmed. Matter remanded to the Division for consideration of pending motion to reinstate. Gillespie v. Newark Pub. Sch., A-5317-09T4, 2011 N.J. Super. Unpub. LEXIS 1272 (App.Div.May 17, 2011).

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New Jersey Superior Court, Law/Chancery Division

There are no education-related decisions posted for May/June at this time.

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Commissioner of Education

Board Authority

A board of education has no authority to censure one of its members; discipline for conduct that violates Ethics Act may only be through the School Ethics Commission. Indemnification for board member denied, as board's censure proceeding was not a "legal proceeding" under indemnification statute. Case involved board censure of board member who, during student walkout in protest of Governor Christie's funding cuts, went to the school during the walkout and allegedly verbally harassed school administrators as she disagreed with their approach to acquiesce in the walk-out and focus on student safety. Castriotta, Commr 2011: May 18.

Contracts

In challenge to board's award of contract to lowest bidder, Commissioner finds that lowest bidder's submission, that included a food service equipment subcontractor which had an expired Certification of Prequalification from the School Development Authority (SDA), contained an unwaivable, material defect. Nor could a bidder substitute itself to perform that work, even though bidder was appropriately classified; case law holds that contractors cannot substitute subcontractors after the bid has been awarded, and the bid instructions required bidders to identify their subcontractors and certify that they would use them. H&S Construction, Commr 2011:May 23. (Woodland Park)

Graduation

Commissioner dismisses as moot the parents' challenge to board's determination that student, who had failed eleventh grade English and thus not satisfied graduation requirements, could not march in the processional or participate in graduation ceremonies. Student later passed his courses at the County Technical Adult High School where he received his diploma rather than earning his diploma from the high school; matter is moot. Tomlin, Jr., Commr 2011:May 23 (Cape May Reg.)

Increments

Commissioner upholds board's action to withhold the increment of a special education teacher; she received "unsatisfactory" ratings in several categories by her supervisors, and both administrators were in agreement that she failed to perform up to their level of expectation; she failed to prove that the board's action was arbitrary, capricious, unlawful, or induced by improper motive. Stapleton, Commr 2011: June 24.

Indemnification

Board is ordered to reimburse an employee and NJEA-provided insurance company, for all costs and fees expended in his defense where he was sued by a student in Superior Court. NJEA's insurance company had defended the employee in the matter which resulted in dismissal of the claims through a settlement; the subrogation clause in the insurance policy stated that the Company shall be subrogated to all the Insured's rights of recovery. Commissioner rejects as overly mechanistic, the board's contention that an employee cannot be indemnified where, because he is covered under insurance, he suffers no loss. Waters, Commr 2011: May 11.

Non-tenured Staff

Non-tenured teacher who received a contract in June, and then in mid-August a letter notifying her that the contract was issued in error, filed an appeal at the end of December challenging her non-renewal and claiming that the board never voted to non-renew her, and seeking specific performance of the contract; Commissioner finds that she filed her appeal in excess of ninety-days after the receipt of the letter and that her petition should be dismissed for failure to timely file. Allen, Commr 2011: May 23. (Elizabeth)

Purchasing
Commissioner grants summary judgment to petitioning boards, reversing ECS decision that the boards must purchase oil from PTC (oil company) pursuant to an alleged joint purchasing agreement between respondent board and 5 other boards. Commissioner adopts ALJ ruling that boards of education that pursue joint purchasing on behalf of other school districts may do so only with the approval of the DLGS and in compliance with the Public School Contracts Law and the Cooperative Purchasing rules; here, those requirements were not met as no joint purchasing agreement existed between the parties, respondent board failed to register and obtain approval of a joint purchasing program, rendering respondent board's agreement with PTC unenforceable against petitioners; further, the ECS did not have the authority to enforce the agreement between respondent board and PTC on petitioners since no joint purchasing agreement existed between petitioners and respondent boards. Sparta, Commr 2011: June 24

Reduction in Force
Teacher of diesel mechanics was RIF'd due to lack of enrollment, and diesel technology program was combined into more encompassing auto technology course; teacher failed to challenge action until 170 days after receiving written notice of the Board's decision and was thus out of time under 90-day rule, N.J.A.C. 6A:3-1.3(i); moreover, he did not have seniority rights to teach the second year of the diesel class or the general auto mechanics class. Berghof, Commr 2011:June 2.

Board did not violate tenure rights under N.J.S.A.18A:17-2 of 10-month secretary when it reduced her time and compensation pursuant to a RIF while maintaining the incumbent in the position of Administrative Assistant to the Superintendent. The Administrative Assistant, a 12-month position with supervisory responsibilities, was a confidential position which included supervisory responsibilities and the assumption of the Superintendent's duties in his absence, and was not similar to the petitioner's position. Petition was dismissed. Burger, Commr 2011:May 19.

Residency
Commissioner dismisses with prejudice a *pro se* residency appeal as parent failed to appear and provided no explanation for her nonappearance. K.M., Commr 2011: June 24.

Commissioner rejects board's claims for financial reimbursement and determines that student was entitled to a free public education in Pine Hills; the parent is domiciled there and has primary physical custody of her children under a court order; pursuant to N.J.A.C.1:1-14.4(d) the parent is entitled to a decision on the merits based on the proofs presented at hearing as the Board failed to submit an explanation for its failure to appear. T.L.J., 2011:June 24.
P*ro se* residency appeal is dismissed with prejudice for non-appearance. J.S., 2011: June 24.

Commissioner rules that, where family resided in the same motel in Mine Hill Township since 2006, they were homeless; because the children were enrolled in schools of Dover, (district of origin prior to becoming homeless) the children shall remain enrolled in Dover schools in order to maintain continuity in their educational program; however, financial responsibility shifted to Mine Hill after one year in the motel pursuant to N.J.S.A.18A:38-1(d), which states that homeless persons who reside within a school district for one year or longer are deemed to be domiciled within that district; Mine Hill is liable for sixth grader's tuition, and for the send/receive tuition for A.S. should Dover seek payment for same. A.M. and M.S., Commr 2011:June 15.

School Ethics
Commissioner affirms Ethics Commission's vacation of reprimand against charter school trustee for not attending second year board member training; trustee had completed his first term of service in 2002, prior to the effective date of the amendment, March 15, 2007, and the statute does not permit the retroactive application of the second-year training requirement. Matter of Lytle, Commr 2011:June 6.

Commissioner vacates earlier order that issued reprimand to charter school trustee; she was not subject to the expanded training requirements for second and third year of a term as she had completed her first term prior to the 2007 revision of N.J.S.A. 18A:12-33, which for the first time required training in the second and third years of a term. Nothing indicated that the 2007 revision was meant to be retroactive. Matter of Oztan, Commr 2011: June 2 (Greater Brunswick Charter).

Commissioner vacates earlier order removing charter school trustee for failure to attend training; charter member served on the board of trustees of the Jersey City Community Charter School since 1997, during which time the SEC had issued a public advisory opinion exempting charter school trustees from attending orientation, and which was prior to the 2000 adoption of regulations requiring first year training. Thus, charter member is not subject to the training requirements. Matter of Rosario, Commr 2011: June 1. (Jersey City Community Charter)

Commissioner vacates earlier order censuring charter school trustee for failure to timely attend training; charter member served on the board of trustees of the Marion P. Thomas Charter School since 1998 and was thus not subject to the expanded training requirements that became effective on March 15, 2007. Matter of Collins, Commr 2011: June 2.

Seniority
Commissioner dismisses on summary judgment, a challenge by tenured secretary whose position was abolished who claimed entitlement to a full-time secretarial/clerical position held by non-tenured and/or less senior tenured employees. Petition was filed out of time; no evidence presented to show that relaxing of 90-day rule is warranted. Polanco-Gomez, Commr 2011: June 15.

Sick Leave
Commissioner rejects secretary's claim that board improperly charged her sick leave bank for absences attributable to a work-related injury; she failed to file complaint within 90 days of the date of the Order approving settlement of her worker's compensation claim. Bishop, 2011: June 24.

Case dismissed with prejudice a bus driver's petition for restoration of sick time for injuries sustained during employment pursuant to N.J.S.A.18A:30-2.1; matter had been placed on the inactive list while workers compensation matter was pending and had subsequently settled, but repeated attempts by ALJ and board counsel to obtain status update from petitioner's counsel went unanswered. Fiore, Commr 2011: June 3. (Morris)

Special Education/Section 504
Margate, the sending district to Atlantic City, sought an order that it had no obligation to bear the costs associated with the extraordinary special education costs of a high school student residing in Margate; Commissioner orders Margate to pay the $175,000 to Atlantic City under settlement reached between parent and Atlantic City for out-of-district placements; contract between the

districts states that under-billed special education tuition costs will be charged to the sending district; further, petition was untimely as 90-days began to run when Margate received notice of the settlement agreement between parents and Atlantic City. Margate, Commr 2011: June 2.

Parent seeks tutoring and damages, on grounds that eighteen year old daughter was not provided state required physical education courses in high school. Commissioner dismisses the petition on summary judgment, finding that the claims are barred by *res judicata* and the entire controversy doctrine as well as being filed beyond the 90-day limit; student's excusal from physical education was due to a medical condition, she graduated with appropriate number of credits, had previously filed a due process claim, which was settled and included a physical education accommodation in her 504 plan; a second due process petition seeking other special education services did not challenge the exemption from physical education. N.N., Commr 2011: May 2.

Tenure Acquisition

Teacher claims that board's non-renewal violated her tenure rights; Commissioner finds that teacher had not acquired tenure; time served as long-term substitute for 2005-2006 did not count toward tenure acquisition; as far as employment during 2006-7, 2007-8, 2008-9, and to 2009-10, period of sick leave for nine weeks in 2007 did not deprive the board of opportunity to evaluate her and would have counted; however, her paid and unpaid leave of absence for the entire 2008-2009 academic year precludes application of that year towards tenure and therefore, she had not completed three consecutive calendar years, nor three consecutive academic years, nor the equivalent of more than three academic years within a period of any four consecutive academic years. Jacobs, Commr 2011: May 6.

Tenure Dismissal

Commissioner grants board's motion for summary judgment granting removal of tenured teacher, where tenure charges had been stayed pending disposition of a criminal matter, and where criminal matter ultimately resulted in teacher's permanent disqualification from employment under *N.J.S.A.* 18A:6-7.1; there is no statutory authority for teacher's position that disqualification is not mandatory. Tenure Hearing of Socrates, 2011: June 24.

Commissioner dismisses tenured custodian brought on tenure charges of excessive absenteeism and other just cause; as she failed to answer charges they are deemed admitted and sufficient to warrant termination. Tenure Hearing of Aleman, Commr 2011: June 14.

Commissioner orders dismissal of tenured special education teacher. Sixteen witnesses for the Board presented credible testimony that the teacher was hostile, aggressive, demanding and unresponsive to reasonable requests for grades, progress reports, test scores and student information. Teacher's own testimony during the hearing was repeatedly unresponsive; her behavior was inappropriate and inconsistent with the decorum and responsibility expected of a professional educator. Tenure Hearing of Kubicki, Commr 2011: May 21.

Superior Court Order directing Spanish teacher to resign his position and forfeit his certificate renders the Board's tenure charges moot. He had been subject to a plea agreement whereby he was sentenced to 364 days in the Somerset County Jail and parole supervision for life, and been ordered to be subjected to the requirements of Megan's Law. Accordingly, the tenure charges, which had been held in abeyance, were dismissed and the matter was transmitted to the State Board of Examiners for effectuation of the Court's Order. Tenure Hearing of Friery, Commr 2011: May 18.

Commissioner grants motion to reconsider earlier decision terminating

employment for failure to answer charges, where employee's failure to file was because he mistakenly sent his response to the attorney listed on the notice rather than the Commissioner. Vacated and remanded for hearing on the merits. Tenure Hearing of Piccoli, Commr 2011:May 6.

Commissioner orders dismissal of tenured attendance officer for excessive absenteeism and conduct unbecoming for insurance fraud stemming from an incident in which his medical insurance was billed for treatment of a person posing as his estranged wife. Commissioner finds disingenuous his argument that his paid suspensions from work should not be considered towards his absences; suspensions were due to serious criminal charges that were later dismissed. Tenure Hearing of Castro, Commr 2011:May 2.

Transfer

Commissioner dismisses on summary judgment teacher's challenge to transfer from high school to middle school by board roll call vote; no violations of the Open Public Meetings Act, N.J.S.A. 10:4-12(b)(8) or of N.J.S.A. 18A:25-1; "Rice" notice not required both because the courts have held that a transfer without loss of salary and without impacting tenure rights is not an adverse action warranting a "Rice" notice, nor was there any discussion of the transfer at this meeting, privately or publicly. Bilse, Commr 2011:June 24

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School Ethics Commission

SEC dismisses complaint alleging that board member, who also sits on the local zoning board of adjustment, violated N.J.S.A. 18A:12-24.1(b) and (c) of the Code of Ethics for School Board Members, when he voted for a project that would bring new homes to the district at a time when the district's schools are overcrowded and have not attained required federal achievement standards; SEC finds no factual support for allegations that his position "puts him in direct conflict with the needs of the district." Ferrara v. Hewitson, (Hamilton, Mercer Cty) SEC 2011: June 28.

SEC determines that the board member's email to the business administrator, suggesting that the BA not use the term "hand check" on its registry report, did not violate N.J.S.A. 18A:12-24.1(c) of the Code of Ethics for School Board Members. SEC is persuaded that the member's email was not a directive to withhold information from the Board, but rather was an offer of her opinion in furtherance of a procedure that had been called into question by the board; her action was fairly within her policy making function and was not inappropriate, under these circumstances. Campbell v. McDonald (Kearny) SEC 2011:June 28.

Board member's vote for the appointment of the Vice Principal who would be the supervisor of her daughter, a newly-hired teacher, did not violate N.J.S.A. 18A:12-24.1(c) and fairly fell within the permissible parameters of the Commission's advisory opinions A10-0 and A23-06. Campbell v. Santos (Kearny) SEC 2011:June 28

SEC grants motion to dismiss allegations that four board members violated N.J.S.A. 18A:12-24.1(a) when they moved forward with plans to install a turf field without amending the the district's Long Range Facilities Plan and obtaining necessary approval and permits as required by N.J.A.C. 6A:26-2.1; complainant does not assert that a final decision has been rendered with respect to these board member from any court or state administrative agency, and SEC does not have authority to determine whether the board members violated local policy or the regulations governing Long Range Facilities Plans. Foody v. Bailey(West

Milford) SEC 2011:May 24

Complainant alleges that the board president violated N.J.S.A. 18A:12-24.1(c), (e) and (g) of the Code of Ethics for School Board Members when he changed the way the Board conducts its public sessions in order to limit the amount of public understanding and input. The complainant alleges that the public must ask their questions about agenda items before they are presented and discussed and that comment time is limited, which violates the Board's Bylaws. Fanelli v. Terebush, (Brick) SEC 2011:May 24.

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State Board of Examiners

Teacher who plead guilty to Cruelty and Neglect of a Child, and was permanently barred from ever holding a public position in New Jersey, agreed to forfeit her Teacher of Chemistry Certificate of Eligibility With Advanced Standing and Teacher of Chemistry Certificate. IMO Almagro, Exam 2011: May 12.

Teacher agrees to forfeit Teacher of Carpentry Certificate of Eligibility, Teacher of Cabinet Making Certificate of Eligibility, and Teacher of Carpentry and Teacher of Cabinet Making Certificates with full force of revocation, as part of tenure charge settlement based on allegations that teacher had engaged in intimate relationship with a student, nurtured inappropriate relationships with students, provided transportation to students in his personal vehicle and spent time alone with female students in a locked classroom. IMO Aquilina, Exam 2011: May 12. (Elizabeth)

After being convicted of Official Misconduct, teacher was court-ordered to forfeit Teacher of Music Certificate of Eligibility and a Teacher of Music certificate; Examiners accepts relinquishment of certificates. IMO Broughton, Exam 2011:May 12.

Where teacher pled guilty to Endangering the Welfare of a Child and was sentenced to parole supervision for life and disqualified from public school employment pursuant to N.J.S.A. 18A:6-7.1 et seq., Examiners orders revocation of Teacher of English Certificate of Eligibility and Teacher of English certificate; facts deemed admitted as he failed to respond to order to show cause. IMO Flynn, Exam 2011: May 12.

Teacher's conviction for Endangering the Welfare of a Child and subsequent disqualification constitute conduct unbecoming a certificate holder that warranted revocation of his Substitute Credential; facts deemed admitted as he failed to respond to order to show. IMO Harrington, Exam 2011: May 12.

Where teacher was convicted of third degree Assault by Auto, Examiners revokes her Teacher of Elementary School in Grades K-5 Certificate of Eligibility With Advanced Standing and Teacher of Elementary School in Grades K-5 certificate. Behavior falls far short of a role model as she knowingly drove while under the influence of drugs and alcohol and caused serious bodily injury to others. Behavior outside the classroom may be relevant in determining qualifications and continued fitness to retain her certificates. The fact that she has undergone treatment for bipolar disorder, alcohol abuse and eating disorder has no bearing on the decision with regard to her certification. IMO Markakis, Exam 2011: May 12

Examiners orders revocation of Substitute Credential for teacher convicted of Criminal Attempt to Entice, Lure Child by Various Means and Criminal Attempted Aggravated Sexual Assault, where teacher was disqualified from public school employment pursuant to N.J.S.A.18A:6-7.1 *et seq.* IMO Oderanti, Exam

2011:May 12.

Examiners orders revocation of Teacher of Spanish Certificate of Eligibility, Teacher of Spanish certificate, and a Teacher of English As a Second Language certificate, where teacher was convicted of Filming Without Consent of Another in violation of N.J.S.A. 2C:14-9b and who, as a result of the conviction, was disqualified from public school employment pursuant to N.J.S.A. 18A:6-7.1 *et seq.* An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. IMO Borja, Exam 2011:June 16.

Teacher was court-ordered to forfeit Teacher of Spanish Certificate of Eligibility and Teacher of Spanish certificate due to his conviction for Endangering the Welfare of Children; Examiners voted to accept his relinquishment, with the force and effect of a revocation. IMO Friery, Exam 2011:June 16.

Examiners revokes Teacher of Elementary School Certificate of Eligibility With Advanced Standing, Teacher of Elementary School certificate, and Teacher of English certificate, of teacher who resigned from his nontenured position in the district as the result of allegations of inappropriate personal and intimate, secretive conversations with a female student. The Commissioner has long held that teachers serve as role models for their students and such conduct crosses the boundary of acceptable teacher behavior and demonstrates lack of professional judgment. IMO Kriesel, Exam 2011:June 16

Examiners orders revocation of Teacher of Physical Science certificate following settlement of a tenure case brought against a teacher under which teacher agreed to retire and relinquish certificates in settlement of charges of unbecoming conduct involving the alleged use of force against two students and the use of inappropriate language towards students. IMO Lee, Exam 2011: June 16 (Trenton)

Examiners orders revocation of guidance counselor's Student Personnel Services certificate and Teacher of Elementary School Certificate of Eligibility; she had entered into settlement to relinquish certificates after Office of Fiscal Accountability and Compliance (OFAC) concluded that she directed or authorized alterations to grades on student transcripts. IMO Meller, Exam 2011: June 16.

Examiners orders revocation of Substitute Credential of employee convicted of Aggravated Assault With Weapon-Bodily Injury, where as a result of the conviction, the teacher was disqualified from public school employment pursuant to N.J.S.A.18A:6-7.1 *et seq.* , sentenced to two years' probation and ordered to perform 100 hours of community service. IMO O'Neil, Exam 2011: June 16

Examiners orders revocation of Teacher of Elementary School Certificate of Eligibility, Teacher of Elementary School certificate, Principal Certificate of Eligibility, and Principal Provisional certificate, where employee resigned from his position in the district after being accused of inappropriate conduct including sending photos to a female employee's cell phone depicting male genitalia in a state of arousal. Revocation ordered despite apologies for his "sophomoric" behavior while inebriated, and claims of rehabilitation; the purpose of this proceeding is "to permit the certificate holder to demonstrate circumstances to counter the charges, not to show rehabilitation." IMO Rhaney, Exam 2011: June 16.

Examiners orders revocation of Teacher of Health Occupations Certificate of Eligibility, and Teacher of Health Occupations certification, where teacher resigned from her position after an investigation revealed she had never been issued a license from the Board of Nursing. Falsifying her qualifications both as a nurse and as a teacher is not only egregious but also dangerous. IMO Steinmetz, Exam 2011: June 16.

Examiners orders revocation of Teacher of the Handicapped Certificate for employee who pled guilty to Uttering Forged Instrument, sentenced to 5 years' probation, ordered to relinquish his teaching certificates, and pursuant to N.J.S.A. 2C:51-2, permanently disqualified from ever holding any position in New Jersey. IMO Williams, Exam 2011: June 16.

Examiners orders revocation of Teacher of Biological Science Certificate of Eligibility and a Teacher of Biological Science certificate where teacher forfeited his position and was disqualified from public school employment as a condition of his acceptance into PTI, following conviction for Abuse of Child-Cruelty, Neglect. IMO Young, Exam 2011: June 16.

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New Jersey Council on Local Mandates

There are no education-related decisions posted for May/June 2011.

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Election Law Enforcement Commission

There are no education-related decisions posted for May/June at this time.

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New Jersey Division on Civil Rights

The Division on Civil Rights issued a Finding of Probable Cause against the Board of Education in Franklin Township, Gloucester County, for allegedly not taking sufficient steps to end the race-based bullying of a student that went on for nearly four years. Although the board had a harassment, intimidation and bullying policy, there was insufficient evidence to show that the board took meaningful steps and fully explored the entire range of responses envisioned by the policy, given the significant duration and type of harassment. Le v. Franklin Twp, April 12, 2011(DCR Docket No. PH05RE-03029)

Click here for NJ Division on Civil Rights decisions.

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New Jersey Government Records Council

Because the request (copies of the information contained within the database purchased by the Township of Nutley each June in its original format) failed to identify a specific government record or a specific time period within which the Custodian could focus her search for the requested entries, but rather seeks general information from a database, the Complainant's request is invalid under OPRA. Moore v. Nutley, GRC Complaint No. 2010-110 (June 28, 2011)

The Custodian's response to OPRA request failed to provide a date certain to expect disclosure and thus violated OPRA; further, the Custodian's failure to charge the actual cost to reproduce "audio recording of the most recent regular public meeting of the governing body" onto a CD-ROM constituted a violation; Custodian must disclose the requested check registry data and tables in the

specifically requested medium and if necessary, consult a vendor to convert the documents upon the Complainant's acceptance of any applicable charges; and must disclose the requested records (a digital copy of the requested check registries and data registries of the Township in either a Microsoft Word, Excel, comma delimited or fixed-field ASCII from Edmunds, MSI or the current software used by the CFO that is readable as a TXT file, accountant or business administrator) with appropriate redactions and a detailed document index explaining the lawful basis for any such redaction upon the payment of the special service charge, if any, within ten (10) business days; further the OPRA request form is deficient in several respects including its failure to state the exceptions to the general rule that personnel files are not public records, and failure to adequately describe avenues to challenge denial of access. Wolosky v. Chester, GRC Complaint No. 2010-184 (June 28, 2011)

No denial of access demonstrated in complaint that Sparta Board of Education's official OPRA request form contains boxes that are too small to comfortably write in the name of the records sought. Wolosky v. Sparta, GRC Complaint No. 2010-224 (June 28, 2011)

No denial of access, where the Complainant failed to file an OPRA request with the Lakewood Board of Education; complainant alleged that Board of Education violated OPMA by failing to make public meeting minutes available after two (2) weeks. The Complainant also states that the Board of Education has violated OPMA by not posting proper notification of meetings on the public announcement board at the Board of Education building. However, the Complainant did not file an OPRA request to the Lakewood Board of Education. Blaustein v. Lakewood Bd. of Ed. GRC Complaint No. 2011-210 (June 28, 2011)

All legal fees relating to disciplinary charges against (complainant) including but not limited to those of (certain named individuals). Delay in providing responsive records was caused by an oversight and the difficulty in securing specific billing information. Although the Custodian violated N.J.S.A. 47:1A-5.i., by failing to indicate a specific date upon which the records would be provided, all records were in fact provided, and the evidence does not show that the violation of OPRA had a positive element of conscious wrongdoing or was intentional and deliberate and thus do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. Bentz v. Paramus, GRC Complaint No. 2008-89 (June 28, 2011)

Because the governing body had approved the executive session minutes at the time of the Complainant's OPRA request, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the request and were therefore disclosable with appropriate redactions. Custodian is ordered to provide minutes within five business days with appropriate redactions, including a detailed document index explaining the lawful basis for each redaction**.** Wolosky v. Jefferson, GRC Complaint No. 2010-163 (June 28, 2011). See similar rulings in Wolosky v. Roxbury, GRC Complaint No 2010-183 (June 28, 2011) and Wolosky v. Montville, GRC Complaint No. 2010-160 (June 28, 2011)(also finding that charge of $10.00 for an audio recording in CD format is unreasonable and in violation of N.J.S.A. 47:1A-5.b as actual charge was $1.79 to duplicate the record)

Request for "a copy of every communication by the BOE, any member or employee of the BOE, and/or anyone contacted by the BOE concerning the Delbury matter, including, but not limited to, any resolutions, complaints, letters, public notices, press releases, memos, notes, telephone logs and e-mails" was overbroad and fails to specifically identify the documents sought; OPRA does not require custodians to research files to discern which records may be responsive to a request, or to conduct research to locate records potentially responsive. Gettler v. Sussex Wantage Regional Bd. of Ed., GRC Complaint No. 2007-105 (May 24, 2011).

Custodian failed to properly redact executive session minutes, and failed to provide a written response setting forth a detailed and lawful basis for each redaction made to the records which were disclosed. Paff v. Lavallette, Complaint No. 2007-209 (May 24, 2011).

Complainant's need for access (desire to ensure compliance with New Jersey's Prevailing Wage Law) did not outweigh Custodian's need to safeguard personal information contained in the certified payroll records of apprentices for public works contracts. The release of the employee names could result in harassment and unsolicited contact between the Complainant and the individuals whose names and wages are being requested. A public agency has a responsibility to safeguard from public access a citizen's personal information when disclosure would violate his/her reasonable expectation of privacy. Ott v. Cape May, Complaint No. 2010-77 (May 24, 2011).

Complainant's request for his original employment application was properly denied as the record was not disclosable because it is an exempt personnel record pursuant to N.J.S.A. 47:1A-10 and Executive Order 26 (McGreevey, 2002). The request for all records relevant to how the DHS will respond to the Complainant's Merit System Appeal was overly broad. Toscano v. DHS, Complaint No. 2010-147 (May 24, 2011).

Employee's Juris Doctor degree is a government record pursuant to N.J.S.A. 47:1A-10 because it exhibits employee's educational qualifications to hold the position of Labor Analyst. Thus the Custodian has unlawfully denied access to the requested record and must l disclose it with appropriate redactions. Guz v. New Jersey Civil Service Commission, Complaint No. 2010-33 (May 24, 2011).

Custodian lawfully denied access to the e-mail discussions involving board members requesting and/or receiving legal advice from the School attorney or the members' deliberations over how to handle personnel or administrative matters; these discussions are exempt from disclosure as attorney-client privilege and/or as
advisory, consultative or deliberative material pursuant. Ray v. Freedom Academy Charter School. Complaint No. 2009-185(May 24, 2011).

Request for "… all cost records, invoices and payment vouchers showing the breakdown and total cost to date of the lawsuit against Monmouth County Parks Department on hunting in a designated no-hunting zone in Wall Township" is not overly broad under OPRA; pending or ongoing litigation is not a lawful basis for denial of access to records requested under OPRA. Darata v. Monmouth County, Complaint No. 2009-312(May 24, 2011).

Request for emails and letters that identify by name the specific recipients of the e-mails and letters sought was valid under OPRA; GRC must conduct an *in camera* review to determine if the records constitute inter-agency or intra agency advisory, consultative or deliberative material. Other requests were not valid as they failed to identify by name the specific recipients of the e-mails and letters sought, failed to specify identifiable government records and would require the Custodian to perform research which he is not required to do. Armenti v. Robbinsville Bd. of Ed. Complaint No. 2009-154 (May 24, 2011).

Where request was for sick time calculation related to a settlement agreement between the Borough and the Complainant, *in camera* review establishes that some is exempt from disclosure as attorney-client privileged information that would give an advantage to adversarial litigants pursuant to N.J.S.A. 47:1A-1.1; however, Custodian unlawfully denied access to executive minutes where only certain paragraphs should be redacted as a discussion of personnel. Verry v. South Bound Brook, Complaint No. 2008-161(May 24, 2011).

Where request was for "copies of any and all invoices submitted by the law firm of […] for the months of October, November and December 2008," the GRC

determined that it must conduct an *in camera* review of the package of unredacted records to determine whether Custodian validly asserts that the record contains information which is exempt from disclosure as attorney-client privileged. Verry v. South Bound Brook, Complaint No. 2009-204 &2009-205(May 24, 2011).

The OPRA request does not require research in order to identify the responsive records (OC's Ethical Standards and Officers' Uniform Code of Conduct," but rather requires the Custodian to locate and provide the two specific records sought; however, there is no language relieving the Complainant from paying the appropriate copying costs because he is indigent. Reid v. Dept of Corrections, Complaint No. 2010-83 (May 24, 2011).

Response to records request beyond the seven (7) business days from receipt of the request was not a "deemed" dismissal where district calendar School demonstrated that the school district was closed for business on February 15, 2010 and did not count as a business day. Schiavoni v. Sparta, Complaint No. 2010-73 (May 24, 2011)

Charge of $7.50 to scan and e-mail records violated N.J.S.A. 47:1A-5.b. because actual cost is likely zero; OPRA request form did not comply with N.J.S.A. 47:1A-5.f. ; the current Custodian complied with Interim Order by providing the requested executive session minutes for an *in camera* examination and disclosed the requested e-mails, lawfully redacted requested executive session minutes for information generated in connection with collective negotiations, including documents and statements of strategy or negotiating position pursuant to OPRA and OPMA and pending or anticipated litigation under OPMA. Prevailing party attorney fees awarded, amount to be determined. Paff v. Gloucester City, Complaint No. 2009-102 (May 24, 2011).

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New Legislation

P.L.2011, c.64. -see **A2920**
Directs the Department of Education to develop a school district dating violence policy and requires school districts to provide dating violence education in the health curriculum Approved 5/4/2011 PDF Format HTML Format

P,L.2011, c.70. -see **S1730**
Requires certain public officers and employees to reside in State
Pamphlet Law 3 pages Approved 5/17/2011 PDF Format HTML Format

P.L.2011, c.71. -see **S2065**
Provides for development of searchable "Bulletin NJ" local public bidding and employment database
Pamphlet Law 1 pages Approved 5/17/2011 PDF Format HTML Format

P.L.2011, c.72. -see **A444**
Disqualifies member of board of education or member of charter school board of trustees for conviction of certain crimes and requires member to undergo criminal history background investigation.
Pamphlet Law 6 pages Approved 5/26/2011 PDF Format HTML Format

P.L.2011, c.78. -see **S2937**
Makes various changes to pension and health care benefits for public employees
Advance Law 123 pages Approved 6/28/2011 PDF Format HTML Format

P.L.2011, c.79. -see **S2959**
Repeals requirement that public employers provide certain health benefit plans

to public employees.*
Advance Law 5 pages Approved 6/28/2011 PDF Format HTML Format

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New Regulations/Executive Orders

There are no new education regulations posted for May/June at this time.

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United States Supreme Court

Funding

Challenge to tax credit for donations to scholarship organizations dismissed. Petitioners lack standing to challenge tax credit as to tax expenditure. Arizona Christian School Tuition Organization v. Winn, 2011 U.S. Lexis 2612 (2011).

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3rd Circuit Court of Appeals

Board Action

Appeal of summary judgment motion concerning appointment of school board attorney affirmed for the reasons substantially expressed in District Court Opinion. Gallagher v. Atlantic City Board of Ed No. 10-1808 (3d. Cir. March 31, 2011)

Employment

Summary judgment affirmed for school district where employee voluntarily signed a separation agreement waiving her right to sue district. Gregory v. Derby School Dist. No. 10-1504 (3d Cir. March 21, 2011)

Special Education

Petitioner claimed that District failed to offer FAPE. Court concludes that petitioner's claims barred by IDEA'S 2 year statute of limitations. District Court decision affirmed. School Dist. of Philadelphia v. Deborah A., No. 09-2190 (3d Cir. April 6, 2011)

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New Jersey District Court

Contracts

Motion for reconsideration denied where Board failed to show a clear error of law or fact and had not shown that facts or law were overlooked by the court. North Plainfield Board Of Education v. Zurich American Insurance Company, No. 05-4398 (D.N.J. March 17, 2011)

Employment

District's motion to dismiss granted where plaintiff fails to state a claim against the district for the actions of an individual teacher concerning an improper relationship with a student. Graham v. Huevel, No. 10-1268, (D.N.J. March 28, 2011)

District Court reverses protective order and compels deposition. If plaintiff is healthy enough to work, then she is healthy enough to sit through deposition with reasonable breaks that take into account her condition. Toorzani v. Elmwood Park Bd. of Educ, No. 09-4262 (D.N.J. March 23, 2011)

Special Education
IEP was appropriate and reasonably calculated to provide B.S. with a meaningful educational benefit, the Court need not consider the appropriateness of the Parents' unilateral placement at the Lewis School. As a result, the Court finds that the Parents are not entitled to reimbursement. G.S. v. Cranbury Bd. of Educ. No. 10-774 (D.N.J. April 26, 2011)

Court denies parents reimbursement for tuition for unilateral placement. District is not liable for failing to develop an appropriate IEP. Upper Freehold Regional Board of Education v. T.W., No. 09-1847, (D.N.J. March 31, 2011)

Resident district's challenge to charter school IEP team placement of student in private school for disabled dismissed. *N.J.S.A.* 18A:36A-11b is constitutional on its face. L.Y. v. Bayonne Board of Education, No. 10-05698, (D.N.J. March 29, 2011)

School district's motion for a stay denied where district has made no showing of a likelihood of success on the merits of the claim. School District had not complied with the IDEA in declassifying student who was disabled and thus eligible for special education services. Matter remanded to ALJ for hearing on appropriate remedy. M.B. v. South Orange-Maplewood Bd. of Educ. No. 09-5294 (D.N.J. March 23, 2011)

Court affirms findings of ALJ that district failed to provide FAPE for 2 years and that parent placement in ABA program at own expense was appropriate. West Windsor-Plainsboro Regional School District, Board of Education, v. M.F. No. 09-4326 (D.N.J. March 4, 2011)

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New Jersey Supreme Court

Abbott v. Burke: A special master appointed by the N.J. Supreme Court found that the state failed to meet its responsibilities to adequately fund public education when it reduced state aid for 2010-2011. The March 22 report by Judge Peter Doyne represents a recommendation to the court, which will consider further arguments from the state and the Education Law Center (ELC), which brought the complaint.

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New Jersey Superior Court Appellate Division

Board Liability
District not liable under NJ Tort Claims Act where district did not create dangerous condition. No showing that public employee created divots on field that led to leg injury. District fulfilled duty to make sure that field was inspected and reasonably free of hazardous conditions. Failure to record its inspections, or maintain records of them, does not transform their actions into palpably unreasonable conduct. Maybloom v. Jackson Bd. of Educ. No. A-5906-09T3 (App. Div. March 3, 2011)

Y.G. filed a complaint seeking damages pursuant to the Child Sexual Abuse Act (CSAA), N.J.S.A. 2A:61B-1, against a former middle school teacher who sexually abused her. A public day school is not a "household" for purposes of the CSAA, despite standing *in loco parentis*. Complaint dismissed. Y.G. v. Teaneck Bd. of Educ. No. A-5146-09T2 (App. Div. April 19, 2011)

Indemnification
The question of whether a board member should be required to indemnify a board of education for improper expenditures he authorized does not require the expertise of DOE. The decision is purely one of law, whether there was a breach of duty and whether any such breach requires indemnification. Such questions are within the common law and non-Title 18A questions that trial judges routinely decide. Matter remanded to judge for determination. Rivera v. Elizabeth Bd. of Educ. No. A-5365-09T4 (App. Div. March 30, 2011)

RIF/Nonrenewal
Imposition of injunctive relief in RIF reversed; While Law Division has subject matter jurisdiction over a contractual dispute as well as the tort and discrimination claims alleged, plaintiff's action also challenges the propriety of the reduction in force ordered by defendant, which is a matter within the primary jurisdiction of the Commissioner of Education. Accordingly, issues regarding the reduction in force must first be resolved by the Commissioner, and the Law Division must stay its action pending final administrative review. Jackus v. Elizabeth Bd of Educ. No. A-0993-10T1, (App. Div. March 9, 2011)

Board's nonrenewal of employee affirmed. A school board's lack of strict compliance with statutory teacher evaluation requirements did not mean a non-renewed teacher had to be reinstated, or that the error allowed financial recovery. *N.J.S.A.* 18A:27-3.1. does not provide for any penalty in the event a local board fails to follow the prescribed procedures. Tuck-Lynn v. Sch. Dist. of Newark, No. A-2072-09T3 (App. Div. March 3, 2011)

Rulemaking
In challenge to rulemaking petition, court rules that Department of Education has met its obligation to provide required information to public school students under the High School Voter Registration law by requiring monitoring piece in QSAC. However, matter remanded to agency concerning promulgation of regulations for non-public schools as required under the law. In The Matter Of The State Board Of Education's Denial of Petition To AdoptRegulations Implementing The New Jersey High School ,Voter Registration Law, ___ NJ Super.____(App. Div. 2011)

Challenge under Rule 2:2-3(a)(2) for agency inaction upheld concerning award of pharmacy benefit management services contract. Union had standing as its members were affected by the contract with provider. The appeal is remanded to the SEHBC so that it may make a determination on the issues raised after developing the record as it sees fit in accordance with its rules of procedure. NJEA v. Beaver, No. A-3221-09T3, (App. Div. April 19, 2011)

Student Discipline
Sanctions warranted against plaintiff's attorney in suit concerning suspension of student for bringing knife to school. Subjective views of attorney cannot overcome what is a plainly frivolous lawsuit. Matter remanded to trial court regarding quantum of sanction. O.R. v. Cave, No. A-5001-09T1 (App. Div. March 10, 2011)

Tenure Dismissal
Board's termination of principal violated her tenure rights because there was no

"meeting of the minds" and therefore, no settlement agreement. Matter remanded to Commissioner for determination of back pay and position to which she will be reinstated consistent with her seniority and tenure rights. Pollack v. South Orange-Maplewood Bd. of Educ, No. A-3386-09T4 (App. Div. March 23, 2011)

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New Jersey Superior Court, Law/Chancery Division

There are no education-related cases for March or April.

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Commissioner of Education

Certification
Commissioner concurs with the Administrative Law Judge that charter school math teacher is subject to a one-year suspension of his teaching certificate for violating N.J.S.A.18A:26-10 when, without the consent of school administrators or the board of trustees, he ceased to perform his duties before the expiration of the term of his employment. An express contract and a contract implied in fact existed between the parties. Galgano, Commissioner 2011: March 21

Commissioner
Parent who contested student's grade in Algebra II failed to appear at hearing and gave no reason for nonappearance. Petition dismissed with prejudice. F.D. o/b/o F.D., Commissioner 2011: March 29

Commissioner has jurisdiction to decide whether the termination of petitioner's employment was a violation of her tenure and due process rights under N.J.S.A.18A:6-1 et seq. Commissioner has jurisdiction over all controversies arising under the school laws pursuant to N.J.S.A.18A:6-9; Tenured secretary is not seeking to enforce an earlier 2008 settlement agreement but is seeking an order finding that the Board violated her tenure and due process rights, which is well within the Commissioner's jurisdiction. The board is using the earlier settlement agreement as a defense to the tenure rights/due process charge. The Commissioner determined that the proper course of action is to consolidate this matter with the tenure charges currently pending at the OAL, and accordingly remanded the case for further proceedings. Robinson, Commissioner 2011: April 4

Compulsory Attendance
Home schooling parent, in second cause of action, challenged board's decision to send first and second grade students to school leased from and located in neighboring school district, claiming that use of facility violated New Jersey compulsory attendance and residency laws. Commissioner found that claims were without merit and precluded by the entire controversy doctrine and her withdrawal of her child from the public schools. Edmondson, Commissioner 2011: March 18

Ethics
SEC determined that board member violated N.J.S.A.18A:12-24.1(d), (e) and (g) of the Code of Ethics for School Board Members when he took private action by

unilaterally proposing to the district administration that he develop a student-level database, without consulting with the Board. Board member did not have the Board's authority "to receive or analyze student data, to work with the data on his home computer, or to host workshops with principals to advise them of the ways to correlate curriculum to improve standardized test score results." He failed to act in concert with his fellow board members, becoming directly involved in activities or functions that were the responsibility of school personnel or the day-to-day administration. He breached his confidentiality obligation as a board member by using the student specific data of a board member's child to illustrate his student level management system. The SEC recommended that the Commissioner of Education impose a penalty of censure. Commissioner found that even if the respondent's action constituted a violation, it was fully supported by the superintendent, was well intentioned and designed to benefit the District. Commissioner found that respondent's conduct did not warrant the imposition of a penalty. Jackson, Commissioner 2011: March 9

SEC found that board members violated the Code of Ethics for School Board Members when they released a School Ethics complaint to the media which contained identifiable student information. By so doing, respondents took action to make public, reveal or disclose information that was confidential in accordance with board policies, procedures or practices in violation of the confidentiality section of N.J.S.A. 18A:12-24.1(g). Respondents, by releasing the School Ethics complaint to the media, without adequately redacting student information, willfully made a decision contrary to the educational welfare of a student, in violation of N.J.S.A. 18A:12-24.1(b). SEC recommended the penalty of censure. Commissioner, whose jurisdiction – in the absence of an appeal – is limited to reviewing the SEC's recommended sanction, adopted the recommendation that respondents be censured. **S.L.G. AND M.S. as parents of D.S., and D.S, Commissioner, 2011: April 11**

Increment Withholding
Board's withholding of principal's employment and adjustment increment for failure to properly oversee administration of district's Terra Nova testing program upheld. Board's decision was neither arbitrary nor capricious nor without a substantive basis. Proper due process was provided to principal. Spells, Commissioner 2011: April 21

90-Day Rule
Petition to challenge nonrenewal must be filed within 90 days of the notice of his nonrenewal, not within ninety days of exhaustion of the other avenues and mechanisms that might have employed in seeking employment renewal. Cumberland, Commissioner 2011: March 4

Petition to challenge two day in-school suspension and expunge discipline, dismissed for failure to file within 90 day time period. J.F.L. o/b/o/M.L., Commissioner 2011: April 12

Assistant Director for Human Resources/Personnel challenged involuntary transfer to the position of Supervisor of Physical Education and Health – a supervisory position within her area of certification – in October 2006. Petitioner alleged her tenure rights were violated and filed her appeal in 2009. Matter dismissed for failure to timely file within 90-day time period. Adams, Commissioner 2011: April 12

Non-Renewal
Charter school's nonrenewal of elementary school teacher upheld. Teacher received timely notice of nonrenewal. Procedural violation with respect to statement of reasons for nonrenewal did not impact teacher's ability to present case. Board's decision to non-renew was neither arbitrary, capricious nor

unreasonable. Gilbert, Commissioner 2011:March 7

Reduction in Force
Former employee's position, Maintenance/Air Conditioning and Commercial Appliance Repair Worker, was eliminated in a reduction in force. Commissioner held that position was significantly different from any janitorial or custodian position and, as such, employee did not have any tenure or seniority rights pursuant the reduction in force. RIF was proper. Mezzina, Commissioner 2011: March 18

RIFd tenured educational media specialist claimed entitlement to elementary teaching position based on possession of instructional certificate with elementary endorsement. Media specialist claimed tenure as a teacher based on claim of having taught Bill of
Rights and Civil War over a six week period in her tenth year as a librarian. Commissioner held that educational media specialist had never served as a teacher. Tenure and seniority rights attached to her educational services certificate but not instructional certificate as she had never served as a teacher. Douglas, Commissioner 2011: April 12

Residency
Commissioner's reversed board's determination that student was not domiciled in the Northern Valley Regional High School district for the 2009-2010 school year. Evidence indicated that student resided in Closter in 2009-2010 and Demarest in 2010, both within the district. Occasional presence at father's home in Cresskill did not amount to residency at that address. S.G.S. o/b/o S.S., Commissioner 2011: March 4

Board's determination of non-residency upheld. Notwithstanding joint custody order, the record demonstrated that student resided with her mother in Trenton and not in Ewing. Commissioner concluded that student was not eligible for a free public education in Ewing. Petition was dismissed. P.B. o/b/o Y.S., Commissioner 2011: March 24

While family had been continuously classified as "homeless" by the Burlington County Board of Social Services; family has resided in Mount Laurel since February 2010. Although a family may fall under the rubric of "homeless," it nonetheless achieves domicile for school law purposes after a continual year of residence in one district. Family deemed domiciled for school purposes in Mount Laurel. Maple Shade, Commissioner 2011: April 27

Settlements
Commissioner rejects settlement. Resolution by the Orange Board of Education approving the settlement properly presented to the Commissioner, but the required resolution by the Hanover Board of Education was not. Nor, in the alternative, did counsel for the Hanover Board execute the settlement document. Matter remanded to the OAL for those proceedings necessary to perfect the settlement or adjudicate the controversy. Hanover BOE v. Orange BOE, Commissioner 2011: April 13

Student Discipline
Commissioner found that school district's drug policy did not violate N.J.S.A.18A:40A-24(d), as it contained a mechanism for challenging a positive test result. The Board did not act in an arbitrary, capricious or unreasonable manner in imposing discipline upon student who failed a random drug test; student was aware of the drug testing policy, did not challenge the student selection method, and acknowledged that student had failed the drug test. Student discipline upheld. Commissioner directed Board to revise its drug policy

to bring it into full compliance with the requirements of *N.J.A.C.* 6A:16-4.4. K.Q. and L.Q. o/b/o C.Q. Commissioner 2011: March 17

One day out of school suspension for violation of board misconduct policy deemed excessive. Board had affirmative right to require that all students understand the severity of harassing language between students. When student did not discourage other student from asking student's girlfriend if she performed certain sexual acts, such behavior constituted misconduct. However chart of offenses and corresponding disciplinary action in Code of Discipline established that first offense for misconduct should have been teacher detention. W.C. o/b/o M.C., Commissioner 2011: March 21

Superintendent
Board resolution seeking to extend CSA contract from four years to five years failed as vote was 4 yes, 2 no, 3 abstentions. Resolution to extend contract did not receive yes votes from a majority of the full board (5 votes) as required under N.J.S.A. 18A:17-15. Nor did it satisfy the common law voting rule of a majority of those present and voting as there were nine board members present and only four yes votes. In addition, the board did not have the statutory authority to approve an appointment or contractual extension that would take effect on a date beyond the current board's natural lifetime. Here the contract extension would take effect more than two months after the 2010-2011 board's lifetime would expire and thus was void. The effect of the no vote on the contract extension was a non-renewal. Even though the board did not expressly vote on a non-renewal, the CSA was not automatically reappointed pursuant to N.J.S.A. 18A:17-20.1 where a motion to renew had failed. Negron, Commissioner 2011: March 28

Tenure Dismissal
Tenured Department of Corrections teacher dismissed from his employment for conduct unbecoming a public employee. Neither teacher nor any attorney filed an answer to the petition. Allegations that teacher met five times with ex-inmate at his home, received inmate's phone number while inmate was a teacher's aide, teacher provided contraband to inmate while incarcerated, had ex-inmate perform construction work at teacher's home upon release and had sexual contact with ex-inmate at teacher's residence, deemed admitted. Harper, Commissioner 2011: April 1

Tenured Department of Corrections teacher dismissed from his employment for conduct unbecoming a public employee. Neither teacher nor any attorney filed an answer to the petition. By teacher's own admission and the findings of an SID investigation, it was determined that teacher introduced his personal cell phone into the lobby of A.C. Wagner YCF and purposely left the unauthorized item unattended in an area frequented by inmates while teacher entered the institution to finish his workday. Piccoli, Commissioner 2011: April 1

Tenured custodian dismissed from employment for conduct unbecoming by engaging in inappropriate sexually harassing workplace conduct. Board sustained its burden of proving that custodian was insubordinate in disregarding administrative directives and flagrantly violating the board's sexual harassment policy. While ALJ made no penalty recommendation, Commissioner adopted ALJ's finding as to conduct unbecoming and insubordination and dismissed custodian from his tenured position. Doerbecker, Commissioner 2011: April1

Tenured secretary, a confidential administrative assistant to the superintendent of schools, dismissed from employment for unbecoming conduct. Secretary sexually harassed a school resource officer, made false statements about the activities of sitting Board members, and slandered and defamed members of the Board by falsely implicating them in crimes of official misconduct. Secretary admitted to making false statements to the school resource officer.

Commissioner agreed with ALJ that board had proven its case of unbecoming conduct against secretary, dismissing her from her tenured employment. Busnelli-Aljallad, Commissioner 2011: April 12

Tenured custodian had criminal and tenure charges dismissed. Tenured school employees who have been exonerated of tenure charges are entitled to be reinstated with back pay and emoluments, but have a duty to mitigate damages by seeking similar employment. Assistant Commissioner found that: custodian was entitled to a credit for the vacation time he accrued but did not use prior to his suspension, not a monetary reimbursement; and respondent should have returned to work immediately following the dismissal of tenure charges in November 2010 and is consequently not entitled to any additional sick or incremental pay beyond November 30, 2010. Custodian was awarded back pay and increments due totaling $52,411.64, and was credited with 96 sick days through November 30, 2010 and 15 vacation days earned but not used prior to his suspension. No additional vacation time was warranted since respondent was paid for the entire amount of time he was wrongfully suspended. Melillo, Commissioner 2011: April 25

Tenure Entitlements

RIFd Teacher of Psychology claimed entitlement to Teacher of Chemistry position in which board retained non-tenured teacher, based on endorsement obtained May 26, after the Board effected the RIF, May 11, but before her employment was terminated. *Francey v. Board of Educ. of the City of Salem*, 286 *N.J. Super.* 354 (App. Div.1996), controls, in which the court found that a tenured teacher's right to re-employment may not be expanded by teaching certificates or additional instructional endorsements acquired after the date that the teacher's position was abolished through a RIF. Tenure rights are fixed on the date the Board passes its resolution effectuating a RIF; in this case May 11, which preceded – by approximately two weeks – the date of issuance of petitioner's endorsement to teach chemistry. Teacher's after-acquired certificate affords her no rights to the chemistry positions presently held by non-tenured teachers in the district. Petition was dismissed. Lobello, Commissioner 2011: April 27

Transportation

Commissioner concurred with ALJ recommendation that school bus driver who left a student on the bus and failed to perform the mandated vehicle inspection of the vehicle's interior before exiting, as required by N.J.S.A. 18A:39-28, have her school bus endorsement suspended for six months; the mandatory penalty for a first offense. Respondent was directed to notify the Motor Vehicle Commission of its obligation pursuant to N.J.S.A.18A:39-28 *et seq.* to suspend petitioner's school bus endorsement and to notify petitioner's employer that she is ineligible for the period of suspension for continued employment as a school bus driver. Firman, Commissioner 2011: March 24

Tuition

Sending districts alleged that improper methodology used by Millville in the calculation of tuition for the 2006-2007 school year resulted in an overcharge of $1,543 per student. Settlement was later reached with the respondent using an actual cost per student of $4,657, and petitioners received tuition credits to reflect the difference. Issue was moot and petition was dismissed by ALJ. Commissioner agreed. Maurice River, Commercial Township, Lawrence, Woodbine, Commissioner 2011: March 14

Commissioner returns the matter of audit of five years of private school for the handicapped tuition to the OAL. Department had previously disallowed approximately $ 9 million in non-allowable costs and expenses and ordered tuition overcharges returned to the sending school districts. Determination of first

audit year overpayments was appealed by the private school to the Appellate Division, which found the appeal to be premature as all five years of calculations and all claims as to all parties had yet to be resolved. On return, ALJ was requested to calculate the monetary figure owed by the private school for each of the five audit years in question. Archway, Commissioner 2011: March 18

Workers' Compensation
Board violated N.J.S.A.18A:30-2.1 when it docked grounds and maintenance employee for nine vacation days during a period of time when he was out of work and receiving worker's compensation during the 2009-2010 school year. Docking the petitioner for vacation time against his entitlement for the subsequent year has the same effect as assessing an employee vacation time while being out on workers compensation-related leave. Gray, Commissioner 2011:March 14

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School Ethics Commission

Mother of student complains that Board member violated the Act when she discussed discipline of a student in a hair salon with wife of mother's ex-husband. SEC finds no violation; it was unclear whether board member learned of discipline from her service on the board, nor that she actually discussed the discipline as opposed to parenting issues involving the student. K.S.M. v. Chris Haley, (Manasquan), SEC 2011: March 22

No ethics violations found where Superintendent complains that board member violated his confidentiality by publicly criticizing his job performance at a public board meeting, and by calling him a "petty tyrant" and "mean spirited." SEC says that, however imprudent, allegations are insufficient to establish violation N.J.S.A. 18A:12-24.1(c) (taking board action to effectuate policies and plans without first consulting those affected by such policies and plans) nor N.J.S.A. 18A:12-24.1(g) (confidentiality), nor N.J.S.A. 18A:12-24.1(i) (failure to support and protect personnel in proper performance of duties); SEC declines to become involved in every dispute between a board member and personnel." Kliszus v. Williams-Bembry (Hackensack) SEC 2011:March 22

No ethics violations found in complaint by one Board member against other board members, where she alleged that they violated N.J.S.A. 18A:12-24.1(a) by coercing her to resign from the board and accusing her of violating the ethics act. Charges under this section require that she produce a decision with respect to these respondents from a court or state administrative agency demonstrating that they failed to enforce all laws, rules and regulations of the State Board of Education, and/or court orders pertaining to schools, or that the respondents brought about changes through illegal or unethical means Oramas-Shirey v. Gallo, (Bethlehem Twp.) SEC 2011:March 22.

SEC dismisses complaint brought by citizen against board members, alleging that they violated N.J.S.A. 18A:12-24.1(a), (e), (g) and (j) by failing to investigate the potential misrepresentation of credentials by the CSA, and creating a hostile environment at board meetings, disregarding her questions and otherwise retaliating against her for her OPRA request to see the CSA'S doctoral transcript (which board counsel informed her would not be produced as it was not in the board's possession). No facts set forth establish ethics violations. SEC notes that to the extent she claims that the Board acted arbitrarily and capriciously with regard to her document request, such claim must be made to the Commissioner, not the SEC. Simon v. Storcella and Doyle, (Margate) SEC 2011:March 22.

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State Board of Examiners

Examiners accepts settlement to suspend superintendent's School Administrator Certificate of Eligibility and School Administrator certificate for five years and Principal Certificate of Eligibility and Principal certificate for two years in matter where DOE's Office of Fiscal Accountability and Compliance (OFAC) reports that he allowed unauthorized expenditures for school building projects, held the superintendent's position initially without proper certification and received separation pay that was neither approved by the Commissioner nor paid in an authorized manner. The individual also holds certificates for Teacher of Physical Education, Teacher of Health and Physical Education certificate, Teacher of Driver Education, and Supervisor. IMO Brown, Exam 2011:March 31 (Stanhope)

Examiners orders revocation of Teacher of Elementary School and Teacher of Mathematics Certificates of Eligibility With Advanced Standing and Teacher of Mathematics certificate, where teacher was convicted in July 2009 of second degree Sexual Assault and subsequently forfeited teaching certificates and was disqualified from public service pursuant to N.J.S.A.18A:6-7.1 *et seq*. IMO Koppenaal, Exam 2011: March 31.

Examiners orders revocation of Teacher of Elementary School and Teacher of Nursery School certificates, where teacher in good standing for 22 years altered her expired emergency Teacher of the Handicapped certificate in order to secure employment in a position for which she was not qualified was inappropriate and potentially harmful to students. Examiners is not limited to revoking certificates where a crime has been committed. IMO Ledden, Exam 2011: March 31.

Examiners orders revocation of certificate of Teacher of Elementary School in Grades K-5
Certificate of Eligibility, Teacher of Mathematics Certificate of Eligibility, Teacher of Elementary School With Subject Matter Specialization: Mathematics in Grades 5-8 Certificate of Eligibility, and Teacher of Mathematics Provisional certificate, where teacher pled guilty to lewdness and was sentenced to one year probation and counseling. IMO Padilla, Exam 2011: March 31.

Examiners orders revocation of substitute credential for individual who plead guilty
to Endangering the Welfare of a Child and who was ordered to forfeit his teaching certificate and barred from holding any employment, office or position of trust, honor or profit under this State or any of its administrative or political subdivisions pursuant to N.J.S.A. 2C:51-2d, and who was disqualified from public service pursuant to N.J.S.A.18A:6-7.1 *et seq.*IMO Powell, Exam 2011: March 31.

Examiners accepts relinquishment, and orders revocation, of Teacher of the Handicapped certificate and Teacher of Social Studies certificate where teacher, after pleading guilty to Endangering the Welfare of a Child, was court-ordered to forfeit his teaching certificates and agreed to forfeit his certificates with the force and effect of a revocation. IMO Riquelme, Exam 2011: March 31.

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New Jersey Council on Local Mandates

Springfield Board of Education filed a Complaint on March 11, in which it is alleged that N.J.S.A. 18A:39-1, paragraphs II(1), II(2), and II(3), which governs a school district's obligation to provide transportation to students regarding Aid In Lieu of Transportation, is an unfunded mandate. Complaint filed by Springfield Board of Education, March 28, 2011.

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Election Law Enforcement Commission

There are no education-related decisions posted for March and April at this time.

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New Jersey Division on Civil Rights

There are no education-related decisions posted for March and April at this time.

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New Jersey Government Records Council

The *In Camera* review revealed that the Custodian lawfully denied access to the redacted portion of the requested record because the discussion relates to a matter for which the Township may become a party to litigation, and involves anticipated litigation pursuant to N.J.S.A. 10:4-12(b)7 and N.J.S.A. 47:1A-9.a. However, Township's OPRA request form did not conform to the minimum form requirements as it does not contain the exceptions in OPRA to the general rule that personnel files are not public records; while this does not rise to the level of a knowing and willful violation of OPRA and the form has been revised, the complainant achieved the desired result, and as prevailing party was entitled to reasonable attorney fee. Case notable for its detailed discussion of "prevailing party." Wolosky v. Township of Fredon (Sussex),No. 2009-12 (GRC March 29, 2011)

Custodian deemed to have denied access where he did not timely respond in writing within 7 days of request for information about former school employee that 2 of 3 requested items did not exist (employment application and college degrees), and waited 7 months to provide existing records (former employee's transcript and certificates). However, deemed denial was not intentional and did not amount to knowing and willful violation. Herron v. Westfield Public Schools (Union), No. 2010-94 (GRC March 29, 2011)

Request for report pertaining to a sexual harassment and discrimination complaint filed by the Complainant, along with handwritten notes from interviews and copies of any inter-/intra-office correspondence (e-mails, memoranda, handwritten/typed notes, letters, meeting minutes, audio tape...) "related to this matter" were properly denied. The report did not yet exist at the time of the request, and the other documents were exempt from access pursuant to N.J.S.A. 47:1A-9.a and Executive Order No. 26 (McGreevey 2002). Cargill v. NJDOE, No. 2009-256 (GRC March 29, 2011).

Motion to reconsider award of attorney fees to requestor of financial disclosure statements is denied. The custodian should not have redacted the financial disclosure statements filed under Local Government Ethics Act, albeit that his concerns were for privacy of volunteer officials and others and although he

obtained advice from the GRC and his Counsel that redaction was appropriate. The Appellate Division has conclusively held that the financial disclosure statements required by N.J.S.A. 40A:9-22.1 et seq., do not invade the privacy of local officials, and the completion of a home address and phone number on the form is noted in statute as being optional, so that a filer may opt to keep those confidential. Walsh v.Twp of Middletown , No. 2008-266 (GRC March 29, 2011)

A request for records of bids for camera system, and certain pupil records were not specific enough regarding time period of documents or specific records sought. GRC notes that the custodian's response was insufficient because he failed to try to accommodate the request before denying access on the basis that it would substantially disrupt the Board's operations; and that in any event, four OPRA requests in three weeks is not voluminous. However, the Custodian did not unlawfully deny access to the records requested because said request was invalid under OPRA. Caldwell v. Vineland Bd. of Ed., No. 2009-278 (GRC March 29, 2011)

Request for "(a)ny and all correspondence, including District and personal e-mail, text messages, etc., having the phrase "petrelli" or "Petrelli" or "BP" or "Temple" or "Sholom" (sic) or "TS" was overly broad and not a valid OPRA request. Although the district conducted a search and provided over 4,500 e-mails responsive to the request via a website link, the custodian need not have done so. GRC notes that, had the request been valid, the Custodian would have had an obligation to ask all indicated school board officials for the specifically identified government records made, maintained or filed on the officials' personal computer storage systems. Petrelli v. Branchburg Bd. of Ed., No. 2010-13 (GRC March 29, 2011).

Redactions must be accomplished by visually obvious method showing the requestor the specific location of any redacted material in the record and the volume of the material. The custodian's method of copying the minutes with a blank sheet of paper covering material to be redacted, thus "whiting out" the executive session minutes in their entirety did not comply with OPRA. GRC must conduct an *in camera* review of the executive session minutes to determine the validity of the Custodian's assertion that the records contain information which is exempt from disclosure as attorney-client privileged, personnel matters and contract negotiations. Council defers analysis of whether the Custodian knowingly violated OPRA, and whether Complainant is a prevailing party, pending the Custodian's compliance. Paff v. Manasquan , No. 2009-281 (GRC March 29, 2011).

Reporter gathering information for articles describing mismanagement and waste in the Lakewood Township budget, was properly denied access to Township 2009 Budget Manual which is exempt from disclosure as advisory, consultative or deliberative material because it contains notes and recommendations used by the Municipal Manager to prepare the final Township budget for presentation to and adoption by the governing body. Rozsansky v. Lakewood , No. 2010-89 (GRC March 29, 2011).

GRC determines that requested letter related to the installation of artificial turf at Ridgewood High School from Assistant Engineer that was not yet reviewed by the Village Engineer, is a draft document, that in its entirety comprises advisory, consultative and deliberative material; Custodian lawfully denied access Shea v. Ridgewood No. 2010-79 (GRC Feb. 24, 2011).

Custodian violated OPRA at N.J.S.A. 47:1A-5.d. and N.J.S.A. 47:1A-5.g. by failing to provide records by requestor's preferred method of delivery, when the Custodian had the capability to convert the records to an electronic medium for e-mail delivery or make paper copies for facsimile delivery. GRC must conduct an *in camera* review of the requested e-mails between the Township Clerk and the Township Attorney regarding the recall of a Township Committee member, to

determine the validity of the Custodian's assertion that the records constitute attorney-client privileged information which is exempt from disclosure. Requester entitled to award of reasonable attorney fee; although violations were not willing and knowing, there was a nexus between the filing of the complaint and the result obtained. (See detailed attorney fee/prevailing party analysis.) Wolosky v. Frankford No. 2008-254(GRC Feb. 24, 2011).

Borough's blanket requirement that all requestors who submit OPRA requests via mail must submit photo identification prior to receiving records presented an obstacle to public access of government records pursuant to N.J.S.A. 47:1A-1. Further, the Borough's OPRA request form contained misinformation regarding the accessibility of personnel records as it fails to state exceptions to the rule that personnel files are not public records; also, Borough must charge actual cost of audio cassette tape, and improperly charged a service charge as charges for labor are permitted only for requests requiring extraordinary time and effort and may not be set in advance but must be based on actual direct cost of providing the copy or copies. Paff v. Wildwood Crest No. 2009-54(GRC Feb. 24, 2011).

While Custodian replied to the request to provide access to proposals submitted for the position of Borough Attorney in time, the response was insufficient because she failed to provide a specific lawful basis for denying access; however violation was not knowing or intentional. Further, she lawfully denied access because at the time of the OPRA request, proposals were exempt from disclosure because they contain information that "would give an advantage to competitors or bidders." Although all proposals were publicly opened with the name of the vendor and the price read aloud, the proposals themselves did not become public documents until the contract was awarded. GRC acknowledges a conflict between the Borough's obligation to open the bids up publicly prior to the successful negotiation of a contract and OPRA's exemption from disclosure for information which "would give an advantage to competitors or bidders.". Bond v. Washington Borough, No. 2009-324 (March 29, 2011).

Emails were exempt and would not be provided to requestor; requestor had not surrendered her rights to confidentiality in her personnel records when she submitted her request for emails containing her personnel information; moreover, Council determined through an *in camera* examination of e-mails, that they were exempt from disclosure as (1) inter-agency or intra-agency advisory, consultative or deliberative material ("ACD"), (2) personnel matters, and/or (3) attorney-client privilege; fact that former township official on the emails was no longer an official when the emails were created did not invalidate the exemption, as she had served during the period that was the subject of the discussions, had first-hand knowledge of the issues. Custodian's verbal response, and fact that no written explanation for the denial of access was supplied until the thirteenth
business day following receipt of the OPRA request resulting in a "deemed" denial, but did not rise to knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. McGee v. East Amwell, No. 2007-305 (March 29, 2011).

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New Legislation

P.L.2011, c.33. -see **A2720**
Establishes new procedure in "Administrative Procedure Act" to allow substantial changes to agency rule-making upon adoption. Advance Law 2 pages
Approved 3/1/2011 PDF Format HTML Format

P.L.2011, c.37. -see **S923**
Changes date for mail-in ballots transmission from 40th to 45th day before an election, with certain exceptions; permits referendum on school levy cap and municipal levy cap to occur on same day. ** Advance Law 49 pages
Approved 3/2/2011 PDF Format HTML Format

P.L.2011, c.40. -see **A3359**
Prohibits practice of excluding unemployed individuals in advertisements for job vacancies. Advance Law 2 pages
Approved 3/29/2011 PDF Format HTML Format

P.L.2011, c.45. -see **A2721**
Changes five year chapter expiration date for rules to seven years; changes procedures for readoption of rules. **Advance Law 2 pages
Approved 4/6/2011 PDF Format HTML Format

P.L.2011, c.51. -see **S2680**
Changes the trigger for extended unemployment benefits.
Advance Law 5 pages Approved 4/20/2011 PDF Format HTML Format

P.L.2011, c.52. -see **S1392**
Requires State-administered pension systems to train employers on enrollment requirements; requires employers to certify validity of employee enrollment with acknowledgement of penalty for providing false information. *Advance Law 5 pages
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43 N.J.R. 767(a) Professional Licensure and Standards, Requirements for Administrative Certification, *N.J.A.C.* 6A:9-12.4

43 N.J.R. 769(a) Student Transportation, *N.J.A.C.* 6A:27-4.1-4.5 and 6.4

Adopted Rules
43 N.J.R. 830(a), Management of a School Facilities Project, *N.J.A.C.* 6A:26-19

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United States Supreme Court

There are no education-related decisions posted for January and February at this time.

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3rd Circuit Court of Appeals

Discrimination – Employees

Former school administrator fails to establish first amendment retaliation and reverse discrimination in violation of Title VII, Sections 1981 and 1983, on basis that she was paid less than an African-American administrator, reprimanded while African-American personnel were not, retaliated against for requesting counsel in response to a written reprimand, and that she was constructively terminated. None of the alleged discriminatory instances would have compelled a reasonable person in this situation to resign, and pay disparity was tied to numerous factors, including seniority, professional certifications, and budgetary concerns. Mieczkowski v. York City Sch. Dist., 2011 U.S. App. LEXIS 3307 (3d Cir. Feb. 18, 2011) (not precedential)

Discrimination – Students

Court affirms district court's grant of summary judgment in favor of school district and various administrators; parents failed to prove that middle school racially discriminated against a student in violation of Title VI , 42 U.S.C. § 2000d *et seq.*; Title IX or § 1981. Individual defendants have no liability under title VI; the combined actions and incidents did not rise to the level of severe and pervasive harassment required under Davis v. Monroe, nor did school act with deliberate indifference as administrators disciplined children following several incidents and implemented a racial sensitivity program; nor did statements and false accusations made by classmates, or teacher's comment that student not tell lies, amount to retaliation; nor was there any evidence of sexual discrimination, or purposeful discrimination under §1981. Whitfield v. Notre Dame Middle Sch., 2011 U.S. App. LEXIS 841 (3d Cir. January 12, 2011) (not precedential)

Court dismisses parent's pro se appeal seeking relief under six provisions of federal law, : (1) 18 U.S.C. § 241 l(2) 18 U.S.C. § 242; (3) the No Child Left Behind Act (4) "42-21-IV-2000" (5) 42 U.S.C. § 1981 ; and (6) 42 U.S.C. § 1983. She alleges that the child did not receive fair or equal treatment as other students, allegedly as a result of racial discrimination. Court affirms District Court's dismissal of her action as a parent cannot assert claims in federal court on behalf of her minor child, and the claims asserted on parent's own behalf are insufficient as a matter of law. Watson v. Wash. Twp., 2011 U.S. App. LEXIS 1437 (3d Cir. January 24, 2011) (not precedential)

Special Education

Third Circuit affirms district court's finding that the parents were not deprived of meaningful participation in the IEPs, despite parents' contention that the district provided no information regarding its chosen methodology. The District Court concluded that the parents were provided with a meaningful opportunity to participate in the IEP process and the District's IEPs contained an instructional methodology, of which the parents were informed. Once a court determines that the requirements of the Act have been met neither parents nor courts have a right to compel a school **d**istrict to employ a specific methodology in educating a student. W.R. v. Union Beach Bd. of Educ., 2011 U.S. App. LEXIS 3131 (3d Cir. February 17, 2011) (not precedential)

Third Circuit affirms denial of tuition reimbursement to student with speech and language impediments. The Court determined that its review was confined to issues pertaining to the student's 2002-2003 IEP, and that claims involving the District's alleged refusal to offer objective evaluations over the years, deprivation of critical language therapy during her early years, loss of self-esteem and other lost opportunities, and the continuing impact of these alleged violations, could have been raised and heard as part of the IDEA claim in the administrative proceedings, but were not. To survive exhaustion, the ADA, Rehabilitation Act, and § 1983 damages claims had to be based on a set of circumstances for which the IDEA did not provide a remedy. R.R. v. Manheim Twp. Sch. Dist., 2011 U.S. App. LEXIS 2702 (3d Cir. Feb. 10, 2011) (not precedential)

The Third Circuit affirms the district court's ruling that a hearing-impaired child be placed for preschool at a planned public school classroom designed for children with hearing impairments. The Court rejects parents' argument that the hearing officer's discounting of certain testimony should have been rejected based on his purported bias, as he was a co-worker with the school's counsel and a current co-worker with the school's counsel's wife. The parents also claimed that it was improper to propose that the child be placed in a classroom that was not operational at the time the IEP was drafted. The District Court determined that even with the disputed testimony, the parents failed to satisfy the relevant legal standard as their evidence went primarily to whether the IEP would provide an ideal education, and not whether it was "reasonably calculated" to provide "meaningful educational benefits." A.B. v. Montgomery County Intermediate Unit, 2011 U.S. App. LEXIS 185 (3d Cir. January 27, 2011) (not precedential)

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New Jersey District Court

Discrimination –Employees

Court dismisses claims by school bookkeeper that board of education terminated her employment because she became pregnant, had to miss work to serve on a jury, and suffered from a serious back injury. Court dismisses without prejudice gender discrimination claim because, although pregnancy is a "prohibited consideration" for employment purposes under the NJLAD, she failed to satisfy fourth prong of gender discrimination claim that she was preplaced by non-pregnant person. She failed to demonstrate a violation of the Jury System Improvement, 28 U.S.C. § 1875, because she alleges only that she served on a jury in state court. With regard to claims based on her back injury, Court dismisses Plaintiff's ADA claim for failure to exhaust administrative remedies as she voluntarily withdrew her EEOC charge without receiving a right-to-sue letter. Although NJLAD does not require a plaintiff to exhaust administrative remedies, she failed to demonstrate that the board sought someone else to perform her job after they terminated her employment. Schwinge v. Deptford Twp. Bd. of Educ., No. 09-5964 (RBK/JS), 2011 U.S. Dist. LEXIS 16610 (D. N.J. February 17, 2011) (not for publication)

African American woman, a nontenured teacher, files race discrimination/retaliation suit against Board of Education, CSA, principal and Human Resources Director, for nonrenewal of her contract. Court grants motion to dismiss § 1981 claims, as a private right of action against state actors cannot be implied under § 1981. § 1983 claims are time barred by 2 year statute of limitations, which began to run the day the discrete act occurred and was communicated to her, namely the May 2 when she was notified by hand-delivered letter that she would be deemed nonrenewed. Court declines to exercise supplemental jurisdiction over Clark's remaining state law claims (NJ LAD, discrimination, retaliation, and aiding and abetting) and does not decide whether these are time-barred; dismisses these without prejudice. Court denies leave to amend the complaint as this would be futile in light of court's rulings. Clark v. Winslow Twp. Bd. of Educ., No. 10-4342 (JEI/AMD), 2011 U.S. Dist. LEXIS 12981, (D.N.J. February 9, 2011)

Discrimination- Students

Matter arose from allegation that district treated student in a discriminatory manner by disciplining him for possessing a knife. Court declines to grant parent's motion for reconsideration of ruling that denied parent's motion to amend and granted school board's request for sanctions in the amount of $4,500.00 (a portion of the board counsel's attorney fees) for repeated claims already foreclosed by previous lawsuits. O.R. v. Hutner, 2011 U.S. Dist. LEXIS 4341 (D.N.J. January 18, 2011) (not for publication)

Privacy

Parents bring motion for summary judgment against Board, administrators, supervisors, and teachers for using their son's confidential psychiatric evaluation as a tool to teach *The Catcher in the Rye,* where redactions are insufficient to prevent identification of student. Parents sue under: Section 1983; privacy violations under 14th amendment Due Process, 1st and 4th Amendments, the New Jersey Constitution, the New Jersey Pupil Records Act ("NJPRA"), N.J.S.A. 18A:36-19; IDEA, FERPA, HIPAA, 29 U.S.C. § 1181; and general negligence principles, and seeking compensatory and punitive damages. Court grants partial summary judgment to defendants on most issues, but grants summary judgment to parents as against two instructors for privacy violations under Section 1983 and N.J. Constitution, and for common law negligence for breach of duty of care owed to student. L.S. & R. v. Mount Olive Bd. of Educ., No. 09-3052 (DRD), 2011 U.S. Dist. LEXIS 19674 (D.N.J. February 25, 2011)

Public Contracts

Board's motion for summary judgment granted in part but denied as to promissory estoppel. Successful bidder of fuel oil that purchased oil futures in reliance on board's acceptance of its bid, sought damages when board subsequently notified all bidders that it would repeat the bidding process and void all bids after the lowest bidder, rejected as non-compliant, had filed a complaint. Bidder's breach of contract claim is denied, as Court finds that there was no enforceable contract between board and bidder as bidder should have known that no contract could issue without a formal resolution. Court dismisses claims of breach of implied covenant of good faith as inapplicable. However, court does not dismiss claim of promissory estoppel, as bidder relied in good faith and based on past experience on the board's representations that a contract had been presumptively awarded, albeit without the formality of a resolution, and was reasonable to go ahead and enter into the necessary fuel oil contracts to insure that it would be able to profit from performance of the contract. It experienced losses related to its attempt to mitigate damages as re-selling the contracts on the open and volatile market resulted in an immediate loss of $100,000 even without any discussion of lost profits. Isobunkers, LLC v.

Byram Twp. Bd. of Educ., No. O9-cv-00607 (DMC)(JAD), 2011 U.S. Dist. LEXIS 16531 (D.N.J. February 16, 2011)(not for publication)

Special Education

Court finds that N.J.S.A 18A:36A-11(b), (resident school district bears financial responsibility when the charter school's IEP calls for placement at a private school) clearly contemplates providing the school board of the student's district of residence the right to challenge through due process, the charter school's placement of a student in private school. Ruling rejects ALJ determination that the issue of district financial responsibility may only be challenged by appeal to the Commissioner. Here, where student enrolled in charter moved from Newark to East Orange, East Orange had standing to dispute charter's private placement of student; further, the stay-put provision of IDEA provided student an entitlement to remain in the private placement while due process proceedings were pending, at expense of district of residence. Where student subsequently moved to another state, and prevailing parents had not in fact paid for the private placement, the appropriate equitable remedy was to award transportation expenses, even though the IEP did not reference transportation. E. Orange Bd. of Educ. v. E.M., No. 08-4778 (SRC), 2011 U.S. Dist. LEXIS 16502 (D. N.J. February 17, 2011) (not for publication)

Court grants Board's motion for summary judgment and affirms ALJ's dismissal of parent's due process petition that alleged violations of IDEA, Section 504, the ADA, and state law and sought remedies including compensatory education and compensatory damages. Court finds that compensatory education claim is not moot as student retains a concrete interest in seeking compensatory education, despite move to adjacent school district. Court also finds that parent exhausted her administrative remedies as challenge to IEP was explicitly adjudicated in earlier ALJ decision. However, parent cannot seek compensatory education under the IDEA because there is no evidence that the procedural violation of failing failure to develop an IEP for the 2004-2005 school year deprived student of an educational benefit or that board's failure to timely respond to parent's requests for records and an IEP meeting deprived her of meaningful involvement in the creation of the IEPs where parent ultimately had the opportunity to, and did, participate ; Section 1983 claim fails because it cannot be used to enforce the IDEA or Rehabilitation Act; and ADA and Section 504 claims must fail because they are derivative of her IDEA claim. N.P. v. E. Orange Bd. of Educ., No. 06-5130 (DRD), 2011 U.S. Dist. LEXIS 11171 (D. N.J. February 3, 2011) (not for publication)

Court grants summary judgment in favor of district and denies parents' motion for summary judgment. Court finds that ALJ correctly denied parents' motion to amend complaint, where amendments not expand the original complaint or add any additional causes of action. ALJ correctly denied motion to extend the 120 days for service on OAL as parents failed to demonstrate good cause. Court also affirms ALJ finding that student who had completed 12th grade was not denied FAPE or entitled to the requested remedies of school taxi service, compensatory education, and transition services. District's procedural violations (failure to develop goals and objectives for testing; lack of individually designed transition plan; discontinuance of OT therapy services without an IEP meeting; and failure to provide independent evaluations) did not rise to the level of a substantive deprivation or deny FAPE. Student passed the NJHSPA, received above average grades in most classes, had good socialization and life skills and parents were not deprived of the opportunity to participate in the decision making process. Third Circuit has not defined what amount of transition planning is required in an IEP but procedural defects in this case did not amount to deprivation of FAPE. District was not required to provide a cerebral palsy expert educator; level of expertise of the experts involved in this case was adequate. Rodrigues v. Fort Lee Bd. of Educ., No. 2:08-cv-05736 (SDW) (MCA), 2011 U.S. Dist. LEXIS 11480 (D.N.J. February 7, 2011) (not for publication)

Court grants parents' interlocutory appeal; stay-put determined to be sectarian school where parents and predecessor district of residence had agreed to place student; however, as Court determines that it was not a permitted "Naples" placement, funds to be advanced by parents and reimbursed on monthly basis to avoid payment directly to sectarian school. Parties preserve the right to argue the substantive ruling of the ALJ that the Board could not and can not legally place a student at a sectarian school under the Naples Act. R.S. & M.S. v. Somerville Bd. of Educ., NO. 10-4215 (MLC), 2011 U.S. Dist. LEXIS 748 (D.N.J. January 4, 2011).

Torts

Court grants school district's motion to dismiss claims by parents of first grader who was injured while playing unsupervised during recess on the monkey bars in school playground with cement surface. Court dismisses claim of constitutional right to bodily integrity based on a state created danger theory, as a school board's allocation of resources is not the kind of affirmative action that should form the basis of such claim; Court dismisses claim that board deprived Plaintiff of his constitutional due process liberty interest in bodily integrity through their cost-cutting policies, as maintaining cement surface did not rise to the required level of conscience shocking, arbitrary government action, in light of need to allocate resources based on economic concerns; Section 1983 action fails as there was no showing that board was responsible for any constitutional violations; Court declines to retain jurisdiction over state negligence claims as no federal questions remain, and denies without prejudice. Goss v. Alloway Twp. Sch., NO. 10-5515 (JEI/JS), 2011 U.S. Dist. LEXIS 11420 (D.N.J. February 7, 2011)

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New Jersey Supreme Court

Petition for certification is denied, with regard to Appellate ruling that settlement between the parties limiting reimbursement for special education student's private school tuition was unenforceable for absence of indication the board approved the agreement. Lenape Reg'l High Sch. Dist. Bd. of Educ. v. G.P., 2011 N.J. LEXIS 197(February 1, 2011)

Petition for certification is denied, with regard to ruling dismissing unsuccessful employment candidate's complaint of racial discrimination under the NJLAD. Gerald v. Hopewell Valley Reg'l Sch. Dist., 2011 N.J. LEXIS 141 (January 18, 2011)

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New Jersey Superior Court Appellate Division

Charter Schools

Commissioner's decision ordering charter school to repay grant funds to NJDOE, was neither arbitrary nor capricious where charter school violated the New Jersey Public School Contracts Law. Charter school awarded a contract for design services, and a contract for "green" consulting services, without bidding or passing a resolution relying on an exception to the public bidding requirement. Oceanside Charter Sch. v. New Jersey State Dep't of Educ. Office of Compliance Investigation, NO. A-2528-09T2, 2011 N.J. Super. LEXIS 8 (App. Div. January 14, 2011) Approved for Publication January 14, 2011.

Criminal
Defendant's convictions arose from the shooting death of a police officer while defendant was at a school seeking vengeance for students assaulting his sister. "The first link in the tragic chain of events that led to the death of a police officer was forged in the context of a seemingly banal event: an altercation between two teenaged girls who attended the same high school, one of whom is defendant's sister." Court affirmed conviction of second degree reckless manslaughter, but reversed and remanded on other counts.
State v. Tindell, 417 N.J. Super. 530 (App. Div. 2011) (Jan. 7)

Student had knife in her backpack on school bus in violation of N.J.S.A. 2C:39-5(e)(2) ; judge imposes residential placement and a one-year probationary term, in light of lengthy criminal record and fact that she had received at-home rehabilitative services for over two years without altering her conduct. State ex rel. L.W., NO. A-3103-08T4, 2011 N.J. Super. Unpub. LEXIS 118 (App. Div. January 18, 2011)

This case arose from a melee at a Paterson high school that spilled out into the adjoining streets and culminated when a group of students beat Hector Robles to death. In connection with those events, defendant was convicted of: second-degree conspiracy to commit aggravated assault, second-degree reckless manslaughter, third-degree endangering an injured victim fourth-degree riot, and third-degree simple assault. Conviction affirmed, sentence remanded. State v. Williams, 2011 N.J. Super. Unpub. LEXIS 50 (App. Div. January 7, 2011)

Discrimination-Employees
Court reverses lower ruling that held that because teacher in related District Court matter could not surmount the First Amendment's "adverse employment action" threshold for purposes of a Section 1983 Free Speech claim, he similarly cannot vault the LAD's and CEPA's supposed higher bar. Court remands further proceedings in matter where physical education teacher in alternative school for behaviorally challenged students, claims he suffered adverse employment consequences after repeatedly complaining to administrators about physical threats and abuse by students. Nead v. Union County Educ. Servs. Comm'n, A-3149-09T1, 2011 N.J. Super. Unpub. LEXIS 128 (App. Div. January 20, 2011).

Funding
Court affirms decision by former Commissioner appointing a fiscal monitor in district for October 1, 2009 through September 30, 2011. Board complained of dissatisfaction with the prior fiscal monitors, but did not establish that the district was fiscally responsible and not in further need of monitoring. Use of 2008 CAFR report was not arbitrary because 2009 report was not yet available. Stay of emergent relief was rightfully denied as cost of monitor does not constitute irreparable harm. Pleasantville Bd. of Educ. v. New Jersey Dep't of Educ., NO. A-1011-09T2, 2011 N.J. Super. Unpub. LEXIS 100 (App. Div. January 13, 2011).

Grades
Court affirms Commissioner's dismissal of parents' challenge to a failing grade their daughter received in Freshman English class; the parents' filing was untimely and was not brought within 90 days of the starting date to trigger the limitation period, the date on which the parents met with the local administration and were informed that their daughter's failing grade would not be changed. H.H. v. Bd. of Educ., No. A-3638-09T3, 2011 N.J. Super. Unpub. LEXIS 333(February 15, 2011).

Open Public Meetings Act
The court determined that the board's routine practice of conducting its regular meetings with a brief open session, followed by a closed session of indeterminate duration, followed by the resumption of the open session, violated

the Open Public Meetings Act. OPMA appears to contemplate a procedure under which the open meeting precedes the closed meeting. The board's variable time for the resumption of the open session, in combination with the brief five-minute open session at the beginning of the meeting, created such uncertainty about when the public session will actually resume as to impermissibly erode the reliability of the times specified in the public notices of the Board's meetings. Court declined to decide whether there can ever be a justification, on an isolated basis, for conducting the closed portion of the meeting before the open session begins. McGovern v. Rutgers U. Board of Governors, ___N.J. Super __(App. Div. 2011) No. A-2531-09T1, 2011 N.J. Super. LEXIS 32, (App. Div. February 18, 2011) Approved for Publication.

Open Public Records Act

Court affirms order denying parent access under OPRA and the common law to a public school district employee's letter of resignation as the high school varsity baseball coach; upheld trial judge's assessment that the letter contains personnel information beyond what is required by law to be released; affirms attorney fee award. Kieffer v. High Point Reg'l High Sch., NO. A-1737-09T2, 2010 N.J. Super. Unpub. LEXIS 3115 (App. Div. December 28, 2010).

Student Discipline

Parents sought reversal of son's suspension for 5 school days and expungement of record where son was caught with one allergy pill under Board's zero tolerance policy. Court affirms Commissioner's dismissal for failure to file within 45-days; however, constitutional challenge to the board's policy is remanded to Law Division. P.P. v. Board of Educ. of the Pinelands Reg'l Sch. Dist., NO. A-2683-09T2, 2011 N.J. Super. Unpub. LEXIS 66 (App. Div. January 11, 2011).

Appellate Division affirms Law Division's dismissal of complaint by classified student who, in 2000, was expelled with homebound instruction until age 16 after testing positive a second time for illegal drugs; court finds that student had abandoned administrative remedies prior to exhaustion, and instead attempted to vindicate his rights in district court and Law Division. Further, law in 2000 did not require alternative educational services pending completion of the administrative proceedings, and parents had not been diligent in assuring student's enrollment in drug treatment that would have made alternative education options more feasible. Gutin v. Washington Twp. Bd. of Educ., A-1736-09T3, 2011 N.J. Super. Unpub. LEXIS 431 (App. Div. February 24, 2011).

Pension

Court affirms ruling by TPAF denying a former teacher an ordinary disability pension on the ground that she lacked the requisite ten years of New Jersey service and declining to refer the matter to the Office of Administrative Law for a hearing. Purchase for service rendered out-of-state did not count for ordinary disability benefits. In the Matter of Barbara Thomas, No. a1191-09, 2011 N.J. Super Unpub. LEXIS 141(App. Div. January 21, 2011).

PERC

Appellate Division will not disturb PERC's refusal to reconsider its ruling that Board committed an unfair labor practice by terminating employment of computer technician who sought to grieve a negative evaluation and where union alleged that imposition of any improvement plan must be negotiated; PERC found that employee was engaging in protected activity when she attempted to file a grievance and when her union asserted Board's obligation to negotiate over PIPs for non-teaching employees, and ordered reinstatement with back pay. Evidence did not support Board's claim that its (former) attorney did not have board authorization to stipulate facts and waive the hearing.

Wall Twp. Bd. of Educ. v. Wall Twp. Info. Tech. Ass'n, NO. A-3764-09T1, 2011 N.J. Super. Unpub. LEXIS 179 (App. Div. January 26, 2011)

Salary
District complied with wage execution order, where the district had notified the constable in writing that the employee was an on-call substitute, that wage attachment deductions are sporadic and can only occur when the employee is entitled to receive a paycheck, and where school presented evidence that the employee no longer worked there. Triffin v. Broadus, Newark Public Schools, 2011 N.J. Super. Unpub. LEXIS 282 (February 8, 2011).

Tax Issues
In challenge by mayor and taxpayer to the formula the Commissioner of Education used to apportion the tax levy between two merged districts (Victory Gardens and Dover), on grounds that tax levy figures used to calculate the apportionment were falsely inflated due to anomaly in the school funding formula, the Court finds that the mayor lacked standing, and the taxpayer failed to exhaust her administrative remedies. Victory Gardens v. State of New Jersey 2011 N.J. Super. Unpub. LEXIS 453 (App. Div. Feb. 25, 2011).

Society of the Holy Child Jesus, appeals from a final order of the Tax Court affirming the revocation of a long-standing tax exemption on its property due to change in use from nun residence to school. Court reverses, holding that if the taxpayer complies with the requirements of N.J.S.A. 54:4-3.6 (organized exclusively for the exempt purpose; exclusively used for the tax-exempt purpose; and property not used for profit) it is entitled to the exemption from real property taxes even if the use of the property does not comply with the municipal zoning ordinance. Society of the Holy Child Jesus v. City of Summit, NO. A-1126-09T3, 2011 N.J. Super. LEXIS 31 (App. Div. 2011) Approved for Publication February 17, 2011.

Zoning
In action in lieu of prerogative writs, Appellate Division finds that Law Division did not err in the standard of review it used over Planning Board's determination that there was a change in use requiring a variance, when congregation sought to operate a religious school at a synagogue that was a pre-existing nonconforming use, finding it was an expansion of such use. Board did not act arbitrarily nor did its decision violate the anti-discrimination provisions of *N.J.S.A.* 40:55D-66(b). Congregation Anshei Roosevelt v. Planning & Zoning Bd. , NO. A-1390-09T3, 2011 N.J. Super. Unpub. LEXIS 291 (App. Div. February 9, 2011).

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New Jersey Superior Court, Law/Chancery Division

Employee Benefits
The court upholds *P.L*. 2010, Chapters 1 - 3, against an array of challenges lodged at the numerous provisions but particularly at Chapter 2's 1.5% base salary contribution for health benefits and the imposition on municipal employees of changes to SHBP negotiated by State employees. The court finds that *P.L*. 2010 is a valid exercise of legislative authority and does not contravene any statutory or constitutional provisions: it does not violate Article I, Par. 19 of the N.J. Constitution, the EERA, nor the Reform Act; (2) does not impair contract obligations; (3) does not constitute unconstitutional "special legislation"; (4) is not void for vagueness; (5) does not violate Equal Protection; (5) is not a tax; (6) does not run afoul of the Bill Origination Clause of the New Jersey Constitution;

(7) is not a "Taking" under the Fifth Amendment of the U.S. Constitution; and (8) comports with both Procedural and Substantive Due Process of the United States Constitution. N.J. State Firefighters' Mut. Benevolent Ass'n et al v. Dept. of Treasury, et al , 2011 N.J. Super. Unpub. LEXIS 154 (Law Div. January 19, 2011)(Mercer Cty)

The Court held that the provision of *P.L*. 2010, Chapter 2, Section 8, which imposes any changes to SHBP negotiated by the majority representatives for State employees on all State and local employees, does not violate the Due Process requirements in the Fifth and Fourteenth Amendments to the United States Constitution, does not interfere with the Constitutional right to organize under Article I, Paragraph 19 of the New Jersey Constitution, and is not void for vagueness. Accordingly, the court grants defendant's motion to dismiss the complaint with prejudice. Communs. Workers of Am. v. Dep't of Treasury**,** 2011 N.J. Super. Unpub. LEXIS 316 (Law Div. Jan 19, 2011). (Mercer Cty)

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Commissioner of Education

Ethics

Censure ordered for Charter Trustee member who failed to take required training until ordered to do so. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels. IMO Collins, Commr 2011 Jan 10.

Reprimand ordered for Charter Trustee member who attended training only after the issuance of an order to show cause. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels. IMO Nieves, Commr 2011 Jan 10

Charter Trustee member attended training only after the issuance of an order to show cause. Commissioner concurs with the penalty of reprimand recommended by the SEC in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels. IMO Lytle Commr, 2011 Jan 10.

Charter Trustee member attended training only after the issuance of an order to show cause. Commissioner concurs with the penalty of reprimand recommended by the SEC in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels. IMO Phillips-Agins, Commr 2011 Jan 10.

Suspension and then removal initially recommended for charter school trustee member who had not attended training, despite issuance of order to show cause. Trustee member reported that she attended training after issuance of order to show cause but was sent wrong training materials. Trustee has since received correct materials and has been given credit for training. Censure ordered. IMO Hagamin, Commr 2011 Jan. 10

Censure ordered for charter school trustee member who failed to attend training in a timely manner. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels. IMO Anderson, 2011, Commr Jan. 10.

Charter Trustee member attended training only after the issuance of an order to

show cause. Commissioner concurs with the penalty of reprimand recommended by the SEC in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels. IMO Sterling, Commr 2011 Jan 10.

Charter Trustee member attended training only after the issuance of an order to show cause. Commissioner concurs with the penalty of reprimand recommended by the SEC in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels. IMO Campanna, Commr 2011 Jan 10.

Charter Trustee member attended training only after the issuance of an order to show cause. Commissioner concurs with the penalty of reprimand recommended by the SEC in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels. IMO Dumont, Commr 2011 Jan 10.

Charter Trustee member attended training only after the issuance of an order to show cause. Commissioner concurs with the penalty of reprimand recommended by the SEC in consequence of respondent's failure to timely honor an obligation placed upon charter school trustees by law. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels. IMO Burns, Commr 2011 Jan 10.

Suspension and then removal initially recommended for board member who had not attended training, despite one last chance to do so. Board member informs SEC that he did attend training. SEC recommends censure as training was taken. Commissioner concurs with the penalty recommended by the SEC and additionally admonishes respondent for failing to honor an obligation placed upon school board members by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. IMO Siedlecki, Commr 2011 Jan 10.

Suspension and then removal recommended for charter school trustee member who had not attended training. Trustee ordered suspended until attendance at final training opportunity. If trustee does not attend, then trustee is removed from charter school board. IMO Rosario, Commr 2011 Jan 10.

Reprimand ordered for Charter Trustee member who attended training only after the issuance of an order to show cause. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels. IMO Oztan, Commr 2011 Jan 10.

Reprimand ordered for Charter Trustee member who attended training only after the issuance of an order to show cause. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels. IMO Morales-Wright Commr 2011 Jan 10.

Reprimand ordered for school board member who attended training only after the issuance of an order to show cause. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels. IMO Littles, Commr 2011 Jan 10.

Trustee suspended from Charter School's Board until she has completed the

New Board Member Orientation program, and will be removed from this board if this training is not completed. Commission additionally admonishes respondent for failing to honor an obligation placed upon charter school trustees by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. IMO Kirtz, Commr 2011 Jan 10.

Reprimand ordered for Charter Trustee member who attended training only after the issuance of an order to show cause. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels. IMO Szpreingel, Commr 2011 Jan 10.

Reprimand ordered for school board member who attended training only after the issuance of an order to show cause. Additionally, respondent is admonished for causing the unnecessary expenditure of administrative and adjudicative resources at both State and local levels. IMO Murray, Commr 2011 Jan 10.

Removal ordered for board member who failed to attend training, even after issuance of order to show cause. Board member illness, although unfortunate, is not an exception to the requirements of N.J.S.A. 18A:12-33. IMO Coombs, Commr 2011 Jan 10.

Evaluation

The evaluation of a teacher's performance involves a process that is broader in scope than the annual, in-class observation, and regulation only mandates that the preparer of the Annual Written Performance Report be a certified participant in the evaluation process; and the Board's practice of having a building principal or assistant principal complete the AWPR does not, on its face, violate the dictates of N.J.A.C. 6A:32-4.4(f). Middletown Education Assn. v. Middletown Bd. of Ed., 2011 Commr Feb 22.

Increment Witholding

Matter dismissed with prejudice where neither party appeared at hearing, without explanation Smith v. Englewood School District, Commr, 2011 Jan 25.

Pupil Residency

Petitioners failed to appear for telephonic hearing and failed to provide any explanation, even after being given time to do so. Matter dismissed pursuant to N.J.A.C. 1:1-14.4. W.B. and L.M. on behalf of minor child, A.B., v. Bd. of Ed. of the City Of Plainfield, Commr 2011 Jan 14 .

Matter dismissed where petitioner failed to appear at hearing concerning residency appeal. M.A.P. v. West Orange Bd. of Ed. 2011 Commr Jan 25

Settlement approved and judgment docketed against parents for period of pupil's ineligible attendance in the amount of $61,160.18. G.B. and K.B. 2011 Commr Feb 9.

Pupil Discipline—Suspension

Challenge to suspension dismissed as moot where petitioner has already received her high school diploma and there is no longer any record of the suspension maintained in petitioner's student records; petitioner's assertions that the suspension was imposed in violation of her due process rights and that the district's disciplinary procedures are legally flawed are likewise moot because petitioner is no longer subject to the force of school procedures or regulations. Robinson v. School District of Paterson, Commr, 2011 Jan 25.

Pupil challenged 3-day suspension. Discipline expunged from record. Portion of complaint related to discipline is moot. Request for attorneys fees denied.

Complaint dismissed with prejudice. Witkins v. Pitman Bd. of Educ., 2011 Commr Feb 18.

Superintendent Contract
Interim CSA challenged termination of contract. Contract only required 30 days notice. CSA entitled to $21,000 for the period of notice. Persi v. Brick Bd. of Ed. 2011 Commr Feb 24.

Tenure Dismissal
Teacher of Media Arts dismissed for conduct unbecoming for taking the electronic signature of the prison administrator without authorization and affixing it to a document; downloading a "bootleg" movie still in general release in the theaters; downloading software on the prison's computer to bypass the encryption code on rented DVDs in order to copy the films prior to their return to the rental company; and using prison inmates to edit video footage produced by respondent's private company. IMO Tenure Hearing of Morgan, Commr 2011 Jan 11.

Tenured administrative secretary dismissed for conduct unbecoming and insubordination for defiant, combative, and unprofessional behavior; failure to adhere to expectations regarding punctuality and absenteeism; failure to adhere to the district's dress code policy; and failure to comply with the professional improvement plan(s) developed for her. Commissioner concluded the Board has carried its burden to prove the charges against respondent, and ordered her dismissed and removed from tenured employment. IMO Tenure Hearing of Nicholson, Commr, 2011 Jan 24.

Tenured custodian had charges brought against him for leaving school building before the end of his shift on several occasions and for falsification of time sheets. Respondent contended that he was forced to leave his post early whenever his co-worker – a custodian who possessed a "black seal' license to operate the building's boilers – wanted to leave early, because respondent did not hold the "black seal" license and was therefore not allowed to remain in the building alone to complete his shift. Board met its burden of proof relative to the charges of conduct unbecoming and misbehavior, but did not meet its burden on the neglect charge as the record reflects that respondent performed his actual duties and was by all accounts a good employee; respondent's lack of any disciplinary history and his reputation as a good worker who performed the tasks required of him – and who advised his immediate supervisor about the problem with his co-worker insisting that he leave early – mitigate against his dismissal from his tenured position. Commissioner orders reinstatement to tenured position with 120 suspension without pay. IMO Johnson 2011 Commr Feb 3.

Tenure Rights/Emoluments
Reinstated employee refuses position in district, terminating her right to tenured position. Matter remanded to ALJ for determination of back pay due petitioner. Bush v. Warren Co. Vo-Tech 2011 Commr Feb 9.

Workers' Compensation
Petitioner failed to prove that the Board's rejection of her claim for additional workers' compensation days rather than sick days was arbitrary, capricious, unreasonable, or not otherwise in accordance with the law. Gusler, Commr, 2011 Jan 3.

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School Ethics Commission

Advisory Opinion: A board member's participation in an exit interview would violate N.J.S.A. 18A:12-24.1(c) and (d) of the Code of Ethics for School Board Members. A15-10.

SEC dismisses complaint without prejudice at to complainant's right to refile. Complainant failed to factually establish a violation of the Code of Ethics for School Board Members, failing to provide factual support to credit the allegation that board member told school secretary and registrar that if she wanted to keep her jobs in the following year she needed to take a pay cut. Where the complainant has no basis of knowledge of the events and "facts" set forth in the complaint, she must provide the SEC with a reasonable basis for such allegations, through, but not necessarily limited to, a sworn affidavit or certification. Danis v. Milevski, SEC 2011: January 25.

SEC dismisses complaint without prejudice at to complainant's right to refile. Complainant failed to factually establish a violation of the Code of Ethics for School Board Members, failing to provide factual support to credit the allegation that board member told principals that he would like to find a job for a friend who had worked his campaign. Where the complainant has no basis of knowledge of the events and "facts" set forth in the complaint, she must provide the SEC with a reasonable basis for such allegations, through, but not necessarily limited to, a sworn affidavit or certification. Danis v. Milevski, SEC 2011: January 25.

SEC dismisses complaint without prejudice at to complainant's right to refile. Complainant failed to factually establish a violation of the Code of Ethics for School Board Members, failing to provide factual support to credit the allegation that board member told principals that she insisted that a patient of hers be hired as a social studies teacher. Where the complainant has no basis of knowledge of the events and "facts" set forth in the complaint, she must provide the SEC with a reasonable basis for such allegations, through, but not necessarily limited to, a sworn affidavit or certification. Danis v. Koch, SEC 2011: January 25.

SEC found that board members violated the Code of Ethics for School Board Members when they released a School Ethics complaint to the media which contained identifiable student information. By so doing, respondents took action to make public, reveal or disclose information that was confidential in accordance with board policies, procedures or practices in violation of the confidentiality section of N.J.S.A. 18A:12-24.1(g). Respondents, by releasing the School Ethics complaint to the media, without adequately redacting student information, willfully made a decision contrary to the educational welfare of a student, in violation of N.J.S.A. 18A:12-24.1(b). SEC recommended the penalty of censure. S.L.G. and M.S., as parents of D.S., AND D.S, v. Granata, Granatir and Calcado, SEC 2011: February 22.

SEC dismisses complaint that board member provided inaccurate address information on Personal/Relative and Financial Disclosure forms. Allegations unfounded. SEC further found that, viewing the totality of the circumstances, the complainant continued this action in bad faith, solely for the purpose of harassment or malicious injury to the respondent. SEC found that the complainant knew, or should have known, that this complaint was without any reasonable basis in law or equity since the complainant was unable to set forth any facts to support a claim of violation. The SEC found the complaint to be frivolous pursuant to N.J.S.A. 18A:12-29(e) and ordered that the complainant pay a fine in the amount of $500.00. Valdes v. Morejon, SEC 2011: February 22.

SEC dismissed complaint as complainant failed to factually establish a violation of the Code of Ethics for School Board Members. The complaint set forth no factual allegations which, if true, could establish that the respondents made personal promises or took action beyond the scope of their duties such that, by its nature, had the potential to compromise the board in violation of N.J.S.A.

18A:12-24.1(e). The complaint set forth no factual allegations which, if true, could establish that the respondents surrendered their independent judgment to a special interest or partisan political group. Nor was there any factual allegation which, if true, could establish that the respondents used the schools in order to acquire some benefit for themselves, a member of their immediate family or a friend in violation of N.J.S.A. 18A:12-24.1(f), The complaint set forth no factual allegations which, if true, could establish that the respondents took deliberate action which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties in violation of N.J.S.A. 18A:12-24.1(i) Daponte v. Becker and Scully SEC 2011: February 22.

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State Board of Examiners

State Board of Examiners orders revocation of school psychologist certificate. Psychologist had agreed to the voluntary surrender of his license to practice professional counseling in New Jersey in accordance with a Consent Order entered into with the Professional Counselor Examiners Committee of the New Jersey State Board of Marriage and Family Therapy Examiners. Consent Order resulted from allegations that psychologist had failed to maintain client records, had engaged in a dual relationship with a client and misrepresented his credentials. IMO Certificate of Davis, Exam. 2011: January 20.

State Board of Examiners orders revocation of substitute credential. Substitute teacher had been convicted of criminal sexual conduct and had been disqualified from public service pursuant to N.J.S.A. 18A:6-7.1 et. seq. Such conviction and disqualification constituted conduct unbecoming a certificate holder. IMO Credential of Genovese, Exam. 2011: January 20.

State Board of Examiners orders revocation of superintendent's Principal and School Administrator Certificates of Eligibility and his Teacher of Music, Supervisor, Principal and School Administrator certificates.. Superintendent had pled guilty to theft by deception and official misconduct and had been disqualified from public service pursuant to N.J.S.A. 18A:6-7.1 et. seq. Such conviction and disqualification constituted conduct unbecoming a certificate holder. IMO Credential of Genovese, Exam. 2011: January 20.

State Board of Examiners orders revocation of teacher's Teacher of Health and Physical Education Certificate of Eligibility With Advanced Standing and Teacher of Health and Physical Education certificate. Teacher had pled guilty to Endangering the Welfare of a Child and Criminal Sexual Contact, and was court-ordered to forfeit his teaching certificates. The SBE accepted the relinquishment of the certificates with the full force and effect of revocation. IMO Certificates of Smith, Exam. 2011: January 20.

State Board of Examiners orders revocation of teacher's Teacher of English and Teacher of Elementary School Certificate. Teacher had pled guilty to Criminal Sexual Contact, and was court-ordered to forfeit his teaching certificates. The SBE accepted the relinquishment of the certificates with the full force and effect of revocation. IMO Certificates of Goffi, Exam. 2011: January 20.

State Board of Examiners orders revocation of teacher's Teacher of Elementary School Certificate of Eligibility and Teacher of Elementary School Certificate. Teacher, after having been charged with Aggravated Sexual Assault, had pled guilty to one count of Sexual Assault and was court-ordered to forfeit his teaching certificates. The SBE accepted the relinquishment of the certificates with the full force and effect of revocation. IMO Certificates of Defranco, Exam. 2011: January 20.

State Board of Examiners denies teacher's application for certification after revocation of her Teacher of Italian Certificate of Eligibility, Teacher of Italian Certificate and as a Teacher of Spanish Certificate. Teacher's certificates had been revoked as a result of a New York conviction for Grand Larceny; a disqualifying offense under N.J.S.A. 18A:6-7.1 et. seq. Teacher's disqualification from teaching pursuant to N.J.S.A. 18A:6-7.1 et. seq. serves as a permanent bar to her teaching in the public schools. In addition, teacher had not satisfied the four year waiting period since revocation of her certificates. IMO Application for Certification after Revocation of Vurro, Exam. 2011: January 20.

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New Jersey Council on Local Mandates

There are no education-related decisions posted for January and February at this time.

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Election Law Enforcement Commission

There are no education-related decisions posted for January and February at this time.

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New Jersey Division on Civil Rights

There are no education-related decisions posted for January and February at this time.

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New Jersey Government Records Council

ALJ ratified settlement agreement approved by GRC in matter regarding Executive Session minutes from September to December 2008. Because the complaint brought about a change in the custodian's conduct (revision of OPRA request form) complainant was a prevailing party with the matter being forwarded to the OAL for a determination of reasonable attorneys fees. Wolosky v. Township of Vernon, No. 2009-57 (GRC February 24, 2011).

Motion for reconsideration granted as earlier GRC decision was based upon a "palpably incorrect or irrational basis." While e-mail in question was contained in a chain of e-mails which concerned official business of the Robbinsville Public School District, and which were therefore government records as defined in OPRA, the contents of this specific e-mail did not concern official business of the School District and therefore said e-mail constituted a personal message which was not "made, maintained or kept on file… in the course of official business." As such, the subject e-mail was not a government record pursuant to N.J.S.A. 47:1A.1.1 and was therefore not disclosable under OPRA. Lewen v. Robbinsville Public School District, No. 2008-211 (GRC February 24, 2011).

Custodian certified that no records responsive to the Complainant's OPRA request
for an official copy of the Superintendent's transcript from Virginia Polytechnic Institute and State University existed in the district files. There was no credible evidence in the record to refute the Custodian's certification. Accordingly, the Custodian did not unlawfully deny the Complainant access to the requested records. Simon v. Margate City School District, No. 2010-140 (GRC February 24, 2011).

Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the handwritten student notes to determine the validity of the Custodian's assertion that the record contains advisory, consultative or deliberative material which is exempt from disclosure under OPRA pursuant to N.J.S.A.47:1A-1.1. Complainant stated that the responsive student notes contained factual information obtained by the School District during the course of a non-criminal investigation and thus should not be considered exempt from disclosure under OPRA as ACD material. Sage v. Freehold Regional High School District, No. 2010-108 (GRC February 24, 2011).

Accumulated sick time is considered to be part of a payroll record which is subject to disclosure under N.J.S.A. 47:1A-10. *See* Jackson v. Kean University, No.2002-98 (GRC February 2004). Roarty v. Secaucus Board of Education, No. 2009-221 (GRC January 25, 2011).

Because the requested records comprise notes used by a board member as a memory aid to facilitate comments made to the public during a Board of Education meeting, and because such notes are not the official record of the meeting, the requested records are exempt from disclosure as advisory, consultative or deliberative material pursuant to N.J.S.A. 47:1A-1.1 and O'Shea v. West Milford Board of Education, No. 2004-93 (GRC April 2006). *See also* Lucente v. City of Union City (Hudson), No. 2008-119 (GRC November 2009). Schiavoni v. Sparta Township School District, No. 2010-73 (GRC January 25, 2011).

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New Legislation

P.L.2011, c.2, S1431, Approved 1/25/2011.
Requires all wireless telephones and electronic communication devices issued by public entities to be activated to receive Amber Alerts.

P.L.2010, c.112, A2290, Approved 1/5/2011.
Establishes standards for certain fertilizer applications, requires certification of professional fertilizer applicators, and regulates labeling and sale of certain fertilizers.

P.L.2010, c.121, A1637 Approved 1/5/2011.
Permits advertising on exterior of school buses.

P.L.2010, c.122, A3466 Approved 1/5/2011
The "Anti-Bullying Bill of Rights Act."

P.L.2011, c.10, A2854, Approved 1/28/2011
Establishes "Jersey Fresh Farm to School Week."

P.L.2011, JR-1, AJR11, Approved 1/26/2011
Designates second full week in April as "Asperger's Syndrome Awareness Week."

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New Regulations/Executive Orders

42 N.J.R. 3058(a) Adult education programs: tuition N.J.A.C. 6:30-3.11

42 N.J.R. 3058(b) Professional licensure and standards rules) N.J.A.C. 6A:9-5.11, 5.12, 8.1, 8.3, 11.1, 11.2, 11.6, 11.10

43 N.J.R.59(a) TPAF; restoration of rules for service and salary credit, back pay. N.J.A.C. 17:3-4.7; 4-4.8; 5-3.6.

43 N.J.R.200(a) Schools Development Authority; school facility projects; N.J.A.C. 19:37

43 N.J.R.200(a) Standards and Assessments; N.J.A.C. 6A:8.

43 N.J.R. 282 (b) Professional licensure and standards: requirements for interstate reciprocity; N.J.A.C 6A:9.

43 N.J.R. 284(a) Fiscal accountability, budgeting, compensation and contracts of district superintendents; N.J.A.C. 6A:23A-1.2 and 3.1

43 N.J.R. 449(a) TPAF service and salary credit; back pay; repeal of N.J.A.C. 17:3-4.7.

43 N.J.R. 662(a) Pensions and Benefits; new rules for defined contribution retirement program N.J.A.C. 17:6.

43 N.J.R. 830(a) Educational facilities; school facilities project, SDA district; N.J.A.C. 6A:26-19.

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Proposed Regulations

43 N.J.R. 711(a) Adult Education Programs, N.J.A.C. 6A:20.

43 N.J.R. 767(a) Professional licensure and standards; certificate of eligibility for CSA in state district N.J.A.C. 6A:9-12.4.

43 N.J.R. 769(a) Student transportation N.J.A.C. 6A:27-4.1, 2, 3, 4, 5 and 6.4.

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United States Supreme Court

Section 1983 Claims

Monell's "policy or custom" requirement applies in § 1983 cases irrespective of whether the relief sought is monetary or prospective. A municipality cannot be held liable simply because it employs a tortfeasor, but may be held liable when execution of a government policy or custom inflicts the injury. Whether an act or omission is a government policy or custom depends on the act or omission, not the nature of relief sought. Reversed and remanded. L.A. County v. Humphries, 131 S. Ct. 447 (2010)(November 30, 2010).

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3rd Circuit Court of Appeals

First Amendment

Court of Appeals affirms district court denial of motion for preliminary injunction enjoining school board from prohibiting student from playing on lacrosse team. Parent signed consent form, which included 24-7 drug and alcohol policy prohibition, with cover letter which indicated that parent signed under duress. Board refused to accept form. Parent did not demonstrate likelihood of success on the merits. No infringement on parent's first amendment rights. No evidence that parent's right to criticize board policy affected. Doe v. Banos, No. 10-2164, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, 2010 U.S. App. LEXIS 24497, November 30, 2010 (not precedential)

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New Jersey District Court

Contract

In a matter involving the construction of a running track at Seneca High School, the District Court found in favor of the contractor in the amount of $10,916.61 on its contract claim against the board; in favor of the contractor on the board's breach of contract and negligence counterclaim; and in favor of the subcontractor on the contractor's claim for contribution and indemnity. Boro Constr., Inc. v. Lenape Reg'l High Sch. Dist. Bd. of Educ., Civil No. 05-4689 (JEI/JS), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2010 U.S. Dist. LEXIS 135822, December 23, 2010.

Discrimination

Motion to dismiss on several counts involving multiple defendants under the Civil Rights Act, Sec. 1983, the Law Against Discrimination and the New Jersey Constitution granted in matter involving a middle school student who was sexually assaulted by another student after departing a school bus. Assaulting

student was subsequently convicted of rape and was allegedly was improperly on the bus as it was not his assigned bus.
Jones v. Ewing Twp. Bd. of Educ., Civil Action No. 3:09-cv-3536 (FLW), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2010 U.S. Dist. LEXIS 119029, November 9, 2010.

Special Education
School district did not comply with the IDEA in declassifying student. Court previously found that the record below lacked sufficient information to permit the Court to fashion an appropriate remedy. OAL is the appropriate forum for development of a factual record and resolve evidentiary disputes concerning reimbursement of expenses, future placement of the student, and other remedies. Matter remanded for development of findings of fact and conclusions of law. M.B. v. South Orange/Maplewood Bd. of Educ., Civil Action No. 09-5294 (SRC), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2010 U.S. Dist. LEXIS 124619, November 23, 2010.

Summary judgment granted to Plaintiffs, parents of autistic student. For each of the IEPs before the Court, the district came to definitive conclusions on placement without parental input, failed to incorporate any parental suggestions or discuss with the parents prospective placements, and in some instances, failed to listen to the parents' concerns; the IEPs were predetermined. Parents were denied any meaningful participation in the development of the IEPs in violation of IDEA. District ordered to draft an IEP in accordance with the procedural requirements of the IDEA. Plaintiffs' request for money damages under the IDEA (excluding attorneys' fees and related costs) denied. Plaintiffs' claims for monetary and equitable relief under the ADA, Rehabilitation Act, Sec. 1983 and the LAD denied. D.B. v. Gloucester Twp. Sch. Dist., CIVIL ACTION NO. 08-5667 (JEI), UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, 2010 U.S. Dist. LEXIS 121479, November 17, 2010.

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New Jersey Supreme Court

Certification
Petition for certification denied. Digiorgio v. Board of Educ. of Elizabeth, C-291 September Term 2010, 066171, SUPREME COURT OF NEW JERSEY, 2010 N.J. LEXIS 1181, November 4, 2010.

Discrimination
Two-year statute of limitations on claims under New Jersey's Law Against Discrimination, N.J.S.A. §§ 10:5-1 to 10:5-49, did not bar disparate wages claims from three veteran female professors, but only limited damages recoverable for past discrimination to the wages they received during two years immediately before the filing of their complaint. Each payment of discriminatory wages constituted an actionable wrong that was remediable under the LAD. Trial court and Appellate Division erred by dismissing their suit. Judgment reversed and case remanded.
Alexander v. Seton Hall Univ., 204 N.J. 219 (2010); 8 A.3d 198, November 23, 2010.

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New Jersey Superior Court Appellate Division

Assault
Appellate Division affirms trial court determination that student, a juvenile, pushed a teacher, committing an act of delinquency that, if committed by an adult, would constitute simple assault against a teacher, which rises to third-degree aggravated assault if bodily injury results. After trial, the trial judge imposed a one-year probationary term conditioned on the student's attendance at and completion of an anger management program. State ex rel. J.S. , DOCKET NO. A-4783-08T2, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2010 N.J. Super. Unpub. LEXIS 2933, December 8, 2010.

OPRA
Appellate Division affirmed decision of the Government Records Council, denying employee request for twelve emails regarding employee's work-related complaints received and/or sent by the township attorney, township administrator, township committee members and planning board chairperson. GRC's broad interpretation of OPRA's "personnel records" and "advisory, consultative, or deliberative" exceptions were consistent with OPRA's purposes. Because OPRA explicitly provides for the release of personnel records with the consent of the individual in question, matter remanded to determine whether employee effectively waived her right to confidentiality under OPRA as to those emails. McGee v. Township of E. Amwell, 416 N.J. Super. 602 (App. Div. 2010) (November 16, 2010).

Appellate Division affirms trial court denial of access to an employee's letter of resignation as the high school varsity baseball coach requested under OPRA and the common law right of access. The letter of resignation, which explained the coach's personal reasons for resigning and contains confidential information, did not fall under the OPRA personnel exception. As to the common law right of access, the individual's right to privacy and the State's interest in confidentiality clearly outweighed the need for any public disclosure. Appellate Division also affirmed the trial court determination as to the amount of attorneys' fees awarded for improperly withholding other documents requested under OPRA. No attorney fees were awarded regarding the resignation letter. Kieffer v. High Point Regional High School, DOCKET NO. A-1737-09T2, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2010 N.J. Super. Unpub. LEXIS 3115, December 28, 2010.

Retaliation/CEPA
Appellate Division reversed trial court dismissal of CEPA action. Failure to comply with the notice provisions of the New Jersey Tort Claims Act was not grounds for dismissal of a CEPA action as those Tort Claims Act provisions did not apply to CEPA actions. Plaintiff not barred from raising his CEPA claim at the trial court level because he did not raise the issue in his administrative challenge to his layoff. Racanelli v. County of Passaic, 417 N.J. Super. 52 (App. Div. 2010) (November 10, 2010).

Retirement Rights/PERS
Appellate Division affirms PERS board of trustees determination to deny elementary school aide accidental disability retirement benefits. Aide had tripped on a rug and fractured her left radius and ulna. The aide filed her application for disability retirement five years and six weeks after the accident, missing the five year deadline. The evidence indicated that the delay in filing was not beyond her control and there was no delayed manifestation of her disability warranting relaxation of the deadline. PERS' decision was supported by sufficient evidence in the record and was not arbitrary, capricious or unreasonable. Caporale v. Board of Trs., DOCKET NO. A-3647-08T2, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2010

N.J. Super. Unpub. LEXIS 2929, December 8, 2010.

Salary
Appellate Division affirms decision of the Commissioner of Education, adopting the initial decision of the Administrative Law Judge (ALJ) dismissing appellant's petition for lost wages and emotional distress. Petition of appeal was untimely and there was no reason to relax the 90 day rule. Appellate Division found arguments to be insufficient to warrant a full opinion. Malinconico v. State-Operated Sch. Dist. of the City of Newark, DOCKET NO. A-4015-09T3, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2010 N.J. Super. Unpub. LEXIS 2955, December 10, 2010.

Tenure Dismissal
Appellate Division affirms Commissioner's dismissal of tenured teacher. Commissioner adopted ALJ determination that behavior constituted unbecoming conduct and that removal was necessary to ensure the safety and well being of students and staff. There was sufficient credible evidence in the record demonstrating that the teacher verbally abused and threatened students, left students unsupervised, threatened his supervisor, acted aggressively toward colleagues, engaged in a physical altercation with a colleague in the presence of students, made defamatory statements to others about students, and displayed insubordination. Teacher's argument that board failed to consider his depression was not raised below and no exception applies.
In re Tenure Hearing of Taylor, DOCKET NO. A-1082-09T2, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, 2010 N.J. Super. Unpub. LEXIS 2630,
November 1, 2010.

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New Jersey Superior Court, Law/Chancery Division

There are no education-related decisions posted for November and December at this time.

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Commissioner of Education

Board policy
On remand of a challenge by 47 parents to Board's revised attendance zone and transportation policies, Commissioner adopts ALJ ruling that: there was no OPMA violation as the board provided adequate notice of its meetings and meetings were open to the public with opportunity for public comment; the Board did not comply with the adoption schedule outlined in its bylaws in the original adoption of the policies but that the transportation policy was properly revised after the Commissioner's earlier decision, and that the attendance zone policy – although reviewed as per the Commissioner's previous decision – was never validly adopted by the Board. Board is ordered to properly adopt its attendance zone policy within 60 days. L.S., o/b/o E.S., Commr 2010: Nov. 1 (Westfield)

Certification- revocation, suspension
Commissioner grants request by charter school teacher to withdraw his appeal of an order by the State Board of Examiners revoking his teaching certificates/endorsements. IMO Revocation of Certificates of Hylick, Commr. 2010:Dec. 28.
» SBE Decision (Appeal decision)

DYFS
Elementary student's mother filed an application for emergent relief contending that restrictions on her access to school property were unlawful and made it impossible for her to send her son to school since she could not be assured of his safety and freedom from retaliation for her actions advocating on his behalf. She also asked that her son's absences be expunged. The Board counterclaimed for an order requiring the parent to cause her son to comply with compulsory education laws (N.J.S.A.18A:38-25 *et seq*.), and for attorney fees. Commissioner finds that since legal custody and decision-making authority for the boy is presently vested in DYFS, she lacks the authority to pursue this litigation or to direct her son's education; nor could mandated pupil records be expunged unless inaccurately recorded. Board's motion for summary decision is granted. A.M.M., o/b/o G.M., Commr 2010: Dec. 2 (Park Ridge)

Elections
Commissioner dismisses petition filed by a minister seeking an order directing the Board to place two referenda questions on a school election ballot: removing the theory of evolution from public school curricula and opening the daily school session with a moment of silence. Commissioner grants motions to dismiss brought by the Board and the Mayor, as the Commissioner has no jurisdiction over election-related issues, and to the extent that the issues are school matters within the Commissioner's jurisdiction, the objects of the referenda cannot be legally performed by the Board and the Commissioner has no authority to permit them to occur, as the referenda implicate federal constitutional issues. Torres, Commr 2010: Nov. 23 (Camden).

Ethics
Commissioner affirms recommended penalty of 6 month suspension for board member who violated N.J.S.A.18A:12-24(e), as well as N.J.S.A. 18A:12-24.1(e), (f) when she solicited – via the school e-mail system – and received campaign contributions from three district employees. Rubino, Commr 2010: Nov. 15 (Matawan-Aberdeen Reg.)

Censure was the appropriate sanction for board member who violated N.J.S.A.18A:12-24 (c). The determination of the Commission as to violation of the SEA was not reviewable by the Commissioner as no notice of appeal was filed. The penalty of censure was consistent with penalties imposed in similar cases. Once administrators are hired**,** board officers with immediate family members employed by the district should not participate in discussions or actions relating to any supervising administrators – including the district Superintendent. *See, e.g.,* A30-05 (March 10, 2006); A10-00 (June 27, 2000); and A07-06 (July 31, 2006). Here, the board member participated in negotiating committee discussions, made motions at public meetings and even voted on issues relating to salaries for incumbent administrators. IMO Birch, Commr 2010: Dec. 13 (Prospect Park)

Censure was the appropriate penalty for a board member who violated N.J.S.A.18A:12-24.1 (d) and (e) when he confronted an employee that he believed was being disrespectful to him, as he became directly involved in activities that involve the day-to-day administration of the school district, and his actions had the potential to compromise the Board as it may have sparked an

impulsive reaction from the employee. The determination of the Commission as to violation of the SEA was not reviewable by the Commissioner as no notice of appeal was filed. DiGesere, Commr 2010: Dec. 13 (Kearny)

Increment Withholding

Case manager and psychologist's failure to ensure timely completion of IEPs justified the withholding of her salary increment; withholding should not be nullified on the basis of a procedural failure to provide notice and reasons within 10 days under N.J.S.A.18A:29-14, as the record showed she was fully aware of the reasons for her withholding and where she suffered no consequences from the alleged failure to send the notice and the de novo hearing held in the OAL cured any procedural deficiencies. The statute does not set forth the consequences for the failure of the board of education to provide the 10-day notice and does not require nullification of the withholding for failure to provide notice. Sidberry, Commr 2010: Nov. 9 (Trenton)

Indemnification

In matter brought by board's security guard for indemnification under N.J.S.A. 18A:16-6 for costs he incurred in defending a civil action brought against him, letter from employee's attorney clearly stating a fee of $150/hour – and the lack of objection to that rate by the board – constitute facts supporting a contract implied-in-fact concerning the fee of $150/hour. Board's policy restricting attorney fees to hourly rates not exceeding $125 violates the Board's responsibility under N.J.S.A. 18A:16-6 to defray all costs incurred by school employees in defending civil actions arising out of their employment. Commissioner orders parties to be bound by that rate, but directed compensation at $125/hour for work by associate, as record shows the billing rate for the associate is $25 less per hour than lead counsel's rate. Galego, Commr 2010: Dec 20 (Elizabeth)

Residency

Commissioner issues summary ruling confirming the correctness of NJDOE's determination that Piscataway is fiscally responsible for educational services during the 2007-2008 school year for a student who was placed in a residential facility by the Department of Children and Families under N.J.S.A. 18A:7B-1 et seq. Pursuant to N.J.A.C. 6A:23A-19.2, the present district of residence of a child in a residential facility means the New Jersey district of residence of the child's parent(s) or guardian(s) as of the last school day prior to October 16; the student was placed residentially on September 27, 2007, his mother resided in Piscataway on that date, and did not relocate to Dunellen until November 19, 2007, so Piscataway was financially responsible during the entire 2007-2008 school year. Piscataway's view that its responsibility for the student should end on the day the mother moved is inconsistent with the statutory scheme for awarding State aid, which is based on a once-annual report of student enrollment data. Piscataway Bd. of Ed., Commr 2010: Nov. 8

Parents who challenged board's determination that their son is no longer entitled to be educated in the district, were not homeless; no evidence that their temporary living situation was undertaken in a crisis of immediacy, or that other options were thoroughly explored. They were no longer domiciled in Point Pleasant when they moved to live with grandparents, although their move following the sale of their house was based on personal and financial setbacks beyond their control and that they plan to re-establish residency in Point Pleasant at some undetermined point in the future. Board is entitled to reimbursement of tuition for the 62 days that J.T.G. attended school after the date they moved. J.G. and D.G., o/b/o J.T.G., Commr 2010: Dec. 27 (Point Pleasant)

In matter involving the allocation of education costs between Egg Harbor and Mainland for a homeless family living in various motels, Commissioner determines that the responsibility for providing and funding education costs attaches to a district under N.J.S.A.18A:38-1(d) once a family determined to be "homeless" resides in the district for one year; the family is considered to be domiciled there, regardless of the form of housing and even though hotels are not intended as permanent housing. As the homeless family stayed in an Egg Harbor hotel for 24 continuous months, the Commissioner affirms NJDOE's determination that responsibility for costs shifted from Mainland to Egg Harbor after the family had been in Egg Harbor for a year. Egg Harbor, Commr 2010: Dec. 30.

Seniority/Reduction in Force

Commissioner dismisses petition brought by tenured English teacher in a pre-school extended-day/extended-year program, whose position was eliminated in response to a reduction in State aid in 2008, and was reassigned to a regular program and position with a resultant reduction in salary. Commissioner determines that her seniority rights were not violated when teachers with less seniority were reassigned to extended-day/extended-year programs for K-8 where the reassigned teachers had become highly qualified teachers under the No Child Left Behind Act and she had not; teacher was therefore ineligible to teach kindergarten or higher and was therefore ineligible for reassignment to the extended-day/extended-year program. Brown, Commr 2010: Nov. 22 (Elizabeth)

Student Discipline

Commissioner concurs with ALJ findings of credibility and assessment of witness and determined that student assaulted another student with a baseball bat at the high school; however, the Board's expulsion was contrary to the requirements of N.J.A.C.6A:16-7.5(a)(1) which requires a long-term suspension and a second subsequent infraction warranting suspension or expulsion before educational services may be discontinued. Accordingly, student must be permitted to return to school and his record amended to reflect a long-term suspension. D.L.G. o/b/o O.G. , Commr 2010: Nov. 12 (Millburn)

Tenure Acquisition

Commissioner grants board's summary judgment motion to dismiss union's petition on behalf of maternity leave replacement teachers who received a letter from the superintendent stating that only time worked in a permanent position can be counted toward tenure; claims were not ripe for adjudication as petition asserts no loss of any benefit by the staff members who received the letter, and matter cannot be viewed as a declaratory judgment. Bridgewater, Commr 2010: Dec. 15.

Tenure Dismissal

Tenure charges are dismissed against custodian accused of inappropriate sexual advances, sexual remarks, and sexual contact with students employees during a summer work program; Commissioner relied on ALJ's determination that witnesses were not credible, and all of the facts related to the alleged unbecoming conduct are in dispute, student witnesses were not credible, and witness testimony and credibility were the only means available to make a determination. Tenure Hearing of Melillo, Commr 2010: Nov. 4 (Elizabeth)

Commissioner dismisses tenure charges against principal of unbecoming conduct, violation of policy and procedure, insubordination, gross negligence and other just cause, but affirms the withholding of his salary increment for the same conduct. There was no evidence that the principal knew of the illegal

grade changing practice in the high school guidance department and the board fails to carry its burden of proving the tenure charges by a preponderance of the competent and credible evidence; however, the decision to withhold an increment does not require a showing sufficient to justify suspension or the revocation of a teacher's tenure, and – once the Board discovered the grade changing scandal – it was reasonable to withhold respondent's increment. Tenure Hearing of Berman, Commr 2010: Nov. 15 (Fort Lee)

Commissioner concurs with the ALJ that teacher is guilty of unbecoming conduct for using racial epithets regarding another teacher during school hours and violating school district policy by engaging in inappropriate staff behavior; however, her conduct did not justify termination from employment. Teacher is penalized with loss of 120 days salary already withheld plus an additional 30 day suspension without pay; additionally, Commissioner orders her to take coursework on racial sensitivity at her own cost and expense. Matter of the Tenure Hearing of Cooke, Commr 2010: Nov. 22.

Commissioner dismisses teacher on tenure charges of conduct unbecoming, incompetence, insubordination and other just cause, based on overwhelming documentation of severe attendance problems, refusal to sign evaluations, poor classroom management, and storing pictures of a sexual nature on the district assigned computer. As teacher failed to appear at scheduled hearings without explanation or excuse despite having been afforded every opportunity to appear, the tenure charges were sustained. Tenure Hearing of Prickett, Commr 2010: Dec. 23 (Bridgeton)

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School Ethics Commission

Board member violated N.J.S.A. 18A:12-24.1(d), (e) and (g) of the Code of Ethics for School Board Members when he analyzed confidential student data, met with various administrators to advise them on ways to improve the standardized test score results and when he used the data for his personal gain. SEC recommends penalty of censure. I/M/O Jackson, Jr. SEC. 2010 Dec 21,

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State Board of Examiners

After pleading guilty to guilty to Criminal Sexual Contact and Tampering With a Witness, teacher was ordered by court to forfeit certificates. Teacher of Elementary School Certificate of Eligibility with Advanced Standing and Teacher of Elementary School Certificate are revoked immediately. I/M/O Blessing Exam 2010 Dec. 9

Teacher had resigned from his tenured position in January 2010, after acknowledging that he had had an emotional relationship with a student. According to teacher, the relationship did not become physical until after the student had graduated. Teachers are professional employees to whom the people have entrusted the care and custody of school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. Teacher's lack of professional judgment warrants revocation. Teacher of Social Studies Certificate of Eligibility and a Teacher of Social Studies certificate are revoked. I/M/O Craig, Exam. 2010

Dec. 9

Following conviction in January 2010 for Sexual Assault and Official Misconduct, teacher was disqualified from public service pursuant to N.J.S.A. 18A:6-7.1 et seq. Teachers are professional employees to whom the people have entrusted the care and custody of school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. Teacher of Mathematics Certificate of Eligibility and Teacher of Mathematics certificate revoked I/M/O Drebes, Exam 2010 Dec. 9

After being charged with Stalking, teacher was court-ordered to forfeit his teaching certificates as a condition of his entry into a Pre-Trial Intervention program. Teacher agreed to forfeit his Teacher of Mathematics and Teacher of Social Studies certificates with the force and effect of a revocation and all attendant consequences. Board voted to accept Gelb's relinquishment with the force and effect of a revocation. I/M/O Gelb, Exam 2010 Dec. 9

Teacher pled guilty to a charge of Conspiracy to Distribute CDS. Board may revoke or suspend the certification of any certificate holder on the basis of demonstrated inefficiency, incapacity, conduct unbecoming a teacher or other just cause. Teachers are professional employees to whom the people have entrusted the care and custody of school children. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. Teacher of Art Certificate revoked. I/M/O Giovinazzi, Exam 2010 Dec 9.

Teacher charged with Endangering the Welfare of a Child, Luring or Enticing a Child and Official Misconduct, voluntarily forfeited his teaching certificates. Teacher currently holds a Teacher of Mathematics Certificate of Eligibility With Advanced Standing, a Teacher of Mathematics certificate, and a Supervisor certificate. Certificates ordered revoked immediately. I/M/O Martin Exam 2010 Dec. 9

Teacher convicted of Sexual Assault was disqualified from public service pursuant to N.J.S.A. 18A:6-7.1 et seq. Teacher currently holds a Teacher of Elementary School Certificate of Eligibility With Advanced Standing. In enacting the Criminal History Review statute, the Legislature sought to protect public school pupils from contact with individuals whom it deemed to be a danger to them. Individuals convicted of a crime such as Sexual Assault fall squarely within this category. This strong legislative policy statement is in accord with the Commissioner's long-standing belief that teachers must serve as role models for their students. Certificate ordered revoked immediately. I/M/O Stellwag, Exam 2010 Dec. 9

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New Jersey Council on Local Mandates

There are no education-related decisions posted for November and December at this time.

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Election Law Enforcement Commission

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New Jersey Division on Civil Rights

Probable cause was found to credit allegations that school district violated the NJ Law Against Discrimination when it failed to remedy repeated harassment of student based on perceived sexual orientation; despite repeated and regular notification of bullying and harassment, students complaints were ignored or improperly handled. J.C. v. Emerson Board of Education, DCR, 2010 Nov. 15

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New Jersey Government Records Council

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New Legislation

P.L.2010, c.84. -see **S947**
Concerns eligibility for Catastrophic Illness in Children Relief fund assistance when more than one child in family has catastrophic illness. Advance Law 2 pages Approved 11/3/2010 PDF Format HTML Format

P.L.2010, c.94. -see **A2743**
Requires development of interscholastic athletic head injury safety training program; requires certain measures to protect student athletes with concussions; and requires continuing education for athletic trainers.* Advance Law 5 pages Approved 12/7/2010 PDF Format HTML Format

P.L.2010, c.96. -see **S95**
Requires the New Jersey Schools Development Authority to biannually compile information on school facilities project contracts awarded to minority and female contractors. Advance Law 2 pages Approved 12/8/2010 PDF Format HTML Format

P.L.2010, c.97. -see **S435**
Limits amount of time vacant teaching position can be filled by substitute teacher. Advance Law 1 pages Approved 12/8/2010 PDF Format HTML Format

P.L.2010, c.100. -see **S2071**
Limits amount of time a vacant teaching position can be filled by certain teachers employed in a temporary capacity Advance Law 2 pages Approved 12/8/2010 PDF Format HTML Format

P.L.2010 c.106 –see S2208
Allows certain organizations, including NJSBA, to file complaints with Council on Local Mandates in certain circumstances. Approved 12/23/2010 PDF Format HTML Format

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N.J.A.C. 6A:21 Marie H. Katzenbach School for the Deaf 42 N.J.R. 1459(a), 42 N.J.R. 2954(a), 12/6/10

N.J.A.C. 6A:5 Regulatory Equivalancy and Waiver 42 N.J.R. 1457(a). 42 N.J.R. 2754(b), 11/15/10

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N.J.A.C. 6:30-3.11 Adult Education 42 N.J.R. 1768(a). 42 N.J.R. 3058(a), 12/20/10

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United States Supreme Court

Certification denied. Stratechuk v. Bd. of Ed., 178 L. Ed. 2d 24; 2010 U.S. LEXIS 6598; 79 U.S.L.W. 3195 (Oct. 4, 2010)

Certification denied. El-Hewie v. Bd. of Ed. of Bergen County Vocational School District, 178 L. Ed. 2d 143; 2010 U.S. LEXIS 6162; 79 U.S.L.W. 3201 (Oct. 4, 2010)

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3rd Circuit Court of Appeals

Contracts

Third Circuit determines that moving company was not entitled to recover from school district under a theory of unjust enrichment for unpaid moving services. The claim of unjust enrichment was barred by Pennsylvania statute and the moving company could not assert estoppel against the school district. Wayne Moving and Storage of N.J. v. School Dist. of Phil., 2010 U.S. App. LEXIS 22263 (3d Cir. October 28, 2010) (Eastern Dist. of Pa.) (precedential)

Criminal Charges

Third Circuit affirms judgment of conviction and life sentence imposed by district court on school bus driver for elementary and middle-school students, who was convicted for child pornography charges where he was not a mere possessor but acted as a facilitator and conduit for others to obtain child pornography. No due process rights were violated, nor did he have any reasonable expectation of privacy in his IP address to establish a Fourth Amendment violation. While the New Jersey constitution recognizes a right to privacy in subscriber information there is no such right under the federal constitution, as "the search and seizure protections in the federal and New Jersey Constitutions are not always coterminous." United States v. Christie, 2010 U.S. App. LEXIS 19285 (3d Cir. Sept. 15, 2010)(non precedential).

Immunity

Third Circuit holds that District court correctly granted Eleventh Amendment immunity to maximum security youth center and its staff in their official capacities, as state institution. The court also affirmed the district court's summary judgment for the individual defendants on the merits of plaintiff's Eighth Amendment (cruel and unusual punishment) claim arising from the playing of tackle football without equipment, where football player who was left a quadriplegic, failed to show a substantial risk of serious harm that violated contemporary standards of decency and failed to show deliberate indifference. The court's adoption of the

more-specific-provision rule obviated the need to address plaintiff's Fourteenth Amendment substantive due process claims. Betts v. New Castle Youth Dev. Ctr. , *621 F.3d 249; 2010 U.S. App. LEXIS 19052 (September 13, 2010)(precedential)*

Based on incidents occurring during the course of employment, the employees were entered into a child abuse central registry pursuant to NJSA 9:6-8.11. The employees contended that their due process rights were violated in that they had no prior opportunity to be heard. The district court properly concluded that the DYFS was immune from suit under the Eleventh Amendment and that Younger abstention was warranted in light of pending state administrative proceedings. A preliminary injunction was properly denied. Howard v. N.J. Div. of Youth & Family Servs**.,** 2010 U.S. App. LEXIS 22354 (3d Cir. October 28, 2010) (not precedential)

Non-Renewal

Third Circuit affirms a district court order denying a "Motion to Reopen Plaintiff's Closed Case," a challenge to the non-renewal of a teacher's one-year provisional contract to work. In prior litigation, his challenge was dismissed at every level through the district court. He filed a new complaint arising out of the same circumstances, which was dismissed, and then filed a motion for reconsideration which was likewise dismissed. He then filed this "Motion to Reopen Plaintiff's Closed Case" which the district court denied, finding no abuse of discretion. El-Hewie v. Bd. of Ed. of Bergen County Vocational School District, 2010 U.S. App. LEXIS 21207 (3d Cir. Oct. 12, 2010)(non precedential).

Third Circuit affirms district court ruling dismissing teacher's complaint against charter school. When teacher's contract as a "Long-Term Substitute Teacher" was not renewed, she filed with the EEOC for race discrimination in violation of Title VII, and received a right-to-sue letter. She sued for race discrimination/retaliation under Title VII, ADA violations, and intentional infliction of emotional distress. The District Court granted the district's motion for summary judgment, holding that teacher's Title VII claims were time barred as she did not file her complainant in court within 90 days from the receipt of the right-to-sue letter, that she failed to exhaust her administrative remedies with respect to her ADA claims, and declining to exercise supplemental jurisdiction over the intentional infliction of emotional distress claim. Williams v. East Orange Cmty. Charter Sch., 2010 U.S. App. LEXIS 20942 (3d Cir. Oct. 8, 2010)(non precedential).

Special Education

Parents were not entitled to tuition reimbursement for time student spent in private placement; rejects parents' claim that delay between her request for a due process hearing to review the proposed IEP and the ultimate resolution was so prolonged as to justify granting an award of tuition reimbursement or compensatory education, where the parents did not challenge the appropriateness of the IEP. C.W. v Rose Tree Media School District, 2010 U.S. App. LEXIS 20001 (3d Cir. September 27, 2010) (Eastern District of Pa.) (not precedential)

Court affirms district court and denies reimbursement to parents of student with pervasive development disorder that caused him to be challenged in his language skills and auditory processing. Court concludes that student's IEP provided FAPE and, in the alternative, that placement at the parent's unilateral placement in a private school for disabilities was not an appropriate placement because it was not in the

least restrictive environment. The district's placement it provided meaningful educational benefit. Procedural flaw resulting from IEP's lack of certain annual goals and short-term objectives is not actionable; procedural violations are only actionable if they impede the child's right to a FAPE, significantly impede the parents' participation rights, or cause a deprivation of benefits, none of which is demonstrated here. N.M. v. School District of Philadelphia, No. 08-4841, 2010 U.S. App. LEXIS 19499 (September 14, 2010) (3d Cir. September 14, 2010) (Eastern District of Pa.) (not precedential)

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New Jersey District Court

Contract

In matter involving demand by board for return of an initial deposit made by the board to out-of-state contractors under a contract for human resources software that was subsequently voided after a challenge by a rival contractor, the court grants partial summary judgment to the contractors/defendants. Characterizing the claim as an effort to enforce the state court's judgment, court finds that the matter is barred neither by the California nor New Jersey statutes of limitations. Grants defendants summary judgment on count one as the defendants were not bound by the judgment as they were neither a party to the judgment nor in privity with parties to the judgment. Denies without prejudice the motion to dismiss on second count of unjust enrichment, because New Jersey law may plausibly apply, depending on whether the choice-of-law clause is void and depending on how that clause is properly construed. Bd. of Educ. of Cherry Hill v. Human Res. Microsystems, Inc., 2010 U.S. Dist. LEXIS 102293 (D.N.J. Sept 28, 2010)

Discrimination-Employees

Court grants in part, denies in part, school district's motion to dismiss lawsuit by music teacher who challenged district's failure to pay him stipends or accommodate his eye problems, and who claimed retaliation due to his protected communications, and alleged improper creation and posting of job opportunities by the CSA and the improper withholding of his annual incremental raise during his leave of absence. Court dismisses disability discrimination claim under ADA, as he has no disability in his post-treatment condition ; dismisses claim that he was retaliated against for filing with EEOC for lack of causal link; dismisses hostile work environment claim; dismisses breach of contract claim for failure to pay Plaintiff stipends as CBA contains a grievance procedure and such procedure must be utilized; dismisses First Amendment claim as teacher failed to establish that he made protected communications; dismisses retaliation claim as Plaintiff's submissions to this Court do not clearly set forth when or to whom he disclosed or threatened to disclose the alleged violations. Timeliness issue survives as it raised questions of fact; NJLAD disability claim with regard to withholding of increment survives; claim under the ADEA survives against the Board, and the claim under the NJLAD survives against board and CSA. Meyers v. Hoboken Bd. of Educ., No. 07-5058 (PGS), 2010 U.S. Dist. LEXIS 115712 (D. N.J. October 29, 2010) (not for publication)

Insurance

The applicability of a college fraternity's liability policy's "hazing exclusion," would not be resolved on motion for summary judgment; the

"hazing exclusion" is limited to those parties who "directed others to participate, and/or participated" in the hazing, creating a question of fact as to which Defendants actually participated in the hazing, and which merely participated in the events that flowed from the hazing, and ultimately resulted in a student's death. Landmark Am. Ins. Co. v. Rider Univ., 2010 U.S. Dist. LEXIS 110020 (D.N.J. October 15, 2010) (not for publication)

Retaliation

Secretary lodged rather unclear claims, including that school defendants retaliated against her after she filed a Notice of Tort Claim against them alleging nepotism, corruption and breach of policies, as well as sexual harassment by the Director of Operations (Director) and claiming that Director tortiously recorded a telephone conversation between him and her. The Director and his wife had filed a defamation suit against her and her lawyer, claiming that she provided a copy of her Notice of Tort Claim containing false allegations, to the newspaper. Court finds that Director did not act under color of law when he filed his defamation suit, he is entitled to summary judgment on secretary's § 1983 claim. The § 1983 claim against the Board of Education fails because nothing in the record supports a conclusion that the Board of Education ratified the Director's decision to file the defamation suit. Nor did depriving her of office supplies, reducing her hours, or moving her office constitute an adverse employment action sufficient to sustain a First Amendment retaliation claim. Nor did the recorded phone conversation constitute a violation under the New Jersey Wiretapping and Electronic Surveillance Control Act, N.J.S.A. 2A:156A-1 et seq., as the Director was a party to the communication, his purpose was not to commit a tortious or criminal act, but rather to clear his name, and did not act "under color of law." Plaintiff did not sustain her burden of establishing that her Tort Claim Notice was drafted and filed in good faith. Court grants defendants' Motions for Summary Judgment on liability. Bradley v. Atl. City Bd. of Educ., 2010 U.S. Dist. LEXIS 92497 (D.N.J. Sept. 7, 2010)

Special Education

School board's Motion to Expand the Record without prejudice in special education unilateral placement reimbursement matter, is denied. Board failed to show why witness testimony on the meaning of relevant regulations and laws is the appropriate means of conveying such information, as opposed to legal argument. Underlying matter involved board's challenge to an administrative determination that it failed to offer FAPE to a 14 year-old boy with autism, where board refused to evaluate him or propose an IEP on grounds that boy was not enrolled in the District at the time, and the state regulations did not require it to provide these services to privately enrolled students. Court will allow Board to proffer relevant additional evidence at the time of summary judgment. Moorestown Twp. Bd. of Educ. v. S.D., 2010 U.S. Dist. LEXIS 109856 (D.N.J. October 15, 2010) (not for publication)

Court enters summary judgment for school board, where parents sought reimbursement after they unilaterally placed declassified student with drug problems in a wilderness camp in Utah without notice to the district, and then in a residential treatment center. Prior to the reimbursement claim, the parents had never notified the Board of the placement or completion of these programs or their intent to request reimbursement. Claim was untimely, as parents had not filed a due process claim regarding the declassification within two years of the declassification. They did not seek reimbursement until more than one year after placement at the treatment center. Parents who object to an IEP must

begin review proceedings within a reasonable time of the unilateral placement for which reimbursement is sought which may not be more than one year, without mitigating excuse. Plaintiffs' failure to comply with the procedural requirements of the IDEA barred them from reimbursement. Mittman v. Livingston Twp. Bd. of Educ., 2010 U.S. Dist. LEXIS 107419 (D.N.J. October 7, 2010) (not for publication)

Court denies board's motion for reconsideration of award of attorney fees to prevailing parents; board argues that the Court overlooked a sentence contained in a certification attached to the board's legal brief which provided: "the Board reserves its right to oppose Defendants' untimely motion for attorneys' fees and expenses on the merits." Court opines that even if such language had been considered by the Court, the Court would not have reached a different conclusion. Dumont Bd. of Educ. v. J.T., 2010 U.S. Dist. LEXIS 93411 (Sept 8, 2010)(not for publication)

Court grants 19-year old student's motion for a preliminary injunction against the Board of Education, requiring the board to maintain his educational placement in an approved private school according to his IEP, pending the outcome of the due process proceedings involving his request for an additional year of schooling beyond June, the date of his graduation. B.A.W. v. E. Orange Bd. Of Educ., No. 10-4039 (JLL), 2010 U.S. Dist. LEXIS 90544 (August 31, 2010) (not for publication)

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New Jersey Supreme Court

Petition for certification is denied. Foushee-Clark v. Newark Bd. of Educ., 6 A.3d 441; 2010 N.J. LEXIS 1034 (October 5, 2010)

Petition for certification is denied. G.S. v. Rumson Bd. of Educ., 203 N.J. 606; 5 A.3d 797; 2010 N.J. LEXIS 969 (September 27, 2010)

Petition for certification is denied. Dunn v. Elizabeth Bd. of Educ., 2010 N.J. LEXIS 918; 3 A.3d 1228 (September 21, 2010)

Petition for certification is denied. London v. Pleasantville Bd. of Educ., 2010 N.J. LEXIS 930; 3 A.3d 1228 (September 21, 2010)

Petition for certification is denied Ponsi v. Cliffside Park Bd. of Educ., 203 N.J. 437; 2010 N.J. LEXIS 839; 3 A.3d 1226 (September 8, 2010)

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New Jersey Superior Court Appellate Division

Civil Service

Appellate Judge reverses ruling below of the Merit System Board (the Board) denying a Dept of Education employee back pay and attorney's fees after he successfully appealed his demotion. Remanded to the Civil Service Commission to determine an appropriate amount of attorney's fees and costs to award. In re Hearn, 2010 N.J. Super. LEXIS 208 (App. Div. 2010) (published) (Sept. 15, 2010)

Contracts
Court holds that in school construction project matter, there were genuine issues of material fact as to whether contractor breached its obligations under a settlement agreement, and if so whether the breach was material such that further performance by the Board (payment of funds in escrow and participation in arbitration) was excused; reversed and remanded to Chancery Division for further proceedings and finding of fact.
Thomas Co. v. Tamburro Bros. Constr. Co. No. A-1490-09T2, 2010 N.J. Super. Unpub. LEXIS 2259 (App. Div. September 14, 2010) (unpublished)

Appellate court reverses law division order for equitable rescission of a settlement agreement that resolved a dispute regarding enforcement of the parties' management services contract pending in arbitration. Rescission had been ordered on the ground of unilateral and material mistake based on finding that implementation would be unconscionable and would violate several laws. Appellate Court finds that there are genuine issues as to material facts on all aspects of the rescission claim, and that the record was insufficient to allow a summary disposition. Trial court's order, including plaintiff's return of the $750,000 payment, is reversed, and the matter is remanded for further proceedings. Tri-Tech Environmental Engineering, Inc. v. Nutley Bd. of Ed., No. A-4601-08T2, 2010 N.J. Super. Unpub. LEXIS 2159 (App. Div. August 30, 2010) (unpublished)

Elections
Court reverses trial court's dismissal of a challenge filed by unsuccessful candidates to the results of the 2009 school board election; petitioners challenged the outcome of the election where the certified election results showed the petitioners as the successful candidates, but the absentee ballots were 90% in favor of respondents resulting in a victory for respondents; petitioners claimed that this proportional irregularity was contrary to the customary result in which votes cast at the polls generally mirror those in absentee ballots, and further contended that the results were tainted by abuse and misuse of absentee ballots, and mishandling of messenger ballots cast through an "authorized messenger" pursuant to N.J.S.A. 19:57-4.(now repealed) Although the court is satisfied that the trial court did not err in denying relief to petitioners, it is constrained to reverse and remand for further proceedings because the matter was decided without a hearing and presentation of evidence without any agreement or order to so proceed, nor motion for summary judgment. Caldwell v. Griffin et al. and Atlantic County Board of Elections, No. A-0842-09T3, 2010 N.J. Super. Unpub. LEXIS 2200 (App. Div. September 2, 2010) (unpublished).

Discrimination-Student
Court finds in favor of Rutgers, and dismisses appeal by former Rutgers student from summary judgment dismissal of student's NJLAD discrimination claim against the university and faculty members. Student, an Arab-American who suffered from cognitive impairment and Crohn's disease, unsuccessfully claimed systematic discrimination based on his ethnicity and disability, including verbal abuse and humiliation, discrimination in awarding him grades, refusal to accommodate his cognitive and physical disabilities, and creation of a hostile educational environment. Nor did student establish that the motions judges discriminate against him or deprived him of a fair opportunity to present his case by their various discretionary determinations, nor by the fact that two of them were Rutgers graduates; moreover, all but one allegation

against Rutgers was barred by NJLAD's 2-year statute of limitations, and that allegation did not constitute part of an ongoing pattern of discrimination under the continuing violation doctrine. Mazouz Middleton Shana v. Rutgers, No.: A5575-08, 2010 N.J. Super. Unpub. LEXIS 2461 (App. Div. October 12, 2010) (unpublished)

Public Records

OPRA applies to the Environmental Law Clinic (Clinic) operated by Rutgers Law School in Newark, as it met the definition of a public agency under N.J.S.A. 47:1A-1.1; it was created and funded in part by a state university's law school, and for purposes of OPRA, was indistinguishable from any other academic program offered by the law school. Request for documents is remanded to the trial court to determine whether the specific documents requested are exempt from disclosure under OPRA or common law. Sussex Commons Assocs. v. Rutgers, No. A-1567-08T3, 2010 N.J. Super. LEXIS 207(App. Div. 2010) October 25, 2010 (Approved for publication)

Deciding issue of first impression, Appellate Court determines that property appraisals performed by a private appraiser at the behest of the West Orange Council must be released in full as they did not fall within OPRA'sdeliberative process exemption. Court reverses trial court determination that portions of the appraisals that were not purely factual were not disclosable; rather, under two-part analysis subsequently established in Education Law Center v. New Jersey Department of Education, 198 N.J. 274 (2009), the appraisals were not subject to the exemption and must be fully released because (1) they had not been used in the "decision making process," and (2) their disclosure would not "reveal deliberations that occurred during" the decision making process. Nor were the appraisals protected from full disclosure under the attorney work product doctrine or on the basis of attorney-client privilege. Tractenberg. V. West Orange Township, (App. Div. 2010)(Sept. 16, 2010)

State Board of Examiners

Appellate Division affirms the Commissioner's decision sustaining a finding by the State Board of Examiners that a principal had engaged in conduct unbecoming a school administrator by placing the fire alarm system on test mode in violation of the State's Fire Prevention Code, and imposing a sixty-nine-day suspension of his license. In the Matter of the Suspension of the Certificates of Kramer, 2010 N.J. Super. LEXIS 2588 (App. Div. 2010)(Oct. 26, 2010) (Approved for publication)

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New Jersey Superior Court, Law/Chancery Division

Non-operating districts

In a ruling on Sept. 24, a judge from the Superior Court, Chancery Division upheld the constitutionality of a 2009 law that requires the elimination and merger of all non-operating school districts. The Rocky Hill and Millstone boards of education, and one local citizen, mounted a constitutional challenge to the 2009 law, after the commissioner of education accepted the recommendation of the Somerset Executive County Superintendent to eliminate these two non-operating districts, and have each district merge with the district to which it sent its students under a send/receive relationship. The judge ruled that the principle of

one person, one vote, was not violated because in a merged district, elections would be “at large” so that each qualified district voter’s vote would count as much as any other voter’s. Rocky Hill Borough, Bd. of Ed., Millstone Bd. of Ed. and LaCave, v. NJDOE and Executive Cty Super of Somerset Cty., Sept. 24, 2010, Superior Court, Chancery Div., Somerset County, Docket No. C-12051-09 (unpublished)

Public Records /Meetings

Where there was a disparity in records produced by County Economic Development Corp (BCEDC) in response to Media Group’s two requests for the same email correspondence and other documents, Court held that the 45-day statute of limitations started to run at the time the second request for the information was made, the only request actually denying access. Court finds that withholding of records was not intentional but that BCEDC must satisfy the request, and comply with the request for a certification of completeness. Such sworn statement must describe in detail (1) the search undertaken to satisfy the request, (2) the documents found that are responsive to the request, (3) the determination of whether the document or any part thereof is confidential *and* the source of the confidential information, and (4) a statement of the agency’s document retention/destruction policy *and* the last date on which documents that may have been responsive to the request were destroyed. Pursuant to DARM Guidelines, any email message that meets the definition of a public record is an official record and must be scheduled, retained, and disposed of accordingly. However, there is no private cause of action or civil penalty under OPRA for an agency’s failure, whether inadvertent or intentional, in maintaining a public record. BCEDC is ordered to implement procedures to ensure compliance with DARM schedules. Court allows Media Group to amend complaint, in interests of justice, where it was not properly verified. North Jersey Media Group, Inc. v. Bergen County Economic Development Corp, Sept. 14, 2010, Law Div. Superior Court, Bergen County, DOCKET No. BER-L-6593-10 (unpublished)

In matter involving a complaint filed by a resident against the Borough and a Councilwoman, judge ruled on numerous allegations involving OPRA and OPMA charges. Judge found that emails on the Councilwoman’s private computer related to the Borough’s business were public records, and that when the Borough failed to respond within 7 days to the request, the request was deemed to be denied. Also, Borough’s response that it would look for correspondence dating from 2003 would be considered by trier of fact as to whether it was appropriate response. Whether investigative report involving a grievance was confidential would be considered by *in camera* review of the report. Handwritten notes and minutes of meetings that are drafts are not disclosable public records. Closed session resolution that informed the public only that the Borough would discuss matters involving "attorney/client privilege, property acquisition" was insufficient and “did not provide a helpful description of the topics it covered in the Closed Session.” O'Brien v. Woodcliff Lake, Nov. 4, 2010, Superior Court, Bergen County, Docket No. L-2091-10 (unpublished)

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Commissioner of Education

Certification

Commissioner affirms State Board of Examiners’ decision, suspending

respondent's teaching and administrative certificates for six months. Teacher had inappropriately raised concerns regarding excessive touching of students by another teacher, damaging that teacher's reputation and potentially damaging that teacher's career. . Paraskevopoulos, Commissioner 2010; September 22

Commissioner affirms decision of State Board of Examiners suspending teacher's certificate for one year. Commissioner and Appellate Division found unbecoming conduct based on excessive absenteeism. The State Board of Examiners independently and justifiably found that appellant's unbecoming conduct rose to a level that supported suspension of her certification. Megargee, Commissioner 2010: September 23

Commissioner affirms State Board of Examiners' decision to revoke teacher's teacher and supervisor certificates and his Principal Certificate of Eligibility. Teacher had been admitted into a pre-trial intervention program, one condition of which was to forfeit his tenured teaching position. Teacher had been charged with Endangering the Welfare of a Child and Harassment for making numerous phone calls and leaving messages for a former eighth grade student. Castel, Commissioner 2010: October 12

Commissioner
Commissioner did not have jurisdiction to adjudicate claims brought by parent against school district as they did not arise under the school laws. . Parent claimed that district representatives violated parent and student's right when they sent student to a hospital for evaluation after finding a disturbing drawing in the student's desk. A.T. and M.T., Commissioner 2010: October 21

Increment Withholding
Board's withholding of increment from assistant superintendent upheld. Action was neither arbitrary nor capricious and was based on unsatisfactory supervisions and evaluation of school principals. Superintendent of schools had, through the evaluation process, emphasized that petitioner was not supervising the schools well enough and continued to need too much direction from him. Barrett, Commissioner 2010: October 18

90-Day Rule
Teacher, who was non-renewed in May 2009, filed her petition contesting the non-renewal in April 2010. Petition was time barred as it was filed beyond the 90 day timeline and no compelling case foe relaxation was presented. Jackson, Commissioner 2010: September 23

Non-Renewal
Commissioner held that Fiscal Monitor acted within his statutory authority when he overturned the Board's decision to reinstate the petitioner-security guard subsequent to non-renewal and Donaldson hearing. Fiscal Monitor's decision was related to the fiscal management of the school district. Decision was based in part on concern that the Board would expose itself to potential legal liability if it reinstated a non-tenured employee who had evidenced inappropriate behavior in the past. Rankins, Commissioner 2010: October 26

Reduction in Force
RIF'd tenured teacher of consumer science not entitled to culinary arts teaching position. Recall rights expired with her retirement from teaching

in 2008. Teacher lacked certifications and practical experience to teach in new culinary arts program. No evidence presented that board hired non-tenured teacher to teach business, computer or technology courses in violation of her tenure, seniority or recall rights. Carey v. Springfield Township Board of Education, Commr 2010:September 8

Sending – Receiving
Challenge to districts' 2010 expansion of sending-receiving relationship so that all Elmer students would attend Pittsgrove schools, rendering Elmer a non-operating school district dismissed; boards' action upheld. Action was a legal management prerogative under *N.J.S.A*. 18A:38-8 and not a regionalization without a referendum as claimed. Elmer and Pittsgrove, Commissioner 2010: October 25

Special Education
Commissioner ordered Archway Programs to return – within 60 days of this decision – a total of $2,315,855.51 to the districts which sent students to its private school for the handicapped during the 1994-1995 school year. The matter was returned to the OAL for further action deemed necessary by the ALJ in order to make the requisite calculations and recommended determination of monies due and owing for the remaining audit years. Archway, Commissioner 2010: October 28

Student Discipline
School board policy regarding student discipline for off campus conduct was beyond the scope of its authority. Authority of the board applies to student conduct on school grounds and at school-sponsored functions, with limited exceptions where the excuse of that authority is reasonably necessary for the student's physical or emotional safety, security and well being or for reasons relating to the safety, security and well being of other students, staff or school grounds. Policy applied to violations of the Code of Criminal Justice and/or applicable municipal code or ordinance violation. Ramapo Indian Hills, Commissioner 2010: September 13.

Tenure Dismissal.
Settlement agreement rejected by Commissioner, remanded to OAL. Agreement was signed by superintendent, not by the Board's attorney, the Board's duly authorized representative in litigation. File did not contain a copy of the Board's resolution approving the settlement and designating the Superintendent to sign the agreement on its behalf. Blevis, Commissioner 2010: September 16

Commissioner held that board sustained its tenure charges against tenured social worker. The employee failed to correct her inefficiencies during the 90-day remediation period and failed to avail herself of the assistance offered to her by the board. The board proved that the tenured social worker engaged in unbecoming conduct when she failed to follow administrative directives on numerous occasions, failed to timely file required documents, failed to attend counseling sessions, failed to respond to parent complaints, and failed to attend meetings of the child study team. These actions resulted in serious consequences that put the District out of compliance with the timelines and requirements of the Special Education Code. The social worker was dismissed from her tenured position. Parise, Commissioner 2010: September 16

Commissioner dismisses tenured guidance counselor from his employment. Counselor had engaged in a pattern of improper

interactions with co-workers over the course of several school years, notwithstanding repeated warnings that his behavior was unprofessional. Counselor used profane, sexually explicit or inappropriate language in interactions with co-workers; made unwelcome flirtatious overtures toward female co-workers; and repeatedly used obscene language to criticize administration and colleagues. While each charge standing alone would not warrant his dismissal from employment; in this case, the sum total of offenses, combined with a seeming lack of understanding that the behavior is intolerable and incompatible with the mission of public schools, resulted in dismissal. Young, Commissioner 2010: October 15

Tenure charges of conduct unbecoming, insubordination and other just cause against tenured health teacher were proven. Teacher delivered unplanned lecture which aimed to teach students that the use of inappropriate and obscene words was demeaning to the user as well as the recipient, and disrespectful to both parties. Respondent had no proper basis to advocate against the use of four-letter words, anatomical words, and slang references to same by actually stating each word or phrase to her students; though her goal may have been worthwhile, her behavior clearly went beyond the boundaries of her professional responsibilities and constituted unbecoming conduct. While her conduct was unprofessional, it did not rise to a level that would justify terminating her tenure and career. Commissioner concurred with ALJ and ordered that respondent forfeit 120 days of pay and one year's salary increment, and that she complete coursework in pedagogy that addresses the boundaries between a teacher's instructional jurisdiction and issues properly in the province of parental guidance and control, as well as professional classroom demeanor. Mercorelli, Commissioner 2010: October 27

Transportation

Commissioner upholds Office of Criminal History Review's determination to suspend bus driver's school bus endorsement. Driver parked bus at the end of route and failed to conduct the mandated visual inspection of the vehicle's interior before exiting, as is required by *N.J.S.A.* 18A:39-28; Kindergarten student remained on the bus after it was parked. Petitioner's endorsement was suspended for six months, the mandatory penalty for a first offense pursuant to *N.J.S.A.* 18A:39-28. Dacres, Commissioner 2010: September 8

Passaic County Educational Services Commission's post bid-opening, *ex parte* discussion with bidding bus company K&M and its failure to reject K&M as a bidder and to demand the forfeit of the bid guarantee were deviations from proper bidding procedure. Such actions were inconsistent with the legislative intent underlying the public bidding laws and were arbitrary, capricious and unreasonable. PCESC is cautioned not to repeat such conduct. Petitioners' demand that the contracts with K&M be set aside is moot as the contracts in question have been fully performed. Passaic County Educational Services Commission, Commissioner 2010: October 29

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School Ethics Commission

Violations found

Board member who sought contributions from three district employees using the school email system in an e-mail solicitation that states that the contributions would enable the candidates "to make some critical changes," and where the employees contributed to her campaign, violated N.J.S.A. 18A:12-24(e); she was in a position to directly or indirectly affect their employment and the contributions were made with the understanding that it would influence the board member in her duties. She also violated N.J.S.A. 18A:12-24.1(e), as the mail was private action that might have compromised the Board, and (f) as she used school email to solicit funds (use of schools) for her personal gain. The SEC adopted the ALJ's recommendation for six-month suspension. Rubino, SEC 2010: Sept. 28. (Matawan Aberdeen Bd.) » OAL Decision

SEC finds that board member became directly involved in activities or functions that are the responsibility of school personnel or the day-to-day administration of the school district in violation of N.J.S.A. 18A:12-24.1(d) when he spoke to a member of the school grounds crew in the maintenance shed, poked him in the shoulder, accused him of being disrespectful during a prior encounter, and said he'd be "watching him." This was also a private action that had the potential to compromise the Board as it may well have sparked an impulsive reaction from the employee under N.J.S.A. 18A:12-24.1 (e). However this limited communication did not rise to the level of taking deliberate action resulting in undermining, opposing, compromising or harming school personnel in the proper performance of their duties in violation of N.J.S.A. 18A:12-24.1(i). Complainant did not meet burden to establish that board member violated N.J.S.A. 18A:12-24.1(g) for allegedly speaking to teacher/coach about another board employee or disclosing closed session information about students in a disciplinary matter. Nor did the complainant factually establish the board member confronted principal and secretary about his perception that his niece was not being scheduled often enough as a substitute in violation of (f) (using the schools for personal gain or gain of friends). There was also insufficient evidence to establish that the board member telephoned the assistant superintendent and told him he was "out to get" the principal. SEC recommended a penalty of censure. Digesere, SEC 2010:Oct. 26 (Kearny Bd. of Ed.)

Board member whose wife was a special education classroom aide, violated N.J.S.A. 18A:12-24(c) when he (1) participated on the Negotiations Committee and negotiated the amendment to the CSA contract and salaries for administrators; (2) made clarifying statements at a meeting as to the CSA contract; and (3) voted to approve the revised amendment to the CSA contract. This was a violation even though he abstained on the original vote to amend the CSA contract and the vote to adopt administrators' salaries for the administrators, and even though his spouse has "extremely limited contact" with the administrators. He also violated the act by (1) voting "no" against a motion to table the amendment to the CSA contract; and (2) making motions to approve the CSA contract, and the compensation for administrators. SEC recommended censure, after considering board member's statements that he was guided by board counsel's advice. Birch, SEC 2010:Oct. 26 (Prospect Pk. Bd. of Ed.)

Complaints Dismissed

Complaint alleges that board member violated N.J.S.A. 18A:12-24.1(g) when he revealed confidential information to a newspaper pertaining to contract negotiations between the district and a candidate for the position

of Superintendent. Because the complainant failed to appear to prosecute the allegations by means of legally competent evidence, he did not meet his burden pursuant to N.J.A.C. 6A:28-6.4 and the SEC, therefore, grants the board member's motion to dismiss the complaint with prejudice. Longo, SEC 2010:Sept. 28 (Belleville Bd. of Ed.)

Parents allege that board president and administrators violated N.J.S.A. 18A:12-24(d) when they failed to communicate with them regarding what punishment, if any, was meted out to the board president's child in connection with a disciplinary incident that involved their child. SEC does not have jurisdiction over FERPA or other of the issues raised. The bare allegation that such non-communication "appears to be caused by the relationship of the student with the student's father…" is insufficient to defeat a motion to dismiss. SEC dismisses complaint but does not find that it was frivolous. J.E.T., Jr. & J.L.T., SEC 2010: Sept. 28 (Cumberland Reg. Bd. of Ed).

SEC finds no probable cause that board member undertook a "service… which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties" in violation of N.J.S.A. 18A:12-24(d) when he hosted a community program which provided a legal seminar and sign-up for internship with the law firm that is the attorney for the Board of Education. He did not vote on attorney's employment subsequently, and his vote the prior year was irrelevant. SEC finds the complaint was not frivolous. Southerland, SEC 2010: Sept. 28 (Irvington Bd. of Ed.)

The SEC finds no probable cause to find that the board member of the Monmouth Regional H.S. Board violated N.J.S.A. 18A:12-24(d) by also holding a position as Assistant CSA with the Monmouth County Vocational School District (MCVSD). The Commission found nothing in the record to suggest a "fundamental incompatibility" between serving as an Assistant CSA of the MCVSD and a member of the Regional Board. (The complainant had argued that the board member's position on the Board gives him the ability to make decisions impacting the educational experience at Monmouth Regional, such as reducing staff and cutting programs that could result in students opting to attend the MCVSD, and that conversely, the respondent's position as an Assistant Superintendent at MCSVD might reasonably be expected to prejudice his judgment with respect to his decisions on the Regional Board.) Serving in these dual capacities necessitates recusal as a Board member on matters that involve the MCVSD. Merola, SEC 2010:Oct 26 (Monmouth Regional H.S. Bd. of Ed.)

SEC dismisses alleged ethics violations against the CSA, stemming from actions by the CSA in allegedly permitting an Assistant Superintendent to perform his job functions without proper certification and qualifications, improperly serving as his mentor, and seeking to hide these unauthorized actions. Many of the determinations necessary to decide the ethics matter requires preliminary findings on issues of licensing, involving statutes and regulations which do not arise under the SEC. While no sanctions are imposed for a frivolous lawsuit, SEC cautions complainant that he has now been informed twice on these claims, and that he be guided accordingly for the future. Valdes, SEC 2010:Oct. 26 (Union City Bd. of Ed.)

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State Board of Examiners

Examiners revokes substitute credential after teacher voluntarily relinquishes it, for inappropriate conversations and conduct with students IMO Credentials of Caso, Exam 2010:Sept. 16.

Examiners orders revocation of Teacher of Spanish certificate of eligibility and Teacher of Spanish certificate, where teacher plead guilty to fourth degree child cruelty and neglect, although he maintained his innocence to the Examiners. IMO Certificates of Garcia, Exam 2010: July 22.

Examiners orders revocation of Teacher of Science and Teacher of Elementary School certificates, for teacher convicted of aggravated sexual assault, sexual assault, aggravated criminal sexual contact, criminal sexual contact and endangering the welfare of a child. IMO Certificates of Hilkevich, Exam 2010:Sept 16.

Examiners orders revocation of Teacher of Mathematics Certificate of Eligibility with Advanced Standing after court ordered teacher to forfeit the certificate after pleading guilty to Endangering the Welfare of a Child. IMO Certificates of Iazzetta, Exam 2010: Sept. 16.

Examiners orders revocation of Certificates of Teacher of Social Studies, Principal/Supervisor and School Administrator, to individual who pled guilty to charges of Criminal Attempt-Endangering the Welfare of a Child and where court believed he should be subject to community supervision for life; charges deemed admitted as he failed to respond to the Order to Show Cause or the hearing notice. IMO Certificates of Johansen, Exam 2010:Sept 16.

Examiners orders revocation of Certificates of Teacher of Elementary School Grades K-5, Eligibility and a Teacher of Elementary School With Subject Matter Specialization: Mathematics in Grades 5-8, for individual who was court-ordered to forfeit his teaching certificates after being convicted of Endangering the Welfare of a Child. IMO Certificates of Mauro, Exam 2010:Sept. 16.

Examiners orders revocation of teacher's Teacher of the Handicapped Certificate where Lopatcong school district had removed him from tenured position on charges of unbecoming conduct, such as asking students to give him back rubs, talking to students about his injuries, walking while holding his private area and yelling at students, in face of numerous reprimands. IMO Certificate of Powell, Exam. 2010: Sept. 16.

Examiners orders revocation of Teacher of Handicapped Certificate who pled guilty to charges of Abuse of a Child, which conduct took place on school property during the performance of her duties in the West Orange School District, and who the court forever barred from holding any state office or position pursuant to *N.J.S.A.* 2C:51-2a(2). Charges deemed admitted as he failed to respond to the Order to Show Cause or the hearing notice. IMO Certificate of Recchione, Exam 2010: Sept. 16.

Examiners orders revocation of Teacher of the Handicapped Certificate of teacher who was convicted and sentenced for Attempting to Elude Police and who had been disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* Although she claimed to have rushed to her son's house because he was in agony from a broken shoulder and he was home alone and in distress and she unknowingly ran a roadblock, no material facts related to Schultz's offense were in dispute since she never denied that she had been convicted and

sentenced. IMO Certificate of Schultz: Exam 2010: Sept. 16.

Examiners orders revocation of Teacher of Physical Education Certificate of Eligibility, and Teacher of Physical Education Certification to individual who had pled guilty to Criminal Sexual Contact and had completed PTI and had his charges expunged. He did not respond to the hearing notice; revocation ordered as he did not deny that he had pled guilty and had been sentenced accordingly. IMO Certificates of Smith, Exam 2010: Sept. 16.

Examiners orders revocation of Elementary School Certificate of Eligibility With Advanced Standing and Teacher of Elementary School Certificate, where Commissioner of Education had dismissed teacher from his tenured position with the Roselle School District for charges of unbecoming conduct inappropriate sexual conduct with a former student. IMO Certificates of Young, Exam 2010: Sept. 16.

Examiners orders revocation of Teacher of Elementary School in Grades K-5 Certificate of Eligibility and a Teacher of Students With Disabilities Certificate of Eligibility where she had been convicted of Grand Larceny and subsequently disqualified from employment and where she had made misrepresentations on her certification. IMO Certificates of Galiano, Exam 2010: Sept. 16.

Examiners orders revocation of Teacher of Health and Physical Education certificate and a Teacher of Driver Education certificate for teacher who was convicted of Attempted Criminal Sexual Conduct. IMO Certificates of Gnade, Exam: 2010:Oct. 28.

Examiners orders revocation of Teacher of Spanish Certificate of Eligibility, where teacher had been terminated from his non-tenured position following allegations of inappropriate behavior towards a student; charges deemed admitted as he failed to respond to the Order to Show Cause or the hearing notice. IMO Certificates of Gonzalez, Exam 2010: Oct. 28.

Examiners orders revocation of Teacher of Art Certificate of Eligibility With Advanced Standing and Teacher of Art certificate after pleading guilty to Child Abuse and being court-ordered to forfeit his teaching certificates as a condition of his entry into a Pre-Trial Intervention program. IMO Certificates of Harvey, Exam 2010: Oct. 28.

Examiners orders revocation of Teacher of Spanish Certificate for teacher who plead guilty to Involuntary Deviate Sexual Intercourse, Statutory Sexual Assault, Corruption of Minors and Sexual Abuse of Children-Possession of Child Pornography. IMO Certificates of Jetter, Exam 2010: Oct. 28.

Examiners orders revocation Teacher of Art Certificate to individual who was arrested for Abuse of a Child-Cruelty, Neglect, and was court-ordered to forfeit his teaching certificate as a condition of his entry into a Pre-Trial Intervention program IMO Certificates of Juzdan, Exam 2010: Oct. 28.

Examiners orders revocation of Certificates of Teacher of Physical Education, Teacher of Driver Education, Supervisor, and Principal Certificate of Eligibility, to individual who pled guilty to Possession of Child Pornography and was sentenced to 41 months' imprisonment in federal prison and fined. Revocation ordered despite his reiteration that the pornographic video clips he received were unsolicited. IMO

Certificates of Kazanjian, Exam 2010:Sept. 16

Examiners orders revocation of Teacher of Physical Education Certificate after individual plead guilty to Criminal Sexual Contact and was court-ordered to forfeit his teaching certificates. IMO Certificates of Kearney, Jr. Exam. 2010: Oct. 28.

Teacher of Elementary School certificate and School Social Worker certificate are voluntarily relinquished with effect of revocation after individual was forced to surrender permanently his license to practice professional counseling and rehabilitation counseling in New Jersey after a client alleged that he had engaged in professional and sexual misconduct, and where individual continued to conduct therapy in violation of the surrender order. IMO Certificates of Singer, Exam. 2010: Oct. 28

Examiners orders revocation of Teacher of Elementary School and Social Studies Certificates of Eligibility and Teacher of Elementary School and Social Studies where State-Operated School (Paterson) had alleged that teacher had engaged in unbecoming conduct, including harassment of staff, and as part of the approved settlement, teacher had agreed to surrender his teaching certificates as condition of dismissal of tenure charges. A relinquishment under N.J.A.C. 6A:9-17.11, has the force and effect of a revocation and prohibits the certificate-holder from applying for certification in the future. Teacher's repeated refusal to relinquish his certificates demonstrates conduct unbecoming that warrants revocation. IMO Certificates of Squicciarini, Exam 2010:Oct. 28

Examiners revokes Teacher of Speech Arts and Dramatics Certificate of individual convicted of Endangering the Welfare of a Child-Photo; individual failed to respond to the Order to Show Cause or the hearing notice, charged deemed admitted and provided just cause to revoke certificate. IMO Certificate of Zinkiewicz, Exam 2010:Oct. 28.

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New Jersey Council on Local Mandates

There are no education-related decisions posted for September and October at this time.

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Election Law Enforcement Commission

There are no education-related decisions posted for September and October at this time.

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New Jersey Division on Civil Rights

The Division on Civil Rights issued a Finding of Probable Cause against the Board for allegedly failing to take sufficient steps to stop the harassment and bullying of a middle school student based on his perceived sexual orientation and Jewish faith. After the fact discipline

was not enough; required broader preventive measures. S.D. o/b/o H.D. v. Old Bridge Bd. of Ed. , DCR Docket No. PM09WE-02972 (August 31, 2010).

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New Jersey Government Records Council

GRC denies requests for reconsideration of the GRC's earlier findings and recommendations as there was no showing they were based upon a "palpably incorrect or irrational basis" or that GRC did not consider the evidence, or acted unreasonably. GRC based its recommendations on Judge Dana's conviction of complainant for harassment and trespass violations, that prohibited him from having any contact with any employees or officials of the Borough of Stanhope except for mailing his tax and utility payments to the Borough and calling 911 in an emergency. Caggiano v. Borough of Stanhope, No. 2010-132, 133, 173 (GRC October 26, 2010) pdf

No knowing violation found, where custodian of records mistakenly informed requestor in a timely fashion that a copy of staff teacher's MA diploma was exempt from disclosure under OPRA as a personnel record before actually searching the teacher's personnel file, and where, after the Custodian learned from GRC that it is a public record, his subsequent search revealed that no record responsive to the request existed. Snyder v. Montague Bd. of Ed., No. 2010-122 (GRC October 26, 2010)

Where the Custodian responded to the Complainant's OPRA request approximately twenty (20) days after receipt of such OPRA request and the custodian received the request over the Memorial Day weekend and states that the absence of staff might have caused a delay in obtaining the responsive documents, a "deemed" denial of access is found but does not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. Weiner v. Newark Housing Authority, No. 2010-121 (GRC October 26, 2010)

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New Legislation

P.L.2010, c.65. -see **A355**
Establishes a permanent Interdistrict Public School Choice Program.
Advance Law 6 pages Approved 9/9/2010 PDF Format HTML Format

P.L.2010, c.66. -see **A1600**
Allows certain entities to submit emergency plans electronically
Approved 9/9/2010 PDF Format HTML Format

P.L.2010, c.68. -see **A1839**
Permits candidate in any election to sign own nominating petition and be circulator thereof
Advance Law 7 pages Approved 9/9/2010 PDF Format HTML Forma

P.L.2010, c.69. -see **A2137**
Provides for educational stability of children placed in resource family

homes and that school district of residence for the child shall be present district of residence of parent
Advance Law 8 pages Approved 9/9/2010 PDF Format HTML Format or guardian.

P.L.2010, c.71. -see **A2300**
Clarifies school district eligibility to receive State funding for special education evaluation services for children enrolled in New Jersey nonpublic school and living out-of-State.
Advance Law 2 pages Approved 9/9/2010 PDF Format HTML Forma

P.L.2010, c.73. -see **A2794**
Permits school boards to charge certain students for remedial or advanced courses provided during summer school.
Advance Law 3 pages Approved 9/9/2010 PDF Format HTML Forma

P.L.2010, c.75. -see **A559**
Decreases certain public document copy fees; amount of fee dependent upon whether letter size page or legal size page.
Advance Law 16 pages Approved 9/10/2010 PDF Format HTML Format

.L.2010, c.76. -see **A914**
Directs Chief Technology Officer in the Office of Information Technology to study and report potential benefits of expanding the use of electronic transactions, including the use of electronic signature and electronic record by the State.
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New Regulations

42 N.J.R. 1519(a). N.J.A.C. 6A:30 (2010), Evaluation of the Performance of School Districts.

42 N.J.R. 2243(a), Rule Adoption, expiration date of N.J.A.C. 6A:32, School District Operations, is extended from September 6, 2010 to September 6, 2012 (September 20, 2010 N.J.R.)

42 N.J.R. 2517(a). Establishes a Red Tape Commission, Exec. Order 41 (November 1, 2010 N.J.R.)

42 N.J.R. 2517(b) Establishes New Jersey Effectiveness Task Force for School and District-Level Professionals (November 1, 2010 N.J.R.)

42 N.J.R. 2830(a) Executive Order No. 47, full Effect of Public Access Exemption Rules if Adopted under the APA through November 15, 2011 (December 6, 2010 N.J.R.)

N.J.R. 2951(a) Special Education Program (December 6, 2010 N.J.R.) N.J.A.C. 1:6A

N.J.R. 2954(a) Marie H. Katzenback School for the Deaf rules (December 6, 2010 N.J.R.) N.J.A.C. 6A:21

42 N.J.R. 2754(b) N.J.A.C. Chapter 5, Regulatory Equivalency and Waiver (December 6, 2010 N.J.R.)

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Proposed Regulations

42 N.J.R. 2524(a) Contracts of district superintendents-- Fiscal accountability, efficiency and budgeting procedures: N.J.A.C. 6A:23A-1.2 and 3.1

42 N.J.R. 2353(a), Proposed New Rules: N.J.A.C. 6A:26-19, Educational Facilities: management of a school facilities project by a School Development Authority district (October 18, 2010 N.J.R.)

42 N.J.R. 2349(a) Proposed Amendment, Uniform Fire Code, School Fire Drills, N.J.A.C. 5:70-2.24 (October 18, 2010 N.J.R.)

42 N.J.R. 1947(a), Proposed Amendments: N.J.A.C. 6A:9-8.8, 12.4 and 12.5 Proposed New Rules: N.J.A.C. 6A:9-8.9, 11.20, 12.8 and 13.22-Requirements for the Standard Certificate (Sept. 7, 2010 N.J.R.)

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United States Supreme Court

There are no education-related decisions posted for July and August at this time.

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3rd Circuit Court of Appeals

Attorney Fees

In student's appeal from the District Court's order that denied outright the student's entire petition for attorney's fees and costs under the Rehabilitation Act of 1973 because the attorney's fees were grossly excessive and his bill replete with inaccuracies and exaggerations. Appeals court finds that although the court agreed with the district court's assessment of the fee petition, it nonetheless committed procedural errors by failing to hold a hearing to determine the reasonableness of the hourly rate claimed by student's attorney. Matter vacated and remanded for further proceedings. M. G. v. Eastern Regional High School Dist., No. 09-4329, 2010 U.S. App. LEXIS 14470 (3rd Cir. July 1, 2010) (not precedential)

Students with Disabilities

Although a 24-year-old student no longer had a statutory right to a free appropriate public education under the IDEA, she was eligible for compensatory education and requiring a school district to provide IEPs and serve as her LEA while the student attended a private school was an appropriate equitable remedy under 20 U.S.C.S. 1415(i)(2)(C)(iii). A court's power to grant equitable relief under the IDEA is not limited to monetary awards, especially where monetary awards can not fully compensate a student for a school district's past failures. Ferren C. v. Sch. Dist. of Phila., 2010 U.S. App. LEXIS 14302 (3d Cir. Pa., July 13, 2010) (precedential)

Circuit court affirms summary judgment dismissal of parent's claims that school district and officials violated Federal Wiretapping Act, 18 U.S.C.S. 2510-2520 and state (Pa.) wiretap laws or intercepted the telephone calls that father made to son at school; no evidence of eavesdropping; therefore, school official could not have "disclosed" the content of the call to a third person, or "used" any information disclosed during the call for any purpose. Further, the father did not establish that he or his son had a reasonable expectation of privacy in the telephone call to maintain § 1983 claim based on violation of Fourth Amendment. Court rejected claims that court could not be impartial, abuse of discretion in the management of discovery. Walsh v. Krantz, No. 10-1217, 2010 U.S. App. LEXIS 14253 (3rd Cir. July 9, 2010) (not precedential).

Resolving a conflict among 3rd Circuit district courts as to the applicability of the statute of limitations for compensatory education claims brought after the 2004 IDEA amendment's effective date, that arose from conduct that occurred before its passage, the Court holds that because the two-year statute of limitations did not become effective until seven months after the enactment of the amendments, it was reasonable to apply it to claims based on conduct that pre-dated the law's passage; the grace period provided reasonable notice and opportunity to bring claims arising in the past. Steven I. v. Cent. Bucks Sch. Dist., No. 10-1179, 2010 U.S. App. LEXIS 17194 (3rd Cir. August 18, 2010)

Discrimination

Circuit court affirms Pa. district court's dismissal of employment discrimination complaint brought against two boards of education who were complainant's former employers, and their attorneys. Her claims failed under 42 U.S.C. §§ 1981, 1983, 1985, 1986, and 1988; Title VII of the Civil Rights Act of 1964;the ADA, the ADEA, IDEA, the Pa. Freedom of Information Act ("FOIA"); the Pennsylvania Whistleblower Law; and the Pennsylvania Right to Know Act. She could not sue attorneys under 42 U.S.C.S. §§ 1983, 1985, or 1986 based on their representation of a school board and a school district. N'Jai v. Floyd, No. 10-1062, U.S. App. LEXIS 13965 (3rd Cir. July 1, 2010)(not precedential)

Where employment discrimination matters were simultaneously filed before the OAL and in federal court regarding provisional teacher's challenge to the school board's termination of his employment, Circuit Court finds that the state final action in Superior Court dismissing the employee's complaint, was entitled to preclusive effect. El-Hewie v. Bergen County, No. 10-1284, 2010 U.S. App. LEXIS 17958 (3rd Cir. August 13, 2010) (not precedential)

Speech

Provisions of a university student code which stated that students could be punished for displaying any unauthorized or offensive sign in certain locations and which banned conduct that caused emotional distress were overbroad under the First Amendment. Both could be used to silence or punish protected speech; court notes that the teachings of Tinker, Fraser, Hazelwood, Morse, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities. McCauley v. Univ. of the Virgin Islands, No. 09-3735, 2010 U.S. App. LEXIS 17196 (3rd Cir. August 18, 2010).

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New Jersey District Court

Attorneys

Court dismisses the school board's motion to disqualify law firm from representing non-renewed assistant business administrator in her retaliation claim against the board; court rejects board's argument that such representation would violate R.P.C. 1.9 and 1.10 where the law firm had merged with a firm whose partner had previously represented the board and had acquired confidential materials, finding that no attorney-client relationship had existed between the board and the attorney

because the services provided -- the conduct of a background fact investigation—had been non-legal services. Fredericks v. Atl. City Bd. of Ed., No. 08-3082 (RBK/JS), 2010 U.S. Dist. LEXIS 88790 (August 26, 2010) (D. N.J. August 26, 2010)

Discrimination

Interscholastic basketball referee alleged that the basketball officials association and other defendants engaged in gender discrimination in violation of Title VII and state laws, and that the Board of Education engaged in gender discrimination in violation of Title IX. Court dismisses all claims as the referee failed to plead sufficient facts to support that an employment relationship (as opposed to a membership relationship) plausibly existed; further, her Title IX claim failed for her failure to demonstrate that the board receives federal financial assistance as required under Title IX. The Court declined to exercise supplemental jurisdiction over the remaining state law claims and dismissed them without prejudice. Covington v. Int'l Ass'n of Approved Basketball Officials, No. 08-3639 (GEB), 2010 U.S. Dist. LEXIS 88088 (D. N.J. August 26, 2010) (not for publication)

Court denies employee's motions for judgment or new trial in matter alleging discrimination by board under the NJLAD for failing to rehire him as an Assistant Principal/Supervisor. Jury had legally sufficient basis to support finding that he was not disabled, where one doctor opined that the stress disorder had resolved prior to the date of nonrenewal. Nor did the trial court commit error requiring new trial, as court was correct in submitting the first prong of his *prima facie* case to the jury, and in giving limiting instruction to the jury so it would not improperly use after-acquired evidence of subsequent psychotic episodes as a justification for the Board's decision. Levine v. Voorhees Bd. of Ed., No. 07-1614 (RMB),2010 U.S. Dist. LEXIS 68277 (D.N.J. July 9, 2010)(not for publication)

Students with Disabilities

Court grants parents' motion for attorneys' fees and related costs as the prevailing parties in an administrative proceeding under IDEA, rejecting board's argument that the relief achieved pursuant a settlement merely constituted interim or *de minimis* relief; applying the two-prong test used to determine prevailing party status, and the Buckhannon 4-part test for voluntary agreements, the court determined that the independent evaluation secured pursuant to the settlement agreement constituted a sufficient material alteration in the legal relationship between the parties to qualify the parents as prevailing parties. A.P. v. N. Burlington County Reg'l Bd. of Ed., No. 09-5811, 2010 U.S. Dist. LEXIS 71434 (D.N.J. July 15, 2010) (not for publication)

School district did not meet the burden of proof in supporting its declassification of a 13-year old where, when it looked exclusively to numerical assessments under the discrepancy method. The ALJ's determination that the district considered various factors was not supported by the record. The Court reserves on what remedy will redress the IDEA violation to afford parties an opportunity to submit their positions.
M.B. v. South Orange/Maplewood Bd. of Ed., No. 09-5294 (SRC), 2010 U.S. Dist. LEXIS 78163 (D.N.J. August 3, 2010)

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New Jersey Supreme Court

Tenure Dismissal
The determination by the Division of Children and Families that allegations of child abuse of a minor student by a teacher were unfounded did not preclude the school district from filing disciplinary charges seeking to terminate the teacher's employment.
In the Matter of the Tenure Hearing of Gilbert Young, Jr., District of the Borough of Roselle, Union County 202 N.J. 50 (2010) (May 12, 2010)

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New Jersey Superior Court Appellate Division

Attorneys
Appellate Division overturned the disqualification of law firm from representing the UMDNJ in plaintiff's whistleblower suit due to an alleged conflict of interest. RPC 1.9, which prohibits a firm from representing a client in one matter, and then another client with adverse interests in the same or a "substantially related" matter, is not implicated unless the party seeking disqualification is a "former client" of the lawyer or a member of the lawyer's firm. Here, the record does not permit a finding of the essential attorney-client relationship between the plaintiff and defendants' lawyers, because the parties differ about the plaintiff's understanding of her relationship with the Morristown firm and client, and where the attorney certified that he advised the plaintiff during their October 2005 meeting that the firm represented UMDNJ and not her personally. Casey v. University of Medicine and Dentistry, 2010 N.J. Super. Unpub. LEXIS 1866, No. A-1997-09T11997-09T1 (App. Div. August 3, 2010).

CEPA/Retaliation
Court affirms a $535,000 verdict under CEPA, to a former Camden public defender who was fired after cooperating with investigators in official corruption investigation of Municipal Prosecutor. Court rejects city's contentions that lower courts had wrongly treated public defender as an at-will employee. Court also finds that his claim for punitive damages should not be dismissed; CEPA claims are exempt from the cap on damages in the Punitive Damages Act. Stomel v. City of Camden, 2010 N.J. Super. Unpub. LEXIS 1930 (App.Div. Aug. 10, 2010) (Appeal after remand)

Certification
Commissioner determines that charter school teacher's certificate was properly suspended when she resigned her position at charter school immediately before school term began; N.J.S.A. 18A:26-10, pertaining to suspension of a teaching certificate for wrongfully ceasing to perform professional duties, and 18A:28-8, requiring tenured teachers to give 60 days' notice of resignation, apply to charter schools.
In the Matter of Teaching Certificate of Van Pelt, ____N.J. Super_ (App. Div. 2010) (July 27, 2010.)(A-5889-08T2; 2010 N.J. Super. LEXIS 144)

Commissioner of Education Authority
In a challenge to the nine discrete Accountability Regulations adopted in 2008 by the Commissioner, that granted the executive county

superintendent extensive powers with respect to reviewing the employment contracts of school superintendents and assistant superintendents, the court holds that they are valid except where they violate the tenure statute. New Jersey Association of School Administrators, et al. v. Schundler and Dow, 2010 N.J. Super. LEXIS 150 (App. Div. August 2, 2010).

Employment Discrimination
Appellate Division reverses trial court's dismissal of assistant superintendent's claims. Court finds that employee sufficiently pled causes of action of handicap discrimination, hostile work environment, and retaliation under LAD to withstand motion to dismiss, after he settled an earlier sexual harassment lawsuit against the district under which he was to receive retroactive salary increase of $ 5,000 above his present salary. Clarke v. Atlantic City Bd. of Ed., 2010 N.J. Super. Unpub. LEXIS 1801, No. A-5344-07T4, (App. Div. July 28, 2010)

Facilities
Court reverses summary judgment that had been awarded in favor of board against architect, where there were factual disputes over, among other things, whether: architect agreed to modify the contract by including addendum affecting 1% fee for contract administration into the fully integrated AIA agreement; whether the board authorized the contract by resolution; and whether post-contract negotiations of the Addendum B language, minus a signature, constituted a valid acceptance of the modification proposal. Court also affirms denial of architect's motion *in limine* to bar documentary and testimonial evidence. Yezzi Associates, L.L.C. v. Brick Twp. Bd. of Ed., 2010 N.J. Super. Unpub. LEXIS 1620, No. A-3207-08T2 (App. Div. July 19, 2010).

Court affirms judgment below in malpractice matter, in favor of defendant architect and engineering firm, in claim brought by guarantors on the construction bond against the defendant; court rejects claim that successful bidder's underpayment of workers by paying prevailing rate for the wrong trade, was the proximate cause of the defendant's negligence in preparing bid specifications and administering the board's public works project. Armm Associates v. Concord Eng'g Group, Inc. 2010 N.J. Super. Unpub. LEXIS 1645, No. A-4823-08T3 App. Div. July 2, 2010)

Funding
In a class action brought by students against state officials and the state, the trial court properly granted the state's motion to dismiss under R. 4:6-2(e) for failure to state a cause of action as the disparity in funding for charter schools under N.J.S.A. 18A:36A-10 and 18A:36A-12 did not deprive the students of equal protection. Application of the New Jersey equal protection balancing test leads to the conclusion that the two categories created by the Charter School Program Act of 1995, N.J.S.A. 18A:36A-2, are reasonably designed to further the appropriate governmental intent of promoting comprehensive education reform by providing a mechanism for the implementation of a variety of education approaches which may not be available in the traditional public school classroom. J.D. v. Davy, ___N.J. Super. (App. Div. 2010) (July 16, 2010) (A-1375-08T2, 2010 N.J. Super. LEXIS 132).

Settlements
Court rejects appeal by assistant principal and affirms Law Division's order directing him to execute an agreement to settle lawsuit against school officials and board; his attorney had actual and apparent authority

to negotiate the settlement of his allegations that the district had engaged in harassment and the distribution of racially discriminatory flyers. Cores v. Atlantic City High School , 2010 N.J. Super. Unpub. LEXIS 1637, No. A-5753-08T3, (App. Div. April 14, 2010).

Students with Disabilities
Appellate court reverses Law Division's finding that the parties entered into valid and enforceable settlements requiring the district to pay only a portion of the tuition for out-of-district placement, as it was not clear that parents' former counsel actually had the authority to bind her clients nor whether the board approved the agreements it seeks to enforce. Lenape Reg'l High Sch. Dist. Bd. of Ed. v. G.P., 2010 N.J. Super. Unpub. LEXIS 2091, No. A-3967-08T23967-08T2 (App. Div. August 23, 2010)

Tenure Dismissal
Court finds that record supports dismissal of tenured custodian for sleeping on the job and taking unauthorized breaks, and rejects claims that using his supervisor as an interpreter violated the custodian's rights or that surveillance tapes were not properly authenticated; further, no there was no requirement for the board to have used progressive discipline, as neither law nor the contract required it. In re Tenure Hearing of Basulto (West New York), 2010 N.J. Super. Unpub. LEXIS 1759 , No. A-1493-09T1, (App. Div. June 3, 2010).

Tort Liability
Court reverses earlier jury award of $127,500 plus expenses in negligence matter brought by citizen who had fallen on the school field while walking her dog. As the evidence did not show that the rock that caused her fall had been generated or left by the Softball League during construction, the issue of liability must be retried with the proofs limited to the theory that the injury was caused by the League's alleged failure to maintain the construction tape until all construction was completed. Court reverses and remands for new trial. St. George v. Colonia Girls Softball League, No. A-2364-08T2, 2010 N.J. Super. Unpub. LEXIS 1598 (App. Div. July 16, 2010).

Parent fell into a hole on football field during scrimmage, was injured and sued. Trial judge granted summary judgment to defendants, finding that they had no notice of dangerous condition and that the board enjoyed immunity under the Tort Claims Act; Court on de novo review finds that parent failed to establish threshold requirement that property was in dangerous condition at time of the injury, as photos and nature of the hole were inconclusive, and affirms summary judgment in favor of defendants. Pazos v. Borough of Sayreville and Bd. of Ed., 2010 N.J. Super. Unpub. LEXIS 2005, No. A-0454-09T2 (App. Div. August 17, 2010)

Unemployment
Court reverses Board of Review's determination that substitute teacher was disqualified for unemployment benefits. Although he submitted his resignation between two successive academic school years and for family circumstances, he was pressed to remain until the end of the year and the court found that at least one of the reasons he left employment was that his substitute contract was ending, which was a "good cause attributable to his work" under *N.J.A.C.* 12:17-9.1(d) (which provides that an individual who leaves work for several reasons, one of which constitutes "good cause attributable to such work," shall not be disqualified for benefits). Court remands for determination of benefits.

Crowley v. Board of Review, 2010 N.J. Super Unpub. LEXIS 1520 (No. A-1708-08T2) (App. Div. July 9, 2010)

Workers Compensation
Court denies board's motion to terminate medical and temporary disability benefits of teaching assistant who was injured by a student, and confirms a compensation judge's prior order requiring the Board to provide her psychiatric treatment for three months; her claims for psychiatric injury subsequent to and beyond original settlement were not barred by *res judicata*, the entire controversy doctrine, or *N.J.S.A.* 34:15-27, as she could allege that her disability increased beyond the level specifically contemplated by the parties at the time of the settlement and included newly manifested psychiatric conditions. Santiago v. North Brunswick Bd. of Ed., 2010 N.J. Super. Unpub. LEXIS 2055, No. A-4709-08T3 (App. Div. August 20, 2010)

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New Jersey Superior Court, Law/Chancery Division

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Commissioner of Education

Abolition of Position
Although Director of Programs and Projects was advised several times by the CSA that his position was being abolished and told that the board had in fact abolished his position to reduce administrative costs, in fact the board never acted to abolish; therefore, his employment was not terminated and he must be returned to the district with back pay. Should a RIF occur, his tenure and seniority rights entitle him to other administrative positions, such as International Baccalaureate Program Coordinator. Goldberg, Commr 2010:Aug 23

Director's challenge to board's abolishment of her position and non-renewal of her employment during a reorganization, is dismissed on summary judgment as she failed to file her appeal of board action within 90 days. Fudd, Commr 2010:Aug 27.

Certification
Commissioner affirms on appeal order of State Board of Examiners that revoked certificates of Teacher of Social Studies and Teacher of the Handicapped following settlement of tenure charges for conduct unbecoming where teacher used school computer visible to students to send and receive sexually explicit and racist e-mails during his instructional time, sent negative e-mails concerning the district and its students and visited a strip club during lunchtime of an in-service day and returned to school late with the smell of alcohol on his breath. IMO Certificates of Howarth, Commr, 2010: July 15.

Commissioner dismisses teacher's appeal of State Board of Examiner's decision to deny her a standard Teacher of Elementary School

Certificate; her educational background and teaching experience was not equivalent to the requirement for 200 hours of formal instruction; she chose to enroll in the alternate route program and must fulfill the requirements set forth in *N.J.A.C.* 6A:9-8.3, which specifically states that 200 hours of instruction in professional education must be completed concurrently with the provisional teaching requirement. Blackstone, Commr 2010:Aug 19.

Endorsements
Teacher failed to show that State Board of Examiners' denial of his application for k-12 social studies endorsement was arbitrary, capricious and unreasonable; where teacher had no academic training or experience in six of the ten subject areas of required knowledge pursuant to *N.J.A.C.* 6A:9-9.2(a)(6)(ii); the PRAXIS score alone not enough, and his experience teaching middle school did not signify that he possesses the expertise and depth of knowledge required for upper level courses. Ferrar, Commr 2010: July 26.

Ethics
Commissioner concurs with the penalty of censure recommended by the Commission and additionally admonishes the respondent for failure to timely file the requisite disclosure statements, in that such delay has resulted in a waste of administrative and adjudicative time at both State and local levels. I/M/O Garcia, Commr 2010 July 7

SEC determined that school board member violated *N.J.S.A.* 18A:12-24(c) when he voted to approve the contract of the School Business Administrator to whom his spouse, a secretary in the school district, reported. A board member whose spouse works in the school district may not participate in discussions or vote on employment issues concerning the employee's supervisors. SEC recommended the penalty of reprimand. Commissioner agreed. . I/M/O Minniti, Commr 2010 July 12 .

Medicaid
Lakewood Board sought Medicaid reimbursement for special education students who were parentally placed in private religious schools. Core legal issue involved interplay between IDEA and a provision of the Medicare Catastrophic Coverage Act of 1988. Jurisdictional issues were resolved and Dept of Human Services determined to be the party of predominant interest. On remand from Appellate Division for OAL hearing, ALJ determines that Medicaid reimbursement (SEMI) does not extend to parentally placed private-school students and district was not eligible for a share. Commissioner determined there were no remaining issues within its jurisdiction. Lakewood v. Department of Human Services, Commr 2010: July 15.

Non-renewal
Non-renewed World Languages teacher claimed non-renewal by Board was in retaliation for workers' compensation claim against district. Board presented evidence that negative evaluations were unrelated to workers' compensation claim. Commissioner concurred with ALJ that petitioner had not met burden to show that Board's action were arbitrary or capricious. Ramirez, Commr 2010 July 2

Board had ability to non- renew a teacher despite CSA recommendation for renewal; renewal requires recorded roll-call vote of the full membership of the board under *N.J.S.A.* 18A:27-1. Little Falls Ed Ass'n,

Commr 2010:Aug 26.

Psychiatric Examinations
Board acted within its authority under *N.J.S.A.* 18A:16-4 when it placed a tenured language teacher on unpaid medical leave as a psychiatric examination of the teacher revealed she was medically unfit to continue teaching. Board did not act in an arbitrary or capricious or unreasonable matter when it determined that she had not demonstrated satisfactory proof of recovery, where the reports from her personal psychiatrist and psychologist did not address her recovery or the concerns raised by her initial medical evaluations. Commissioner recommends that the parties agree upon an expert to perform a fitness-for-work evaluation regarding teacher's present emotional ability to return to the classroom. Diaz, Commr 2010:Aug 27.

Residency
Niece who relocated from Florida to live with aunt her because of conflicts with her stepfather and because she missed her aunt and grandmother, and whose parents support her financially is not entitled to free education in the district; ordered to pay back tuition, remanded for correct amount at $75 per day. E.P.F, Commr 2010: Aug 5 (Mount Olive).

In light of parent's unexplained failure to appear in residency appeal, matter is dismissed with prejudice. R.H., Commr 2010:Aug 11. (Newark)

Settlements
Settlement agreement cannot be approved as it does not contain board attorney's signature nor a board resolution designating the Attendance Officer to sign on board's behalf; remanded for agreement modification, but if none is forthcoming, then for a hearing. B.S., Commr 2010:Aug 5.

Student Harassment
Petitioner sought home schooling for his child after he was allegedly attacked at school, claiming that student could not continue to attend classes because of nervousness and vomiting. Complaint dismissed with prejudice after neither party appears for hearing without explanation. F.P. o/b/o F.P., Commr 2010 July 7. (Pleasantville)

Summary judgment granted to board on parent's request that district provide tuition payments for student to attend private Arts Academy in Michigan, where parents fail to substantiate allegations that school administrators engaged in persistent harassment, intimidation of student in aftermath of Facebook comment made by the student expressing suicidal thoughts. M.E.T., Commr 2010:Aug 11 (Berkeley Heights)

Tenure Dismissal
Commissioner upholds charges of insubordination and unbecoming conduct against elementary teacher/reading specialist where extensive testimony over 43 days of hearing shows she failed to follow district policies regarding Basic Skills and ESL instruction, thereby denying services to children in need; and overwhelming evidence demonstrates that over many years, she engaged in repeated and unprovoked verbal abuse and intimidation against co-workers and supervisors, creating a hostile work environment. Teacher is ordered dismissed and removed from tenured employment. Tenure Hearing of Ziznewski, Commr 2010: Aug 3.

Board fails to carry burden of proving tenure charges against tenured special education teacher alleging failure to follow lesson plans, substantiate grades and meet goals of improvement plans; board failed to comply with the procedural requirements for inefficiency charges and failed to substantiate the charges of incompetency and conduct unbecoming. Charges are dismissed and teacher awarded back pay and emoluments. Tenure Hearing of Kavet, Commr 2010:Aug 19(New Brunswick)

Tenure charges against elementary teacher for allegedly engaging in inappropriate conversation in her classroom, including speaking candidly to her students about private and/or sexual matters, are proven; however, while her conduct was unprofessional, it was a misguided attempt to capitalize on "teachable moments" and did not justify terminating her tenure and career. Commissioner agrees with ALJ that teacher should forfeit 120 days of pay and one year's salary increment. Additionally, she is ordered to complete coursework in pedagogy addressing: the social and psychological needs of different age and grade levels; the boundaries between a teacher's instructional jurisdiction and issues properly in the province of parental guidance and control; and classroom demeanor. Tenure Matter of Geurds, Commr 2010:Aug 27.

Tenure Rights
Superintendent whose contract was not renewed, and who was also tenured principal, was entitled by his tenure rights to principal position after the Board declined to renew his contract as superintendent. N.J.S.A. 18A:17-20.4 protects a superintendent's tenure rights. Lewis, Commr 2010:Aug. 4. (Asbury Park)

Tuition
Private school for the disabled, which serves children with disabilities requiring both medical and educational services, appealed DOE's determination to disallow salary and fringe benefits for three of its employees on grounds that that the employees were in unrecognized job titles without Department approval; on closer work of actual job duties of the employees, Commissioner determined that they did not require such certificates; one was more like a paraprofessional and other did not require supervisory certificate; DOE was wrong to disallow the salaries. Cerebral Palsy League, Commr 2010: July 29 .

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School Ethics Commission

SEC determined that board member who wrote letter to the editor in support of three candidates who were running for the board did not violate the School Ethics Act. No facts were alleged that, if true, would establish that the letter to the editor had the potential to compromise the board. *N.J.S.A*. 18A:12-24.1(e). Writing the letter in support of the incumbent candidates was fairly within the board member's role as a private citizen. No evidence was presented that the board member surrendered her independent judgment to a special interest or partisan group or used the schools for personal gain or the gain of friends. *N.J.S.A.* 18A:12-24.1 (f). Board member's employment as a senior clerk typist in the Elmwood Park Tax Department did not violate the Act. Sproviero, SEC 2010: August 31

SEC determined that complainant failed to factually establish that board member violated N.J.S.A. 18A:12-24.1 (c), (e), (g) and (i) of the Code of Ethics for School Board Members when he discussed the resignation of the band teacher with his son, blaming the resignation on another teacher; evidence merely shows that he discussed the resignation with his son and likely expressed his candid opinion that the other teacher was responsible. Nor did he violate the act by sending an email to the teacher that blamed him for the resignation; this was not *deliberate action* which resulted in undermining, opposing, compromising or harming school personnel in the proper performance of their duties, but was predominantly the message of a parent expressing his disappointment directly to a teacher. Commission cautions respondent about taking any future official action as a Board member which would involve the teacher's employment. Laverty, East Windsor Regional Bd. of Ed., Mercer County, C29-09, 7/27/10

SEC determined that complainant failed to factually establish that board member violated N.J.S.A. 18A:12-24.1 (c), (e), (g) and (i) of the Code of Ethics for School Board Members. It was alleged that the board member discussed with his son an issue regarding the resignation of the band teacher and the involvement of another music teacher and band director in the school district. The son placed reports on www.facebook.com regarding the resignation and his father's placement of blame on another teacher. The board member also sent an email to the employed music teacher expressing his disappointment with the events that occurred. Laverty, SEC 2010: July 27

Click here for School Ethics Commission decisions.

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State Board of Examiners

SBE ordered revocation of Teacher of Social Studies and Teacher of Psychology Certificates of Eligibility With Advanced Standing and Teacher of Social Studies and Teacher of Psychology for teacher who pled guilty to third degree theft and was court-ordered to forfeit her teaching certificates. In the Matter of the Certificates of: Karen B. Binder Exam 2010: July 22

SBE ordered revocation of Teacher of Social Studies Certificate of Eligibility and Teacher of Social Studies certificate for teacher who had pled guilty to Endangering the Welfare of a Child and was court-ordered to forfeit his teaching certificates. In the Matter of the Certificates of: Douglas Brustman, Exam 2010: July 22

SBE orders revocation of Teacher of Music certificate of teacher who had been removed from his tenured teaching position for charges of unbecoming conduct. Teacher had kissed on the lips a troubled male student who had come to him for guidance. While teacher was a dedicated and talented teacher with an exemplary and unblemished record, his transgression was so egregious as to outweigh any mitigation he established. As stated by the ALJ, "a 'gifted' teacher who engages in inappropriate physical contact with an emotionally distressed child is no less culpable than any other teacher who engages in the same inappropriate conduct." In the Matter of the Certificate of: Stephen Fox Exam 2010: July 22

SBE ordered revocation of Teacher of Chemistry Certificate of Eligibility

and Teacher of Chemistry Certificate for teacher who was convicted of Aggravated Criminal Sexual Contact in October 2009. As a result of the conviction, the teacher was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. In the Matter of the Certificates of: Eric Johansen, Jr. Exam 2010: July 22

SBE ordered revocation of Secondary School Teacher of English, Secondary School Teacher of Social Studies, Supervisor, School Administrator and Teacher of the Handicapped certificates for teacher who was convicted of Child Abuse and Criminal Coercion in January 2009. As a result of the conviction, the teacher was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. In the Matter of the Certificates of: Frank Mattiace Exam 2010: July 22

SBE ordered revocation of Substitute Credential for teacher who was convicted in June 2009 of Death by Auto and two counts of Assault by Auto. As a result of the conviction, the teacher was disqualified from public school employment pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* An individual whose offense is so great that he or she is barred from service in public schools should not be permitted to retain the certificate that authorizes such service. In the Matter of the Credential of: Sean McGuirk Exam 2010: July 22

SBE ordered revocation of Teacher of Mathematics Certificate for teacher who pled guilty to Conspiracy to Import 100 Grams or More of Heroin, Importation of 100 Grams or More of Heroin, Conspiracy to Possess With Intent to Distribute 100 Grams or More of Heroin and Attempt to Possess with Intent to Distribute 100 Grams or More of Heroin and was sentenced to 60 months imprisonment. As a result of the conviction, and sentencing to five years imprisonment, he can no longer serve as a role model for students. In the Matter of the Certificate of: Tom Oye Exam 2010: July 22

SBE ordered revocation of Teacher of Music Certificate of Eligibility With Advanced Standing, for teacher who had pled guilty to Harassment after being charged with Endangering the Welfare of a Child and was sentenced to one year of probation. As part of his plea agreement, he was ordered to forfeit his public employment. As a result of the conviction, and forfeiture of public employment, he can no longer serve as a role model for students. In the Matter of the Certificate of: Yorgo Papadakis Exam 2010: July 22

SBE ordered revocation of Teacher of Elementary School, Teacher of Mathematics, Principal and School Administrator Certificates of Eligibility and his Teacher of Elementary School, Teacher of Mathematics and Principal certificates of former charter school principal. The Commissioner has long held that teachers serve as role models for their students. Respondent's conduct in soliciting cash from parents and staff at their homes and from a school telephone late at night and in the early morning hours and in allegedly taking cash, laptop computers, a staff book and student files from the Liberty Academy Charter School is inexcusable. Moreover, his dismissal from his tenured position in Plainfield for unbecoming conduct involving his possession of cocaine and drug paraphernalia prohibits him from laying claim as a role model to anyone. In this instance, his repeated lack of judgment and his egregious behavior warrants revocation of his certificates. In the Matter of the

Certificates of: William Thomas Exam 2010: July 22

SBE ordered revocation of Principal and School Administrator Certificates of Eligibility and Teacher of Elementary School, Teacher of Social Studies, Teacher of General Business, School Business Administrator, Supervisor and School Administrator certificates of former school business administrator who, in January 2009, pled guilty to a federal charge of Embezzlement of School Funds. In May 2009, he was sentenced to federal prison for 12 months and one day, fined and ordered to pay restitution in the amount of $117, 951.81. On January 12, 2009, he pled guilty to a state charge of Official Misconduct. His state prison term was suspended provided that he fulfill all the terms of his federal sentence. His acts of Embezzlement of School Funds and Official Misconduct were serious enough that the court deemed it necessary to imprison him for 12 months and a day. The Commissioner has long held that teachers serve as role models for their students. Clearly, he cannot claim status as a role model to anyone. In the Matter of the Certificates of: Robert Walsh Exam 2010: July 22

SBE ordered revocation of Teacher of English Certificate of Eligibility and Teacher of English Certificate for teacher who pled guilty to Official Misconduct and Criminal Sexual Contact and was court-ordered to forfeit his teaching certificates. In the Matter of the Certificates of: James I. Clancy Exam 2010: July 22

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New Jersey Council on Local Mandates

Complaint dismissed as to whether recent court decision, *Smith v. Hudson County Register, 411 N.J. Super. 538,(App. Div.2009)* imposes unfunded mandates, namely, insufficient fees for the copying of public documents requested pursuant to the Open Public Records Act ("OPRA"), *N.J.S.A*. 47:1A-a to -13. Complaint dismissed for failure to name a statute, rule or regulation that was an unfunded mandate. In re Complaint filed by the Township of Branchburg, GRC, 2010: August 10

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Election Law Enforcement Commission

There are no education-related decisions posted for July and August at this time.

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New Jersey Division on Civil Rights

There are no education-related Director's Orders or Findings posted for July and August at this time.

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New Jersey Government Records Council

Custodian lawfully denied access to the discussions in the requested e-mail chain between and among the Board Attorney, previous School Leader and Board members pursuant to *N.J.S.A*. 47:1A-6 because the e-mail chain discussions are exempt from disclosure as attorney-client privileged material pursuant to *N.J.S.A*. 47:1A-1.1. However, the Custodian must disclose the following information contained in the e-mail chain: (1)To: (2) cc: (3) From: (4) Subject: (5) Closing salutations and electronic signature information. Miguel Mendes v. Freedom Academy Charter School, No. 2009-184 (GRC August 24, 2010)

Custodian's response is insufficient pursuant to *N.J.S.A*. 47:1A-5.g., *O'Shea v.Township of Fredon (Sussex),* GRC Complaint Number 2007-251 (February 2008), and *Paff v. Borough of Sussex (Sussex),* GRC Complaint Number 2008-38 (July 2008) because he failed to provide copies in the Complainant's preferred method of delivery, email, and failed to individually address each of the eleven requested items. Jesse Wolosky v. New Jersey Department of Environmental Protection No. 2009-194 (GRC August 24, 2010)

Because the Complainant's OPRA request for e-mail correspondence contains the sender and/or recipient, content of the e-mail and a specific date range, said portion of the OPRA request is valid. *See Sandoval v. NJ State Parole Board*, GRC Complaint No. 2006-167 (October 2008), *and Elcavage v. West Milford Township* (Passaic), GRC Complaint No. 2009-07 (March 2010). Pursuant to *Paff v. NJ Department of Labor, Board of Review*, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of several emails to determine the validity of the Custodian's assertion that the record contains information which is exempt from disclosure as attorney-client privileged and advisory, consultative or deliberative pursuant to *N.J.S.A.* 47:1A-1.1 Jnanendra P. Ray v. Freedom Academy Charter School Complaint No. 2009-185 (GRC August 24, 2010)

Custodian lawfully denied access. Medical records from New Jersey DYFS and medical records compiled during the Complainant's stay in foster care are exempt from the definition of a government record pursuant to *N.J.S.A*. 47:1A-9.a. and Executive Order No. 26, paragraph 4.b.1 (McGreevey 2002) as "information relating to medical, psychiatric or psychological history, diagnosis, treatment or evaluation." While the GRC acknowledges that the Complainant is attempting to obtain his own medical records from Division of Child Behavioral Health Services, the identity of a requestor is not a consideration when deciding whether an exemption to disclosure applies to a government record requested pursuant to OPRA except for those specific provisions set forth at *N.J.S.A*. 47:1A-2.2. and *N.J.S.A*. 47:1A-10. Christopher Cicero v. New Jersey Department of Children & Family Services, Division of Child Behavioral Health Services No. 2009-201 (GRC August 24, 2010)

In camera examination leads to order requiring Custodian of Records to disclose various parts of ten sections of executive session minutes from six different dates. Jesse Wolosky v. Andover Regional School District, No. 2009-94 (GRC August 24, 2010)

Custodian violated *N.J.S.A*. 47:1A-5.e. by not providing immediate access to the bills and vouchers requested. The Complainant identified the types of government records (*architect and engineer costs, publicity costs, staff costs and any other related service cost to the project*) within

a specific date (*presumably the project timeframe was anticipated by the Complainant since only the costs for a particular project was requested*). The Custodian's search was not open-ended, nor did it require research, but rather required the Custodian to locate the corresponding *bills and vouchers* and provide them to the requestor. While immediate access was not provided, the Custodian did disclose all bills and vouchers related to the sports complex project to the Complainant on July 19, 2010 in response to the GRC's request. Russell Miller v. Westwood Regional School District No. 2009-191 (GRC August 24, 2010)

Custodian complied with interim order when he made the requested records available to the Complainant on seven(7) CD-ROMs at a total cost of $2.45 (or $0.35 per CD-ROM) and provided certified confirmation of compliance pursuant to N.J. Court Rule 1:4-4 to the Executive Director within five (5) business days of receiving the Council's May 27 Interim Order. Jesse Wolosky v. Township of Sparta No. 2008-277 (GRC July 27, 2010)

GRC dismisses case based on Municipal Court Judge's Judgment of Conviction for harassment and trespass violations prohibiting petitioner from having any contact with any present or former employee or official of the Borough except that petitioner may mail his tax and utility payments to the Borough and he may call 911 if he has an emergency. Thomas Caggiano v. Borough of Stanhope (Sussex) No. 2010-132; 2010-133 (GRC July 27, 2010)

Custodians are obligated to provide access to requested records in the medium requested pursuant to *N.J.S.A.* 47:1A-5.d. Custodian unlawfully denied access when he failed to provide the Complainant with electronic copies of the meeting minutes dated January 22, 2009, February 19, 2009 and March 17, 2009. Records were ultimately provided to the Complainant in electronic format, via e-mail. Kerwyn Pierre v. Plainfield Municipal Utilities Authority (Union) No. 2009-207 (GRC July 27, 2010)

Custodian violated OPRA pursuant to *N.J.S.A*.47:1A-5.g. Custodian's response was legally insufficient because she failed to provide a date certain on which she would either grant or deny access to the requested records and failed to respond to each request item contained in the request individually. Because the Township Committee approved the January 5, 2009 and January 14, 2009 executive session minutes on May 4, 2009 and March 18, 2009 respectively, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable with appropriate redactions. Stultz Taylor v.Township of Downe (Cumberland) No. 2009-174 (GRC July 27, 2010)

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New Legislation

P.L.2010, c.37
Reduces employer unemployment taxes during fiscal year 2011.
Pamphlet Law 23 pages Approved 7/1/2010 PDF Format HTML Format

P.L.2010, c.39
Makes position of treasurer of school moneys optional.
Pamphlet Law 12 pages Approved 7/2/2010 PDF Format HTML Format

P.L.2010, c.44
Reduces school district, county, and municipal property tax levy cap from 4% to 2.0% and permits unused school district, county, and municipal increases to be banked for three succeeding years.
Pamphlet Law 14 pages Approved 7/13/2010 PDF Format HTML Format

P.L.2010, c.49
Provides an additional month for the completion of a school district's annual audit.
Advance Law 1 pages Approved 7/29/2010 PDF Format HTML Format

P.L.2010, c.50
Changes references of "mental retardation" to "intellectual disability" or "developmental disability" and uses person-first language for persons with disabilities.
Advance Law 80 pages Approved 8/16/2010 PDF Format HTML Format

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New Regulations

Commissioner; reporting responsibilities, *N.J.A.C. 6A:2-2.2 and 2.4*, Appendix 42 *N.J.R*. 1515(c)

Evaluation of the performance of school districts *N.J.A.C. 6A:30* 42 *N.J.R*. 1519(a)

Division of Pensions and Benefits PERS, *N.J.A.C*. 17:2 42 *N.J.R.* 1612(b)

DOE denies request for rulemaking requiring local districts to provide both voter registration services and other education programs to students annually. 42 *N.J.R*. 1629(a)

DOE denies request for rulemaking seeking amendment to *N.J.A.C*. 6A:9-9.2(b)2 and 3 to permit teachers with elementary school endorsement to teach all subjects in grade 6 k-6 districts. 42 *N.J.R.* 1911(b)

School district operations: extension of chapter expiration date by gubernatorial directive *N.J.A.C. 6A:32* 42 *N.J.R.* 2243(a)

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Special Education: revocation of parental consent *N.J.A.C. 6A:14-2.3* *N.J.R*. 1284(a)

PERC: Contested transfer determination rules *N.J.A.C*. 19:18 *N.J.R*. 1347(a)

Regulatory equivalency and waiver rules *N.J.A.C. 6A-5* *N.J.R*. 1457(a)

Marie H. Katzenbach School for the Deaf rules *N.J.A.C. 6A:21N.J.R* 1459(a)

Professional Licensure and Standards Rules *N.J.A.C. 6A:9* *N.J.R*. 654(a)

Procedures for undertaking under-55 percent districts' school facilities projects *N.J.A.C*. 19:37 *N.J.R*. 1695(a)

Special Education Program rules *N.J.A.C.* 1:6A, 3.1,4.1 *N.J.R*. 1763(a)

Adult Education Programs: tuition *N.J.A.C. 6:30-3.11* *N.J.R* 1768(a)

Standards and Assessment Rules *N.J.A.C. 6A:8* *N.J.R*. 1769(a)

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United States Supreme Court

Free Speech

Supreme Court affirmed Ninth Circuit holding that a public law school's "accept-all-comers" policy was a reasonable viewpoint-neutral condition for a student group to be recognized and be provided access to the student-organization limited public forum. The school could reasonably decide that the educational experience was best promoted by the policy. The First Amendment challenge to the policy by a student Christian group, which refused membership to those with different religious and sexual orientation beliefs, was dismissed and the policy upheld. Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez, No. 08-1371, 130 S. Ct. 2971 (June 28, 2010).

Searches

City and police department did not violate employee's Fourth Amendment search and seizure rights by obtaining and reviewing transcript of text messages sent to him on city-provided pager. City and police department had a legitimate interest in determining, based on cost overages, whether character limit on pager was sufficient. Search was a reasonable, efficient and expedient way to determine whether the employee's overages were the result of work-related messaging or personal use. The search was reasonable. City of Ontario v. Quon, No. 08-1332, 130 S. Ct. 2619 (June 17, 2010).

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3rd Circuit Court of Appeals

Free Speech

Court of appeals affirmed district court's grant of summary judgment. Teacher alleged the employer retaliated against him for protesting certain school safety and security policies and problems including student violence and drug use, cigarette breaks for students, the school's inadequate discipline policy, and the Board of Education's general inattention to school problems. As a union representative, he spoke out on behalf of his co-workers regarding school safety and security. District court held that employee did not establish a First Amendment retaliation claim because if his protesting of school policies was a protected activity, the alleged retaliatory acts were trivial or unsupported; he did not establish a due process claim based on assaults by students because he did not show they were a state created danger. Principal's alleged retaliation in the form of dirty looks, refusal to talk with him and non-ordering of supplies were trivial. Report to DYFS that student alleged that teacher had kicked him, while unfounded, was required by law and not retaliatory. Nead v. Union County Ed. Servs. Comm'n, No. 09-2589, 2010 U.S. App. LEXIS 9202 (3d Cir. May 4, 2010) (not

precedential)

Special Education
Court of appeals affirmed district court order denying injunctive relief. Charter school (Elysian) student's new IEP determined that he should be placed in an out-of-district private school (Community) beginning the following September. The school district (Bayonne) exercised its right under N.J. Stat. Ann. § 18A:36A-11(b) to contest the placement. The district court found that the student should remain at the charter school during the pendency of the dispute. Court of appeals agreed, holding that placing the student at the private school (Community) would not have been consistent with the "stay-put" provision of the IDEA, which calls for child to remain in the then current educational placement during the pendency of proceedings. Student was on summer break when the dispute arose and had not started at the private school. Remaining at the charter school was the option closest to the plain meaning of the statute and the congressional intent of maintaining the status quo. L.Y. v. Bayonne Bd. of Ed. , No. 09-3741, 2010 U.S. App. LEXIS 11920 (3d Cir. June 10, 2010)(not precedential).

Court of Appeals affirms order of district court denying parents' claim for reimbursement of private school tuition and other related costs for their disabled child under the IDEA. District's failure to have an individualized educational program (IEP) in effect for their child on the first day of classes did not warrant parents' unilateral decision to remove their child from the public school and place him in a private residential school for students with disabilities. Court of Appeals held that procedural violations of the IDEA did not merit tuition reimbursement absent a showing of substantive harm and unreasonable parent conduct, which delayed continuation of the IEP meeting until after classes began, warranted equitable denial of tuition reimbursement. C.H. v. Cape Henlopen Sch. Dist., No. 08-3630, 606 F.3d 59; 2010 U.S. App. LEXIS 10574 (3d Cir. May 25, 2010, as amended May 26, 2010.)

Student Discipline
Petition for rehearing en banc is granted. Matter will be argued before the en banc court on Thursday, June 3, 2010, at 10:00 a.m. J.S. v. Blue Mt. Sch. Dist., No. 08-4138, 2010 U.S. App. LEXIS 7342, (3d Cir. April 9, 2010); Layshock v. Hermitage Sch. Dist., No. 07-4465, 2010 U.S. App. LEXIS 7362 (3d Cir. April 9, 2010).

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New Jersey District Court

Americans with Disabilities Act
Injunctive relief denied. Parents sought temporary restraining order against private school so that their son could graduate from the eighth grade and participate in graduation ceremony. Parents alleged discrimination under Title I and III of the ADA but did not meet the TRO standard. Novack v. Politz Day School, No. 10-3025 (JBS/JS), 2010 U.S. Dist. LEXIS 59478 (D.N.J. June 16, 2010).

Civil Procedure
Father's claim against school district that his son could not read because he had only been provided with group instruction rather than individual

instruction dismissed. Complaint did not articulate how school district violated any laws, regulations, or constitutional rights when they provided his son with group instruction rather than one-on-one instruction. Complaint that there was a "lack of management at this school" and the schools are "using inexperienced individuals" was insufficiently pled. Further, with regard to the son, both the son as a party and his claims must be brought in the name of the appropriate party and must be asserted by an attorney of record. With regard to his own claims against the school district, the father may file an amended complaint within 20 days of the date of this Opinion properly articulating his claims. Ciarrocchi v. Clearview Reg'l High School. Dist., No. 09-2433 (NLH) (AMD), 2010 U.S. Dist. LEXIS 64017 (D.N.J. June 25, 2010).

Teacher's motion to dismiss the school district's answer, counterclaim, and crossclaim for failure to file a timely answer and insufficient service of process denied. No evidence was provided of a history of dilatoriness or willful conduct by the school district; no evidence that the school district's untimely filing subjected the teacher to unfair prejudice; a default judgment would unfairly prejudice the school district as it has established the meritoriousness of their counterclaim and defense. No evidence was provided that the school district's alleged non-compliance was willful or unfairly prejudiced teacher. Williams v. Paterson Pub. Schools, No. 09-2999 (PGS), 2010 U.S. Dist. LEXIS 43317 (D.N.J. May 4, 2010).

Discrimination

District court declines to exercise supplemental jurisdiction against school district in matter involving altercation between police officer stationed at the school and disabled parent who found all handicapped parking spaces occupied when he dropped his kindergarten daughter off at school. Rothman v. City of Northfield, No. 09-1877 (JEI), 2010 U.S. Dist. LEXIS 57718 (D.N.J. June 10, 2010).

Motion for summary judgment, dismissing plaintiff's complaint granted. Plaintiff, long term substitute teacher, alleged that her non-renewal was due to four causes of action, including race discrimination and unlawful retaliation under Title VII, violation of the Americans with Disability Act ("ADA"), and intentional infliction of emotional distress. Williams v. E. Orange Cmty. Charter Sch., No. 07-CV-3227 (DMC), 2010 U.S. Dist. LEXIS 27351 (D.N.J. March 23, 2010).

Free Speech

School district did not violate teacher's first amendment rights by reprimanding him for violations of board mailbox use policy. Policy required teachers to seek permission before circulating personal correspondence through school mailboxes. Policastro v. Tenafly Bd. of Ed., No. 09-1794 (DRD), 2010 U.S. Dist. LEXIS 44841 (D.N.J. May 7, 2010).

Special Education

Motion to supplement the administrative record granted to shed light on whether board of education's decision to declassify student was reasonable under the circumstances. Parents were really seeking to provide evidence to cultivate a fuller record in order to assist the Court in determining whether Congress' goal in enacting the IDEA has been reached for the student. The weight to be given the additional evidence will be determined at a later date. H.M. v. Haddon Heights Bd. of Ed., No. 09-4293(NLH) (AMD), 2010 U.S. Dist. LEXIS 61930 (D.N.J. June 22, 2010).

Motion to reopen the case denied. Plaintiffs allege ALJ bias, discrimination and retaliation and further allege that their former counsel failed to execute proper service of the initial summons and complaint. No viable claim existed. Rodrigues v. N.J. Office of Admin. Law, No. 07-CV-3145 (DMC - MF), 2010 U.S. Dist. LEXIS 61363, (D.N.J. June 21, 2010). (not for publication)

District court upholds ALJ determination that an after school program, including two hours of in-home instruction, was necessary to provide the autistic student with FAPE. No evidence to justify a different result than what was determined by the ALJ. Parents were deemed prevailing parties. New Milford Bd. of Ed. v. C.R., No. 09-328 (JLL), 2010 U.S. Dist. LEXIS 61895 (D.N.J. June 21, 2010).

Because the Court does not have before it a fully-developed record with which to review Plaintiffs' due process request, all issues related to Plaintiffs' due process request must be remanded to the New Jersey Office of Special Education Programs to be addressed in a manner consistent with the IDEA. Plaintiffs are entitled to independent evaluations consisting of an FBA, a psychiatric assessment, and an educational evaluation. Plaintiffs' request for a speech and language evaluation must be addressed on remand with the remainder of Plaintiffs' due process complaint. The issue of compensatory education is non-justiciable on Plaintiffs' present appeal. K.B. v. Haledon Bd. of Ed., Civil Action No. 08-4647 (JLL), 2010 U.S. Dist. LEXIS 51337 (D.N.J. May 24, 2010).

Summary judgment granted to parents, affirming ALJ decision. Placement was appropriate and autistic student was making meaningful progress. School district's IEP denied FAPE. School district ordered to pay for placement. Dumont Bd. of Ed. v. J.T., Civil Action No. 09-5048 (JLL), 2010 U.S. Dist. LEXIS 45413 (D.N.J. May 10, 2010).

Mother's claim against school district that her son was treated differently than other students; that such unequal treatment was spurred by racial discrimination; and that this unequal treatment resulted in a deprivation of rights conferred upon son by federal education programs was dismissed. No private right of action under NCLB exists. Further, with regard to the son, both the son as a party and his claims must be brought in the name of the appropriate party and must be asserted by an attorney of record. With regard to her own claims against the school district, the mother may file an amended complaint within 20 days properly articulating her claims. Watson v. Wash. Twp., No. 09-3650 (RBK/JS), 2010 U.S. Dist. LEXIS 60049 (D.N.J. June 17, 2010).

Student Discipline

Parent's Motion for Preliminary Restraints, seeking an order compelling defendants to allow his daughter to play with the school's lacrosse team, denied. Parent contested school district's conditioning participation on a school-sponsored sports team on the parent's unqualified consent to a school policy that precluded the child from any involvement with drugs and alcohol. Parent alleged that school district infringed on his First Amendment right to dissent from the school district's anti-drug and -alcohol policy. Doe v. Banos, No. 10-cv-1338 (NLH) (AMD) 2010 U.S. Dist. LEXIS 51666 (D.N.J. April 26, 2010).

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New Jersey Supreme Court

Free Speech

For purposes of 42 U.S.C. § 1983, school board president was acting as a final policymaker while presiding over the public comment period of the board meeting. The board could therefore be held liable for a violation of student father's First Amendment rights when he was "gaveled down" by the board president. Father presented sufficient evidence for the jury to determine that the Board silenced him for no reason other than the unpopular viewpoint he expressed regarding the board's policy and the girl's basketball coach, in violation of his free speech rights. Father offered minimal evidence of emotional distress and the $100,000 trial court damages award is so clearly excessive that it constitutes a miscarriage of justice. Remittur hearing ordered. Besler v. Bd. of Ed. of W. Windsor-Plainsboro Reg'l Sch. Dist., 201 N.J. 544; 993 A.2d 805, 2010 N.J. LEXIS 408 (May 17, 2010).

Labor Relations

Supreme Court reverses Appellate Division and reinstates trial court decision affirming arbitration award. Arbitrator found that board had just cause to discipline, but not to terminate and imposed an appropriate sanction. Arbitrator did not exceed his authority but simply answered the question presented; whether the board had just cause to discipline the employee and if not, what shall be the remedy? Appellate Division had erred by reversing order of the trial court which affirmed arbitration award, which set aside the Board's decision to terminate the employment of a custodian, and instead imposed a ten-day suspension as the appropriate penalty; and ordered the custodian reinstated with full back pay, fringe benefits and seniority rights following his period of suspension. Linden Bd. of Ed. v. Linden Education Association, 2010 N.J. LEXIS 507, 159 Lab. Cas. (CCH) P61009 (N.J. June 8, 2010) (A-19-09) (reversing App. Div. A-1236-07T3, April 17, 2009).

Tenure Dismissal

Tenured teacher was properly terminated, as the New Jersey Division of Children and Families' determination that allegations that he sexually abused a minor student were unfounded, did not preclude the school district from filing tenure charges against him under the New Jersey Tenure Employees Hearing Law, N.J.S.A. §§ 18A:6-10 to 18A:6-18.1. There was substantial credible evidence in the record to support the tenure dismissal findings and no legal error to disturb the decision. In re Tenure Hearing of Young, 202 N.J. 50; 995 A.2d 826; 2010 N.J. LEXIS 407(May 12, 2010).

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New Jersey Superior Court Appellate Division

Civil Service

Appellate Division affirms the decision of the Civil Service Commission reversing employee's termination, reinstating his County employment, dismissing the charge of engaging in conduct unbecoming a public employee, awarding him back pay, and granting counsel fees. The Commission's decision to downgrade the charge of theft of time to one of inefficiency and to sanction employee with a public reprimand, as well as its calculation of the amount of back pay due, mitigated for subsequent

employment was also affirmed. Employee had been accused of improper use of the school's security system to inappropriately view the cheerleaders' practice. Spencer v. Dearborn (In re Spencer), (A-0239-08T2; A-5344-08T3) 2010 N.J. Super. Unpub. LEXIS 1006 (App. Div. May 7, 2010).

Discrimination
Appellate Division affirmed trial court's grant of summary judgment. Plaintiff alleged violations of the Law Against Discrimination when school district failed to hire her for the position of vice principal/math supervisor. Trial court found that defendants had clearly established nondiscriminatory motives for not selecting plaintiff; that the search committee simply found other candidates to be more qualified and that plaintiff's failure to be recommended for the job was due to her lack of qualifications, and not her race. Gerald v. Hopewell Valley Reg'l Sch. Dist., (A-5783-08T1) 2010 N.J. Super. Unpub. LEXIS 1442 (App. Div. June 30, 2010).

Executive Orders
Appellate Division holds that paragraph 1 of Executive Order 7, signed by the Governor of New Jersey, violates principles of separation of powers and is invalidated. To the extent that it is written or intended to be construed to treat collective bargaining agreements as "contracts" and labor unions as "business entities," it is so fundamentally incompatible with our existing laws and statutes as to impair the "essential integrity" of the constitutional powers of the Legislature; particularly with respect to existing pay-to-play statutes such as N.J.S.A. 19:44A-20.3 to -22. Communications Workers of Am. v. Christie, A-2871-09T2, A-2996-09T2, A-2997-09T2) 413 N.J. Super. 229; 994 A.2d 545 (App. Div. May 7, 2010).

Appellate Division holds that Governor Christie's Executive Order 14, which characterized the current state fiscal crisis as an emergency and directed that State Aid be withheld from school districts for the remainder of the 2010 fiscal year in an amount equal to the anticipated excess surplus funds, did not violate principles of separation of powers and was authorized both statutorily and constitutionally. Perth Amboy Bd. of Ed. v. Chris Christie, A-3361-09T4, 2010 N.J. Super. LEXIS 100, (App. Div. June 14, 2010)(published).

Jurisdiction
Appellate Division affirms Commissioner of Education's dismissal of petition for lack of jurisdiction. Matter involved an issue of sick leave verification under the collective bargaining agreement, a determination over which the Commissioner of Education has no authority, because the issue did not arise under the school laws, notwithstanding that they occur in a school setting. Jeannette v. Bd. of Ed., A-1013-09T3, 2010 N.J. Super. Unpub. LEXIS 1236 (App. Div. May 18, 2010).

Labor Relations
Appellate Division reverses restraint of arbitration. The parties' dispute concerning the interpretation of the just cause arbitration provision of the collective negotiating agreement between the Board and Association is an issue that the agreement confers authority upon the arbitrator to decide. A court should not interpret the disputed substantive provisions of the parties' labor agreement, but only determine whether "the parties have agreed that an arbitrator shall decide which of the competing interpretations is correct." Matter involved the discharge of a non-tenured

custodian and had been remanded by the Supreme Court for reconsideration in light of the Mount Holly decision. Medford Twp. Bd. of Ed. v. Medford Ed. Ass'n, A-5580-05T3, 2010 N.J. Super. Unpub. LEXIS 1070 (App. Div. May 18, 2010).

OPRA

Appellate Division affirms trial court's denial of first and second motions for reconsideration in matter concerning efforts to augment discovery by using the Open Public Records Act and common law right of access to public records. Underlying matter was a 2004 event at the Community Middle School in Plainsboro and the then-minor student's related grievances. O.R. v. Rudnick, A-5262-08T3, 2010 N.J. Super. Unpub. LEXIS 970 (App. Div. May 4, 2010) (certification denied, July 15, 2010 by O.R. v. Rudnick, 2010 N.J. LEXIS 715.)

Reduction in Force

Tenured physical education teacher, who did not possess certification to teach health, did not have her tenure or seniority rights violated when board abolished position of teacher of physical education and created position of teacher of physical education and health. Board retained non-tenured staff in teacher of physical education and health positions while terminating her employment. RIFd teacher did not possess the necessary certification for the new position. Francin v. Maywood Bd. of Ed., A-0450-09T3, 2010 N.J. Super. Unpub. LEXIS 1017 (App. Div. May 10, 2010) (certification denied July 15, 2010 by Francin v. Maywood Bd. of Ed., 2010 N.J. LEXIS 733).

Retaliation/CEPA

Appellate Division affirms trial court dismissal of complaint which alleged violations of the Conscientious Employee Protection Act (CEPA). Plaintiffs' claims against the board failed to articulate a prima facie CEPA claim. London v. Pleasantville Bd. of Ed., A-3009-08T1, 2010 N.J. Super. Unpub. LEXIS 1306 (App. Div. June 16, 2010).

Special Education

Appellate Division affirms final determination of Commissioner of Education, upholding revocation of private school's preliminary authorization to operate a State-approved private school for students with disabilities. School failed to comply with the final stipulation of settlement and failed to establish an average daily enrollment of 24 students. Kentwood Acad. v. Davy, A-5522-07T1, 2010 N.J. Super. Unpub. LEXIS 1231 (App. Div. June 4, 2010).

Appellate Division affirms Law Division's dismissal of several of plaintiffs' claims, both with and without prejudice, in a matter emanating from the parties' stipulated settlement of a dispute under the IDEA, dating back to 2003. G.S. v. Rumson Bd. of Ed., . A-4774-08T2, 2010 N.J. Super. Unpub. LEXIS 959 (App. Div. May 3, 2010).

Student Residency

Appellate Division affirms Commissioner's determination that, effective January 5, 2005, Deptford became the district of residence for homeless family's students "and, as such, was and continues to be responsible for providing them with a free public education from that point until such time as the family establishes a fixed residence in another school district." Department of Education ruled on apportionment of students' educational expenses among Magnolia, Deptford and Moorestown

school districts. Bd. of Ed. of Magnolia v. Bd. of Ed. of Deptford, A-4942-08T3, 2010 N.J. Super. Unpub. LEXIS 1416 (App. Div. June 28, 2010).

Superintendents
Appellate Division affirms trial court judgment regarding negotiated separation agreement between superintendent of schools and the board of education. Trial court found that the terms of the contract should be interpreted as allowing sick leave reimbursement payment at the per diem rate of his superintendent's salary. Trial judge's interpretation of the contract was consistent with applicable law and was supported by substantial credible evidence in the record. Trial court's final judgment against the Board in the amount of $314,476.37, as compensation for 377.5 unused sick days at $833.05 per day; $166,859 as compensation for 200.3 unused vacation days at $833.05 per day; $47,181.40 in prejudgment interest and $1,182.34 in taxed costs stands. Dunn v. Elizabeth Bd. of Ed., A-4687-08T3, 2010 N.J. Super. Unpub. LEXIS 1139 (App. Div. May 25, 2010).

Unemployment
Appellate Division affirms decision of the Board of Review reversing the Appeal Tribunal determination and finding that substitute teacher was ineligible for unemployment benefits from June 22, 2008 through September 6, 2008, the summer vacation period. Fact that teacher had reasonable assurance of reemployment at the beginning of the summer vacation given her prior work history, despite not being placed on the substitute teacher list until August, is supported by substantial evidence in the record. Issue of teacher's liability to refund benefits for the weeks ending June 21, 2008 and June 28, 2008 remanded. Farrell v. Bd. of Review, A-5342-08T2, 2010 N.J. Super. Unpub. LEXIS 1194, (App. Div. June 1, 2010).

Workers Compensation
Appellate Division affirms judgment of the Division of Workers' Compensation awarding employee permanent total disability, and from a subsequent determination that no benefits were due from the Second Injury Fund. Employee injured neck and shoulder throwing a heavy garbage bag into a dumpster. Brown v. Cent. Reg'l Bd. of Ed., A-0025-08T3, 2010 N.J. Super. Unpub. LEXIS 1439 (App. Div. June 30, 2010).

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New Jersey Superior Court, Law/Chancery Division

There are no education-related decisions posted for May and June at this time.

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Commissioner of Education

Certificate Revocation, Suspension
Commissioner upholds Examiners' decision to revoke teacher's certificate as record supports factual findings and provides a rational basis for the decision. Penalty not too harsh as teacher, who had plead

guilty to identity theft and theft by deception, essentially stole the "speech language specialist" certificate of another individual, showing herself unworthy of retaining the previously acquired professional certificates which allow individuals to educate and serve as role models to children and youth. Matter of Teaching Certificates of Lowenstein-Mase, Commr 2010: May 17.

Commissioner orders one year suspension of charter school teacher who resigned his position mid-year on one-day's notice; failure to answer the order to show cause was deemed an admission. Matter of Certificate of Linton, Commr 2010: May 20.

Charter school teacher's certificate is suspended for unprofessional conduct pursuant to *N.J.S.A.* 18A:26-10 for resigning her position as a first grade teacher on the second day of school, without notice and contrary to the terms of her employment contract; her argument of constructive discharge/hostile environment were unsupported by evidence. Matter of Suspension of Certificate of Ponti, Commr 2010: May 12.

Class size
Elizabeth, as a "high poverty district" within the intent of *N.J.A.C.* 6A:13-3.1, is ordered to immediately comply with class size limits in that regulation; matter was ripe for decision and citizens, parents and teachers had standing. Elizabeth Education Association, Commr 2010: May 27.

Preschool
Commissioner upholds board's decision not to renew a private preschool program contract in the first matter involving an appeal by a private provider since the enactment and adoption of the SFRA and its implementing regulations, under which districts are no longer prohibited from using their own preschool programs even if a district has contracted with community private providers. Board's decision was not arbitrary, capricious or unreasonable where the board had facilities to educate the 30 Neptune children in a more efficient manner with savings in preschool education aid. A Little Class, Inc., Commr 2010: May 20.

Reduction in Force
Commissioner dismisses tenured teachers' petition that sought entitlement to positions over less senior employees; as matters were resolved or abandoned and no controversy remained, petition was dismissed in its entirety. Cucukov and D'ottavio (Vineland), Commr 2010: June 25.
Commissioner finds that board did not violate tenured teacher's tenure rights when his full time position was eliminated and he was offered and accepted a part-time teaching position in which he received a percentage of his salary step in proportion to his new part-time teaching schedule; loss of eligibility for health insurance due to part-time status is does not constitute a reduction in compensation as that has been explicitly defined as encompassing only salary. Teacher may file new appeal if parties cannot resolve disputes on amount of pro-rata salary due to increased hours in the second semester of the 2009-2010 school year. Manna, Commr 2010: June 14.

School Ethics
Board member, whose wife is employed as a secretary in the District, appeals SEC's determination that he violated *N.J.S.A.* 18A:12-24(c) of

the School Ethics Act by voting to approve the Superintendent's salary. However, due to board member's failure to prosecute his appeal, Commissioner had no jurisdiction to review SEC's determination of violation; Commissioner's jurisdiction was limited to review of penalty of private reprimand, which is affirmed. Carey, (Pennsauken), Commr 2010:June 3.

"Rookie" board member violated *N.J.S.A.* 18A:12-24(c) of the School Ethics Act when he voted, *inter alia*, to: reappoint his wife as a teacher; reappoint the Principal, Assistant Principal and Supervisor of Elementary Education under whom his wife served; and to reappoint his wife as club sponsor. The Commissioner affirmed SEC's recommended penalty of censure even though his votes would not have altered the result of board's action and he was not cautioned. Guarascio (Berkeley), Commr 2010: June 4.

Board member violated *N.J.S.A.* 18A:12-24.1(g) of the School Ethics Act when she transmitted confidential correspondence from Board counsel to the Interim County Superintendent of Schools and when she posted on NJ.com inaccurate information regarding the salary negotiations for the Interim Superintendent. The Commissioner affirms the SEC's recommended penalty of reprimand. Jordan, (High Bridge), Commr 2010:June 7.

Settlements

Settlement agreement that requires Commissioner to assess a penalty if the agreement is breached and includes penalties, damages and attorney fees as a consequence of a breach of the agreement, must be stricken as these are outside Commissioner's jurisdiction; remanded to revise agreement accordingly. Colvert, Commr 2010: May 17.

Commissioner cannot approve settlement that neither contains a copy of a Board resolution approving the settlement or authorizing the Board Secretary to sign it; nor contains the signature of the Board attorney, who is the Board's duly authorized representative in litigation. Commissioner remands settled matter to OAL to include appropriate authorization or signatures. H.P. (Hillside), Commr 2010: June 25.

Student Discipline

Commissioner dismisses with prejudice a petition alleging that removal of student from school wrestling team for violating school's alcohol policy as a result of a DWI, which did not occur on school grounds or during school hours, is arbitrary, capricious and unreasonable. After denying student's motion for emergent relief, student failed to appear at the hearing without explanation; Commissioner dismissed the petition with prejudice. Nash (Kearny), Commr 2010: June 25).

Student Residency

Parent's *pro se* residency claim appeal is dismissed pursuant to *N.J.A.C.* 1:1-14.4 for failure to appear without explanation for his non-appearance and in light of district's withdrawal of its counterclaim for tuition. A.J.M., (Lenape Region), Commr 2010: June 17.

Parent's *pro se* residency claim appeal is dismissed with prejudice pursuant to *N.J.A.C.* 1:1-14.4 for failure to appear without explanation. L.M.R., (Lawrence Twp), Commr 2010: June 25.

Commissioner upholds board's determination that resident's niece is not entitled to a free public education in the Mt. Olive School District.

Resident is not student's legal guardian, student's parents live in Florida; and although student claimed poor relationship with stepfather, evidence did not establish that student's parents are incapable of supporting or providing care for their daughter due to a family or economic hardship pursuant to *N.J.S.A*. 18A:38-1; remanded for amount of determination of back tuition for illegal attendance. E.P.F., o/b/o M.W., Commr 2010: May 12.

Parents did not establish domicile for 2006-7 school year at a district property they had purchased in 2005 with intent to occupy upon completion of renovations, when delays in construction postponed their move into the home until mid-August 2007; domicile is not established unless there is "the necessary concurrence of physical presence and an intention to make that place one's home." M.B. and C.B., Commr 2010: May 4.

Mother met burden in demonstrating that student was entitled to education in Newark from January to June 2006; although she resided in a unit her company owned in East Orange and was renovating prior to moving to Newark, she provided proofs regarding her home residence in Newark. When there is more than one residence, a court should consider numerous factors in determining domicile, including physical characteristics of each place, time spent and things done, other persons there, mental attitude toward each place, and when absent, any intention to return. Y.E., o/b/o E.E., Commr 2010: May 4.

In ruling that resolves residual issue in residency matter, Commissioner agrees with parent that given the totality of circumstances the parent lived in Newark from January through June 2006. Y.E., o/b/o E.E., Commr 2010: May 25 (amended decision).

Tenure Dismissal and Settlements

Commissioner orders teacher's dismissal, and his name to be maintained on the IAIU central registry, in consolidated complaints against social studies teacher before the Commissioner and IAIU. Although IAIU finds neglect unfounded, Board did not use IAIU charges to prove the tenure charges but conducted an independent investigation demonstrating that teacher directed student to retrieve a book from a the roof, allowed students to play cards during instructional time, showed "R" rated movies, and failed to carry roll book during fire drills. Department of Children and Families (Trenton), Commr 2010: June 17.

Commissioner rejects lesser penalty recommended by the ALJ and orders dismissal of Spanish teacher against whom the board filed tenure charges of insubordination and unbecoming conduct for inappropriate behavior toward students, including repeated inability to control his temper, anger and frustrations, inappropriate language and pushing a desk in such a manner as to threaten or injure a student. Tenure Hearing of Alvarez, (Lakewood), 2010:June 3.

Motion to dismiss tenure charges of conduct unbecoming and insubordination against an LDTC for physical altercations with students is granted where teacher was ordered to forfeit public office on criminal charges arising from the same facts; withdrawal meets the standards of N.J.A.C.6A:3-5.6 tenure matter moot in light of teacher's affidavit consenting to relinquish his certificates and the State Board of Examiners Order of Revocation. Tenure Hearing of Flynn, Commr 2010: May 21.

Commissioner cannot approve the settlement agreement of tenure dismissal charges, as neither settlement nor file contains a copy of the

Board's resolution approving the settlement and designating this individual to sign the agreement on its behalf, nor – in the alternative – is the agreement signed by the Board attorney; remanded. Tenure Hearing of Bartolomeo, Commr 2010: May 4.

Commissioner is reluctant to approve a settlement document evidencing numerous substantive handwritten alterations to the document's typewritten text with no concomitant indication, either in the document itself or elsewhere in the record, of acceptance of each such alteration by both parties through initialing or other generally recognized mechanism. Remanded. Matter of Tenure Hearing of Piccoli, Commr 2010: May 4.

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School Ethics Commission

Board member whose spouse works in district and reports to the business administrator, violated *N.J.S.A.* 18A:12-24(c) when he voted on the business administrator's contract and salary. Reprimand recommended. I/M/O Minnitti, SEC, 2010: May 25

Commission finds that the complainant failed to factually establish that the respondent violated *N.J.S.A.* 18A:12-24.1(c), (d), (e), (i) and (j) of the Code of Ethics for School Board Members. Complaint is dismissed. Dagastino v. Bennett, SEC, 2010: May 25

Complaint dismissed where the within complaint lacks specific allegations and supporting facts, that the named respondents individually violated the School Ethics Act, but, rather, presents a list of grievances essentially charging that the Board has improperly spent taxpayer funds and abused its hiring authority. Alma v. Fajardo and Munoz, SEC, 2010: June 22

SEC grants motion to dismiss where board members were alleged to have violated N.J.S.A. 18A:12-24.1(e), (i), (g) and (j) of the Code of Ethics for School Board Members when they approached the Executive County Superintendent and attempted to discuss the amendment to the Superintendent's employment contract. Complainants have not met their burden to establish facts which, if true, would constitute a violation of the Code of Ethics. Motion to have the complaint declared frivolous and a request for sanctions denied. Demarast v. Pantoja and Makino SEC, 2010: June 22

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State Board of Examiners

Teacher's conviction for Aggravated Sexual Assault and Endangering the Welfare of a Child demonstrates egregious behavior that warrants revocation of Teacher of Elementary Certificate. I/M/O Certificate of Booth, Exam. 2010: June 10

Teacher's conviction for Sexual Assault falls squarely within *N.J.S.A.* 18A:6-7.1. Teacher of Music and Supervisor certificate revoked. I/M/O Certificates of Brown, Exam. 2010: June 10

Holder of Student Personnel Services certificate voluntarily agrees to

relinquish license as a condition of settlement of tenure charges. I/M/O Certificates of Clayton, Exam. 2010: June 10

Teacher pled guilty to charges of Distribution of Obscene Material and in 2009 was sentenced to five years' probation. He was also ordered to have no unsupervised contact with children under the age of 16 (unless his own), have no contact with social networking sites, undergo psychological evaluation and recommended treatment, and obtain and maintain employment. As a result of his conviction, he was also forever barred from holding any office or position of honor, trust or profit under this state or any of its administrative or political subdivisions pursuant to *N.J.S.A.* 2C:51-2a(2). Distribution of Obscene Material is inexcusable for any individual, teacher or not. Moreover, the Commissioner has long held that teachers serve as role models for their students. Unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. Teacher of Health and Physical Education Certificate of Eligibility With Advanced Standing (July 2007) and Teacher of Health and Physical Education Provisional certificate (September 2007) are revoked. I/M/O Certificates of Godfrey, Exam. 2010: June 10

Teacher convicted of Conspiracy to Possess CDS and Conspiracy to Obtain CDS By Fraud, was court-ordered to forfeit his teaching certificates. Teacher agreed to forfeit his Certificates of Eligibility With Advanced Standing, and Teacher of Elementary School and Teacher of Elementary School With Subject Matter Specialization: Mathematics in Grades 5-8 certificates, with the force and effect of a revocation and all attendant consequences. I/M/O Certificates of Santini, Exam. 2010: June 10

Teacher resigned from his non-tenured position in the district following allegations that he had made inappropriate comments to two female students, sent inappropriate text messages of a sexual nature to them, called them repeatedly and contacted them through the internet. Teacher held a Teacher of Health and Physical Education Certificate of Eligibility With Advanced Standing, a Teacher of Health and Physical Education certificate, and a Teacher of Swimming and Water Safety Instructor certificate. Board of Examiners disagrees with ALJ's imposition of four month suspension of certificates and instead imposes a two-year suspension of certificates. I/M/O Certificates of Saunders 2010: June 10

Teacher agrees to surrender his teaching certificates as a condition of his admission into a Pretrial Intervention program following his guilty plea to Exhibiting Obscene Material to Person Under 18. Holding a Teacher of Elementary School Certificate of Eligibility With Advanced Standing, a Teacher of Elementary School certificate, and a Teacher of Elementary School With Subject Matter Specialization: Mathematics in Grades 5-8 certificate, Board of Examiners accepts relinquishment of certificates. I/M/O Certificates of Sorenson 2010: June 10

Following conviction for Endangering the Welfare of a Child, teacher was disqualified from public school employment pursuant to N.J.S.A. 18A:6-7.1. A teacher's behavior outside the classroom may be relevant in determining that person's qualifications and continued fitness to retain his certificate. In re Grossman, 127 N.J. Super. 13, 30 (App. Div.), cert. denied, 65 N.J. 292 (1974). Unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant. Redcay v. State Bd. of Ed., 130 N.J.L. 369, 371 (1943), aff'd, 131 N.J.L. 326 (E & A 1944).Holder of a substitute credential, Board of Examiners finds that conduct sufficient to revoke his credential. I/M/O Certificate of Teopengco 2010: June 10

Teacher of English Certificate of Eligibility With Advanced Standing and Teacher of English certificate revoked following conviction for Official Misconduct, demonstrates egregious behavior that warrants revocation. I/M/O Certificates of Trias, 2010: June 10

Teacher of Elementary School Certificate of Eligibility and Teacher of the Handicapped and Teacher of Art certificates revoked following resignation from employment after he made sexually inappropriate comments to several female students, invited several female students to go with him to Bushkill falls and joked about skinny dipping with them and talked in class about problems in his marriage. In addition, he sent inappropriate notes to a female student, showed a student a painting on his computer depicting an orgy and showed some students naked pictures of his children. Board of Examiners adopts initial decision of ALJ revoking his certificates. I/M/O Certificates of Vanden Huevel, 2010: June 10

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New Jersey Government Records Council

Custodian failed to respond to request for records, resulting in a deemed denial of records. Complainant's request for open and closed meeting minutes that led to his non-renewal would require research and therefore was properly denied. Specific request for e-mails was proper but subject to *in camera* review due to claim of attorney client privilege. Mendes v. Freedom Academy Charter School, No. 2009-184 (GRC June 29, 2010)

Council denies complainant's motion for reconsideration as the decision was not made on a "palpably incorrect or irrational basis" nor did the

GRC fail to consider the significance of probative, competent evidence. Custodian as already submitted $1000.00 violation for a willful violation of OPRA and has submitted a certification that there are no records responsive to request, no further penalty will be sought. Z.T. v. Bernards Township Bd. of Ed., No. 2007-277 (GRC June 29, 2010)

The Custodian's failure to respond in writing to an OPRA request within the statutorily mandated seven business days results in a "deemed" denial of OPRA request. Further, the Custodian should have provided access to the requested records rather than informing the Complainant that the records were available on the board's website. Custodian may only charge the actual cost of paper and toner for the reproduction of the requested records, and may not charge costs associated with the rental of the copy machine, the program, or other administrative costs. Custodian must contact the board's toner supplier to determine actual costs and the average paper life of one toner or ink cartridge and must contact the copy machine company to determine the board's annual copying volume (calendar or fiscal year).The Custodian must maintain documentation of all related information (i.e., contracts or correspondence from purchasing agent or copying company) and must calculate and charge a copying fee based upon the following actual cost calculation: total cost of paper purchased for 1 year (calendar or fiscal) + the total cost of toner purchased (calendar or fiscal) ÷ the annual copying volume = per page copying cost. The Custodian was ordered to provide the resulting amount to the Complainant within five business days from receipt of GRC order. Kaplan v. Winslow Township Bd. of Ed., No. 2009-148 (GRC June 29, 2010)

Although the Custodian's failure to provide a written response to the Complainant's three records requests within the statutorily mandated seven business days resulted in a "deemed" denial, because custodian was responsive to other requests in same period of time, it is concluded that the Custodian's actions do not rise to the level of a knowing and willful violation of OPRA and unreasonable denial of access under the totality of the circumstances. Complaint referred to OAL for determination of whether attorney fees should be awarded to requestor as prevailing party. Danis v. Garfield Bd. of Ed., Nos. 2009-156, 2009-157 & 2009-158 (GRC June 29, 2010)

Because no records at time of request existed, Custodian has not unlawfully denied access to said request item. Request was for legal services agreement between counsel and school district. Request for copy of any record that includes the amount of fees paid by the School District to counsel and copy of any record that includes fees the School District charges for audio and video recordings of its minutes are not requests for identifiable government records. Council has previously held that there is generally no charge incurred by an agency to transmit records electronically. Complainant is not a "prevailing party" entitled to an award of reasonable attorney's fees. O'Shea v. Bloomfield Bd. of Ed., No. 2009-175 (GRC May 27, 2010)

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New Legislation

P.L.2010, c.13. -see **S826**
Requires certain conditions be met in order for school districts to provide their employees with tuition assistance for coursework or additional compensation upon acquisition of academic credits or completion of a

degree program. Advance Law 2 pages Approved 5/6/2010 PDF Format HTML Format

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41 N.J.R. 3992(b), 42 N.J.R. 929(b) 05/17/10

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42 N.J.R. 936(a) 05/17/10

N.J.A.C. 6A:26 Educational Facilities – Section 15 Grants for Regular Operating School Districts
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3rd Circuit Court of Appeals

Employment Discrimination
In suit alleging violations of 42 *U.S.C.* § 1983, the Due Process Clause of the Fourteenth Amendment and the New Jersey Law Against Discrimination, Third Circuit upholds District court grant of summary judgment in matter dealing with labor grievance and “work to rule” policy . Aurelio v. Bd. of Educ. of Carteret, No. 09-3134, 3d Cir., 2010 U.S. App. LEXIS 7069, April 6, 2010

First Amendment
Preliminary injunction was appropriate given a reasonable likelihood of establishing that a district attorney's threatened prosecution of a student for "sexting" would have been in retaliation for the student's refusal to participate in an education program, in violation of the First and Fourteenth Amendment rights of the student and her mother. Miller v. Mitchell, 598 F.3d 139 (3d Cir. Pa. 2010)

Special Education
Third Circuit reverses District Court order requiring termination of board’s obligation to pay tuition for private special education school. On remand, court to determine relief to parents. D.S. v. Bayonne Bd. of Educ., __ 3d Cir.__ (2010)

District Court ruling affirmed where it was determined that board had provided FAPE under IDEA and Rehabilitation Act. Jury instructions regarding ADA and Rehabilitation Act were proper. K.R. v. Sch. Dist. of Phila, 2010 U.S. App. LEXIS 7426, No. 09-1234, 3d Cir., April 12, 2010.

District Court rejects parents requested hourly rate of $400 and instead calculated the attorney’s fee award based on the hourly rate of $250. Third Circuit affirms. Court applied the correct legal standard and did not abuse its discretion in finding that
$250 is a reasonable hourly rate. L.J. v. Audubon Bd. of Educ., No. 09-2448, 3d Cir., 2010 U.S. App. LEXIS 7350, April 9, 2010.

District Court correctly found that the District provided student with

FAPE, as evidenced by the advances she made in life skills, such as hygiene, toileting, eating, navigating the school, and acknowledging people, and provided her with an IDEA compliant education. Award of compensatory education is improper. A.G. v. Wissahickon Sch. Dist., Nos. 08-3966 and 09-2775, 3d Cir., 2010 U.S. App. LEXIS 6411, March 29, 2010

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New Jersey District Court

Civil Procedure
Motion to amend will be freely given where there is no undue delay, bad faith, or undue prejudice. In instant case, Board has offered no evidence of prejudice bad faith or undue delay. Toorzani v. Elmwood Park Bd. of Educ., No. 09-4262, 2010 U.S. Dist. LEXIS 24079 (D.N.J. Mar. 16, 2010)

Board's motion to dismiss is granted in controversy where plaintiff failed to exhaust administrative remedies, failed to give proper notice of claims and stated a claim after the statute of limitations had run. Gillespie v. Janey, 2010 U.S. Dist. LEXIS 20041 (D.N.J. Mar. 5, 2010)

Employment Discrimination
Court issues order administratively terminating action without prejudice where plaintiff intends to pursue administrative and state law claims first. Nicolas v. Trenton Bd. of Educ., No. 10-760, 2010 U.S. Dist. LEXIS 37286 (D.N.J. Apr. 14, 2010)

Board prevails against plaintiff's claims. Concerning the employment discrimination claim, court dismisses with prejudice where seven years have passed since alleged discrimination took place. On employment retaliation claim, plaintiff failed to exhaust administrative remedies. Finally, court dismisses contract claim as it declines to exercise supplemental jurisdiction. McCullough v. Trenton Bd. of Educ., 2010 U.S. Dist. LEXIS 18683 (D.N.J. Mar. 2, 2010)

School employee alleged board discriminated against her based on her race, sex and age, and subjected her to a hostile work environment in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"); and asserting claims of defamation and intentional infliction of emotional distress. Employment discrimination claims dismissed; the race, sex, disability and age discrimination claims are barred by the applicable statute of limitations. Court will decline to exercise supplemental jurisdiction over the remaining state law claims. Dixon v. Elizabeth Bd. of Educ., No. 08-4243, 2010 U.S. Dist. LEXIS 41531 (D.N.J. Apr. 27, 2010)

First Amendment
Court determines that student's First Amendment rights were violated when the school denied her permission to 1) wear a black and red tape armband saying "Life," 2) distribute anti-abortion flyers during non-instructional times, and 3) wear tape over her mouth during the school day as part of her participation in the Pro-Life Day of Silent Solidarity. Court finds that Defendants have not met their burden under *Tinker*. Claim that school may have disruptions because of failure to enforce dress code in unbridled manner is simply not a specific and significant fear of disruption to meet standard. School is enjoined from prohibiting

student from wearing the armband or distributing the flyers absent a well-founded expectation of disruption. C.H. v. Bridgeton Bd. of Educ., No. 09-5815, 2010 U.S. Dist. LEXIS 40038 (D.N.J. Apr. 22, 2010)

New Jersey State Interscholastic Athletic Association
Plaintiff's motion for injunctive relief in the form of being permitted to participate in athletic tournament denied. Defendant's provided adequate due process. Additionally, plaintiff's fourth amendment claim fails where defendant's agents observed players at open gym session where there was no expectation of privacy.
St. Patrick High Sch. v. N.J. Interscholastic Ath. Ass'n, 2010 U.S. Dist. LEXIS 17993 (D.N.J. Mar. 1, 2010)

Special Education
Parents failed to show that district did not provide FAPE. IEP was sufficiently detailed, comported with all procedural requirements and showed no loss of educational opportunity. On the contrary, student's record indicated progress towards goals. W.R. v. Union Beach Bd. of Educ., No. 09-2268, 2010 U.S. Dist. LEXIS 39671 (D.N.J. Apr. 22, 2010)

Parents bring action against private special education school following non-fatal shooting of student and false imprisonment in windowless disciplinary room. Alleging violations of 42 *USC* § 1983 and § 1985, the court finds that the private school defendants were not state actors as education is not a function specifically reserved to the State. Motion to dismiss granted in part. Donlow v. Garfield Park Acad., No. 09-6248, 2010 U.S. Dist. LEXIS 39154 (D.N.J. Apr. 20, 2010)

Parents seek order enjoining private special education school from using certain time-out disciplinary rooms ("time-out rooms") in its school facility, or in the alternative, ordering it to abide by and enforce written policies and procedures regarding the use of time-out rooms and the plaintiffs further seeking to enjoin the defendant Board of Education from allowing time-out rooms in schools, or in the alternative, ordering it to bar the use of such time-out rooms unless the Board of Education adopts written due-process procedures for such use as the use of the time-out rooms deprives students of their constitutional rights. Court denies petition. Donlow v. Garfield Park Acad., No. 09-6248, 2010 U.S. Dist. LEXIS 32384 (D.N.J. Apr. 1, 2010)

When considering a motion to dismiss, a plaintiff who brings an action for compensatory damages under Section 504 and NJLAD is not required to exhaust administrative remedies before bringing and action in a district court. Further, Section 1983 claims will stand as plaintiff needs only to allege that he received different treatment from other similarly situated individuals or groups to survive a motion to dismiss. Board's motion denied. Davie v. Barnegat Bd. of Educ., No. 09-5769, 2010 U.S. Dist. LEXIS 27840 (D.N.J. Mar. 24, 2010)

In dispute over reimbursement for tuition and services, Board's motion to dismiss is granted without prejudice, for lack of subject matter jurisdiction. Matter remanded to OAL for full development of record including findings of fact and conclusions of law. H.A. v. Teaneck Bd. of Educ., 2010 U.S. Dist. LEXIS 22485 (D.N.J. Mar. 10, 2010)

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New Jersey Supreme Court

There are no education-related decisions posted for March and April at this time.

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New Jersey Superior Court Appellate Division

Abbott
Dispute over allowable costs for Abbott preschool educational program provider. At issue was administrative costs pertaining to the program. An administrative law judge found that the disputed costs were allowable under the DOE's budgetary guidelines. The Commissioner reversed this determination. The court held that the final decision of the Commissioner requiring recoupment of allegedly excessive administrative/indirect costs from the Abbott private preschool provider was erroneous. The provider's budget was prepared in accordance with DOE-promulgated guidelines, and approved by the district and the DOE. All expenses were incurred in accordance with the approved budget. The Commissioner's reliance on oral instructions and past practices was arbitrary and could not override specific agency prepared instructions and guidelines. Catholic Family & Cmty. Servs. v. State-Operated Sch. Dist. of Paterson, __N.J. Super.__ (App.Div. 2010)

CEPA
Court affirms dismissal of CEPA claim because plaintiff at private special education school failed to show that defendants' stated reasons for terminating his employment were a pretext for retaliation. Shlala v. Catholic HHS, No. A-0055-08T2 (App. Div. Apr. 23, 2010)

Summary judgment properly granted for defendants in matter involving CEPA claim and wrongful discharge. Plaintiff failed to prove a prima facie claim for wrongful discharge. Claim that school violated Title IX was insufficient to sustain wrongful discharge where private school receives no federal funds, despite belief of plaintiff. Kommendant v. Diocese of Trenton, No. A-1062-08T3 (App.Div. Apr. 13, 2010)

Discrimination
Plaintiff math teacher alleged termination in violation of NJLAD when the Board refused to accommodate his disability. Court affirms reinstatement, back pay plus interest as well as attorneys fees and monetary penalty. Ponsi v. Cliffside Park Bd. of Educ., No. A-5902-07T2 (App. Div. Apr. 1, 2010).

Pensions
Members of TPAF, although entitled by law to the receipt of vested benefits upon retirement, possessed no constitutionally protected contract right to the particular level, manner, or method of State funding provided by statute. The New Jersey Constitution created no contractual right to retirement benefits or to future legislative appropriations. Moreover, granting members the contract rights they claimed would run afoul of the Appropriations Clause, N.J. Const. art. VIII, § 2, para. 2, and

the Debt Limitation Clause, N.J. Const. art. VIII, § 2, para. 3, which granted the legislature exclusive powers of appropriation and precluded one legislature from binding future legislatures regarding prospective appropriations. New Jersey Educ. Ass'n v. State, 412 N.J. Super. 192 (App.Div. 2010)

Public Contracts
In dispute over who was the lowest responsible bidder, bidders on school projects who submit a single bid are required to list subcontractors for structural steel work and provide proof of their performance security, but they are not required to set forth the scope of work each subcontractor will perform. While Local Public Contracts Law requires bidders to set forth scope of work in this type of bid, the Public Schools Contracts Law does not. Lighton Indus. v. North Hanover Twp. Bd. of Educ., No. A-1238-09T3 (App.Div. Mar. 29, 2010)

Public Records (OPRA)
In consolidated actions involving the NJLAD, OPRA and the common law right to records access, court affirms that trial court properly disposed of all claims. Following a ten day suspension for possession of a knife, student's parent made voluminous records requests to support claim of selective enforcement. Court found that there was no legal error in the way that requests were disposed of and affirmed the lower court rulings. O.R. v. Kniewel, No. A-5181-07T2 (App.Div. Mar. 17, 2010)

Regulation
Contractors Association of New Jersey challenge regulations promulgated by the New Jersey Schools Development Authority pursuant to its enabling legislation. N.J.S.A. 52:18A-235 to -249. With the exception of the regulations related to short-listing, which are invalid because they are arbitrary and not authorized by statute, the regulations represent a valid exercise of the Authority's powers. O'Shea v. New Jersey Schs. Dev. Auth., No. A-3943-08T1 (App.Div. Apr. 7, 2010)

Sending-Receiving
In dispute over tuition in a sending-receiving relationship, court affirms the Commissioner's ruling to bring the parties' payment/credit status at the conclusion of this matter into alignment with the structure provided by law, so that they could put years of improper 'ad hoc' arrangements behind them and continue thereafter strictly in accordance with applicable rule. Court declines to exercise original jurisdiction and leave parties to the remedies available under applicable regulations. Board of Educ. of Mountainside v. Board of Educ. of Berkeley Heights, No. A-6215-07T3 (App.Div. Mar. 15, 2010)

Statutory Construction
Private, NJ-licensed childcare center offering programs for children aged six weeks to six years is not an elementary school for purposes of N.J.S.A. 2C:35-7. Conviction vacated. State v. Shelley, No. A-0868-07T4 (App.Div. Mar. 22, 2010)

Tenure Dismissal
Petition dismissed as untimely where terminated teacher seeks to litigate issue of after-acquired endorsement one year after issue was initially raised in litigation. Petitioner had 90 days to file from the time he learns of the state of facts that would enable him to file a timely claim. Ziegler v.

Board of Educ. of Bayonne, No. A-1998-08T3 (App.Div. Apr. 23, 2010)

Workers Compensation
Court affirms dismissal of workers compensation claim where teacher submitted claim alleging exposure to fumes and irritants in the workplace. Teacher failed to sustain her burden of proof. Mucci v. Board of Educ. of Moonachie, No. A-4733-08T3 (App.Div. Mar. 24, 2010)

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New Jersey Superior Court, Law/Chancery Division

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Commissioner of Education

Indemnification
Matter remanded to the OAL to determine eligibility for indemnification. A complaint alleging violation of the Code of Ethics for School Board Members (*N.J.S.A*. 18A:12-24.1) is both one of first impression and one posing unique difficulties, since proceedings arising under this statute frequently involve a plethora of diverse allegations rather than claims arising from a single act which may be discretely analyzed in terms of the statutory standard for indemnification. Proceedings under the School Ethics Act are administrative proceedings which do not require favorable disposition in order for the charged party to be eligible for indemnification. However, it is the particular actions on which the allegations against a charged party are predicated that must be scrutinized – consistent with prior case law as to time, place and subject matter – in terms of the statutory standard of "arising out of and in the course of the performance of his duties as a member of the board" in order to determine a petitioner's entitlement to indemnification. Matthews, Commissioner 2010:April 15.

90-Day Rule
Commissioner concurred with ALJ dismissal of matter for failure to timely file the claim.

Petitioner, a per diem substitute teacher, had filed an appeal alleging that he was entitled to lost wages as a result of his being placed on "inactive" status by the district and had suffered emotional distress as a result. Commissioner noted that petitioner was not a regular teaching staff member, but rather an "at-will" employee with no basis on which to claim entitlement to current, past or future employment. Malinconico, Commissioner 2010: March 11.

Non-Renewal
Commissioner agreed that former English teacher did not meet his burden of proof that his personnel file was intentionally manipulated or "papered", that positive evaluations were missing or that his non-renewal

by the Board was arbitrary, capricious or unreasonable. Eisenberg, Commissioner 2010:March 11.

Guidance counselor was promoted to assistant principal and served in the position for two years, at which point she was non-renewed, before gaining tenure as a vice principal, and returned to the position of guidance counselor. Petitioner alleged that the decision not to renew her contract as assistant principal was in retaliation for her having called attention to alleged administrative improprieties by the principal and that the superintendent of schools acted wrongfully in denying her tenure in the position of assistant principal. Commissioner concurred with ALJ that respondent's non-renewal determination was supported by credible evidence and was not arbitrary or capricious. Andino, Commissioner 2010: March 24.

Commissioner upholds non-renewal of part-time, non-tenured substance abuse counselor. Petitioner alleged that she was not evaluated in accordance with N.J.S.A. 18A:27-3.1. Board's decision was premised on the elimination of part-time substance abuse counselor position as part of a restructuring, not on petitioner's evaluations; and the Board's determination is entitled to a presumption of correctness. It is well-settled that a school board has virtually unlimited discretion in the hiring or renewal of non-tenured teachers. The petition was dismissed. Minnella, Commissioner 2010: April 30.

Reduction In Force

RIF'd Supervisor of Curriculum and Instruction/Fine and Performing Arts, and Supervisor of Social Studies had no tenure entitlement to vice principal positions. Neither possessed the requisite certification for the position. Matter remanded for a determination of whether one petitioner had an entitlement to the position of Director of Educational Services. Missal and Fattal, Commissioner 2010: March 22.

School Ethics

Commissioner affirms the decision of the School Ethics Commission that respondent violated N.J.S.A.18A:12-24.1(i) of the Code of Ethics for School Board Members when he sent a letter to the Superintendent of Schools accusing him of allowing his administrative staff to violate Board policy and – by copies of this letter – directed his recriminations to the attention of State officials. Commissioner rejects the SEC's recommended penalty of censure finding, instead, that respondent should be and hereby is reprimanded for such violation. Hollander, Commissioner 2010: March 5.

Commissioner concurred with the SEC that reprimand was the appropriate sanction for a board member who violated N.J.S.A.18A:12-24(c) of the Code of Ethics for School Board Members when he voted to extend the contract of the district's Superintendent, who was the direct supervisor of respondent's spouse, a truant officer. Because respondent failed to file an answer, the charges were deemed to be admitted. Depsee, Commissioner 2010: March 11.

Matter remanded to School Ethics Commission for determination of whether employee is subject to the School Ethics Act and whether he received the SEC's mailings. Garcia, Commissioner 2010: March 26.

Commissioner affirms the decision of the SEC that respondent violated N.J.S.A.18A:12-24.1(d), (e) and (i) of the Code of Ethics for School Board Members when he administered the schools contrary to his duty as a Board member, took private action capable of compromising the

Board, and failed to support and protect school personnel in the proper performance of their duties by inserting himself into the controversy surrounding the interim superintendent's cancellation of a previously scheduled mock student election and asking the high school principal – also the head of the district administrators' association (WEAA) – to inform her colleagues that they should not stand in the way of such election, which was a parent-teachers (PTA/PTO) event that – contrary to apparent widespread belief – had *not* been cancelled by the Board. Gordon, Commissioner 2010: March 30.

Settlements
Settlement rejected. Did not dispose of all issues with all parties. T.T and I.D. Commissioner 2010: April 23.

Student Discipline
Student was expelled from charter school for participation in a fight with three other students, destruction of school property and possession of homemade brass knuckles – all violations of school rules. Commissioner adopted in part and rejected in part the ALJ decision. Pursuant to *N.J.A.C.* 6A:16-7.5, a student cannot be expelled unless he has engaged a second time in conduct warranting possible suspension or expulsion, after having first served a duly imposed long-term suspension for an earlier infraction. Commissioner determined that the appropriate remedy in this matter is the revision of student's school record to reflect imposition of a long-term suspension, followed by withdrawal from the school at the end of the school year and directed the charter school to revise the student's records accordingly. M.R., Commissioner 2010: March 22.

Student Residency
Commissioner orders enforcement of residency settlement agreed to at conclusion of hearing but ultimately not signed by parent. Parties agreed that tuition would be assessed for period of ineligible attendance of high school senior and elementary school student from February 1, 2009 through the end of the school year, with payments of $ 60 per month. Commissioner noted that many school districts allow students who change residence during their last year to finish high school tuition free. Insofar as school district has the right – underN.J.S.A.18A:38-1(b)(2) – to move for tuition for both of petitioner's children, the Commissioner ordered the enforcement of the settlement reached by the parties. K.L., Commissioner 2010: March 11.

Student entitled to receive a free public education in the school district. Prior to becoming homeless, the student's last residence was in the district. Since becoming 18 the student has resided within the school district. A.B., Commissioner 2010:April 12.

Tenure Acquisition
In decision on remand, ALJ found that, based on the principles in *Kletzkin, supra,* and *Blinn v. Board of Trustees of the Public Employees' Retirement System,* petitioner's employment relationship with the Board continued during her leaves of absence and that these leaves of absence had no adverse impact on the Board's ability to evaluate her. Petitioner met the requisite number of months for tenure and is entitled to back pay, less mitigation, from the date of her removal, together with all of the benefits of her tenured position. Commissioner concurred. Mendez-Azzolini, Commissioner 2010: April 23.

Tenure Dismissal
Tenured secretary was chronically absent and tardy in every full year of her employment from 2001 to 2009. School district sustained the burden of proving the charges of conduct unbecoming based on chronic and excessive absenteeism, insubordination based on respondent's failure to follow a legal direction to report for fitness for duty exams, and inability to complete duties, and, based on the foregoing, the fitness for duty determination is moot. ALJ ordered respondent's employment terminated. Commissioner concurred.
Lleo, Commissioner 2010:March 25.

School district brought unbecoming conduct tenure charges against tenured special education teacher who was arrested for DWI and indicted for alleged unlawful possession of a controlled dangerous substance (CDS). Respondent was admitted into a pre-trial intervention (PTI) program regarding the charge of possession of a CDS, third degree. Teacher contended that because the incident occurred away from the school and out of the district, the penalty of dismissal was unnecessary and unwarranted. ALJ found that: respondent was driving while intoxicated and that she was in possession of a CDS; the fact that possession of the CDS occurred off school premises has no bearing on the determination that the behavior underlying respondent's arrest constituted conduct unbecoming; the petitioning Board had sustained its burden of proving that the respondent engaged in conduct unbecoming a teacher; and respondent's entry into a PTI program does not negate the fact that she engaged in unbecoming conduct sufficiently flagrant to warrant dismissal. The nature and severity of the offense required that respondent be dismissed from her tenured teaching position. Commissioner agreed and transmitted a copy of the decision to the State Board of Examiners. Lewis, Commissioner 2010: March 26.

Board proved by a preponderance of the credible and legally competent evidence that respondent, a tenured custodian, engaged in a pattern of belligerent conduct towards his co-workers and supervisors, behaved in an objectionable and offensive manner toward a female co-worker, left his assigned post without permission, failed to abide by procedures regarding absences, failed to clean as directed, and flagrantly disregarded workplace rules. ALJ found that respondent's conduct warranted dismissal from tenured employment. Commissioner concurred. Jimenez, 2010: April 23.

Board certified unbecoming conduct tenure charges against tenured speech and dramatic arts teacher. Petitioner allegedly allowed the demonstration of an inherently dangerous activity, how to pass out while hyperventilating, during a student presentation, which resulted in an injury, and failed to follow school procedures in dealing with the injured student. She left her class unattended, during which time a student was injured. Charges were proven. ALJ recommended forfeiture of 90 days pay. Commissioner concurred. Teacher was returned to her tenured employment. Priano-Keyser, Commissioner 2010: April 30.

Tenure Dismissal-Settlement
Tenure settlement rejected. Did not meet the Cardonick standard.
Jackson, Commissioner 2010: April 23.

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School Ethics Commission

Board member violated N.J.S.A. 18A:12-24(c) when he voted to approve the CSA's salary increase. The board member's wife is tenured secretary for the nurses in the high school nursing office, reports to the school nurse and the school physician, is evaluated by the Principal or the Assistant Principal, the latter who is evaluated by the Principal, who in turn is evaluated by the CSA. Reprimand ordered. I.M.O. Carey, SEC 2010: March 23(Pennsauken).

SEC finds that board member violated N.J.S.A. 18A:12-24(c) (personal /financial involvement) where board member, whose wife works as a tenured secretary for the nurses, voted to reappoint non-tenured members of the administrators union which included the high school principal in the chain of supervision over his wife, and voted to reappoint the members of the secretaries union, which included his wife. SEC recommends a penalty of reprimand. I/M/O Carey, SEC: 2010: April 20 (Pennsauken).

SEC dismisses complaints against board member that alleged violations of N.J.S.A. 18A:12-24.1(c) and (e). Contrary to the allegations, there was no showing that the respondent, prior to becoming Board President and absent authorization from the Board, met with Tri-Tech, the board's construction company, to arrange a settlement of a lawsuit that the company had filed against the Board. Nor was respondent's attendance at a meeting with the board attorney outside the scope of his duties as Board President, nor was his presentation of the settlement proposal at the Board meeting outside of his duties. Kuchta et al. v. Casale, SEC 2010:March 23(Nutley).

SEC dismisses allegations against CSA for violations of N.J.S.A. 18A-12-24(b), (c) and (f) no showing that former principal who subsequently became the CSA, used or attempted to use, her former position as a principal to secure an *un*warranted advantage for herself or others when she campaigned in her private capacity for several board members up for election. Nor did the record demonstrate that she used her principal's position to effectuate the hiring of a board member's sister-in-law. SEC dismisses allegations against board members for violations of N.J.S.A. 18A:12-24.1(b), (e) (f) and (h) as the record did not establish that any board member made a decision contrary to the educational welfare of students when hiring the principal as the CSA in light of the interview and search process, and the board member abstained from the August 2008 vote to hire her sister-in-law. Ferguson v. Fipp,SEC 2010: March 23 (Northvale).

The SEC found no probable cause to credit the allegations that a board member had a financial interest in a company for which he insisted the BA sign a contract for his tenant; or used "intimidating verbal tactics in his demand, nor was there probable cause that the board member violated the School Ethics Act when he sent a letter asking the CSA for an explanation of why he did not renew a teacher assistant who was the daughter of an acquaintance. McGivney v. Zarish,SEC 2010: March 23 (Flemington-Raritan Reg.)

The SEC found no probable cause to credit the allegations that a board member violated N.J.S.A. 18A:12-24(c) by serving on the Personnel Committee when his wife is a secretary in the District whose income is determined by the Committee. The SEC nevertheless cautions the board member that whenever there is discussion before the Personnel Committee of any matter which implicates, directly or indirectly, his wife's employment such as, but not necessarily limited to, salary, benefits and working conditions, the respondent must recuse himself from these

discussions and leave the room. Worrell v. Minniti, SEC 2010: March 23 (Greenwich)

Board president and vice president, who brought an ethics action against another board member, did not violate N.J.S.A. 18A:12-24(c) when they participated in the vote to approve the counsel fees associated with the matter, under the particular circumstances where the entire board had originally intended to bring the action and hired the board attorney to represent it, but was informed by the SEC that only individual members may bring a complaint. The obligation to pay the fee never belonged to the individual board members but rather to the board, and thus the board members never had "a direct or indirect financial interest" in the payment of the legal fee, nor a personal involvement that created some benefit to them. I/M/O Brown and Garrison, SEC 2010: April 20 (Englewood)

Board member violated N.J.S.A. 18A:12-24(c) when at board's organization meeting he voted to reappoint his wife, a tenured elementary teacher, and later to reappoint her to a paid position as club sponsor for the scrap-book club. He also violated N.J.S.A. 18A:12-24(c) by voting at the organization to reappoint two of her immediate supervisors and a central office administrator in his wife's chain of supervision and by participating in discussions of the CSA's contract and voting to non-renew the CSA's contract. However, where he voted to appoint a board attorney whose firm made a campaign contribution to the member's campaign, no violation was found since at the time the respondent accepted the donation, he was not a school official, nor was there any factual support in the record to indicate that he had knowledge that the contribution was given with the intent to influence him as per N.J.S.A. 18A:12-24(e) . Censure recommended in light of mitigating circumstances "cautiously applied" for new board member who was not advised to abstain. I/M/O Guarascio, SEC 2010: April 20 (Berkeley Twp)

SEC recommends reprimand after finding on summary basis that former board member violatedN.J.S.A.18A:12-24.1(g) when she transmitted to the Interim County Superintendent of Schools confidential correspondence from Board counsel to the board and superintendent, and when she posted on NJ.com inaccurate information regarding the salary negotiations for the Interim Superintendent. Reprimand ordered. I/M/O Jordan, SEC 2010:April 20 (High Bridge)

SEC was not compelled to place complaint in abeyance, as pending criminal complaint arising from same facts involves different fact-finding and legal issues. SEC finds board member did not violate N.J.S.A. 18A:12-24.1(j), when she filed a criminal complaint in her personal capacity against a fellow board member; no showing that she attempted to resolve a concern brought to her attention by the public or school personnel prior to referral to the CSA or failure of an administrative solution. Brister v. Tanner, SEC 2010:April 20 (Union County)

Click here for School Ethics Commission decisions.

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State Board of Examiners

Examiners orders immediate revocation of certificates of elementary school teacher dismissed on tenure charges after a finding of unbecoming conduct including, inappropriate language towards students, hitting and/or punching a student, screaming his instructional aide and calling her profane names in the presence of students, making

unwarranted, unprofessional, offensive and/or sexist remarks to another staff member, beating a classified student, with his hands or a yardstick and routinely hitting, punching and/or beat a classified student. IMO Certificates of Robinson, Exam 2010: Jan 7.

Examiners orders immediate revocation of teacher's Teacher of the Handicapped and Learning-Disabilities Teacher-Consultant certificates where teacher agreed to forfeit these certificates after pleading guilty to Endangering the Welfare of a Child. IMO Certificates of Flynn, Exam 2010:Jan 7.

Examiners accepts settlement proposal in which teacher would voluntarily relinquish her Teacher of Elementary School certificate with the force and effect of a revocation; teacher had provided the district with a forged Supervisor certificate and a forged duplicate Supervisor certificate. IMO Certificates of Holmes, Exam 2010:Jan 7.

Examiners orders immediate revocation of Teacher of Health and Physical Education Certificate of Eligibility With Advanced Standing and Teacher of Health and Physical Education Provisional certificate notwithstanding teacher's contentions of rehabilitation, where teacher had pled guilty to criminal charges of Theft and Possession of a Controlled Dangerous Substance With Intent to Distribute Within 1000 Feet of School Property. Fact that teacher completed a drug rehabilitation program and is seeking to become a certified alcohol and drug counselor, while a step in the right direction, has no bearing on the decision the Board of Examiners must make with regard to his certification. IMO Certificates of Yurchak, Exam 2010:Jan 7

Examiners orders immediate revocation of Teacher of Instrumental Music certificate after he plead guilty to Endangering the Welfare of a Child, where he was court-ordered to forfeit the certificate. IMO Certificates of Atikinson III, Exam 2010:March 25.

Examiners orders immediate revocation of Teacher of Industrial Arts certificate, Supervisor certificate and a Principal Certificate of Eligibility, and a Principal certificate, after he plead guilty to Theft of CDS , where he was court-ordered to forfeit the certificates. IMO Certificates of Bevilacqua, Exam 2010:March 25.

Examiners orders immediate revocation of Substitute credential after teacher plead guilty (and later withdrew his plea) to Aggravated Sexual Contact and Endangering the Welfare of Children. IMO Credential of DOOGAN, Exam 2010: March 25.

Examiners orders immediate revocation of Teacher of English As A Second Language and Teacher of Spanish certificates, where as a condition of acceptance into a Pretrial Intervention Program, he was court-ordered to forfeit his teaching certificates. IMO Certificates of Lubiner, Exam 2010:March 25.

Examiners orders immediate voted to suspend Oderanti's substitute credential pending resolution of the criminal charges against him, where his was arrested and charged with Criminal Attempt to Entice, Lure A Child By Various Means, Criminal Attempted Aggravated Sexual Assault, Criminal Attempted Sexual Assault and Criminal Attempted Endangering the Welfare of Children. IMO Certificates of Oderanti, Exam 2010: March 25.

Examiners orders immediate revocation of Teacher of Drafting and Design Technology Certificate of Education Certificate of Eligibility for teacher convicted of Conspiracy to Possess CDS With Intent to

Distribute and Possession and Distribution of a CDS in a School Zone. IMO Certificate of Spivey, Exam 2010: March 25.

Examiners accepts settlement proposal in which teacher would voluntarily relinquish Teacher of Comprehensive Science and Teacher of Social Studies certificates with the force and effect of a revocation, where the school district had advised that the teacher had resigned from his tenured position after being suspended for allegedly possessing and displaying pornographic images on a district computer. IMO Certificates of Stenz, Exam 2010: March 25.

Examiners orders immediate revocation of Teacher of Health and Physical Education certificate and Teacher of the Handicapped certificate for teacher convicted of Aggravated Assault with Bodily Injury and Assault on Police Officer, notwithstanding his contentions of rehabilitation for alcoholism. IMO Certificates of Strazza, Exam 2010:March 25.

Examiners orders immediate revocation of Teacher of Health and Physical Education certificates of Juvenile Justice Commission employee after Commissioner of Education had dismissed him from his tenured position for unbecoming conduct, insubordination and neglect of duties including falsifying timesheets and attendance records, failing to prepare lesson plans, habitually arriving late and leaving early, violating an order banning him from attending sports tournaments and giving a false statement to a police officer. IMO Certificate of Ash, Exam, 2010: April 29

Examiners orders immediate revocation of Teacher of Health and Physical Education Certificate of Eligibility With Advanced Standing and Teacher of Health and Physical Education and Teacher of Elementary School certificates after teacher's conviction of Production of Child Pornography, Attempted Production of Child Pornography, Transporting a Minor in Interstate Commerce to Engage in Sexual Activity and Possession of Child Pornography. IMO Certificates of Broxmeyer, Exam 2010: April 29.

Examiners orders immediate revocation of Teacher of Drafting and Design Technology Certificate of Eligibility, where teacher was accepted into a Pre-Trial Intervention Program (PTI) after being charged with Endangering the Welfare of a Child and Harassment for making numerous phone calls and leaving messages for a former eighth grade student and where as a condition of entry into PTI, he was required to forfeit his tenured teaching position. IMO Certificates of Castel, Exam 2010:April 29

Examiners orders immediate revocation of Teacher of Mathematics Certificate of Eligibility With Advanced Standing, and Teacher of Mathematics certificate where teacher entered a conditional guilty plea to Endangering the Welfare of a Child. Teacher's s court-ordered forfeiture and PTI entry warrant a decision of revocation. IMO Certificates of Coar, Exam 2010:April 29.

Examiners orders immediate revocation of Teacher of the Handicapped certificate where teacher was ordered to forfeit her teaching certificate as a condition of acceptance into a Pre-trial Intervention program following her arrest on charges of Theft By Deception, Use of Personal Identifying Information of Another and Theft-Illegal Retention. IMO Certificate of Dressel, Exam 2010:April 29.

Examiners orders suspension for two years of after-acquired Teacher of English As a Second Language Certificate of Eligibility, where her other

certificates had been suspended for two years in prior suspension proceeding for her attempt to fraudulently obtain money from the Board and for unbecoming conduct and neglect of duty in knowingly preparing and acquiescing in the submission of the fraudulent matrix. IMO Certificate of Duran Exam 2010:April 29.

Examiners orders immediate revocation of Teacher of Elementary School and Elementary School Principal certificates where holder plead guilty to Official Misconduct and Theft By Deception was sentenced to three years imprisonment, fined and ordered to forfeit his public office. IMO Certificate of Hailey, Exam 2010:April 29

Examiners orders revocation of Teacher of Elementary School and Principal certificate where teacher pled guilty to Conspiracy/Official Misconduct-Unauthorized Act and Attempted Theft By Deception and was given three years' probation, 100 hours of community service, fined and ordered to forfeit her public office. IMO Certificate of Johnson, Exam 2010: April 29.

Examiners orders revocation of Teacher of Health and Physical Education and Teacher of Driver Education Certificates of Eligibility With Advanced Standing, where he was for Conspiracy to Distribute Oxycodone, after he agreed to forfeit his teaching certificates. IMO Certificate of Kolodziejczyk, Exam 2010 April 29.

Examiners orders revocation of Teacher of Elementary School Certificate of Eligibility and a Principal Certificate of Eligibility where she pled guilty in August 2008 to one count of Theft, 3rd Degree, was sentenced to three years' probation, 200 hours of community service and was disqualified from public service pursuant to N.J.S.A.18A:6-7.1 *et seq.* IMO Certificates of Little, Exam 2010 April 29.

Examiners orders revocation of Teacher of Elementary School certificate of a teacher who was convicted in federal court of Possession of Child Pornography and sentenced to 4 years, nine months imprisonment and was disqualified from public service pursuant to N.J.S.A.18A:6-7.1 *et seq.* IMO Certificate of Macango, Exam 2010 April 29.

Examiners orders revocation of Teacher of Physical Education Certificate of Eligibility With Advanced Standing where he pled guilty to two counts of Rape in the third degree, served mandatory prison term of two years, and was ordered not to have unsupervised contact with children under the age of 18. IMO Certificate of McGuire, Exam 2010 April 29.

Examiners orders six-month suspension of Teacher of Music certificate, School Administrator and Principal Certificates of Eligibility, and Supervisor certificate of teacher with long, successful career, against whom tenure charges had been filed alleging he had fabricated charges of inappropriate touching of students by another teacher. Tenure charges were resolved by settlement in which District withdrew the charges and teacher resigned his tenured position in the district; Examiners concludes that statements were uttered as a result of teacher's emotional state after an altercation. IMO Certificates of Paraskevopoulos, Exam 2010 April 29.

Examiners revokes Teacher of Health and Physical Education Certificate of Eligibility With Advanced Standing of teacher upon guilty plea to Computer Theft, 3rd Degree, was sentenced to three years' probation and disqualified from public service pursuant to N.J.S.A.18A:6-7.1 *et seq.* IMO Certificates of Poliseno, Exam 2010 April 29.

Examiners revokes Certificate of Teacher of Mathematics from teacher who resigned from his tenured position after an investigation revealed that he had allegedly sent at least 92 lewd and inappropriate e-mails from school computers to two of his former students who were still students in the district, and where he voluntarily agreed as part of a settlement, to relinquish his certificates. IMO Certificate of Weidemoyer, Exam 2010 April 29.

Examiners revokes Teacher of Preschool Through Grade 3 Certificate of Eligibility and Teacher of Preschool Through Grade 3 Certificate after former "Teacher of the Year," with otherwise exemplary career, was convicted for Criminal Attempt/Theft By Deception. IMO Certificates of Worthy, Exam 2010 April 29. See also IMO Worthy, Examiners revokes Teacher of Elementary School and Principal Certificates of teacher on similar facts. IMO Certificates of Worthy, Exam 2010 April 29.

Examiners revokes teacher's Teacher of Health and Physical Education Certificate of Eligibility With Advanced Standing, notwithstanding his contentions of rehabilitation, and his arguments that there was no foundation to the criminal charges but that he plead guilty to Theft and Conspiracy as a better alternative to a trial. IMO Certificates of Yurchak, Exam 2010 April 20.

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New Jersey Council on Local Mandates

There are no education-related decisions posted for March or April at this time.

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Election Law Enforcement Commission

There are no education-related decisions posted at this time.

Click here for Election Law Enforcement Commission decisions.

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New Jersey Division on Civil Rights

DCR issued a Finding of Probable Cause that the Winslow Township Bd. of Ed violated the NJ Law Against Discrimination, for discharging a woman from her job as Head Care Giver in a before-and-after-school program because she was unable to lift more than five pounds; the ability to lift more than five pounds was not an essential part of her job. If Conciliation is not successful, the matter will be referred for a hearing and initial decision by an Administrative Law Judge. Demitri v. Winslow Twp. Bd. of Ed., (DCR) February 3, 2010.

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New Jersey Government Records Council

GRC determines that a request for the name, position, salary, payroll record and length of service for every Board/District employee who was employed in whole or part from January 1, 2008 to March 24, 2009 is a request for information rather than a specifically identifiable government record, and is invalid under OPRA. A request for unapproved, draft executive session meeting minutes for every meeting held between January 1 and March 24, 2009, was properly denied as these constituted inter-agency or intra-agency advisory, consultative, or deliberative material and are not government records. The Custodian provided the CAFR and management and CAP reports; his failure to provide a response within 7 days, while deemed a denial of access, did not rise to the level of a knowing and willful violation under the totality of the circumstances. Referred to ALJ for determination of whether complainant is entitled to counsel fees as prevailing party under the "catalyst" theory. Danis v. Garfield Bd. of Ed., GRC No. 2009-156, 2009-157, & 2009-158 (April 28, 2010)

Request for "[c]opies of any and all reports, memoranda, etc. from the engineering firm Douglas Mace to the Township of Mansfield regarding Block 2201.02, Lot 11 (2 Hemlock Court)" is invalid under OPRA because it is overly broad and fails to specify an identifiable government record since no specific individually named parties to the communications are listed. OPRA is not intended as a research tool litigants may use to force government officials to identify and siphon useful information. Duarte v. Mansfield Twp, GRC No. 2009-130 (April 21, 2010).

Request for every e-mail and America Online Instant Messenger message sent to or sent from former mayor's personal email account during the week of July 24, 2005 fails to seek specific identifiable government records because no content and/or subject is included , the Complainant's request is overly broad. Verry v. South Bound Brook, GRC No 2009-124(April 28, 2010).

Custodian failed to respond within 7 mandated days where request was made for inspection of minutes of all public meetings from January 1, 2007 to February 1, 2009; copy of a list of all executive session meetings from January 1, 2007 to February1, 2009, including date, location, times and topics of meetings, and for contact information for the Custodian (name, mailing address, daytime telephone number, fax number, and e-mail address.) and copy of any written policy covering the transfer of OPRA information via e-mail, including any fee schedule. Request for custodian contact information, however, is overly broad, seeks information rather than an identifiable government record, and the original Custodian has not unlawfully denied access. GRC issues interim order January 26, 2010 for custodian comply with providing other records within 5 days with appropriate redactions; defers analysis of whether the original Custodian knowingly and willfully violated OPRA. Matter withdrawn April 28, 2010. Gonzalez v. Washington Twp, GRC Nos. 2009-121, 2009-122 & 2009-123 (April 28, 2010).

Custodian complied with interim order to certify actual cost of duplicating audio tape of board meeting, where board had originally charged $5.00 and later provided a certification to the GRC that the actual cost of duplication of the requested audio tape excluding labor and other overhead was $2.35, and also certified that he refunded to the

Complainant $2.65. No finding of knowing and willful violation where tape was timely provided, and refund made. Underlying decision is ruling that recording of an agency's public meeting used to draft the official meeting minutes is not deliberative in nature, and thus not exempt from disclosure as advisory, consultative or deliberative. Miller v. Westwood Regional Bd. of Ed, GRC No. 2009-49 (April 8, 2010)

Closed session minutes that were approved were no longer advisory, consultative or deliberative. OPRA requires the disclosure of a record with redactions, and denial of access to the entire record is therefore unlawful under OPRA. A second approval by the governing body for public release of the requested minutes is not required because N.J.S.A. 47:1A-5.g. allows for the redaction of information that is exempt from disclosure under OPRA. Where the custodian mistakenly believed that the requested closed session minutes had to undergo a second approval by the Board of Education prior to their public release, the GRC found no knowing or willful violation. Merckx v. Franklin Bd. of Ed., GRC No. 2009-47 (April 8, 2010)

Custodian's response is insufficient because she violated the interim order by failing to specifically address the complainant's preference for receipt of records although she had the proper means to deliver the requested paper record via facsimile. Complainant is a prevailing party entitled to an award of a reasonable attorney's fees. Silkes v. Dover, GRC No. 2009-60 (April 28, 2010).

GRC enters interim order; custodian must calculate actual costs of providing audio cassette and audiotape as neither reflected the actual cost, and incorrectly included a special service charge although such charges are only for requests that require an extraordinary amount of time and effort, may not be set in advance, and are not warranted for one hour's labor. Blanket requirement that OPRA requests via mail must include photo identification is not required under OPRA and presents an obstacle to public access but *may* be necessary when a requestor pays by check for the legitimate reason of pursuing the individual if the check bounces. OPRA request form provides misinformation regarding the accessibility of personnel records and requirement for photo id. Borough must either adopt the GRC's Model Request Form at http://www.nj.gov/grc/custodians/request/, or amend its OPRA request form as directed by GRC. Paff v. Wildwood Crest, GRC No. 2009-54 (April 8, 2010).

Secretary's failure to forward an OPRA request for audiotape to the Custodian or direct the Complainant to submit the OPRA request directly to the Custodian, violated N.J.S.A.47:1A-5.h. but under totality of circumstances there was no knowing and willing violation of OPRA in light of custodian's unrefuted certification that such audio recording does not exist. Bogen v. Lyndhurst, No. 2009-50 (April 8, 2010)

GRC enters interim order, and finds that custodian complied with earlier interim order, and awards counsel fees to complainant as prevailing party. No knowing and willful violation, although custodian had placed an unreasonable limitation on the Complainant's access to government records by requiring that each request be submitted on a separate OPRA request form; failed to provide the Complainant with Code of Ethics in the medium requested (text file, word processing file, or non-scanned PDF) and provided instead a paper copy although custodian could have charged a special service charge based on the actual cost for an outside vendor to complete the medium conversion. Paff v. Camden, GRC No. 2009-25 (April 8, 2010)

Custodian lawfully denied access to the redacted portion of executive session minutes because the redacted discussion involves review and compromise on multiple contractual terms for the position of the Chief of Police and is exempt from disclosure pursuant toN.J.S.A.47:1A-9.a. and N.J.S.A. 10:4-12.b(7); also is specifically exempt from disclosure as information generated on behalf of public employers/ employees in connection with collective negotiations pursuant toN.J.S.A.47:1A-1.1. Redactions to executive session minutes were lawfully made for information relating to confidential contract negotiations. No attorney fees awarded. Wolosky v. Stillwater, GRC No. 2009-22 (April 8, 2010)

Custodian lawfully denied access to the redacted portion of requested record because in camera review shows that the redacted discussion relates to a matter for which the Township may become a party to litigation; the governing body may exclude the public from such discussion since it involves anticipated litigation pursuant to N.J.S.A. 10:4-12(b)7 and N.J.S.A. 47:1A-9.a. OPRA request form did not conform to the minimum form requirements set forth in N.J.S.A. 47:1A-5.f.; however, interim order was followed and request form has been revised. Complainant is a prevailing party entitled to an award of a reasonable attorney's fees. Wolosky v. Fredon, GRC No. 2009-12 (April 8, 2010)

Custodian has not unlawfully denied access to records, as a request for electronic copies of "all e-mails from Bettina Bieri's township account from January 1, 2008 to June 17, 2008" fails to seek specific identifiable government records and is overly broad and invalid under OPRA. Elcavage v. West Milford, GRC No. 2009-08 (April 8, 2010) See also GRC 2009-07, on similar facts.

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New Legislation

P.L.2010, c.5. -see **S825**
Establishes registry of offenders of individuals with developmental disabilities in DHS. Approved 4/30/2010 PDF Format HTML Format

P.L.2010, c.10. -see **S920** Revises provisions of "New Jersey Economic Stimulus Act of 2009" concerning public-private higher education construction and improvement projects and municipal ordinances to adopt stimulus measures. Approved 5/5/2010 PDF Format HTML Format

P.L.2010, c.13. -see **S826**
Requires certain conditions be met in order for school districts to provide their employees with tuition assistance for coursework or additional compensation upon acquisition of academic credits or completion of a degree program. Approved 5/6/2010 PDF Format HTML Format

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New Regulations

N.J.A.C. 6A:11-1.2 and 2.1, 42 *N.J.R.* 627(a) Charter Schools

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Proposed Regulations

There are no proposals posted at this time.

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United States Supreme Court

There are no education-related decisions posted at this time.

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3rd Circuit Court of Appeals

STUDENT DISCIPLINE

Third Circuit affirms District Court's findings; grants summary judgment in favor of student on Section 1983 First Amendment violation where district disciplined student for creating fake profile of high school principal using his grandmother's computer; no foreseeable and substantial disruption found; court grants summary judgment in favor of district on parents' substantive due process claim regarding nurture and care of student. Layshock v. Hermitage School District 2010 U.S. App. LEXIS 2384 (3d Cir. Pa. Feb 4, 2010)(precedential) (vacated by, and rehearing en banc granted by, 2010 U.S. App. LEXIS 7362 (3d Cir. Pa. Apr. 9, 2010)

Board did not violate student's First Amendment free speech rights by punishing her for creating on her home computer a MySpace.com Internet profile featuring her principal containing his photograph and profanity-laced statements insinuating that he was a sex addict and pedophile; school authorities could reasonably have forecasted a substantial disruption. J.S. v. Blue Mountain School District et al. 2010 U.S. App. LEXIS 2388 (3d Cir. Feb. 4, 2010) (precedential). (vacated by, and rehearing en banc granted by, 2010 U.S. App. LEXIS 7342 (3d Cir. Pa. Apr. 9, 2010).

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New Jersey District Court Decisions

ATTORNEY CONFLICT OF INTEREST

Attorney's advocacy on behalf of the receiving district, maintaining that the sending district's representatives could not vote for Board solicitor, created a conflict of interest that would have precluded the attorney' from representing the board; he was therefore not denied procedural due process when the board failed to appoint him as board solicitor. Court grants board's motion for summary judgment because the attorney did

not have a legitimate expectation of entitlement to the position. Gallagher v. Atl. City Bd. of Educ., No. 08-3262 (RBK/JS), 2010 U.S. Dist. LEXIS 13509, (February 17, 2010). (not for publication)

BOARD LIABILITY

Court grants in part and denies in part, district defendants' motion to dismiss NJLAD and 1983 complaint arising from the sexual assault of a Middle School student by another student shortly after getting off the school bus. Allegations are sufficient to sustain the NJLAD claim against board for hostile educational environment, but claims against individual defendants are dismissed without prejudice; plaintiff is directed to file an amended complaint pleading separately delineated counts and the individual liability of each defendant. Jones v. Ewing Twp. Bd. of Educ., No. 3:09-cv-3536 (FLW), 2010 U.S. Dist. LEXIS 17612 (D.N.J. February 26, 2010) (not for publication)

EMPLOYEE SPEECH

Teacher/union president claims a schedule change violated his right to associate with union members, and that he was suspended in retaliation for filing instant lawsuit and for exercising his free speech right to distribute an essay "the Scab" in teachers' mailboxes. Court dismisses on summary judgment two of the three counts, holding that administrators had qualified immunity for discretionary functions such as altering the schedule and imposing discipline. As to the protected union speech, there remained a question of fact as to whether teacher may be disciplined under the Pickering balancing test, precluding summary judgment on that issue. Cowan v. Bd. of Educ. of Carteret, No. 06-5459 (PGS), 2010 U.S. Dist. LEXIS 15215 (D.N.J. February 19, 2010) (not for publication)

Court grants district and superintendent's motion for summary judgment to dismiss non-tenured employee's claim for wrongful discharge. Although union-related speech is generally a matter of public concern, speech here involved employee's own personal demands and complaints and some union members' grievances; nor was it made as a private citizen but rather as a public employee union president/negotiator. (See Garcetti) Employee also failed to show that the speech was a motivating factor in the alleged retaliatory action. No valid claims stated for intentional/negligent infliction of emotional distress, violation of public policy or NJLAD violations. Beresford v. Wall Twp. Bd. of Educ., No. 08-2236 (JAP), 2010 U.S. Dist. LEXIS 9180 (February 3, 2010) (not for publication)

NON-RENEWAL

Court grants school district summary judgment, dismissing federal claims brought by technology consultant claiming that board violated his constitutional rights when it terminated his position and replaced him with Apex Computer Systems, LLC. Court dismisses alleged violations of procedural and substantive due process, liberty interest, equal protection ("class of one"), and Section 1983. Court declines to exercise jurisdiction over state law claims. Valenti v. Abate, No. 08-1609 (KSH), 2009 U.S. Dist. LEXIS 121174 (D.N.J. December 31, 2009)(not for publication)

SPECIAL EDUCATION

Board may proceed with its complaint that the judge's ruling that the district failed to offer the student an appropriate placement, was not supported by a preponderance of evidence and contained no analysis. Parent's motion to dismiss the board's appeal of the judge's decision is denied. Dumont Bd. of Educ. v. J.T., No. 09-5048 (JLL), 2010 U.S. Dist.

LEXIS 2781 (D.N.J. January 13, 2010) (not for publication)

NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION
Court denies private school's request for injunctive relief enjoining NJSIAA from banning the boys' basketball team from participating in state tournament for alleged violations of a ban on out-of-season coaching, and prohibiting NJSIAA from conducting searches/ investigations. Plaintiff has no property interest in participation in extracurricular activities, and hearings/procedures provided by the NJSIAA were sufficient to provide due process. Further, viewing/recording of "open gym" events were not unconstitutional searches in absence of expectation of privacy. St. Patrick High Sch. v. N.J. Interscholastic Ath. Ass'ns, No. 10-cv-948 (DMC), 2010 U.S. Dist. LEXIS 17993 (D.N.J. March 1, 2010) (not for publication)

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New Jersey Supreme Court

CERTIFICATION GRANTED/DENIED
Pension: Supreme Court denies certification of ruling below that denied teacher's request to have her retirement date approved retroactive to the month after she turned sixty. Goldstein v. Bd. of Trs., 2010 N.J. LEXIS 30 (N.J. Supreme Court, January 14, 2010).

SEARCHES
Supreme Court determines that the appellate court properly upheld the denial of defendant's motion to suppress the drug evidence found in student's car parked at his high school; the assistant principal's search did not violate the student's rights because it was reasonably related in scope to the locations on school property where he may have had contraband. State v. Best, 201 N.J. 100 (2010).

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New Jersey Superior Court Appellate Division

BOARD LIABILITY
Board and employees did not violate their duty of care and were not responsible for injuries sustained by high school student in car accident, by failure to cancel football practice despite approach of Hurricane Floyd and by allowing student to leave school with a youthful uninsured driver; record contained no evidence that Hurricane Floyd actually caused "severe weather conditions" in New Jersey on date in question; and unlike the much younger child in Jerkins, the injured student was not routinely taken to and from school by his parents or others chosen by them. Nor did court find liability for county, as actions to address the dangerous condition of the curve by placing warning signs were not "palpably unreasonable." Pluchino v. Borough of Rutherford, 2010 N.J. Super. Unpub. LEXIS 215 (App. Div. Feb. 1, 2010)

Grandfather sustained injuries from a fall while photographing his grandson's tap dance rehearsal from stage steps. Court affirms grant of summary judgment to board based on plan/design immunity, as board

constructed the steps, aisles and lighting in accordance with DOE and DCA-approved plans. The Board had no actual or constructive notice of a dangerous condition, nor was there any evidence of negligent construction. However, board not entitled to plan or design immunity for the negligent operation of its facilities where employee completely blacked out the lighting making the steps invisible; genuine issue of material fact exists as to whether plaintiff has a viable claim. Cephas v. Washington Twp. Bd. of Ed., 2010 N.J. Super. Unpub. LEXIS 69 (App. Div. January 13, 2010)

LABOR

Court affirms lower court's grant of summary judgment to board restraining arbitration over custodian's non-renewal; non-renewal did not constitute termination, discharge or dismissal and therefore fell outside the terms of the CNA and was not grievable. The bargaining agreement did not address non-renewal of non-tenured employees and excluded discretionary Board actions from its grievance procedure. Board followed procedures set forth in N.J.S.A. 18A:27-4.1(b), and N.J.A.C. 6A:32-4.6. Lenape Regional High School Bd. of Ed. v. Lenape Support Staff Ass'n, 2010 N.J. Super. Unpub. LEXIS 304 (App. Div. February 16, 2010)

MISAPPROPRIATION OF FUNDS

Supreme Court upholds conviction of former wrestling coach of theft by failure to make the required disposition of tournament fees, where under board policy coaches were no longer permitted to deposit fundraiser monies into private, personal bank accounts; crime does not require proof that he had the intent to permanently keep the property. Eighteen-month probation and restitution of $5,594, fees and penalties. State v. Murray, 2010 N.J. Super. Unpub. LEXIS 54 (App. Div. January 11, 2010)

PUBLIC RECORDS

A government agency may not charge members of the public more than the approximate "actual costs" of making photocopies of printed material. Smith v. Hudson County, 2010 N.J. Super. LEXIS 25 (App. Div. 2010) (Feb. 10, 2010, published) Docket No.A2518-08.

STUDENT RESIDENCY

Court affirms Commissioner ruling that 2 year delay in seeking reimbursement for the tuition costs associated with her son's attendance at a private school precluded any recovery. D.Q. ex rel. S.Q. v. State Operated Sch. Dist., 2010 N.J. Super. Unpub. LEXIS 82 (App. Div., January 14, 2010).

Court affirms Commissioner ruling that students were not domiciled in district; surveillance showed that the children did not stay overnight in the district; it strained credibility to believe that mother wakes daughter at 5:00 a.m. to have breakfast in another town, and then drives her back to the district to attend school across the street. Other documentary proofs were inadequate. Court affirms tuition award for period of illegal attendance. M.J.-M. ex rel. E.A.M. v. Ridgefield Bd. of Ed., *2010 N.J. Super. Unpub. LEXIS 86 (App. Div. Jan 14, 2010).*

Court affirms Commissioner's decision that parents, whose anticipated residency was set back by construction delays, never established domicile despite their intention to live in the district, and must pay tuition according to board policy. The Court also rejects parents' procedural due process arguments that board denied them a hearing, as parents

themselves sought immediate Commissioner review rather than await board's determination. K.L. v. Board of Education, 2010 N.J. Super. Unpub. LEXIS 11 (App. Div. January 4, 2010).

TENURE DISMISSAL
Court upholds State Board ruling terminating teacher in home for developmentally disabled adults where teacher reflexively slapped a client on the back after the client unexpectedly punched him in the chest near his pacemaker-defibrillator; despite his lengthy and previously unblemished history, teacher demonstrated a lack of judgment and an unfitness for his position that struck at the heart of the DHS's mission to safeguard its disabled charges. In re Tenure Hearing of Gall, 2010 N.J. Super. Unpub. LEXIS 216 (App. Div. February 1, 2010)

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New Jersey Superior Court, Law/Chancery Division

PUBLIC RECORDS
Resignation letter in personnel file was not a disclosable public record under the personnel records exemption of OPRA or under the common law right of access. Kieffer v. High Point Reg. Bd. of Ed., Sussex Cty Docket No. SSX-L-873-08 (L.Div. 12/2/09) (currently on appeal)

STUDENT CONDUCT
Trial court (Judge Buchsbaum, J.S.C.) grants student's motion to dismiss matter against another student on summary judgment for claims of civil conspiracy, intentional infliction of emotional distress, spoliation and destruction of evidence, in matter where student who was victim of school fight sues another student who recorded the fight on his cell phone camera, and then destroyed the tape. Moleta v. Voorhees High School, et al. January 26, 2010, HNT-L-744-07.

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Commissioner of Education

EXPUNGEMENT
Pardon of criminal conviction for possession of CDS in South Carolina does not amount to an expungement under N.J.S.A. 18A:6-7.1. Petitioner disqualified. Palmer, Commr 2010: Jan 4

90-DAY RULE
Suit concerning intentional infliction of emotional distress dismissed where petition was untimely. Further, the petitioner has graduated from high school and no relief can be granted that would restore his ability to participate in the 2006 wrestling match; and there are no significant public policies or any constitutional grounds which need be resolved in this matter such as to require that the Commissioner act in spite of the failure to file within ninety days and/or the mootness of the case. Semprevivo, Commr 2010: Jan 15.

SCHOOL ETHICS
Board member suspended as a school official found to have violated the School Ethics Act, such suspension to remain in effect until the completed disclosure statement(s) are filed; provided, however, that if such statement(s) are not filed within 30 days of the mailing date of this decision, the above-named respondent shall be summarily removed from office. Hepperle, Commr 2010: Jan 27. Commissioner imposes penalty of censure following board member's resignation. Hepperle, Commr 2010: Feb 1

Board member reprimand recommended by the Commission and concurred in by Commissioner. Additionally respondent admonished for failure to timely file the requisite statement(s), in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials. Marinaro, Commr 2010: Jan 27

Board member filed disclosure statement after an order to show cause was issued but prior to issuance of the Commission's decision. Commissioner concurs with the recommended penalty of reprimand by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement(s), in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials. Smith, Commr 2010: Feb 1

Board member filed disclosure statement after an order to show cause was issued but prior to issuance of the Commission's decision. Commissioner concurs with the recommended penalty of reprimand by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement(s), in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials. Mather, Commr 2010: Feb 1

Board member filed disclosure statement after an order to show cause was issued but prior to issuance of the Commission's decision. Commissioner concurs with the recommended penalty of reprimand by the Commission and additionally admonishes the respondent for failure to timely file the requisite statement(s), in that such delay has resulted in a waste of administrative and adjudicative time by local, county and State education officials. Adubato, Commr 2010: Feb 1

STUDENTS-ATHLETICS ELIGIBILITY
Commissioner upholds NJSIAA decision to deny hardship waiver to student who transferred from local private school to public school and sought exemption from NJSIAA rule requiring one year of ineligibility for athletics where parental address had not changed. NJSIAA decision upheld as not arbitrary or unreasonable. Constitutional claims dismissed as there is no right to participate in athletics. A.P.M. on behalf of minor child, K.A.M., Commr 2010: Jan 19

STUDENT DISCIPLINE
Petitioner challenged the Board's two-day suspension of his son, M.L., for inappropriate behavior, and sought to expunge his official student record. The Board filed a motion to dismiss, asserting that the petition was not timely filed pursuant to N.J.A.C. 6A:3-1.3(i). The Commissioner rejected the recommended decision of the ALJ and remanded the matter to the OAL for further proceedings, finding that there was in fact a timely answer to the Board's motion to dismiss contained in the file. Matter remanded for further proceedings. J.F.L., on behalf of minor child, M.L., Commr 2010: Feb 23

STUDENT GRADES

Petitioners filed a petition of appeal on May 19, 2009, challenging a failing grade awarded to their daughter by her freshman English teacher during the 2007-2008 school year. Respondent Board contended that the petition was not timely filed and should be dismissed pursuant to *N.J.A.C.* 6A:3-1.3(i). Petitioners' appeal was filed well past the regulatory timeline. H.H. and E.H. on behalf of minor child P.H., Commr 2010: Feb. 22

STUDENT RESIDENCY

Board's determination that students are not eligible to receive a free public education in the Rahway public schools because of petitioners' failure to demonstrate that they are properly domiciled within the City of Rahway upheld. Petitioners failed to prosecute their appeal. Board entitled to tuition reimbursement from petitioners in the amount of $10,340 through February 2, 2010 and at a rate of $57.44 per day thereafter. Petition dismissed with prejudice. Application for post judgment award must be sought through a new petition of appeal. G.D. and B.D., on behalf of minor children, E.D. and E.D., Commr 2010: Feb 25

Residency determination remanded to ALJ to attempt to evaluate petitioner's reasons for not appearing at the scheduled hearing and for a determination as to whether rescheduling of the hearing is appropriate, given petitioner's *pro se* status. B.S., on behalf of minor child, D.L.S., Commr 2010: Feb 25

Petitioner not entitled to a free education while living with aunt. Petitioner failed to establish that L.M.'s mother is incapable of supporting or providing care for her daughter due to a family or economic hardship pursuant to N.J.S.A. 18A:38-1. Petitioner failed to appear at the pre-hearing conference, and offered no explanation for her absence. Petitioner shall reimburse the Board in the amount of $ 4,164.48 plus $77.12 per day for each day of L.M.'s attendance beyond the 54 days accrued as of January 2010. F.A., on behalf of minor child, L.M., Commr 2010: Feb. 26.

Controversy dismissed with prejudice where litigants failed to appear. D.B. and K.B., Commr 2010: Jan. 4

SUBSTITUTE PARAPROFESSIONAL

Substitute Paraprofessional not entitled to full-time position where she was unsuccessful in meeting new NCLB-mandated standards for instructional support for students. The Board is under no legal obligation to employ petitioner, her petition was not timely filed and is dismissed. Collazo, Commr 2010: Jan. 27

TENURE DISMISSAL

Tenured teacher dismissed where he committed various acts of misconduct constituting insubordination and conduct unbecoming a school employee, including making intimidating verbal attacks against a fellow employee, inappropriate and disrespectful comments to the building principal, and lounging on a desk, and watching a movie during working hours. Ruggero, Commr 2010: Jan 14.

Tenured teacher dismissed where charges not responded to and therefore deemed admitted. Board alleged that respondent: 1) purposefully submitted inaccurate supplemental time sheets seeking

compensation for services not rendered; 2) exhibited excessive absenteeism and tardiness, and failed to sign in as required; 3) collected funds from students for purchase of books from a scholastic book fair, then ordered and disbursed the books but failed to pay the vendor; 4) collected funds from students/parents under the pretense of organizing a surprise party for other teachers, but did not return the funds notwithstanding that no party occurred; and 5) had fallen asleep in class and at faculty meetings, eaten during class instructional time, failed to submit timely lesson plans, left the building during her contracted/scheduled prep period, and cashed her paycheck in advance of its authorized payment date. Bechard, Commr 2010: Jan. 19

Tenure charges for inappropriate touching and sexual comments not sustained where there were substantial inconsistencies in the testimony and written statements of the two students who testified on behalf of the petitioning Board; and respondent's denial that he engaged in any inappropriate conduct in regard to the alleged incident was credible. Board bears the burden of proving the tenure charges of unbecoming conduct against respondent by a preponderance of the credible evidence. Salaam, Commr 2010: Feb 18

Upon remand, Commissioner determines that 6 month suspension without pay is appropriate penalty where CSA directed staff to convert vacation and personal days into sick days for his own financial benefit. Witmer, Commr 2010: Jan. 27.

TENURE DISMISSAL-SETTLEMENT
Tenure and employment rights may be voluntarily relinquished; a settlement agreement is a contract between the parties and should only be set aside if it was achieved through coercion, deception, fraud, undue pressure, or if one party was not competent to voluntarily consent thereto. petitioner offered her resignation at the end of a sixteen month period in exchange for an opportunity to seek other employment while being paid by the respondent Board; although the Board sought clarification of certain aspects of petitioner's settlement proposal, the essence of the agreement – ie: that petitioner would resign in exchange for the consideration she requested in her proposal – was unchanged. Commissioner concurs with ALJ that petitioner's attempt to retract her settlement offer after both sides had taken action to meet the terms of said agreement does not negate the fact that there was an enforceable contract, with material terms clearly established, already in place. Board was directed to reimburse petitioner for $5,275 in legal fees consistent with the parties' settlement agreement. Pollack, Commr 2010: Feb 8.

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School Ethics Commission

SEC determined that board members' endorsement of a fellow board member for the office of mayor did not violate the Act. The board members endorsed the candidate as private citizens and had no involvement in preparing the campaign literature which characterized them as "School Board members." There was no showing that the board members used their official positions to secure unwarranted privileges or advantages for themselves or others. Nothing on the record suggested that the endorsement constituted private action that could compromise their respective boards. The acceptance of campaign contributions from

the West Paterson Regular Republican Organization was not an Ethics violation *per se*. No facts were presented to suggest that the contributions were given to influence the board members in the discharge of their official duties. Even if there were an agreement to endorse the mayor, it would be a private action not part of official duties. There was nothing in the record to suggest that the board member/mayoral candidate used his official position as a board member to secure unwarranted advantages or privileges for himself or others. Probable cause was not found and the matter was dismissed. Kazmark v. Depsee, Hasko & Fazio, SEC 2010: January 26

SEC determined that board member, whose spouse was employed as a truant officer who reported directly to the superintendent, violated the Act when he voted to extend the contract of the superintendent. The board member had an indirect financial involvement that would reasonably be expected to impair his objectivity of judgment. The SEC recommended the penalty of reprimand, finding that the board member's subsequent recusal from voting on the renewal of the superintendent's contract mitigated the penalty. I/M/O William Depsee, SEC 2010: January 29 . Commissioner agreed. I/M/O William Depsee, Commr. 2010: March 11

SEC determined that board member did not violate the Act when he wrote a letter to the editor in which he criticized the board of education and alleged that the board engaged in illegal activities in the 2008-09 school year. No showing was made that he took board action to effectuate policies or plans without consulting those affected by those policies or plans. No direct orders to school personnel were demonstrated. The board member followed the standard set forth in SEC advisory opinions regarding letters to the editor and made no personal promises or took any actions that could compromise the board, did not reveal any closed session information and did not provide any inaccurate information. Johnson and Schill v. Pollison, SEC 2010: January 26

SEC determined that board members did not violate the Act. One board member individually contacted a candidate for the position of superintendent prior to the conclusion of the interview process. While this was private action it did not compromise the board. The board member's independent judgment was not surrendered to partisan political groups and he did not use the schools for personal gain or the gain of friends. Another board member was a friend of one of the candidates and acted in an alleged inappropriate manner towards staff members. No evidence was produced that any personal promises were made or private action taken that compromised the board. The schools were not used for the gain of friends nor were school personnel not properly protected. Bouyer v. Walker and John, SEC 2010: February 23

SEC determined that a superintendent of schools did not violate the Act when he solicited and received a personal charitable donation from a vendor who was seeking to do business with the school district. The transaction was not in substantial conflict with his official duties, It was also determined that the superintendent of schools did not violate the Act when he, on behalf of the school district, purchased lighting equipment, needed by graduation, through a former board member. The transactions were not in substantial conflict with his official duties, were not an attempt to use his position to secure unwarranted privileges or advantages, were not actions that could reasonably be expected to impair his objectivity or independence of judgment, and were not improper contributions. Mott v. Frederiks, SEC 2010: February 23

SEC determined that board member did not violate the Act regarding her vote on an insurance broker. No evidence was presented that

confidential information was improperly conveyed. No evidence was presented of any personal promises, actions beyond the scope of duty or action on behalf of a special interest group. Spencer v. Wilson, SEC 2010: February 23

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There are no decisions posted for January and February at this time.

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New Jersey Division on Civil Rights

Division of Civil Rights issued a Finding of Probable Cause against the Board of Education in Winslow Township, Camden County, for discharging a woman from her job as Head Care Giver in a before-and-after-school program because she was unable to lift more than five pounds. Demitri v. Winslow Township Board of Education, DCR, 2010: February 3

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New Jersey Government Records Council

Custodian provided redacted approved executive session minutes from August 14, 2008. Redacted materials included attorney-client privileged information and collective negotiations information. *In camera* review by GRC denied as redactions were previously mediated. No knowing or willful violation of OPRA found. No counsel fees awarded as complainant

not deemed a prevailing party. Wolosky v. Township of Vernon, No. 2009-16 (GRC February 23, 2010)

GRC determined that because hospital was a charitable nonprofit corporation, which did not perform a governmental function affecting the rights of others and had no collective authority to spend public funds, it was not a public agency as defined by OPRA and therefore not subject to the provisions of OPRA. *N.J.S.A.* 47:1A-1.1. Cole v. Newton Memorial Hospital No. 2009-68 (GRC February 23, 2010)

Custodian provided redacted approved executive session minutes from September through December 2008. Redacted materials included attorney-client privileged information and collective negotiations information. No knowing or willful violation of OPRA found. No counsel fees awarded as complainant not deemed a prevailing party. Wolosky v. Township of Vernon, No. 2009-16 (GRC February 23, 2010)

GRC determines that because first request would require the research of over two years of email accounts and the custodian is not required to conduct research in response to a request and the second request asks for information rather than for an identifiable government record, the requests are invalid under OPRA. Schmidt v. Gloucester City, No. 2009-119, 2009-120 (GRC February 23, 2010)

GRC determines that failure to identify a specific government record that is sought deems those requests for information invalid. Where no records responsive to the request exist, there is no knowing or willful violation of OPRA. Kossup v. Newark No. 2009-135 (GRC February 23, 2010)

Disciplinary records, classified as personnel records are exempt from disclosure under OPRA. Riggins v. Jamesburg No. 2009- 105 (GRC February 23, 2010)

GRC determined that Custodian violated N.J.S.A. 47:1A-5.g. by unlawfully denying access to the entire record when only a portion of the record was exempt from disclosure pursuant to OPMA and failed to bear her burden of proving that the proposed $25 per audio tape copying fee was permissible under OPRA. While the Custodian actions do not rise to the level of a knowing and willful violation of OPRA, complainant was a prevailing party and entitled to attorneys' fees. Wolosky v. Township of Frankford. Docket No. 2008-278 (GRC February 23, 2010)

GRC determined that for the purposes of OPRA, a settlement agreement constitutes a contract, access to which shall ordinarily be granted immediately pursuant to N.J.S.A. 47:1A-5.e. Paff v. Blairstown Docket No. 2009-53 (GRC February 23, 2010)

CRG determined that since a recording of an agency's public meeting that is used to draft the agency's official meeting minutes is not deliberative in nature, such recording is not exempt from disclosure under OPRA as advisory, consultative or deliberative (ACD) material pursuant to In Re Liquidation of Integrity Insurance Co., 165 N.J. 75 (2000), Education Law Center v. NJ Department of Education, 198 N.J. 274 (2009), and Burlett v. Monmouth County Board of Freeholders, GRC Complaint No. 2004-75 (August 2004). Pursuant to *N.J.S.A.* 47:1A-5.b. and Libertarian Party of Central New Jersey v. Murphy, 384 N.J. Super. 136 (App. Div. 2006), the Custodian must charge the actual cost of duplicating the requested record. As such, the Custodian's charge of $5.00 for an audio recording of the requested public meeting is unreasonable and in violation of N.J.S.A. 47:1A-5.b. Miller v. Westwood Regional School District Docket No. 2009-49 (GRC February 23, 2010)

Pursuant to Paff v. NJ Department of Labor, Board of Review, 379 N.J. Super. 346 (App. Div. 2005), the GRC must conduct an *in camera* review of the November 10, 2008 executive session minutes to determine the validity of the Custodian's assertion that the redactions made to the requested closed session minutes were for confidential contract negotiations exempt from disclosure pursuant to N.J.S.A. 47:1A-1.1. and N.J.S.A. 10:4-12.7. Pursuant to N.J.S.A. 47:1A-5.b., Libertarian Party of Central New Jersey v.Murphy, 384 N.J. Super. 136 (App. Div. 2006), Moore v. Board of Chosen Freeholders of Mercer County, 39 N.J. 26 (1962), and Dugan v. Camden County Clerk's Office, 376 N.J. Super. 271 (App. Div. 2005), the Custodian must chargethe actual cost of duplicating the requested record. As such, the Custodian'scharge of $5.00 for a copy of the December 2, 2008 Stillwater public meeting CD is unreasonable and violates N.J.S.A. 47:1A-5.b. Wolosky v. Stillwater Township Docket No. 2009-22 (GRC February 23, 2010)

GRC determines that the Custodian's response was insufficient because she failed to specifically address the Complainant's preference for receipt of records; fax or email. The custodian violated OPRA pursuant to N.J.S.A. 47:1A-5.g., O'Shea v.Township of Fredon (Sussex), GRC Complaint No. 2007-251 (February 2008) and Paff v. Borough of Sussex (Sussex), GRC Complaint Number 2008-38 (July 2008). Silkes v. Town of Dover Docket No. 2009-60 (GRC February 23, 2010

GRC determined that because the Board of Chosen Freeholders approved the November 25, 2008 executive session minutes on December 17, 2008, said minutes no longer constituted advisory, consultative or deliberative (ACD) material at the time of the Complainant's request and were therefore disclosable pursuant to *N.J.S.A.* 47:1A-1.1. and Wolosky v. Vernon Township Board of Education, GRC Complainant No. 2009-57 (December 2009). Pursuant to O'Shea v. Township of West Milford, GRC Complaint No. 2007-237 (May 2008), the Custodian shall amend the Board of Freeholder's official OPRA request form to include the remainder of the applicable provisions of OPRA. Wolosky v. County of Sussex, Docket No. 2009-26 (GRC February 23, 2010)

Items which would require the Custodian to conduct research were invalid under OPRA pursuant to MAG Entertainment LLC v. Division of Alcoholic Beverage Control, 375 N.J.Super. 534, 549 (App. Div. 2005), and N.J.Builders Ass'n v. NJ Council on Affordable Housing, 390 N.J. Super. 166, 176 (App Div.), *certif. denied* 190 N.J. 394 (2007). *See also* Bent v. Stafford Police Department, 381 N.J.Super. 30 (App. Div. 2005); Schuler v. Borough of Bloomsbury, GRC Complaint No. 2007-151 (February 2009). Executive session meeting minutes that had not yet been approved by the governing body, constituted inter-agency, intra-agency, advisory, consultative, or deliberative material and were exempt from disclosure. Parave-Fogg v. Lower Alloways Creek Twp, GRC Complaint No. 2006-51 (August 2006). Custodian must refund to the Complainant $2.55, representing the postage fees inappropriately charged for the July 9, 2008 OPRA request. Bogart v. Borough of Lebanon, Docket No. 2008-172, 2008-173 (GRC February 23, 2010)

Councilman's list of "suggested" budget cuts, which were proposed at council meeting prior to the adoption of the Fiscal Year 2009 budget, was both pre-decisional and deliberative and is exempt from disclosure under OPRA as advisory, consultative or deliberative (ACD) material. Antonucci v. City of Hoboken, Docket No. 2009-125 (GRC February 23, 2010)

A second approval by the board of education for public release of

minutes that have been approved by the board is not required. N.J.S.A. 47:1A-5.g. allows for the redaction of information that is exempt from disclosure under OPRA. Closed session minutes that have been approved by the board are no longer constituted advisory, consultative or deliberative material. Merckx v. Township of Franklin Board of Education, Docket No. 2009-47 (GRC January 26, 2010)

Videotapes requested were part of a video surveillance system that rerecorded tapes every 30 days. Tape requested was non-existent at the time of the OPRA request. Hardrick v. Hamilton Township School District, Docket No. 2009-172 (GRC January 26, 2010)

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New Legislation

S4--P.L.2010 c.3 approved 03/22/2010 — Makes various changes concerning payments to public employees for unused sick leave, sick leave injury in State service, and PERS and TPAF disability retirement.

S3--P.L.2010c.2 approved 03/22/2010 — Makes various changes to SHBP and SEHBP concerning eligibility, cost sharing, plan choice, benefit change application, coverage waiver, multiple coverage; requires contributions toward health care benefits by public employees and certain retirees.

S2--P.L.2010 c.1 approved 03/22/2010 — Makes various pension system changes concerning eligibility, retirement allowance formula, compensation definition, position eligible for service credit, non-forfeitable rights, prosecutors part, PFRS special retirement, employer contributions.

A4377 --P.L.2009 c.305 approved 01/17/2010 — Extends pilot program in DOE to address State's shortage of mathematics and science teachers by 12 months.

A3317--P.L.2009 c.284 approved 01/17/2010 — Revises conditions to qualify for exemptions from electrical contracting permit requirements for electrical installation, repair and maintenance work done by public employees on public property.

A2752--P.L.2009 c.281 approved 01/17/2010— Requires schools to provide eligible high school students with voter registration material.

A2702--P.L.2009 c.280 approved 01/17/2010 — Requires schools to notify certain students of potential eligibility for NJ STARS Program.

A2640--P.L.2009 c.279 approved 01/17/2010 — Enacts "Interstate Compact on Educational Opportunity for Military Children."

S1771 --P.L.2009 c.260 approved 01/17/2010 — Establishes New Jersey Student Athlete Cardiac Screening Task Force.

S52--P.L.2009 c.254 approved 01/17/2010 — Permanently disqualifies certain persons convicted of child endangerment from working with children.

A4270-- P.L.2009 c.250 approved 01/16/2010 — Establishes New Jersey Special Education and Traumatic Brain Injury Task Force.

A880-- P.L.2009 c.228 approved 01/16/2010 — Establishes New Jersey Reading Disabilities Task Force.

A420--P.L.2009 c.227 approved 01/16/2010 — Establishes measures to provide employment stability for teaching paraprofessionals employed in school districts that receive federal funding under Title I of the Elementary and Secondary Education Act.

S2898--P.L.2009 c.223 approved 01/16/2010 — Establishes in DOE a four-year Community Service Phase Two Pilot Enhancement Program.

S2941 --P.L.2009 c.185 approved 01/12/2010 — Revises State share calculation for debt service aid for new school facilities projects of county vocational school districts.

A3002--P.L.2009 c.178 approved 01/11/2010 — Requires school security drills to improve emergency preparedness.

A1072--P.L.2009 c.175 approved 01/11/2010— Requires prompt parental and staff notification of contaminated soil found on school property.

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New Jersey District Court Decisions

Equal Protection

Former technology consultant alleged that board violated his Fourteenth Amendment rights to equal protection and to procedural and substantive due process when he was removed from his position. The court concluded that the employee failed to establish that he possessed a property interest in his continued employment or that his liberty interest was impinged. As a consequence, there was no violation of the employee's Fourteenth Amendment procedural safeguards when the board decided not to offer him an employment contract for the 2007-08 school year without providing notice and a hearing. The court declined to exercise supplemental jurisdiction over the state claims raised. Valenti v. Abate, 2009 U.S. Dist. LEXIS 121174 (D.N.J. Dec. 31, 2009).

IDEA

Plaintiff's motion for a preliminary injunction denied. ALJ found that student has received some educational benefit in his current placement in small group resource room language arts and literacy instruction. Given the guidance of the Supreme Court of the United States that substantive compliance with the IDEA requires only that a student's IEP be "reasonably calculated to enable the child to receive educational benefits," Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), the Court was disinclined to make a finding of irreparable harm or success on the merits. W.R. v. Union Beach Bd. of Educ., 2009 U.S. Dist. LEXIS 108148 (D.N.J. Nov. 19, 2009)

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New Jersey Supreme Court

Board Member Ethics
Motion for certification denied. In re Delbury, C-392 September Term 2009, 64,785, Supreme Court of New Jersey, 983 A.2d 1113; 2009 N.J. LEXIS 1296, November 17, 2009

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New Jersey Superior Court Appellate Division

Arbitration Award
Appellate Division affirmed Law Division decision confirming an arbitration award that board improperly used 1/187 instead of 1/200 in determining daily rate of pay for ten month salaried certificated employees. E. Brunswick Bd. of Ed. v. East Brunswick Educ. Ass'n, 2009 N.J. Super. Unpub. LEXIS 3050 (App. Div. Dec.15, 2009).

Order of the trial court compelling the Board to reinstate employee reversed. Order enforced judgment affirming arbitrator's decision to set aside board's termination. Appellate Division, April 17, 2009, reversed trial court and reinstated board's termination. Matter is pending before the New Jersey Supreme Court. Linden Bd. of Ed. v. Linden Ed. Ass'n, Docket No. A1331-08T3, App. Div., unpublished, December 7, 2009.

Non-renewal
Appellate Division affirmed Commissioner's decision upholding teacher of mathematics' non-renewal by the board. School district's lack of full compliance with the mentoring and evaluation program did not prevent non-renewal. The Commissioner decision was overwhelmingly grounded in substantial credible evidence in the record as a whole, and was not arbitrary, capricious or unreasonable. The court found the decision to be a fair and reasonable implementation of applicable law and legislative policies. El-Hewie v. Bd. of Ed. Voc. Sch. Dist., 2009 N.J. Super. Unpub. LEXIS 3116 (App. Div. Dec. 24, 2009.)

Search and Seizure

Sending-Receiving

Thorough and Efficient
Appellate Division affirms dismissal of class action by parents/ guardians of students in certain school districts seeking to vindicate rights under State Constitution to a "thorough and efficient education." Plaintiffs' allegations that State and school officials violated their rights in light of poor student performance on standardized tests designed to measure proficiency, are precluded in light of recent finding by the Supreme Court that the School Funding Reform Act of 2008 was facially constitutional. Court dismisses equal protection claims. Crawford v. Davy, 2009 N.J. Super., Unpub. LEXIS 3226 (App. Div. November 23, 2009.) (Note: Prior to the ruling, and following the Supreme Court's decision in Abbott v. Burke, 199 *N.J.* 140 (2009)(Abbott XX) the parties submitted supplemental briefs discussing the effect, if any, of that decision on the issues in this appeal.)

Tort Claims Act
Appellate Division affirms in part and vacates in part trial court summary judgment dismissing plaintiff's complaint for damages under the Tort

Claims Act, *N.J.S.A.* 59:1-1 to 12-3 arising out of a high school cheerleading accident. Court affirms that plaintiff's injuries failed to satisfy the Act's verbal threshold for non-economic claims, but vacated and remanded as to plaintiff's economic damages. Baligian v. Hunterdon Central Reg. High School Bd. of Ed. , Docket No. A2026-08, App. Div., unpublished, Nov. 12, 2009.

TPAF

Unemployment
Appellate Division affirms Board of Review denial of unemployment benefits claimed by per diem substitute school teacher for the summers of 2006 and 2007. Aranguren v. Bd of Review and Ocean County Voc. Tech. School, Docket No. A0802-08T3, App. Div., unpublished, Nov. 5, 2009.

Workers Compensation
Appellate Division affirms Commissioner decision that teacher who sustained a work-related injury that prevented her from performing her extra-curricular duties as a field hockey coach, was not entitled to payment of her coaching stipend because the term "full salary," as used in *N.J.S.A.* 18A:30-2.1, refers only to the compensation received for teacher's full-time teaching position, and not to a part-time coaching salary. Daganya v. Board of Educ. of Twp. of Old Bridge, 2009 N.J. Super. Unpub. LEXIS 2973 (App. Div. Dec. 8, 2009.)

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New Jersey Superior Court, Law/Chancery Division

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Commissioner of Education

Certification
Commissioner denies application for recertification of teacher whose certificate had been revoked in 1992 as a condition of PTI for charges of criminal sexual contact against students and misconduct in office; the doctrine of *res judicata* applies as the petitioner had applied to State Board of Examiners for recertification in 1999 and had been denied after a full hearing and a ruling by the Commissioner. Moreover, the application of administrative code provisions that were adopted after he reentered PTI did not violate *ex post facto* law; *ex post facto* laws only apply to criminal matters, not regulatory laws governing teacher licensure. Armino, Commr. 2009:Dec. 7

Contract
Commissioner dismisses petition filed by non-tenured athletic director who claims his contract was improperly terminated, as case involves issues of contract interpretation over which the Commissioner has no jurisdiction; summary judgment granted. McGriff, Commr. 2009: Nov. 6.

Judgment Order
Commissioner orders docketing of judgment with Superior Court for back tuition award be corrected to reflect correct spelling of names. Rutherford, Commr. 2009: Dec. 7.

Non-tenured teacher
Non-renewal of non-tenured teacher's contract was not arbitrary, capricious or unreasonable and will be upheld, regardless of whether the procedures for observing and evaluating the teacher were adhered to; however, she is entitled to compensation for twelve days of work she performed after her contract had expired. Tuck-Lynn, Commr. 2009: Nov. 20.

Commissioner reinstates and denies parent's application for emergent relief claiming that restrictions placed on her access to school property are unlawful and make it impossible for her to send her 8-year old child to school; Commissioner grants board's counterclaim for interim judgment requiring the parent to send her son to the district school or some other school; Commissioner directs Board to initiate truancy proceedings if parent fails to provide schooling for her son within a week. A.M.M. o/b/o G.M., Commr. 2009:Nov. 30.

Public Contracts
Commissioner affirms directive NJDOE Office of Compliance Investigation (OCI), requiring charter school to return federal grant funds in the amount of $354,765.04 spent in violation of bidding requirements under public school contracts law; bidding violation must be viewed against the backdrop of a misleading grant application and submissions that veiled the fact that the funds – which were intended for school rehabilitation – were being used for the design and construction of buildings and facilities that did not yet exist. Oceanside Charter, Commr. 2009:Dec. 17.

Pupil Residency
Uncle's *pro se* residency appeal is dismissed for failure to prosecute; Commissioner orders tuition reimbursement of $ 3,494.82.M.H., Commr. 2009:Nov. 10.

Where parent blamed her initial failure to prosecute her appeal of the board's residency determination on her failure to receive notice after becoming homeless, and after being served again failed to prosecute, her appeal was dismissed and the board is awarded tuition reimbursement in the amount of $8,199.36. L.E.H.o/b/o Z.H., Commr. 2009:Nov. 10.

Student, by his own admission and his father's admission, no longer resides in Fort Lee and in light of the uncontradicted evidence that he resides in New York, Fort Lee has no obligation to educate him. Fort Lee, Commr. 2009:Nov. 12.

Student with disabilities was entitled to free education in district where she resided with grandmother who had been awarded custody/guardianship by Superior Court order and where grandmother is domiciled in the school district—regardless of the reasons for the arrangement. Board's evidence that the student is not, in fact, domiciled within the school district is speculative at best. (Commr also noting that *N.J.S.A*. 18A:38-2 pertains only to court orders of placement in resource family (foster) homes, whereas present situation is governed by *N.J.S.A*.

18A:38-1.) B.C., Commr. 2009:Nov.18.

Pupil Discipline
Commissioner lacked jurisdiction to decide mother's claim for emergent relief based on allegations of racism, retaliation and other improper motives involving district's placement of her son at alternative school following an alleged assault; since mother disenrolled student, Commissioner lacks jurisdictional authority to grant relief. R.W. o/b/o A.W., Commr. 2009:Dec. 2.
Commissioner dismisses as untimely, a student's constitutional challenge to district's zero tolerance drug policy as applied to his possession of an over- the- counter- allergy pill; however, separate challenge on facial constitutionality is outside jurisdiction of Commissioner but may be refiled in Superior Court. A.S., Commr. 2009:Dec. 16.

School Ethics
Commissioner concurs with penalty of censure for charter school administrator who knowingly filing disclosure statement with false information but was no longer employed by the charter school; his actions implicated very purpose of ethics act where he used school for personal gain by failing to disclose that he facilitated the charter school's purchase of services from a company he owned. Matter of Stewart, Commr. 2009: Dec 11.

Board member is reprimanded for posting online "private" information – to which he had access by virtue of his position as a school board member – about the mayor to discredit him before the election to the benefit of the mayor's opponent, for whom the respondent served as campaign manager. Ybarra, Commr. 2009:Dec.14.

Settlements
Where stipulation of settlement includes neither signature of the Jointure Commission's attorney nor resolution approving the settlement and designating who may execute it on behalf of the Commission, matter will be remanded to revise as to signatures, or if parties unable/unwilling to agree, for hearing . South Bergen Jointure, Commr. 2009:Dec. 11.

Sick Leave
Commissioner dismisses teacher's petition for restoration of sick time for injuries sustained in the course of employment pursuant to *N.J.S.A.* 18A:30-2.1; matter had been placed on inactive list pending settlement of Workers Compensation matter, and her counsel notified the Commissioner that the matter had been settled in Worker's Compensation Court. Bradley, Commr. 2009: Nov. 6.

Tenure Dismissal
Custodian is ordered dismissed from his position where he filed no answer to tenure charges of neglect, misbehavior and conduct unbecoming; charges deemed admitted. Tenure Hearing of Johnson, Commr. 2009:Nov. 18.

Board failed to prove any of the 28 tenure charges brought against principal for matters involving lack of leadership, action, concern and oversight; in fact she was not involved in the decision to reconstitute the ninth grade repeater program; under her tenure as principal, the drop-out rate was reduced dramatically, test scores rose, and the graduation rate increased significantly. Tenure Hearing of Dawson, Commr. 2009:Dec.

4.

Commissioner vacates earlier decision sustaining tenure charges against custodian where he had failed to answer; custodian's attorney filed answer with explanation for late filing; Commissioner transmits matter to OAL for expedited hearing. Tenure Hearing of Johnson, Commr. 2009:Dec. 9 (amended)

Tenure Rights
Board did not violate tenure rights of tenured secretary when it retained full-time, non-tenured secretarial employee to serve as adult education coordinator (a non-certificated position) and reduced her job to an hourly part-time position; Commissioner found that while the duties of the secretarial position and the coordinator position overlapped in some areas, they were not "substantially similar" so as to invoke her tenure rights to the position; and even while she performed some of the higher-level responsibilities, there were many that she did not perform; no finding that board sidestepped her tenure rights by simply renaming the position or tacking on additional meaningless requirements. Fink, Commr. 2009: Nov. 2

Commissioner rejects claim by SAC whose position was eliminated during a RIF, that she acquired tenure as a guidance counselor by working in the dual position of Guidance Counselor/SAC, where board minutes described her only as working as an SAC; alternatively, she may be entitled to the guidance position as a consequence of being tenured under her Educational Services certificate over non-tenured person employed in that position at the time of the RIF, as per *Ellicott* and *Dennery*. Matter was remanded to the OAL to allow intervention of any individual staff persons who may potentially be displaced from their position as a consequence of petitioner's tenure status. Part-Willbergh, Commr. 2009:Dec. 11.

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School Ethics Commission

School Ethics Commission
Commission finds no probable cause to credit the allegations that the administrator violated N.J.S.A. 18A:12-24(b) of the Act when he allegedly made illegal appointments; was appointed to the position of Assistant Superintendent without proper credentials; stole public funds and made administrative decisions relevant to public education without proper certification. Commission dismisses the complaint. Valdes v. Caputo SEC, 2009: Nov. 24

Commission finds no probable cause to credit the allegations that board president violated various provisions of the School Ethics Act and Code of Ethics when he allegedly approved salary increases without public notice and hearing. Commission dismisses the complaint. Rosenwald v. Lawson SEC, 2009: Nov. 24

Commission dismisses complaint specifically alleging that the respondents violated N.J.S.A. 18A:12-24(a), (b) and (c) in the adoption of the district nepotism policy. Chamberlin v. Bencivengo SEC, 2009: Nov. 24

Commission finds no probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(a), (b), (c), (d), (e), (f), (g) and

(h) where his architectural firm has undertaken no work for the Board. Commission finds complaint frivolous, imposes fine of $500.00. Rogers v. Somjen SEC, 2009: Dec. 15

Commission finds no probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24.1(a), (e) and (f) as well as N.J.S.A. 18A:12-24(a), (b), (c), (d) and (g) when she attended a meeting at which the subject of SROs (school resource officers) was discussed and she negotiated for these positions and salaries although her husband is a police officer and serves as the SRO and D.A.R.E. (Drug Abuse Resistance Education) officer in the District. Additionally respondent is alleged to have violated the Act where she initially voted for her employer to be the depository of the district but then immediately changed her vote to an abstention. No probable cause found. Commission dismisses the complaint. Taylor v. Mitchell SEC, 2009: Dec 15

Commission finds no probable cause to credit the allegations that the respondent violated N.J.S.A. 18A:12-24(b) and (e), when she allegedly accepted a gift from a vendor, then recommended that the Board contract with the vendor, which benefited the respondent's daughter. No probable cause found. Commission dismisses the complaint. Spearman v. Lassiter SEC, 2009: Dec. 15

Commission dismisses complaint where the respondents allegedly violated N.J.S.A. 18A:12-24.1(a), (c), (d), (f) and (h) for violating board policy and for failing to maintain objectivity. Bouyer v. Walker SEC, 2009 Dec. 15

Disclosure statements

Commission dismisses complaint where the respondents allegedly violated N.J.S.A. 18A:12-24.1(a) because they failed to timely submit their 2009 personal/relative and financial disclosure statements in accordance with N.J.S.A. 18A:12-25 and 26. Complainant failed to carry their burden of proof. Bouyer v. Owens SEC, 2009 Dec. 15

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State Board of Examiners

Elementary certificate revoked following plea of guilty to two counts of Endangering the Welfare of a Child in the third degree. IMO Certificates of Bowler Exam 2009:Dec 2

Teacher of Psychology and Teacher of Elementary School certificates of eligibility, and Teacher of Elementary School, Teacher of Psychology and Teacher of Spanish certificates revoked following his entrance into pre-trial admission program. IMO Certificates of Brandt, Exam 2009:Dec. 2.

Teacher of Elementary School certificate revoked following conviction of lewdness. IMO Certificates of Coleman, Exam 2009:Dec 2.

Teacher of Technology Education certificate of eligibility revoked following conviction for Endangering the Welfare of a Child, IMO Certificates of Corvino, Exam 2009:Dec 2.

Teacher of the Handicapped certificate revoked following plea of guilty to charges of Assault By Auto and Driving While Impaired. IMO Certificates

of Deckert, Exam 2009: Dec 2

Teacher of Earth Science certificate revoked following plea of guilty to charges of Aggravated Sexual Assault and Endangering the Welfare of a Child. IMO Certificates of Gentile, Exam 2009: Dec 2

Teacher of Social Studies and Teacher of the Handicapped certificates revoked following settlement of tenure charges for conduct unbecoming where teacher used school computer visible to students to send and receive sexually explicit and racist e-mails during his instructional time, sent negative e-mails concerning the district and its students and visited a strip club during lunchtime of an in-service day and returned to school late with the smell of alcohol on his breath. IMO Certificates of Howarth, Exam 2009: Dec 2.

School Administrator, Principal/Supervisor, Teacher of Health Education and Teacher of Physical Education certificates suspended for a period of two years after principal failed to take action when two middle school students reported to him that a teacher at the school was engaging in cyber sex and phone sex with a middle school student. IMO Certificates of Johnson, Exam 2009: Dec 2

Teacher of Music certificate revoked following conviction for offensive touching. IMO Certificates of Provanzana, Exam 2009: Dec 2

Teacher of Physical Education certificate revoked following conviction for lewdness. IMO Certificates of Rosenberg, Exam 2009: Dec 2

Teacher of Elementary School certificate of Eeigibility revoked following report by DCF, where charges substantiated that teacher grabbed the student by the neck and choked him for approximately ten seconds, causing his face to turn red. IMO Certificates of Troutman, Exam 2009: Dec 2

Teacher of Elementary School and Teacher of Nursery School certificates revoked following tenure dismissal for corporal punishment and unbecoming conduct for slamming her classroom door on the fingers of a student causing him injury. IMO Certificates of V.R., Exam 2009: Dec 2

Teacher of Music certificate revoked following plea of guilty to official misconduct. IMO Certificates of Vann, Exam 2009: Dec 2

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New Jersey Government Records Council

GRC does not have the jurisdiction to determine alleged denials of requests for pupil records. General access to pupil records is controlled by the Family Education Rights and Privacy Act ("FERPA") and by *N.J.A.C.* 6A:32-7.5. Watson, GRC 2009: Dec 22

Custodian must disclose not only requested e-mails, but also their attachments. *In camera* review of redacted email required by GRC. Lewen, GRC 2009:Dec. 22

Requested record of check made out to attorney must be produced for requestor. Matthews, GRC 2009: Nov. 18. Matthews, GRC 2009: Dec. 22

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P.L.2009, c.144. (**S562**)
Provides triggers for reductions of employer unemployment insurance taxes. Approved 11/20/2009

P.L.2009, c.148. (**S1927**)
Regulates solicitation of credit cards on college campuses
Approved 11/20/2009

P.L.2009, c.149. -see (**S2372**)
Permits revenue received by municipality as payments in lieu of taxes to increase cap base upon which permissible increases to final appropriations are calculated under local cap law. Approved 11/20/2009

P.L.2009, c.150. (**S2552**)
Extends range of investment vehicles in which Director of the Division of Investment and State Investment Council may invest moneys in the State of New Jersey Cash Management Fund and State pension funds.
Approved 11/20/2009

P.L.2009, c.153. (**A1943**)
Establishes pilot program in Department of Education to provide instruction in personal finance to high school seniors.
Approved 11/20/2009

P.L.2009, c.157. (**A2655**)
Requires law enforcement agency to inform school principal of certain crimes committed by students. * Approved 11/20/2009

P.L.2009, c.162. (**A3181**)

Revises cosmetology and hairstyling statutes. Approved 11/20/2009

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N.J.A.C. 6A:12 Interdistrict Public School Choice
41 N.J.R. 3166(a), 42 N.J.R. 179(a). 12/21/09

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41 N.J.R. 2530(a), 41 N.J.R. 4077(a). 10/8/09

N.J.A.C. 6A:22 Student Residency 41 N.J.R. 3484(a), 42 N.J.R. 179(b). 12/22/09

N.J.A.C. 6A:23A Fiscal Accountability, Efficiency and Budgeting Procedures 41 N.J.R. 2381(a), 41 N.J.R. 4721(a). 11/25/09

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3rd Circuit Court of Appeals

Due Process

Computer technician brings Section 1983 action against board for firing him. Court finds (after thorough analysis) that he was provided the procedural due process required under *Mathews* and *Loudermill.* Edward Biliski v. Red Clay Consolidated School District, 2009 U.S. App. LEXIS 16683 (3d Cir. Del., July 29, 2009) (Precedential)

Special Education

Circuit Court reverses in part district court, and determines that board is not required to reimburse parents for the cost of IDEA placement for child with educational and mental health disorders in a residential health care where the placement was prompted by a psychiatric crisis and where the services provided enabled the student to manage her medical condition, not her educational needs, where no special education was provided; nor was the cost reimbursable as a related service as it was more akin to a hospital service than an educational facility and is excluded from coverage under IDEA and *Tatro*. Nor was the district responsible for compensatory services when it delayed implementation of a student's IEP until the student's acute psychiatric condition stabilized, as it acted promptly thereafter. Mary Courtney T. v. School District of Philadelphia, 2009 U.S. App. LEXIS 17001 (3d Cir. Pa. July 31, 2009)(Precedential) click here to get this document.

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New Jersey District Court Decisions

Civil Rights

Court of Appeals holds that teacher's as-applied challenge to the board's mailbox policy (requiring permission to distribute personal correspondence through the mailboxes) and section 1983 cause of action are not barred by *res judicata* and may proceed as these were not addressed on their merits by the Court of Appeals in Policastro I; however Court grants motions to dismiss overbreadth challenge as it was already addressed in Policastro I, and to dismiss vagueness claim,

as it *could* have been brought in *Policastro I*. Policastro v. Tenafly Bd. of Educ., Civ. No. 09-1794 (DRD), 2009 U.S. Dist. LEXIS 64461 (D. N.J. July 30, 2009) (not for publication) (Court characterizes "(T)he long and winding history of this action" as "a dispute 'full of sound and fury, signifying nothing.'")

Insurance

Court grants motion to reconsider; holds that insurer's duty to defend the board in litigation did not convert into a duty to reimburse and that insurer is responsible for cost of defense up to point in time that covered claim was eliminated; insurance company is entitled to reimbursement for payments it made for the Board's defense incurred after that point. N. Plainfield Bd. of Ed. v. Zurich Am. Ins. Co. No. 05-4398 (MLC), 2009 U.S. Dist. LEXIS 68175 (D. N.J. August 5, 2009)(not for publication)

Labor

Court preliminarily finds that the state failed to preserve evidence in a suit brought by owners of bus companies claiming that Atlantic City charter buses run by blacks are singled out for safety inspections by NJDOT and others. Court ordered the Attorney General's Office to hand over to the plaintiffs the litigation "hold" letters it sent instructing state officials to preserve evidence in the case, noting that while the Third Circuit has not ruled on the issue, the prevailing view is that when spoliation occurs the relevant portion of the letters becomes discoverable and no longer protected by the attorney-client privilege or work-product doctrine. Major Tours, Inc. v. Colorel, (Civil No. 05-3091(JBS/JS) 2009 U.S. Dist. LEXIS 68128 (D. N.J. August 4, 2009)

Retaliation/Discrimination

Former teacher files CEPA claim that board retaliated against him because he told students to complain about method of punishment used by vice principal; Court finds that his actions could constitute "objecting" to the punishment under CEPA, denies Board's motion to dismiss for failure to state a claim, and permits matter to go forward. Rivera v. Camden Bd. of Ed., 2009 U.S. Dist. LEXIS 58634 (July 10, 2009)

Court does not grant motion to dismiss claims by former school psychologist against district, administrators and board members for retaliatory discharge under CEPA, l free speech violations under § 1983 or common law wrongful discharge; psychologist alleges she was terminated after complaining to her supervisors and others about repeated violations of New Jersey laws meant to protect students in special education, as well as other laws. Court notes that on free speech claim as it is not clear whether she spoke as a citizen or as an employee, the court must resolve reasonable inferences in her favor on a motion to dismiss. Michel v. Mainland Regional School District, Civil No. 08-2238 (RBK/KMW), 2009 U.S. Dist. Lexis 66828 (D. N.J. July 30, 2009) (not for publication)

Lunch aid claims that board reduced her hours, transferred her to another school, and terminated her due to her race in violation of Title VII. Court dismisses on board's motion for summary judgment as aid fails to make a *prima facie* showing of an inference of discrimination, and because she is unable to prove that the board's reasons for taking the alleged adverse actions were pretextual. Mentor v. Hillside Bd. of Educ., Civil No. 08-CV-1173 (DMC), 2009 U.S. Dist. LEXIS 68174 (D. N.J. August 5, 2009) (not for publication)

Special Education
Where parties could not agree on remedial plan and counsel fees in wake of court ruling that board violated IDEA and Rehabilitation Act and must compensate child for seventeen missed days of education in 2003, Court orders compensatory plan proposed by Tennessee school of current residence, minus the cost of simultaneous teachers. Parents entitled to counsel fees as prevailing parties; the fees incurred in advancing the two claims not proven are recoverable because they are inextricably related with the third successful claim; however, amount of counsel fees reduced to reasonable figure. L.T. v. Mansfield Twp. Sch. Dist., Civil Action No. 04-1381(NLH), 2009 U.S. Dist. LEXIS 56232, (D. N.J. July 1, 2009)

Court addresses interplay between IDEA and Rehabilitation Act; although Third Circuit has not expressly stated that intentional conduct is necessary to maintain a Rehabilitation Act claim, by its nature, intentional, not negligent, conduct is necessary; thus parties are ordered to submit supplemental briefs on whether board purposefully violated student's right to FAPE when he missed seventeen days of school in September 2003. Exhaustion of parents' administrative remedies not required, as record has already established as to child's classification and placement; Section 1983 claim is dismissed as such is not available to redress IDEA violations (see *A.W.*) L.T. v. Mansfield Twp. Sch. Dist., Civil Action No. 04-1381(NLH), 2009 U.S. Dist. LEXIS 70133, (D. N.J. August 11, 2009)

Students – Harassment
Court denies district's motion for reconsideration of its decision denying in part district's motion for summary judgment, in a matter alleging district violations of the student's rights to due process, equal protection and under the LAD, and Civil Rights Act , when it acted with deliberate indifference to a racially hostile environment by transferring student to an alternative placement after he had been the victim of several racially harassing incidents. Lee v. Lenape Valley Reg'l Bd. of Educ., Civil Action No. 06-CV-4634 (DMC), 2009 U.S. Dist. LEXIS 76997 (D. N.J. August 26, 2009) (not for publication)

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New Jersey Superior Court Appellate Division

Certification
Appellate Division affirms State Board's determination that board wrongly terminated a tenured teacher coordinator of cooperative industrial education on grounds of lack of proper certification, where he held an obsolete certificate of "employment orientation" and a 1982 certificate in skilled trades; the certifications in fact enabled him to teach basic level

courses that he was in fact teaching such as shop, maintenance and repair with carpentry emphasis, and industrial technology; App. Div. also affirms State Board's reduction of back-pay to $140,167.24, reflecting period time that he would have been subject to RIF and on preferred eligibility list. Ziegler v. Bayonne Bd. of Ed. App. Div. unpublished decision (A-4189-07T3; A-4199-07T3, August 4, 2009).

Civil Rights

Parent was unsuccessful in invasion of privacy claim that PTA exploited her daughter for its commercial benefit by selling videotape of play in which she tripped; parent signed consent form issued by board, proceeds went to charity, only incidental use of her likeness, any damage merely speculative; case interesting for its analysis of tort of invasion of privacy. Jeffries v. Whitney Houston Academy PTA and East Orange BOE, App. Div. unreported decision (A-1888-08T3, July 20, 2009)

Employee Benefits

The board of education could provide one vacation day per month as it is earned, rather than "front-load" the full 10 days at the start of the year, for security guards employed as 10-month civil service workers; statute was silent and regulations requiring front-loading for State civil service employees did not necessarily apply to local government civil service employees. In the Matter of Vacation Leave, Vineland, App. Div. unreported decision (A-3029-07, July 22, 2009)

Ethics

Appellate Court confirms State Board of Education's censure of board member for violating the Code of Ethics by actions which included: voicing questions and concerns directly to reporters without first seeking an administrative resolution, and contacting teachers and administrators directly without going through the superintendent; SEC complied with the procedural requirements, provided him procedural safeguards and based its decision on substantial credible evidence; although the SEC's decision was untimely, board member did not object and was not prejudiced by the delay which did not result from gross indifference, inexcusable neglect or bad faith. In re Censure of Delbury, App. Div. unpublished decision (per curiam) (A-5873-07T1, August 10, 2009)

Increments

Reversing the Commissioner of Education, the Court holds that in the year following the withholding of a salary increment, a board of education has discretion to provide for only horizontal movement; the Commissioner's calculation would have advanced the employee one step horizontally and one step vertically. Morris v. State Operated School District of Newark, App. Div. unreported decision (A-0823-08T2, July 15, 2009)

Labor

Appellate Court *per curiam* upholds PERC's determination requiring the union to refund $300 of the sums deducted from an employee's pay by the Teaneck Board of Education for representation fees in lieu of dues; that the Teaneck Board deducted on behalf of Local 97 from employees' pay; Local 97 did not meet its burden of proof with respect to the allocation of per capita taxes. Jacobs v. Teamsters Local 97, App. Div. unpublished decision (A-5778-07, July 17, 2009)

The Appellate Court refused to interfere with an arbitration award requiring the Manalapan-Englishtown Board to place a reinstated teacher on the top of the salary guide where she had been prior to taking a disability retirement nearly 20 years ago. Manalapan-Englishtown Regional Board of Education v. Manalapan –Englishtown Education Association, App. Div unpublished opinion (App. Div. A-3515-06T1 and A-3138-07T1, July 28, 2009)

In a case involving the standard of review to be applied to an arbitrator's interpretation of the issue submitted to grievance arbitration, the Appellate Division applied the same a deferential standard that it applies to the arbitrator's interpretation of the collective bargaining agreement; the arbitrator's interpretation will be given deference if his interpretation of the issue "is reasonably debatable." Here, where issue submitted was broadly drafted the court deferred to the arbitrator's finding that the collective bargaining agreement was violated when the township required a police officer to work as a civilian dispatcher during her pregnancy. Township of Wyckoff v. PBA Local 261 and Groslinger, 2009 N.J. Super. LEXIS 212 (App. Div. A-2268-07T2 and A-2527-07T2) (consolidated), (August 26, 2009- Published).

Open Public Records Act
While an official OPRA request form should be used, no request for information should be rejected if the form is not used as long as the requester sets forth in writing, and in a cogent and clear manner, the nature of the request and the other information required by *N.J.S.A. 47:1A-5(f)*, sufficient for the custodian to determine the nature of the request and whether it falls within the scope of OPRA. (May 21, 2009) Renna v. County of Union, 407 *N.J. Super*. 230 (App. Div. 2009)

Open Public Meetings Act
Where a pattern of misconduct is alleged under the OPMA, a court should consider violations occurring outside the statute's 45-day limitations period to decide whether an injunction to prevent future wrongful conduct is warranted under N.J.S.A. 10:4-16; here, where court finds one instance of an OPMA violation within 45-day limitations period, and plaintiffs alleged that over course of two years freeholder board voted on numerous occasions in closed session rather than bring issues for a public vote, court remands for further findings on whether injunctive relief is warranted. Burnett v. Gloucester County Board of Chosen Freeholders, 976 A.2d 444; (App. Div. August 20, 2009) (2009 N.J. Super. LEXIS 206).

Public Funds
Court affirms State Board decision to deduct from the Elizabeth Board's 2006-2007 fiscal year the sum of $88,373 to compensate for board expenditures during the prior fiscal year for a 20-page brochure and television communication that amounted to political advertisement and contained misrepresentations and criticized the mayor, in connection with a campaign to build new schools in Elizabeth. In the Matter of the use of Abbott Funds, App. Div. unpublished decision (A-2409-07T3, August 18, 2009)

Reduction in Force (RIF)
Trial court did not err in vacating an arbitration award that would reverse the state monitor's RIF of twenty-two non-tenured special education aides; the award ignores monitor's function to implement policies to achieve sound fiscal management of the District, and is contrary to

existing law and public policy; fact that there was no "just cause" for termination under the contract was irrelevant because a RIF is not arbitrable; award must be vacated as a "mistake of law." Pleasantville Board of Education v. Pleasantville Education Association, App. Div. unpublished decision (A-2123-08T3 Aug. 25, 2009)

Residence

App. Div. affirms Commissioner decision that Margate was father's domicile in light of numerous steps manifesting a desire to make Margate his domicile despite many transfers to other places as a result of his service in the Army, and that the child was entitled to be educated in Margate although staying temporarily with grandparents in Pennsylvania during father's active service duty. Under these circumstances it would be unjust and contrary to statutory purpose to consider child as an affidavit pupil residing with grandparents, because that would effectively place him outside the purview of New Jersey law and deprive child and father of a New Jersey education.
A.M.S., obo A.D.S., v. Margate Bd. of Ed. and Jackson Twp Bd. of Ed.,; (2009 N.J. Super. LEXIS 194) (App. Div. August 6, 2009) Approved for Publication.

Retirement

Court affirms TPAF's denial of teacher's request to have her retirement date approved retroactive to October 1, 2005, the month after she turned 60; she was on notice that she could retire at age 60 and chose not to file her application at that time although she was not employed in New Jersey, despite that, unfortunately, she may not have understood that there is no financial gain to delayed receipt of retirement benefits after age 60. Goldstein v. TPAF, App. Div. unpublished decision (A-4496-07, July 6, 2009)

Special Education

Court dismisses appeal of emergent relief order requiring new district of residence to pay costs, including transportation, for special educational placement made by former district of residence, as matter has become moot due to parent's relocation out of State; remaining underlying issue that is pending in separate proceeding (involving whether new district of residence must honor private placement made by former district of residence under IDEA) requires agency expertise and should be resolved through administrative proceedings. E.M.o/b/o J.B. v. East Orange Bd. of Ed., App. Div. unpublished decision (A-1348-08T3, August 4, 2009).

Tenure dismissal

Appellate Court refuses to invalidate factually supported charges against tenured vice principal found in a park with crack cocaine where vice principal had been fully afforded his due process rights, although the tenure charges were drafted in a way that placed more emphasis on procedure than the underlying circumstances. In the Matter of the Tenure Hearing of Thomas, (Plainfield), App.Div. unpublished opinion (A-6096-07, July 28, 2009)

Appellate Division affirms State Board decision that contractually tenured superintendent was guilty of unbecoming conduct for failing to report vacation days, misdirecting leave time, and intentionally deceiving the board, but reverses on count that he abused his authority and coerced staff, in light of evidentiary record showing that superintendent was unable to intimidate staff and that they did not always do as he asked;

court remanded to determine whether six month suspension remains the appropriate penalty. Middletown Bd. of Ed. v. Witmer, App. Div. unpublished decision (A-5128-07, August 17, 2009)

Torts
Court affirms summary judgment dismissal of plaintiff's claim (and husband's per quod claim) for injury that resulted when she fell on ice in the school parking lot, as doctor reports showed that the injury had fully healed and was not permanent and thus her injuries failed to satisfy the requirements of the Tort Claims Act. Acevedo v. Edgewater Pk. Bd. of Ed., App. Div. unpublished decision (A-1397-08, August 17, 2009)

Workers compensation
Appellate Division affirms workers' compensation judge's dismissal of teacher's claim for benefits related to asthma and pulmonary disease, as she failed to satisfy her burden of proof by objective medical evidence that occupational conditions caused her medical problems. Thomas v. Newark School System, App. Div. unpublished decision (A-4877-07, A-4877-07T14877-07T1, July 16, 2009)

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New Jersey Superior Court, Law/Chancery Division

There are no decisions posted for July and August at this time.

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Commissioner of Education

Bidding
Commissioner determines that the board was wrong to reject lowest bidder for custodial and management services contract, where deviations from specs were waivable and not material and reflected the reality that the bidder was already a presence in the district, and could thus accelerate startup/transition tasks before the contemplated start date; board is enjoined from awarding contract to next-lowest bidder. Pritchard Industries, Commr. 2009: July 14.

Challenge to award of bid for utility upgrades fails where challenger was out of time, and where challenger was an HVAC vendor rather than a bidder and thus had no standing; addendum permitted bidders to supply equipment other than Fafco brand required by the specs. D&B Engineering, Commr 2009: August 13. (OAL Decision not yet available online)

Certification, suspension
Certificate of non-tenured elementary charter school teacher is suspended for one year for unprofessional conduct under *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8 where she resigned as an elementary school teacher on insufficient notice; she assumed risk that school would not receive her notice during its summer closing. Suspension of the Certificate of Stokes, Commr. 2009: July 17.

Ethics/Conflict of Interest
Commissioner affirms SEC's penalty of public censure for Board President who took private action capable of compromising the Board by submitting a letter to the editor dealing with Board matters, in response to an article appearing a few days earlier, without the prior review and consent of the Board; fact that he conferred with Board counsel no excuse. Letters written by other board members did not violate the Ethics Act. Dericks 2009: August 18.

Private school
Private school for students with disabilities unsuccessfully appealed the DOE's revocation of its preliminary approval to operate; the school had not fulfilled the conditions contained in the settlement of prior litigation between itself and the DOE with regard to average daily enrollment. Kentwood Academy, Commr 2009: July 27

Parent failed to prosecute her appeal on daughter's behalf; Commissioner orders $12,535.56 in tuition for period of daughter's illegal attendance. M.Y., Commr 2009: August 4. (West Orange)

Residency
Although parent failed to prosecute her claims before the board and OAL, Commissioner rejects ALJ's finding that parent owes $10,643 in back tuition and continued payment for each day child continues to attend West Orange schools; orders further proceedings to determine whether in fact parent received notice of the OAL hearing, and whether family may be homeless. L.E.H., Commr.2009:July 2. *(update---ECS said not homeless, awaiting Comm'r decision or settlement)*

Although her mother moved out of the home to another district, 18-year old student who remained behind in the family home with her aunt, could maintain her own residence under *N.J.A.C.* 6A:22-3.1(a)2 and was entitled to free education as she intended to remain there indefinitely. Marshall, Commr. 2009:July 15

Commissioner grants entry of back tuition assessment for child's illegal attendance, on the judgment docket of the Superior Court pursuant to *N.J.S.A*. 2A:58-10 in the name of parent as well as in her alias. Z.A., Commr. 2009: July 16.

Residency matter is dismissed as moot; board no longer contests student's eligibility to attend school in the district. S.K., Commr 2009: August 4.

Tenure Charges
Where teacher in correctional facility failed to respond to charges that he showed an unauthorized movie to his students during class time — charges deemed admitted; Commissioner orders 90-day suspension without pay. Tenure Hearing of Harper, Commr. 2009: July 14.

Commissioner dismisses teacher who failed to respond to charges, noting that teacher showed such evidence of deviation from normal mental health that the Board placed him on paid leave pending the results of a psychiatric evaluation and that he has not cooperated in securing such an evaluation to ascertain his ability to return to his teaching position. Tenure Hearing of Kous, Commr. 2009: July 17.

English teacher was insubordinate and engaged in unbecoming conduct

when she used her cell phone for a personal call during class, did not respond appropriately to an incident which occurred while she was on that phone call, and later made a related foray into another teacher's classroom; a reprimand and loss of the 120 days salary, are a sufficient penalty given the circumstances in this matter. Tenure Hearing of Getty, Commr. 2009:July 17 (Asbury Park)

District suspension of teacher without pay was wrongful because under *N.J.S.A.* 18A:6-14, board may only suspend without pay if tenure charges have been filed or employee has been indicted; therefore, board must return pay withheld and provide prospective pay until certification of tenure charges or indictment; Commissioner declines to consolidate issue with separate pending matter involving whether teacher may perform his teaching duties while the criminal charges are pending. Flynn, Commr 2009: August 3

Tenure, Seniority
Board did not violate tenured physical education teacher's tenure/seniority rights, and followed *N.J.S.A.* 18A:28-9 thru -13, when it terminated her position and created the position of Health and Physical Education Teacher which requires endorsements in both subject areas; teacher had been given opportunity, but failed, to obtain health endorsement. Francin, 2009: August 20.

Transportation
Board did not act arbitrarily in discontinuing courtesy transportation to domestic violence shelter that operates before and after-school daycare; dismisses petition by daycare center as board's decision resulted from periodic rotation of bus routes under its uniformly applied policy, to achieve cost efficiencies. Strengthen our Sisters, Commr. 2009:July 8.

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School Ethics Commission

SEC determined that board member/ president, who was employed by the Department of Education as County Supervisor for Child Study for Salem and Cumberland Counties, did not violate the School Ethics Act by virtue of her employment. She did not violate *N.J.S.A*. 18A:12-24(c) as she was a board member in Gloucester County, not in either of the counties that she covered as part of her employment. She did not violate *N.J.S.A.* 18A:12-26 as her financial disclosure form was not filled out improperly and she did not violate *N.J.S.A*. 18A:12-24.1(g) as she did not provide inaccurate information on the financial disclosure form. Herrschaft v. Ciancaglini, SEC 2009: July 28

SEC determined that board member/president did not violate the School Ethics Act, particularly *N.J.S.A.* 18A:12-24.1(f) when he issued a letter of apology to the high school gay-straight alliance regarding statements made at a board meeting. Board policy authorized the president to speak on behalf of the board. The board president's statements to the press did not violate *N.J.S.A.* 18A:12-24.1(g) as the allegedly inappropriate statements were made at a public meeting and could not be deemed confidential. Armenti v. Reca, SEC, 2009: July 28

SEC determined that board members did not violate the School Ethics Act with respect to actions taken at two board meetings. Board members

did not violate *N.J.S.A.* 18A:12-24.1(a) (b) (c) (f) and (g) when they moved to "disclose the public and financial burden" to the district, particularly the legal fees, regarding an interim order by the GRC finding an unlawful denial of an OPRA request. The GRC matter was ultimately withdrawn. Board members did not violate *N.J.S.A.* 18A:12-24.1 (f) and (g) with respect to the political group FT Vote. There was no showing that the board members had surrendered their independence of judgment or used the schools for personal gain. A request by defendants that the complaint be found to be frivolous was denied. Burdick v. Digiambattista and Weiss, SEC, 2009 August 25

Board member failed to attend first year first term training. SEC recommends to the Commissioner that the respondent be suspended from the board until demonstrating completion of the orientation program, and further recommends that the board member/trustee be removed from the Board if the orientation program is not completed by November 14, 2009. Should the respondent complete the training prior to the Commissioner's issuance of a final decision in this matter, the SEC recommends that the respondent be censured for failing to timely attend the orientation program. I/M/O Dianna Whittaker, Hi Nella Bd. of Ed., Camden County, T07-09nb, 7/28/09. See also I/M/O Gwendolyn Torres, Woodlyne Bd. of Ed., Camden County, T09-09nb, 7/28/09 and I/M/O Andrew Marancik, Ridge and Valley Charter School, Warren County, T19-09nb, 7/28/09.

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State Board of Examiners

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New Jersey Division on Civil Rights

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New Jersey Government Records Council

Custodian lawfully denied access to unredacted audiotape of student disciplinary hearing. Unredacted audiotape contained reference to another student and could not be released. Student/requestor was offered a redacted version of the audiotape. The identity of the requestor is not a consideration in deciding whether an exemption applies to a requested OPRA government record. White v. William Paterson University Custodian of Records No. 2008-216 (GRC August 11, 2009)

Custodian certified that responding to twenty-one (21) OPRA requests in one (1) week would substantially disrupt the operations of his agency. Custodian's properly requested extension of time to respond to the Complainant's OPRA requests was a sufficient and reasonable solution that accommodated the interests of the requestor and the agency. Custodian's failure to adhere to the extended deadline date was a "deemed" denial. The special service charge should reflect the estimated ten (10) hours to search, locate, copy, redact and return the records to their original location, as well as the Confidential Secretary to the Board Secretary's hourly rate of $31.63 per hour. As such, the Custodian's $320.00 charge was unreasonable because it did not reflect the actual direct cost of fulfilling the request, $316.30. Various other requests regarding tenure charges were satisfied in part and "deemed" denials in part. Complainant was deemed to be a prevailing party, resulting in the complaint being referred to the OAL for a determination of reasonable attorneys fees. Rivera v. Union City Board of Education No. 2008-112 (GRC August 11, 2009)

GRC does not have jurisdiction over records request made to the Office of Legislative Services, as it falls under the Legislative Branch of government. Sachau v. New Jersey Legislature, Office of Legislative Services No. 2009-196 (GRC August 11, 2009)

Leave request forms which document an employee's absence from work and the reason for that absence is an attendance record. Leave forms, as attendance records, are an integral part of a payroll record, which is exempted from the prohibition to disclosure set forth at *N.J.S.A.* 47:1A-10. The Custodian must disclose the requested records. McManus v. West Milford Township No. 2008-129 (GRC August 11, 2009)

Names and addresses of residential owners properly redacted pursuant to *N.J.S.A.* 47:1A-1.1, which provides that "a public agency has a responsibility and an obligation to safeguard from public access a citizen's personal information with which it has been entrusted when disclosure thereof would violate the citizen's reasonable expectation of privacy." Reynolds v. New Jersey Board of Public Utilities No. 2008-14 (GRC August 11, 2009)

Given the Custodian's duty to safeguard the integrity of government records and the fragility of the meeting minutes, providing inspection was a reasonable alternative to compromising the integrity of fragile records. The Custodian's offer of inspection of the meeting minutes from 1925 to 1975 was lawful pursuant to *Hascup v. Waldwick Board of Education*, GRC Complaint No. 2005-192 (April 2007). Taylor v. Cherry Hill Board of

Education No. 2008-258 (GRC August 11, 2009)

Small public agencies may charge the enumerated paper copy fees established under *N.J.S.A.* 47:1A-5.b. rather than determining the actual cost of providing such copies. Because Stillwater's population is less than 5,000 according to the 2000 Census, the Township qualifies as a small municipality. Additionally, because the Custodian certified that the paper copy fees established in the Township's code were based on the rates of neighboring municipalities, and thus are not based on the Township's actual cost of providing paper copies, the Township may charge OPRA's enumerated rates for paper copies. O'Shea v. Stillwater Township No. 2007-253 (GRC August 11, 2009)

Complainant's OPRA request is invalid because it is a broad general request for records and would require the Custodian to conduct research to discern which records may be responsive to the Complainant's OPRA request. While the Custodian has not unlawfully denied the Complainant access to the records requested, the Custodian was erroneous in asserting that OPRA exempts from disclosure government records that relate to a matter in litigation or in anticipation of litigation, as OPRA contains no such exemption. Cody v. Middletown Township Board of Education, No. 2008-162 (GRC August 11, 2009)

Councilman knowingly and willfully violated OPRA and unreasonably denied access to the Complainant's OPRA request. Conduct of Councilman was intentional and deliberate, with knowledge of the wrongfulness of his actions, and not merely negligent. Councilman ordered to "pay a civil penalty in the amount of $1,000 for this initial violation pursuant to *N.J.S.A.* 47:1A-11.a." Johnson v. Borough of Oceanport No. 2007-107 (GRC August 11. 2009)

GRC must conduct an *in camera* review of resignation letter, law firm invoice and executive session meeting minutes in order to determine the validity of the Custodian's assertion that the redactions constitute information which is exempt from disclosure pursuant to *N.J.S.A.* 47:1A-1.1. Kupferman v. Long Hill Township Board of Education No. 2007-213 (GRC August 11, 2009)

Because the requested record, a resume of a successful candidate for employment, is disclosable pursuant to *N.J.S.A.* 47:1A-10, *N.J.S.A*. 47:1A-9.b., Executive Order No. 26 (McGreevey 2002), and *Mendes v.Tinton Falls Board of Education*, GRC Complaint No. 2006-201 (March 2007), the Custodian violated *N.J.S.A.* 47:1A-6 by unlawfully denying access. Fallstick v. Haddon Township No. 2008-156, (GRC August 11, 2009)

Executive session minutes from October 2006 through February 2007 reviewed *in camera* by the GRC. Determinations made as to what was properly redacted and what was not. Custodian ordered to comply with the review. Barile v. Stillwater Township No. 2007-92, (GRC August 11, 2009)

Numerous emails reviewed in camera by the GRC. Some emails had redactions because of privacy interests, some fell under the ACD exception, some were exempt personnel records, some were protected by attorney-client privilege, some needed to be disclosed. McGee v. Township of East Amwell No. 2007-305 (GRC August 11, 2009)

GRC to conduct *in camera* inspection of letter read my mayor at a public meeting to determine whether the record falls under the ACD exception and is exempt from disclosure. Diaz v. South Harrison Township No. 2009-171 (GRC August 11, 2009)

GRC to conduct *in camera* inspection of draft proposal for re-adoption of the Small Employees Health Benefits program to determine whether the record falls under the ACD exception and is exempt from disclosure. Srivastav-Seth v. New Jersey Department of Banking and Insurance No. 2008-152 (GRC August 11, 2009)

Electronic database of drinking establishments provided to the Division of Alcoholic Beverage Control ("ABC") as part of the "Last Drink" initiative, created under the Attorney General Law Enforcement Directive 2007-2 to be used as an investigatory tool to enforce *N.J.A.C.* 13:2-29.2, was exempt from disclosure. Osman v. New Jersey Department of Law and Public Safety, No. 2009-32 (GRC August 11, 2009)

Custodian's written request for an extension of time was inadequate, pursuant to *N.J.S.A.* 47:1A-5.i, because the Custodian failed to provide an anticipated deadline date upon which the requested records would be made available. Kohn v. Township of Livingston, No. 2007-322 (GRC June 23, 2009)

Complainant sought access to correspondence and email between district administration, board of education and township committee members, collectively or as individuals, in which the Complainant's name or position was mentioned or referred. This request required an open-ended search of the board of education's files and failed to identify with reasonable clarity the records sought. Complainant requested "correspondence" without further reference as to what type of correspondence was requested, such as letters, memorandums, or facsimile transmittals, etc. Complainant failed to identify specific parties to the requested correspondence, but rather requested correspondence between categories of personnel, such as Township Committee members and district administration. Because the Complainant failed to identify with reasonable clarity the records sought, and because the request required an open-ended search of the board's files, the request is invalid and properly denied. Oberwanowicz v. Branchburg Township Board of Education No. 2008-113 (GRC June 23, 2009)

Requests for records made to the Judicial Branch of New Jersey State Government are not within the GRC's authority to adjudicate. Dixson v. Township of Hamilton No. 2009-63 (GRC June 23, 2009)

GRC referred complaint to OAL for hearing, including an *in camera* examination of the record, to determine whether School District Internal Investigation Report completed by Special Counsel was attorney-client privileged material, and if so, whether the attorney-client privilege was waived, and if the Custodian knowingly and willfully violated OPRA and unreasonably denied access. Jones v. Trenton Board of Education No. 2007-282 (GRC June 23, 2009)

Because of the extraordinary volume, time, and effort required to fulfill the Complainant's OPRA request, the special service fee assessed by the Custodian is reasonable and valid. The special service fee permissible under *N.J.S.A.* 47:1A-5.c. is $11,586.08 ($12,173.98 - $587.90 = $11,586.08). The Supervisor of Technology's ten (10) hours at $58.79, or $587.90, was deducted as the Computer Technician had the necessary expertise. Rogers v. Roxbury Township Board of Education No. 2007-243 (GRC June 11, 2009)

Because the Complainant's OPRA request is not a request for specific identifiable government records, the Complainant's OPRA request for a list of all contractors and subcontractors at the Cecily Tyson School and for the names, addresses, and union status of those contractors and

subcontractors is invalid. Walker v. East Orange Board of Education No. 2008-20 (GRC June 11,2009)

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New Legislation

P.L.2009, c.68. (A4100**)**
Appropriates $28,990,484,000 in State funds and $13,859,752,122 in federal funds for the State budget for fiscal year 2009-2010. Approved 6/29/2009

P.L.2009, c.69. (A4102)
Temporarily increases income tax rates for taxpayers with income exceeding $400,000, temporarily adjusts property tax deduction for certain taxpayers with income exceeding $150,000 and taxes New Jersey Lottery Prizes exceeding $10,000. Approved 6/29/2009

P.L.2009, c.78. (A4141**)**
Clarifies the procedure for the elimination of non-operating school districts. Approved 6/30/2009

P.L.2009, c.79. (A2451**)**
The Vote By Mail Law. Approved 6/30/2009

P.L.2009, c.80. (S1175 **)**
Requires certain districts to develop a program of after school activities and provides for voter approval of additional local funding. Approved 7/2/2009

P.L.2009, c.85. (A4111)
Defines contractual salary for State employees in PERS or TPAF to include certain wage increases deferred from July 1, 2009 through June 30, 2011. Approved 7/2/2009

P.L.2009, **c.86.** (A1784)
Requires that any United States or State of New Jersey flag purchased with State funds be manufactured in the United States. Approved 7/4/2009

P.L.2009, c.87. (A3569 **)**
Concerns stop-work orders and certain violations of workers' compensation requirements. Approved 7/10/2009

P.L.2009, c.88. (S1421**)**
Requires reporting of wage records under certain solid waste contracts. Approved 7/15/2009

P.L.2009, c.89. (A3372**)**
Concerns prevailing wage in construction projects connected with Board of Public Utilities financial assistance. Approved 7/15/2009

P.L.2009, c.90. (A4048)
"New Jersey Economic Stimulus Act of 2009"; appropriates $15 million to "New Jersey Affordable Housing Trust Fund." Approved 7/28/2009

P.L.2009, c.**106.** (S702)
Authorizes enhancement of State Uniform Construction Code's energy subcode based on anticipated energy savings; provides down payment

assistance to certain purchasers of homes meeting enhanced energy subcode requirements. Approved 8/6/2009

P.L.2009, c.109. (A930)
Directs the New Jersey State Interscholastic Athletic Association to establish adapted athletic programs. Approved 8/6/2009

P.L.2009, c.110. (A3214)
Eliminates required mailing of sample ballots to inactive voters. Approved 8/6/2009

P.L.2009, c.114. (S2231)
Includes nurse midwives among medical professionals authorized to certify medical condition of individuals under "Temporary Disability Benefits Law" and "Work First New Jersey Act." Approved 8/12/2009

P.L.2009, c.115. (A2238)
Requires health benefits coverage for certain therapies for the treatment of autism and other developmental disabilities. Approved 8/13/2009

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New Regulations

N.J.A.C. 6A:4, Appeals. Adopted: July 10, 2009, 41 N.J.R. 2893(a) as R.2009 d.248, See proposal: May 4, 2009 **a**t 41 N.J.R. 1921(a). Implements the administrative appeal processes established by P.L. 2008, c. 36, that eliminated the role of the State Board of Education in the hearing of administrative appeals

N.J.A.C. 6A: 9, Subchapter 18, Professional Licensure and Standards - Pilot Programs for Mathematics and Science Certifications, was adopted as special new rules by R.2009 d.238, effective June 30, 2009 (to expire January 4, 2011). See: 41 N.J.R. 2984(a).

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Proposed Regulations

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ADEA

Plaintiff bringing disparate-treatment claim under ADEA had to prove, by preponderance of evidence, that age was "but-for" cause of adverse employment action, and burden of persuasion did not shift to employer to show that it would have taken the action regardless of age, even when a plaintiff produced evidence that age was a motivating factor. Decisions construing Title VII did not control construction of ADEA because Title VII was materially different as to burden of persuasion. Gross v. FBL Fin. Servs., 129 S. Ct. 2343; 174 L. Ed. 2d 119 (June 18, 2009)

Affirmative Action

City's refusal to certify promotion test results because no black firefighters were eligible for promotion constituted disparate treatment of non-black firefighters who were denied promotions in violation of Title VII. City wanted to avoid potential liability for discrimination based on disparate treatment against the black candidates. The threshold showing of statistical disparity in the examination results was insufficient by itself to constitute a strong basis in evidence of unlawful disparate impact, the extensively analyzed examinations were job-related and consistent with business necessity, and there was no strong basis in evidence of an equally valid, less-discriminatory testing alternative. Ricci v. DeStefano, 129 S. Ct. 2658; 174 L. Ed. 2d 490 (June 29, 2009)

EEOA

Whether to grant relief from an institutional reform decree, which required state funding to overcome student language barriers under the Equal Educational Opportunities Act (EEOA), improperly focused on the adequacy of funding, since the appropriate inquiry was whether EEOA compliance was achieved based on changed circumstances.
Horne v. Flores, 129 S. Ct. 2579; 174 L. Ed. 2d 406 (June 25, 2009). On remand, Flores v. Arizona, 2009 U.S. App. LEXIS 18092 (9th Cir. Ariz., Aug. 13, 2009)

IDEA

When a school district failed to provide a free appropriate public education (FAPE) and the parents unilaterally placed the child in an appropriate private school, reimbursements for the private special education costs could be ordered. Section 1412(a)(10)(C)(ii) imposed no categorical bar on such reimbursements if a child had not previously received special education and related services by the district. The Act authorized reimbursement for the cost of private special-education services when a school district failed to provide a FAPE and the private placement was appropriate, whether or not the

child previously received special education or related services through the district. Forest Grove Sch. Dist. v. T. A., 129 S. Ct. 2484; 174 L. Ed. 2d 168 (June 22, 2009).

Religion
Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied. Borden v. Sch. Dist. of E. Brunswick, 129 S. Ct. 1524; 173 L. Ed. 2d 656(March 2, 2009.)

Student Searches
Extending search to point of searching 13-year old student's underwear was unreasonable and violated Fourth Amendment because there was no indication of danger to the students from the power of the drugs or their quantity, and there was no reason to suppose that student was carrying pills in her underwear. Principal was entitled to qualified immunity as clearly established law did not show that the actions violated the Fourth Amendment; the school district's liability was remanded for a determination under *Monel.* School policy strictly prohibited the non-medical use, possession, or sale of any drug on school grounds. Another student's statement that prescription and non-prescription drugs came from the student was sufficiently plausible to warrant suspicion that the student was involved in pill distribution, justifying a search of the student's backpack and outer clothing. Safford Unified Sch. Dist. #1 v. Redding, 129 S. Ct. 2633; 174 L. Ed. 2d 354. (June 25, 2009).

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3rd Circuit Court of Appeals

First Amendment
Court of Appeals affirms District Court's grant of summary judgment in favor of school district *et al*. on former employee's claims that the school district violated the First Amendment, the ADA, and the Rehabilitation Act by refusing to renew his bus driver contract allegedly in retaliation for his advocacy on behalf of a student with disabilities. Where an employee speaks in a way that is wholly within the scope of his employment and responsibilities, such speech is not protected from disciplinary actions under the First Amendment. Isler v. Keystone Sch. Dist., No. 08-3853, 2009 U.S. App. (3d Cir. May 29, 2009) (not precedential)

IDEA
Third Circuit determined that school district's counter-claim was filed in a timely fashion although it was filed more than 90-days after the hearing officer's final decision. The IDEA's 90-day limitation only applies to complaints, not compulsory counter-claims. Jonathan H. v. Souderton Area School District, No. 08-2196, 2009 U.S. App. LEXIS 7794 (3d Cir. 2009) (precedential)

Court of Appeals affirmed District Court's denial of compensatory education services, finding that the court did not clearly err in finding that the individualized education programs developed by the district were reasonably calculated to provide the child a meaningful

educational benefit. District court credited the hearing officer's conclusion, predicated on testimony by the child's teachers, that the child was not a student who had problems with attention, impulsivity, or hyperactivity during the relevant period. District court pointed to extensive evidence in the record that the child was perceived by educators to be an average student who was making meaningful progress, but whose increasing difficulty in school was attributable to low motivation, frequent absences, and a failure to complete homework. Richard S. v. Wissahickon Sch. Dist., No. 08-3568, 2009 U.S. App. LEXIS 12428 (3d Cir. Pa, June 9, 2009). (not precedential)

Court of Appeals affirmed District Court judgment. District court properly focused its inquiry on whether the move to an inclusion classroom was likely to significantly affect child's ability to learn and also accepted the findings made during administrative proceedings. Thus, district court did not err when it held that there was no violation of IDEA's stay-put provision, 20 U.S.C.S. § 1415(j). J.R. v. Mars Area Sch.Dist. (In re Educ. Assignment of Joseph R.), No. 07-2440, No. 07-2753, 2009 U.S. App. LEXIS 6287 (3d Cir. Pa, March 24, 2009)(not precedential).

Religion
Refusal by defendants, a school district and school officials, to allow the parent of a kindergarten student to read Bible verses to the class did not violate the parent's First Amendment rights. The age of the students was a factor in determining the appropriateness of restrictions on classroom speech, and defendants' actions were reasonable. The fact that the parent was invited to speak did not prevent defendants from placing reasonable restrictions on her speech content. Defendants' actions were not unreasonable and were meant to prevent promotion of a religious message in the kindergarten class; a permissible purpose to ensure Establishment Clause compliance. Busch v. Marple Newtown Sch. Dist., No. 07-2967, 567 F.3d 89; 2009 U.S. App. LEXIS 11696 (3d Cir. Pa, June 1, 2009, as amended, June 5, 2009.) (Precedential)

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New Jersey District Court Decisions

Labor Relations
District court dismisses action filed by transferred maintenance worker and spouse, former teacher's aide, alleging deprivation of rights under the NJ LAD, Sec. 1983, the fourteenth amendment and retaliation regarding his transfer and her non-renewal. Aurelio v. Bd. of Educ., No. 06-3146 (JLL), 2009 U.S. Dist. LEXIS 52759 (D. N.J. June 23, 2009)

Law Against Discrimination
Board of education found to have not violated the NJLAD when Biddy Basketball League which used board of education facilities refused 12 year old girl's request to play on 5th and 6th grade boys team. J.A. v. Vill. of Ridgewood Bd. of Educ., No. 07-1179 (DRD), 2009 U.S. Dist. LEXIS 41100 (D.N.J. May 13, 2009.)

Whistleblower (CEPA)
In matter arising out of one staff member's suspension and the other's dismissal, the court granted school district's motion for summary judgment for alleged violations of free speech and due process due to false accusations; malicious prosecution; employment retaliation for "whistle-blowing activity"; violation of the NJLAD for reprisals from a "protected activity"; civil conspiracy and common law wrongful discharge. *Calabria v. State Operated Sch. Dist. for City of Paterson*, 2008 U.S. Dist. LEXIS 65264, (D. N.J. Aug. 26, 2008)(not for publication); reconsideration denied May 1, 2009 by Calabria v. State Operated Sch. Dist. for Paterson, No. 06-CV- 6256(DMC), 2009 U.S. Dist. LEXIS 38871.

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New Jersey Supreme Court

Abbott v. Burke
The State is relieved of prior remedial court orders concerning public school funding in Abbott districts as the New Jersey School Funding Reform Act of 2008 (SFRA), is constitutional under the Thorough and Efficient Education Clause, N.J. Const. art. VIII, § 4, para. 1 and may be applied in Abbott districts, with the following caveats: State must provide school funding aid during 2009 and the next two years at the levels required by SFRA's formula each year, and formula's weights and other operative parts must be reviewed after three years of implementation. Abbott v. Burke, 199 N.J. 140 (May 28, 2009).

Certification
Petition for certification denied. East Orange Bd. of Educ. v. New Jersey Schs. Constr. Corp., 199 N.J. 540 (June 3, 2009)

Petition for certification denied. P.J. Smith Elec. Contrs., Inc. v. North Plainfield Bd. of Educ., 199 N.J. 519 (May 21, 2009.)

Petition for certification denied. Dempsey v. Alston, 199 N.J. 518 (May 21, 2009)

Petition for certification denied. Irvin v. Newark Sch. Dist., 199 N.J. 133 (April 23, 2009.)

Disability Retirement
As formerly disabled teacher was declared by New Jersey Teacher's Pension and Annuity Fund to have recovered sufficiently to return to teaching, under *N.J.S.A.* § 18A:66-40(a), school district was required to reinstate her to the next opening in the position from which she was retired, so long as her credentials for that position remained in effect. Klumb v. Board of Educ., 199 N.J. 14 (2009) (May 11, 2009).

Discrimination
Appellate Division affirmed jury verdict at trial court level finding that plaintiff had not proven his claim of employment discrimination and that plaintiff was not performing his duties in an acceptable manner. Bruno v. N.B. Bd. of Educ., (A-1543-07T1) 2009 N.J. Super. Unpub. LEXIS 1488, (App. Div. April 15, 2009.)

Labor Relations
The Supreme Court reversed the Appellate Court below, in holding that the mid-term termination of a custodian was arbitrable under the procedures contained in the collectively negotiated agreement (CNA). Held that language need not parrot that of Pascack Valley to require arbitration; and individual contract terms will yield where they conflict or diminish right to arbitration set forth in CNA. Mount Holly Twp. Bd. of Educ. v. Mount Holly Twp. Educ. Ass'n, 199 N.J. 319(2009) (June 24, 2009)

Ordinances
Townships' ordinances, establishing residency restrictions that formed buffer zones for convicted sex offenders living within their communities, were invalid because they were precluded by the stark language of Megan's Law, N.J.S.A. §§ 2C:7-1 to-19. G.H. v. Township of Galloway, 199 N.J. 135 (2009) (May 7, 2009).

Public Records
The document was exempt from release under OPRA's deliberative process privilege and the common law right. A government record, which contains factual components, is subject to the deliberative process privilege when it was used in the decision-making process and its disclosure would reveal the nature of the deliberations that occurred during that process. Education Law Center v. New Jersey Dept of Ed., 198 N.J. 274 (2009. (March 26, 2009)

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New Jersey Superior Court Appellate Division

Arbitration/Labor
Appellate Division vacates Chancery Division order restraining arbitration of dispute regarding school district obligation to provide health benefits to employees working between 20 and 32 hours per week and directs arbitration in accordance with the CBA**.** Berlin Borough Bd. of Educ. v. Berlin Teachers' Ass'n, (A-4715-07T2) 2009 N.J. Super. Unpub. LEXIS 1123 (App Div. May 13, 2009)

Appellate Division reverses order of the trial court which affirmed an arbitration award that set aside the Board's decision to terminate the employment of a custodian and instead imposed a ten-day suspension as the appropriate penalty; and ordered the custodian reinstated with full back pay, fringe benefits and seniority rights following his period of suspension. Appellate Division reinstated the board's termination.
Linden Bd. of Educ. v. Linden Educ. Ass'n, (A-1236-07T3,) 2009 N.J. Super. Unpub. LEXIS 1503 (App. Div.April 17, 2009).

Appellate Court affirms PERC's denial of board's requests to restrain arbitration and vacate the arbitration award requiring board to place a teacher at top of salary guide, where by order of the Commissioner of Education teacher had been reinstated to the board's employment many years after she took disability retirement. Manalapan-Englishtown Reg'l Bd. of Educ. v. Manalapan-Englishtown Educ. Ass'n, (A-3515-06T1; A-3138-07T1) 2009 N.J. Super. Unpub. LEXIS 1980 (App. Div. July 28, 2009)

Charter Schools
Appellate Division affirms Commissioner's dismissal of petition challenging charter school settlement of school construction finance related litigation. Board of trustees' decision was neither arbitrary nor capricious and was entitled to deference.
Crapelli v. Bd. of Trs. of the Red Bank Charter Sch.. (A-6216-07T3) 2009 N.J. Super. Unpub. LEXIS 1656 (App Div. June 23, 2009).

Criminal Background Checks
Appellate Division affirms decision of the Commissioner of Education concluding that petitioner is disqualified from teaching in the New Jersey Public Schools by operation of N.J.S.A. 18A:6-7.1.Chavis v. N.J. State Dep't of Educ., (A-5862-07T1) 2009 N.J. Super. Unpub. LEXIS 1118 (App Div. May 13, 2009).

Finance
Appellate Division affirms Commissioner decision denying the school district's request for funding for additional educational programs, declining to subsidize the Board's decision to give its teachers and aides a one-hour lunch break instead of the thirty minutes provided under the collective bargaining agreement, and concluding that it had not been sufficiently thrifty in planning and paying for its technology needs .Bd. of Educ. of Elizabeth v. N.J. State Dep't of Educ., (A-4063-07T2)2009 N.J. Super. Unpub. LEXIS 506 (App. Div. March 16, 2009.)

Non-renewal
Appellate Division affirms Chancery Division order, which restrained arbitration of the board of education's decision not to renew school bus driver's employment contract. Non-renewal did not constitute discipline. Freehold Reg'l High Sch. Dist. Bd. of Educ. v. N.J. Educ. Ass'n, (A-4130-06T1) 2009 N.J. Super. Unpub. LEXIS 1099 (App Div. May 8, 2009.)

OPRA
Appellate Division affirms Law Division summary judgment dismissal of OPRA complaint by student, who was suspended from middle school for ten days and adjudicated in the Family Part for weapons possession, for production by the Plainsboro police department of investigatory records, narrative reports and complaints related to weapons possessions on school grounds. R.O. v. Plainsboro Police Dep't, (A-5906-07T2) 2009 N.J. Super. Unpub. LEXIS 1560 (App Div June 17, 2009.)

Custodian of government records may adopt a form for requesting access to a government record, and may require specific reasonable procedures that need not include every method of transmission mentioned in N.J.S.A. 47:1A-5(g); thus where custodian required that requests be made by mail or hand-delivery, he was not required to honor request for access made by fax. Paff v. City of East Orange, 407 N.J. Super. 221(App. Div. 2009) (May 21,2009)

Pension
Appellate Division affirms decision of the TPAF Board of Trustees granting the application for involuntary ordinary disability retirement benefits filed by the board of education on behalf of the employee. The Board adopted the ALJ recommendations that the employee

suffered from a serious psychiatric disorder and was totally and permanently disabled from performing regular and assigned teacher duties.
Starling v. Teachers' Pension & Annuity Fund, (A-0450-07T1) 2009 N.J. Super. Unpub. LEXIS 486, (March 18, 2009.

Preschool
Appellate Division affirmed Commissioner decision that the board of education substantially complied with the notice requirements of N.J.A.C. 6A:10A-2.3(b), and the Department of Education (DOE) did not err in affirming the school board's decision not to renew the Toddler Town contract. Toddler Town Child Care Ctr. v. Bd. of Educ., (A-5749-07T2) 2009 N.J. Super. Unpub. LEXIS 728, (App.Div. April 28, 2009.) Certification denied by Toddlertown v. Bd. of Educ. of Irvington, 2009 N.J. LEXIS 826 (N.J., July 16, 2009)

Regionalization/Withdrawal
Appellate Division affirms Board of Review decision denying the Township of Liberty's request to withdraw from the Great Meadows Regional school district.
In re Liberty Twp., (A-4783-06T3) 2009 N.J. Super. Unpub. LEXIS 873 (App. Div. April 1, 2009.)

School Construction
Appellate Division modified a final decision of the New Jersey School Development Authority excluding a site consultant from an eligibility list for a school construction project by expanding the chosen list of seven to eight to include the excluded site consultant because the authority failed to follow N.J.A.C. 19:38C-5.6 in the selection process. Van Note-Harvey Assocs., P.C. v. New Jersey Schs. Dev. Auth., 407 N.J. Super. 643 (App. Div.2009) (June 19).

School Ethics
Appellate Division reverses State Board decision that suspended a board member for one year for threatening a member of the public at a public board meeting. Court says the State Board erred in upholding the SEC's rejection of the ALJ's credibility determinations. Although the SEC was entitled to reject the ALJ's factual determinations, it was required to defer to her credibility determinations that the board member had not in fact threatened a member of the public at the meeting.
In re Atallo, 2009 N.J. Super. Unpub. LEXIS 606 (App. Div. March 20, 2009).

Student Records
Appellate Division affirms Commissioner decision, which affirmed ALJ's initial decision, dismissing, as untimely, appellant parent's petition to expunge her child's student disciplinary records. Commissioner's decision was supported by substantial credible evidence in the record, was not arbitrary, capricious or unreasonable, and was in compliance with the controlling legal principles. J.G. ex rel. C.G. v. N.J. Dep't of Educ., (A-6057-07T2) 2009 N.J. Super. Unpub. LEXIS 1176 (App. Div. May 15, 2009).

Tenure
Appellate Division affirms final determination of the Commissioner

removing employee as a tenured teacher based on a finding of "conduct unbecoming and other just cause" predicated on allegations of engaging in improper sexual contact with a minor student. While the Department of Children and Families, through its Institutional Abuse Investigation Unit, had made an independent determination the charges were unfounded, that fact did not statutorily preclude the school district from bringing the tenure charges.
In re Young, (A-0309-08T3) 2009 N.J. Super. Unpub. LEXIS 1686 (App. Div. June 25, 2009.)

Appellate Division affirms State Board decision which affirmed Commissioner decision, denying employee's claim that she was entitled to be placed in a non-tenured teaching position upon the school district's elimination of her position as a school social worker. The employee's tenure and seniority rights did not extend beyond her educational services certificate. The board could have, but was not required to hire the employee as a teacher. Aiello v. Bd. of Educ. of Westwood Reg'l Sch. Dist., (A-5896-07T1) 2009 N.J. Super. Unpub. LEXIS 1690 (App. Div. Decided June 25, 2009.)

Tort Claims Act
Appellate Division reverses trial court decision granting summary judgment to a school board and school and dismissing a former student's personal injury action, as the former student had complied with the notice requirements of New Jersey Tort Claims Act, N.J.S.A. § 59:8-8, when she sent such notice at the time of the accident, 10 years prior to the filing of her complaint. Lebron v. Sanchez, 407 N.J. Super. 204 (App. Div. 2009) (May 21, 2009.)

Appellate Division affirms trial court summary judgment order dismissing lawsuit against defendant board of education, a public entity, for failure to satisfy the verbal threshold of the Tort Claims Act ("TCA"), *N.J.S.A.* 59:9-2(d).Zuniga v. Paterson Bd. of Educ., (A-1139-08T2) 2009 N.J. Super. Unpub. LEXIS 1235, (App. Div. May 21, 2009)

Tuition
Appellate Division affirms Commissioner decision dismissing North Brunswick's challenge as not timely filed. North Brunswick had been determined by the Somerset County Executive County Superintendent to be the district of origin for the children of a particular family. Bd. of Educ. of N. Brunswick v. Bd. of Educ. of Somerville, (A-6082-07T2) 2009 N.J. Super. Unpub. LEXIS 1390 (App. Div. June 8, 2009).

Whistleblower (CEPA)
Appellate Division affirms trial court's summary judgment dismissal of employee's CEPA retaliatory claims. Brown v. N.B. Bd. of Educ., (A-2501-07T2, 2009 N.J. Super. Unpub. LEXIS 596 (App. Div. March 20, 2009).

Workers Compensation
Appellate Division affirms workers compensation decision which awarded 22.5% of partial total disability arising from a work-related spinal injury and dismissed two employee claims. Thomas v. Newark Bd. of Educ., (A-4365-07T3) 2009 N.J. Super. Unpub. LEXIS 852, (App. Div. March 30, 2009.)

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New Jersey Superior Court, Law/Chancery Division

Board of education erred when it disqualified a candidate's nominating petition because the candidate was unregistered to vote when she assented to the candidate's acceptance and oath of allegiance, even though she properly registered to vote before timely filing her nominating petition. Board was directed to accept the nominating petition. Algarin v. Haledon, 408 N.J. Super. 266 (L. Div. 2009)(Passaic Cty, April 1 2009) (approved for publication June 25)

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Commissioner of Education

Bus Drivers
Veteran bus driver unsuccessfully challenged the imposition under *N.J.S.A.* 18A:39-28 of a 6-month suspension of school bus endorsement when she left a student on the bus at end of route. Garner, Commr.2009: May 1.

Certification
Supervisor of Testing and Assessment, who held a Ph.D. but no certificate, must be removed from position where job duties included staff guidance and training; although the board did not require certification in the job description and improperly assigned her to a position for which she was not certified, the board was not equitably estopped from denying her tenure. Ramaswami, Comm'r. 2009: May 1.

Ethics
The Commissioner adopts SEC's determination that a board member violated the Ethics Act by administering the schools, by taking private action that could compromise the board, by failing to protect and support the principal and superintendent in the performance of their duties, and by failing to refer all complaints to the chief school administrative officer. These findings were based on the board member's dissemination of correspondence to the other board members that was critical of the administration's handling of a senior prank, his complaints to the police despite the CSA's managing of the prank, his dissemination of employee complaints to the Board before the complaints were investigated or even received by the superintendent. Six-month suspension ordered was ordered, taking into account that his actions disparaged the principal who supervised his spouse, projecting an appearance of bias and impropriety. Yafet, Comm'r. 2009: May 15.

Increments
Commissioner dismisses teacher's appeal of board's action to withhold his increment for unbecoming behavior toward a student; reason for withholding was disciplinary and proper appeal is through negotiated procedures, not with the Commissioner. Chilmonik, Comm'r. 2009: May 6.

Nonrenewal
Commissioner dismisses claim by maintenance mechanic that the board failed to provide him timely notice of nonrenewal; the statutory May 15 date does not apply to non-tenured individuals, and he was provided notice according to his annual contract and bargaining agreement. Hensel, Comm'r. 2009: May 18.

Placement on Salary Guide
Commissioner lacked jurisdiction to determine whether the board properly placed a teacher on the salary guide upon her return from maternity leave; the matter should have been brought to arbitration through the procedures set forth in the collective bargaining agreement. Wachtel, Comm'r. 2009: May 22.

Resignation
A charter school teacher who wishes to resign prior to the expiration of the contract must provide notice under her contract pursuant to *N.J.S.A.* 18A:26-10. Charter school teacher who resigned her position on week's notice was guilty of unprofessional conduct and had her certificate suspended for one year. Van Pelt, Comm'r. 2009: May 29. (ALJ decision not yet available online)
Teacher who, after one week in the classroom was overwhelmed and rendered ill by the challenges in the urban district and by personal issues, and who resigned his position as a sixth grade math teacher without consent or notice required under the contract, was guilty of unprofessional conduct under *N.J.S.A*. 18A:26-10 . Commissioner orders certificate suspended for one year. Orban, Comm'r. 2009: June 11.

Sending-Receiving
Commissioner approves the settlement agreement for a phase out of the severance of a sending-receiving relationship between Newfield and Buena –Commissioner noted that all statutory requirements were satisfied, and that there had been a feasibility study and public comments. Newfield, Comm'r. Supplemental decision, 2009: June 11(ALJ decision not yet available online). See also, Commissioner stating that in an uncontested application for severance, procedural requirements in *N.J.A.C.* 6A:3-6.1 must be followed prior to severance, and ordering further proceedings accordingly. Newfield, Comm'r. 2009: March 11. (ALJ decision not available online)

Settlements
Commissioner declines to approve settlement because it is signed on behalf of the Board by the Board Secretary and Board President, there was no indication that the Board approved the agreement and designated these officials to sign it on the Board's behalf; nor, was it signed by the Board attorney. West Milford, Comm'r. 2009: June 18. (ALJ decision not available online)

Student Residency
Deciding a dispute over which of three districts is responsible for providing a free education to children who have been homeless since 2003 when they lost their home in Magnolia, the Commissioner determined that since 2003, Magnolia was the district of residence and beginning January 5, 2005, the Deptford Township

became the district of residence. Magnolia's appeal of the County Superintendents' determination was dismissed as untimely under *N.J.A.C.*6A:23-5.2(d). Magnolia and Deptford, Comm'r. 2009: May 5.

Parent could not provide any proof that after she moved from her home in North Plainfield, she maintained residency in North Plainfield; district may immediately remove child, and parent is ordered to pay back tuition of $22,810. for period of child's illegal attendance. L.C., Comm'r. 2009: June 8.

Tenure Dismissal
The Commissioner upheld tenure charges for inefficiency, tardiness and absenteeism over a 5-year period; teacher failed to improve teaching skills, classroom management techniques and other deficiencies despite district's efforts over 90-day period; however, her employment did not terminate until the rendering of Commissioner decision, and not according to law judge's ruling that her position be forfeited retroactively from date of suspension. Tenure Hearing of Ashe-Gilkes, Comm'r. 2009: May 22.

Although board proved 3 of the 5 charges it brought against a confidential secretary, the penalty of tenure dismissal is too harsh where she had 17 years of unblemished service and her acts (discarding important documents, lacking candor during an investigation; and failing to perform her duties to answer general counsel's telephone), while showing extremely poor judgment, were not premeditated, cruel or vicious. Commissioner adopts ALJ decision for loss of 120 days' pay and loss of increment for one year. Tenure Hearing of Weaver, Comm'r. 2009: June 1.

Tenure Rights
The Commissioner found that the board's termination of the employment of a tenured secretary because she refused to sign employment contracts (due to her concerns over the 10-day notice of termination clause) violated her tenure rights; it did not equate to constructive resignation or abandonment of her position. However, her request should have been filed as a regular petition, and not as a request for a declaratory ruling. Commissioner orders reinstatement with back pay less mitigation, and emoluments. Bush, Comm. 2009: May 27(ALJ decision not yet available online)

Work-Related Sick Leave
Teacher's petition that the board violated the prohibition against reducing sick leave time for absence due to work-related injury under N.J.S.A. 18A:30-2.1, is dismissed as untimely; he failed to file within the 90 day period. Straszewski, Comm'r. 2009: May 5.

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School Ethics Commission

Code of Ethics for School Board Members
Commission determined that former board member violated *N.J.S.A.*

18A:12-24.1(c) by failing to confine his board action to policy-making, planning and appraisal while participating as a members of the district staffing team when he developed detailed staff interviewing documents and directed their implementation without consulting with administration. Former board member censured. Dericks v. Schiavoni, SEC, 2009: April 28.

SEC determined that complainant failed to prove that board member violated *N.J.S.A.* 18A:12-24.1(a) by failing to uphold and enforce all laws, rules and regulations of the State Board of Education and court orders pertaining to the schools. Complainant failed to present a "copy of a final decision from any court of law or administrative agency of this State" finding that the respondent failed to enforce all laws, rules, and regulations of the State Board of Education. As to the allegation that the respondents violated the Open Public Meetings Act when they held an emergency meeting on June 8, 2007, the Commission noted that matters arising out of the OPMA are not within the jurisdiction of the Commission which is limited to matters arising out of the School Ethics Act. Myers v. Barksdale, SEC, 2009: April 28.

Commission found that probable cause did not exist to credit allegations that board member violated *N.J.S.A.* 18A:12-24.1(b) by using his board position to secure unwarranted advantages. Board member issued press release immediately prior to the annual school election, however the press release did not speak to the board member's candidacy for office. LiaBraaten v. Emory, SEC, 2009: April 28.

Commission determined that board did not violate various provision of the Code of Ethics for School Board Members where the board trustees voted to appoint a staff member to a position for which he was not certified. Lovett and Fussell v. Asbury, SEC. 2009: April 28.

Commission found that board member did not violate *N.J.S.A.* 18A:12-24.1(e) by taking private action that could have compromised the board when she failed to reveal a prior professional relationship between the newly appointed interim superintendent and the board attorney. Myers v. Barksdale, SEC, 2009: May 27.

Commission determined that insufficient competence evidence existed to credit allegations that board member violated *N.J.S.A.* 18A:12-24.1(g) by failing to provide accurate information in school matters where he allegedly provided false information to an investigator from the Office of Fiscal Compliance. Myers v. Cox, SEC 2009: May 27.

Commission determined that board president did not violate various provisions of the School Ethics Act when she spoke with a board member's employer about the board member's actions pertaining to district property. No evidence was found that such contact had the ability to compromise the board. Le Munyon v. Loughlin, SEC 2009: May 27.

Commission found insufficient cause to credit the allegation that the regional board member violated the School Ethics Act. Regional board member voted on proposed budget for submission to the voters while his wife was employed as a school nurse within the district. Luthman v. Longo, SEC, 2009: June 23.

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State Board of Examiners

Teacher agreed to forfeit teaching certificates with the force and effect of a revocation and all attendant consequences in the resolution of pending criminal charges. I.M.O. the Certificates of Zisa, Exam, 2009: May 11.

Examiners accepted one-year suspension of teacher of the handicapped certificates proposed by teacher after Division of Youth and Family Services (DYFS) investigation substantiated allegations of physical abuse. I.M.O. the Teaching Certificate of Berkowitz, Exam, 2009: May 11.

Examiners revoked the certificates of a teacher who had been convicted of attempting to solicit commercial sex with a person under the age of 18. I.M.O. the Certificates of Clark, Exam, 2009: May 11.

Teacher agreed to forfeit teaching certificates with the force and effect of a revocation and all attendant consequences in the resolution of pending criminal charges. I.M.O. the Certificates of Darden, Exam, 2009: May 11.

Examiners revoked certificate of teacher who pleaded guilty to failure to make a lawful disposition of CDS to police. I.M.O. the Certificate of Doughtery, Exam, 2009: May 11.

Examiners revoked certificate of teacher following that teacher's loss of tenure subsequent to a tenure hearing by the Commissioner of Education. Loss of tenure and loss of certificate based on improper touching. I.M.O. the Certificate of Gilmore, Exam, 2009: May 11.

Examiners revoked teacher of the handicapped certificate of tenured Juvenile Justice Commission teacher who was dispossessed of tenure rights for possession of CDS. I.M.O. Guarni, Exam, 2009: May 11.

Examiners revoked teacher of the handicapped certificate of teacher who was disqualified from public service by the Commissioner of Education for possession of CDS. I.M.O. the Certificate of Hanania, Exam, 2009: May 11.

Teacher agreed to forfeit teaching certificates with the force and effect of a revocation and all attendant consequences in the resolution of pending criminal charges. I.M.O. the Certificate of Kereks, Exam, 2009: May 11.

In reviewing evidence of rehabilitation, Board of Examiners determined that the purpose of a hearing before the Examines is "to permit the individual certificate holder to demonstrate circumstances or facts to counter the charges set forth in the Order to Show Cause, not to afford an opportunity to show rehabilitation." Examiners revoked the certificate of certificate holder who was convicted of theft by failure to make a required disposition as a 2nd degree crime. I.M.O. the Certificates of Lemme, Exam, 2009: May 11.

Examiners revoked county substitute credential of substitute teacher who had previously been disqualified from public service for a CDS conviction four years earlier. I.M.O. the Credential of Peterson, Exam, 2009: May 11.

Examiners revoked certificate of social studies teacher who was disqualified from public service in 1994 and 1996 for possession of CDS, despite the fact that teacher did not obtain certificate of eligibility until 2007. I.M.O. Pietrangelo, Exam, 2009: May 11.

Examiners adopted a three-year suspension of the certificate of English teacher who resigned while tenure charges of unbecoming conduct and insubordination were pending. Suabedissen, Exam, 2009: May 11.

Examiners declined to issue certificate to teacher who had previously forfeited his teaching certificate as part of a plea agreement with the county prosecutor. I.M.O. the Certificates of Arminio, Exam, 2009: May 11.

Teacher agreed to forfeit teaching certificates with the force and effect of a revocation and all attendant consequences in the resolution of pending criminal charges. I.M.O. the Certificates of Welch, Exam, 2009: June 22.

Examiners revoked the certificate of a social studies teacher who was convicted on two counts of criminal sexual contact. I.M.O. the Certificates of Calandrillo, Exam, 2009: June 22.

Teacher agreed to forfeit teaching certificates with the force and effect of a revocation and all attendant consequences in the resolution of pending criminal charges. I.M.O. the Certificates of Engelson, Exam, 2009: June 22.

Examiners revoked the certificate of teacher who pleaded guilty to aggravated criminal sexual contact. I.M.O. the Certificates of Fetter, Exam, 2009: June 22.

Examiners revoked the certificate of teacher who had been disqualified from public service for a conviction of indecent exposure. I.M.O. the Certificate of Franco, Exam, 2009: June 22.

Examiners revoked the certificate of elementary teacher who pled guilty to theft by deception and was forever barred from holding any office or position of honor, trust or profit under this state or any of its administrative or political subdivisions pursuant to *N.J.S.A.* 2C:51-2c. I.M.O. the Certificate of Gurtov, Exam, 2009: June 22.

Teacher agreed to forfeit teaching certificates with the force and effect of a revocation and all attendant consequences in the resolution of pending criminal charges. I.M.O. the Certificates of Ingenito, Exam, 209: June 22.

Examiners revoked the certificate of elementary teacher who was convicted of identity theft and disqualified from public school employment pursuant to *N.J.S.A*. 18A:6-7.1 *et seq*. Evidence of rehabilitation was not pertinent to the purpose of demonstrating circumstances or facts to counter the charges set forth in the Order to Show Cause. I.M.O. the Certificate of Lowenstein-Mase, Exam, 2009: June 22.

Examiners denied teacher's motion for a stay of the judgment suspending her teaching certificates for one year, pending appeal to the Commissioner of Education. Teacher failed to meet *Crowe v. DeGoia* standards. I.M.O. the Certificates of Megargee, Exam 2009: June 22.

Examiners revoked the certificate of business teacher who pled

guilty to charges of computer criminal activity-theft and harassment and was ordered by the sentencing court to resign from his tenured teaching position and to surrender his teaching certificates during the period of his probation. Unfitness to hold a position in a school system may be shown by one incident, if sufficiently flagrant; here teacher committed theft and harassment against students and their families. I.M.O. the Certificates of Naylor, Exam, 2009: June 22.

Biology teacher voluntarily relinquished his certificate after tenure charges were certified to the Commissioner based on the teacher's alleged use of district computers to access pornographic websites. I.M.O. the Certificates of O'Neil, Exam, 2009: June 22.

Examiners revoked certification of physical education teacher who had been convicted of aggravated sexual assault, criminal sexual conduct, and official misconduct and had been disqualified from public service pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* I.M.O. the Certificates of Umosella, Exam, 2009: June 22.

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New Legislation

P.L.2009, c.51. (S2707**)** Establishes a pilot program in DOE to address the State's shortage of mathematics and science teachers' pages. Approved 5/4/2009.

P.L.2009, c.54. (A462) Modifies reference from "substance awareness coordinator" to "student assistance coordinator" in substance abuse programs in public schools. Approved 5/6/2009

P.L.2009, c.62. – (S2828)
Authorizes borrowing by public school districts between June 8 and June 30 of the school budget year in certain circumstances. Approved 5/29/2009

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New Regulations

N.J.A.C. 6A:8 Standards and Assessment - Amendment
Adopted: June 17, 2009
The chapter Appendix, AYP Targets, was adopted as new rules by R.2009 d.234, effective July 20, 2009. See: 41 N.J.R. 1302(a), 41 N.J.R. 2779(c).

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Issued April 9, 2009
Submit written comments by June 5, 2009 to:
Dr. Jay Doolan, Assistant Commissioner
New Jersey Department of Education
River View Executive Plaza
Building 100, P.O. Box 500
Trenton, New Jersey 08625-0500

N.J.A.C. 1:6B – Department of Education Tenure Hearings
Issued April 9, 2009
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Patricia Prunty, Assistant Director
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3rd Circuit Court of Appeals

Students – Special Education
Third Circuit determined that school district's counter-claim was filed in a timely fashion although it was filed more than 90-days after the hearing officer's final decision. The IDEA's 90-day limitation only applies to complaints, not compulsory counter-claims. *Jonathan H. v. Souderton Area School District,* No. 08-2196, 2009 U.S. App. Lexis 7794 (3d Cir. 2009).

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New Jersey District Court Decisions

Employees - Discrimination
District Court dismissed employee's discrimination claims filed against college and labor union under 29 U.S.C.S. §185(a), the *Labor Management Relations Act*, for lack of subject matter jurisdiction. The Act excluded "political subdivision" from the definition of employer. Because the college was a political subdivision, both the college and labor union fell within the political subdivision exception to jurisdiction. *Watford v. Union County College*, Civil No. 06-5542, 2009 U.S. Dist. Lexis 9661, (D. N.J. Feb. 10, 2009).

Employees - Professional Services
District Court determined that board of education violated board attorney's procedural due process rights where board permitted sending-district representatives to vote on the attorney's appointment to the receiving district. Board members were not entitled to legislative immunity because sending-district participation was beyond parameters established by the Legislature and therefore the appointment was not procedurally legislative. *Gallagher v. Atlantic City Bd. of Ed.*, Civil No. 08-3262, 2009 U.S. Dist. Lexis 16548 (D. N.J. Feb. 27, 2009).

District Court substantially reduced attorney's fees of prevailing party where special education attorney could not substantiate entitlement to

an hourly rate of $400 per hour, and where records reflected excessive billing. *L.J. individually and by his Parents V.J. and Z.J., v. Audubon Bd. of Ed.,* Civil No. 06-5350, 2009 U.S. Dist. Lexis 37473 (D. N.J. April 13, 2009).

Students – Harassment

Parent alleged that the district was deliberately indifferent to a racially hostile environment when the district transferred E.L. to an alternative placement after he had been the victim of several racially harassing incidents. Motion for summary judgment denied for claims under due process and equal protection clauses, 42 *U.S.C.* §1983, Law Against Discrimination, and Civil Rights Act. Student's claims of deliberate indifference under Title VI dismissed because Title VI requires a showing of intentional discrimination. *Lee o/b/o/ E.L., v. Lenape Valley Reg'l Bd. of Ed.,* Civil No. 06-CV-4634, 2009 U.S. Dist. Lexis 26788, (D. N.J. March 31, 2009).

Students – Special Education

District Court determined that district's IEP conferred significant learning and a meaningful educational benefit despite the fact that improvements to the IEP were possible. Parent petition for tuition reimbursement dismissed. *G.B. and D.B. o/b/o J.B., v. Bridgewater-Raritan Regional Bd. of Ed*., Civil No. 07-4300, 2009 U.S. Dist. Lexis 15671 (D. N.J. Feb. 29, 2009).

District Court denied Supplemental Security Income benefits where child's IEP reports failed to evidence marked limitations in two functional equivalent domains or an extreme limitation in one functional equivalent domain. *Diaz o/b/o N.D. v. Commissioner of Social Security,* Civil No. 07-5672, 2009 U.S. Dist. Lexis 23557 (D. N.J. March 26, 2009).

District Court determined that parents failed to demonstrate that disabled child was denied FAPE where district did not provide extended school year or transportation services. At the beginning of the following school year, district failed to provide FAPE for 17 days when it failed to provide transportation after notice that parent was no longer able to provide transportation. *L.T o/b/o B.T v. Mansfield Twp. Sch. Dist.,* Civil No. 04-1381, 2009 U.S. Dist. Lexis 21737, (D. N.J. March 17, 2009).

District Court dismissed parent complaint alleging a failure to provide FAPE in the least restrictive environment, where parents failed to exhaust administrative remedies by failing to request due process hearing. *D.A. v. Pleasantville Sch. Dist.,* Civil No. 07-4341, 2009 U.S. Dist. Lexis 30104, (D. N.J. April 6, 2009).

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New Jersey Supreme Court

Supreme Court dismissed employee complaint alleging breach of contract and employment claims where teacher was allegedly detained for making threatening statements against students. *Leang v. Jersey City Bd. of Ed.,* _____ N.J. _____ (2009) (Slip op.), 2009 N.J. Lexis 167, (N.J. April 16, 2009).

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New Jersey Superior Court Appellate Division

Regionalization – Withdrawal
Appellate Division affirmed Board of Review denial of permission to conduct a withdrawal referendum; withdrawal would result in an excessive debt burden for River Edge and would interfere with maintenance of an efficient system of education in that district without excessive costs. In Re: Petition For Authorization To Conduct A Referendum On The Withdrawal Of The Borough Of Oradell From The River Dell Regional School District. 964 *A.2d* 341 (App. Div. 2009).

Students – Dress Codes
After board adopted a dress code policy, parents contested the constitutionality of the law authorizing boards to adopt dress code policies. Appellate Division upheld the district dress code policy. Statute was deemed constitutional even though it failed to contain an opt-out provision; the law was neither vague or overbroad. Board policy was adopted in conformance with statute. *Dempsey v. Alston, 966 A.2d 1 (App. Div. 2009)*

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Commissioner of Education

Board Governance – Ethics
Commissioner dismissed petition alleging board member violated N.J.A.C. 6:3-6.5 or 6.6 where board member took possession of a student file found abandoned in a district building. East Rutherford Borough Bd. of Ed., Commr., 2009: April 15.

On appeal from the School Ethics Commission, the Commissioner affirmed SEC decision finding a violation of the code of ethics where board member attended a meeting on behalf of the board without board consent, urged an employee to leave the district, and refused to cooperate in an affirmative action investigation. Brown v. Matthews,

Commr., 2009: April 15.

Sending-Receiving – Severance
Commissioner rejected severance application where responding district first opposed, then acquiesced in the severance. Specific regulatory procedures apply where a petition seeks to sever a sending-receiving relationship is not opposed. Newfield Borough Bd. of Ed., Commr., 2009: March 11.

Students – Athletic Eligibility
Commissioner determined that NJSIAA did not act arbitrarily, capriciously, or unreasonably in denying student-athlete eligibility after transfer from private school to public school. Transfer to address academic issues did not constitute a hardship under NJSIAA rules. D.S.J. o/b/o/ minor child J.J., Commr., 2009: March 13.

Students – Residency
Board demonstrated that student attended district schools while ineligible, before grandmother obtained legal custody during the pendency of the matter. Tuition ordered for period of ineligible attendance in the amount of $7,826. C.P. on behalf of minor child, Z.P., Commr., 2009: March 30.

Commissioner determined that grandmother had standing to contest the district's determination of non-residency, despite the fact that the grandmother did not have legal custody of the child nor did she support the student gratis. Board elected to waive any tuition due because of student's ineligible attendance. P.B. o/b/o minor child C.K., Commr., 2009: April 2.

Commissioner determined that student was ineligible to establish residency with her sister where parents were capable of providing support but sent student to live with her sister for emotional reasons. J.D. o/b/o minor child A.D., Commr., 2009: April 3.

Students – Transportation
Commissioner dismissed parent appeal of bus stop location. The Commissioner determined that placement of the bus stop was not a dangerous location. Goldberg, Commr., 2009: March 31.

Employees – Reduction in Compensation
Commissioner determined that board impermissibly reduced secretary's compensation when it transferred her from a 10-month to a 12-month position. Despite an increase in salary, secretary's rate of compensation was reduced from $192.57 to $184.64 in violation of her tenure right against reduction in compensation. East Rutherford Ed. Assn. o/b/o Dolinsky, Commr., 2009: March 31.

Rules of Procedure – 90-Day Rule
Commissioner determined that terminated teacher failed to timely file petition of appeal. Commissioner specifically rejected that portion of the Initial Decision that granted terminated teacher the right to a *Donaldson* hearing as being unnecessary to the disposition of the matter. Lachenauer, Commr., 2008: March 18.

Commissioner dismissed retired teacher's appeal of the denial of her

petition to restore sick days as untimely. Although teacher's attorney delayed providing notice to the teacher, she received denial 45 days after it was issued and had ample time to file an appeal. Gusler, Commr., 2009: April 21.

Employees – Tenure Acquisition
Commissioner determined that teacher acquired tenure on October 3, 2004. Board directed to compensate teacher for the difference in health insurance costs between individual and family coverage for the period she should have been granted tenure status. Milano, Commr., 2009: March 25.

Employees – Tenure Dismissal
Commissioner determined that board had proven charges of unbecoming conduct, where teacher directed students to touch him inappropriately in class; engaged in personal work during his class time; and used obscenities and vulgar hand gestures in the presence of his students. I.M.O. the Tenure Hearing of Powell, Commr., 2009: March 18.

Commissioner determined that board proved charges of unbecoming conduct for failing to create, widely publish, and monitor an attendance policy, but failed to prove unbecoming conduct in Special Review Assessment administration or assignment of improperly certified teaching staff. Six-month suspension ordered. I.M.O. the Tenure Hearing of Tracey, Commr., 2009: April 8.

Settlement – Commissioner Rejection
Commissioner rejected settlement agreement (without prejudice) that was signed by chief education officer of charter school but failed to include board resolution approving the settlement and designating chief education officer authority to sign the agreement on behalf of the board. Neither was the settlement signed by the board attorney, who is the board's authorized representative in litigation. I.M.O. the Suspension of the Teaching Certificates of Lamb, Commr., 2009: April 14.

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School Ethics Commission

SEC found, upon rehearing a matter on remand from the State Board, that the Board member's act of signing a certification recounting what transpired at a Planning Board meeting in order to bolster the board's interest in a school ethics case against a former board member, did not constitute private action; even if it had, there was no evidence it could have compromised the board; no violation of N.J.S.A. 18A:12-24.1(e). I/M/O Chiego, SEC 2009: March 24 (on remand).

SEC dismisses complaint and counterclaim/third party complaints *without prejudice* to the right to re-file where during the pendency of the complaint, the complainant was not reelected and subsequently died; only her personal representative, and not the board or another board member, had standing to maintain the suit. Hakim, SEC 2009: March 24.

SEC dismisses an ethics complaint against incumbent board member, finding that neither her providing an opinion to the press supportive of reduced government, nor sending a letter supportive of regionalization signed "board president" (but couched in the first person, "I") to the Executive County Superintendent (ECS), constituted "board action" and thus did not violate N.J.S.A. 18A:12-24.1(c)(confining "board action" to policy making). Nor did these acts constitute private action that could harm the board under N.J.S.A. 18A:12-24.1(e) as she neither made personal promises nor purported to speak on behalf of either Board, and the letter was timed so as not to influence the ECS in its investigation of Oradell's request to withdraw from the Regional Board. Shinevar and Beslow, SEC 2009: March 24.

The SEC found no probable cause to credit numerous allegations of ethics violations made by a parent against six board members for the middle school's practice of locking bathrooms between each class period; board president duly relied on the administration to address the complainant's concerns, responded to parent's letter only after consulting with the Superintendent and the Board's counsel; it was the administration that responded to the complainant's concerns without interference from the Board members. Wittreich, SEC 2009: March 24.

SEC dismisses complaint brought against four board members by Administrative Systems Support Technician alleging members violated N.J.S.A. 18A:12-24.1(h) and (i) when they voted to transfer her to a secretary position; SEC found no proof that board members failed to appoint the best qualified personnel after considering CSA recommendation; failed to appoint the best qualified person, or to support personnel in proper performance of their duties. Jenkins-Buwa, SEC 2009: March 24

SEC ADVISORY OPINIONS

SEC advised that two board members, one whose spouse was employed as a district secretary and the other whose spouse was employed as a caller of substitutes in the district, would not violate N.J.S.A. 18A:12-24.1(c) if they were to participate in the discussion and adoption of the board's goals and objectives for the CSA as long as those goals and objectives are broad in scope but may not participate where the goals touch upon the employment of the board members' spouses. A25-08 (1/29/09).

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Custodian was "deemed" to have denied access where he waited until the 21st business day to respond to a request for receipts regarding purchases, contracts and invoices for "Organic Law" books; his failure to immediately respond that no such documents existed and that he was still researching or needed extra time, where the records requested were "immediate access" records, was a violation of N.J.S.A. 47:1A-5.e; however, because he did respond (albeit 21 days later), while he violated N.J.S.A. 47:1A-5.g. and N.J.S.A. 47:1A-5.i., there was no unlawful denial of access pursuant to the Pusterhofer standard. Nor did his actions rise to the level of a knowing and willful violation. Taylor v. Trenton Bd. of Ed. No. 2008-240 (GRC March 25, 2009)

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P.L.2009, c.23. - See A770 Extends payment of accidental death benefit in PFRS, SPRS, PERS, and TPAF to survivors of certain members of reserve component of Armed Forces and National Guard. Approved 3/18/2009

P.L.2009, c.29. - See A2901 Revises membership of New Jersey Task Force on Child Abuse and Neglect. Approved 3/21/2009.

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N.J.A.C. 6A:2-2.4 - Commissioner
Adopted: January 30, 2009

Filed: January 30, 2009 as R.2009 d.72.
Effective Date: January 30, 2009.
Expiration Date: March 9, 2012
Authority: N.J.S.A. 18A:4-22 and 52:14B-3(1).

N.J.A.C. 10:92 – Educational Svcs of the Comm. for the Blind and Visually Impaired.
Proposed: August 4, 2008
Adopted: January 11, 2009
Filed: March 12, 2009
Effective Dates: March 12, 2009, Readoption;
April 6, 2009, Amendments.
Expiration Date: March 12, 2014

N.J.A.C. 19:36 - Procedures for Procurement of Design Build Contracts for School Facilities Projects for the Schools Construction Program
Adopted: February 4, 2009
Filed: February 27, 2009 as R.2009 d.102.
Authority: P.L. 2000, c. 72 (N.J.S.A. 18A:7G-26) and P.L. 2007, c. 137, specifically, §§9(c) and (d) and 36.
Effective Date: February 27, 2009.
Expiration Date: February 27, 2010.

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United States Supreme Court

Employees – Discrimination
Resolving a conflict among the circuits, the Court held that the protection against retaliation afforded by the opposition clause in Title VII of the Civil Rights Act of 1964, extended to an employee who spoke out about discrimination not on her own initiative, but in answering questions during an employer's internal investigation. Nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when asked a question. *Crawford v. Metropolitan Government of Nashville and Davidson Cty.* 129 *S. Ct*. 846 (2009).

In the context of a peer sexual harassment suit, the Court held that Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, or a substitute for 42 *U.S.C.* §1983 suits as a means of enforcing constitutional rights. Absent contrary evidence, Congress intended Title IX to allow for parallel and concurrent 42 *U.S.C.* §1983 claims**.** *Fitzgerald v. Barnstable School Comm.*, 129 *S. Ct*. 788 (2009).

Employees – Free Speech
Idaho's ban on political payroll deductions, as applied to local governmental units, does not infringe the unions' First Amendment rights. *Ysursa v. Pocatello Ed. Assn.***,** ___U.S. ___2009, 2009 U.S. LEXIS 1632 (U.S. Feb. 24, 2009)(No. 07-869).

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3rd Circuit Court of Appeals

Students – Special Education
District's failure to address special education student's behavioral problems in a systematic and consistent way denied her a FAPE. Third Circuit affirms the District Court's award of compensatory education. *Lauren P. v. Wissahickon Sch. Dist.*, No. 07-3595, 2009 U.S. App. LEXIS 2835 (3d Cir. Feb. 12, 2009).

Parents were not entitled to reimbursement for the cost of a private tuition and other declaratory relief where the IEP provided a "meaningful benefit" despite the absence of parent's requested modifications to the IEP for homework accommodation and supplemental reading. *G. N. and S. N., On Behalf of J.N., v. Bd. of Education Livingston*, No. 2009 U.S. App. LEXIS 2455 (3d Cir. Feb. 4, 2009).

Parents' claims were dismissed; while they could prosecute their legally cognizable interests in their son's FAPE without an attorney, in the Third Circuit, they did not have the right to represent their son over NJLAD, procedural due process, or common law counts alleged in their Amended Complaint; further, they failed to pursue their administrative remedies. *Woodruff v. Hamilton Twp. Pub. Sch*., No. 08-2439, 2009 U.S. App. LEXIS 834 (3d Cir. Jan. 15, 2009).

Court affirmed the dismissal of parents' challenge to the suspension of their disabled son; the parents' complaint failed to conform to the IDEA's pleading standards. *M.S.-G v. Lenape Reg'l High Sch. Dist. Bd. of Educ.*, No. 07-1567, 2009 U.S. App. LEXIS 604 (3d Cir. Jan 13, 2009).

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Employees – Free Speech
Court granted partial summary judgment in favor of the school district, in a matter arising out of a teacher's allegations that she experienced retaliation and a hostile work environment after reporting an alleged grade-fixing scheme at a district school. The Court found that her reporting was done as a public employee, not as a private citizen, and thus, free speech rights did not protect her communications from employer discipline. Union's motion for summary judgment regarding teacher's claim for breach of fair representation is denied. *Veggian v. Camden Bd. of Educ.*, No. 05-70, 2009 U.S. Dist. LEXIS 13573 (D. N.J. Feb. 23, 2009).

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New Jersey Superior Court Appellate Division

Board Membership - Conflict of Interest
The Appellate Division determined that a planning board member who lived with her boyfriend, the principal of the engineering firm that employed the planning board engineer, must disqualify herself from applications in which the board's engineer reviews the application and provides recommendations to the board. *Randolph v. City of Brigantine Planning Board*, 963 A.2d 1224; 2009 N.J. Super. LEXIS 25 (App. Div. 2009).

Facilities – Funding

Court dismisses on its merits a complaint brought by Board of Education to compel the SCC and EDA to proceed with certain school construction and renovation projects that were delayed because of a statewide shortage of funds available for such projects despite the Commissioner's approval of the district's LRFP. The district did not establish a greater need than that of other Abbott districts, nor did equitable estoppel apply to DOE's allocation of scarce monetary resources. The action in lieu of prerogative writs was properly venued in the Appellate Division. *East Orange Bd. of Ed., v. New Jersey Schools Construction Corp.*, *405 N.J. Super. 132* (App. Div. Feb. 3, 2009).

Employees - Discrimination

In a matter brought by special education teacher bringing a challenging his termination during a RIF under the Law Against Discrimination and the Veterans' Tenure Act, the Court reverses grant of partial summary judgment in favor of the district on the teacher's VTA claim. The factual record precluded summary judgment on the VTA claim, and the jury's findings on the LAD claim did not necessarily encompass a finding that would be fatal to the VTA claim. *Vitale v. Atlantic County Special Services School District*, No. A-1675-07(App. Div. January 12, 2009).

Employees – Benefits

A teacher, including a substitute teacher, is not entitled to unemployment benefits for the period between successive academic years, or during a vacation or recess when the teacher has "reasonable assurance" that she will be returning to work. Here, as the substitute's name was placed on the list of substitute teachers for the next academic year, she was not entitled to benefits over the summer; however, the Court did not disturb the factual determination of the Board of Review that dates in early September and late June fell within the school year during which she was eligible for unemployment benefits. *Washington Twp. Bd. of Ed. v. Bd. of Review*, No. A3405-07 (App. Div. Feb. 10, 2009).

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New Jersey Superior Court, Law/Chancery Division

Facilities - Construction

The Court ordered equitable rescission of a settlement agreement between the Board and its construction manager on the ground of unilateral and material mistake, where implementation would be unconscionable and would violate several laws. *Tri-Tech Environmental Engineering, Inc. v. Nutley Board of Education,* No. L-009675-08 (Essex County) (L. Div 2009, Feb. 19, 2009).

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Commissioner of Education

Students – Residency
Commissioner determined that student did not change domicile where parents changed residence temporarily to care for a sick relative. M.L. o/b/o G.R.C.L., Commr., 2008: Nov. 12.

Commissioner determined that district was the district of residence where student was placed in a residential facility during the school year. Commissioner found that mother resided in the district on the last school day prior to October 16, the date that annual enrollment is established. Bound Brook Bd. of Ed., Commr., 2008: Dec. 29.

On remand from *M.L.P. v. Bloomfield Bd. of Ed.*, No. A-4265-06, (App. Div. July 8, 2008) (slip op.), the Commissioner determined that child's domicile was that of the parent, despite the fact that the child resided with grandmother in a different district. M.L.P., on behalf of minor child, C.L.P., Commr., 2008: Dec. 29. (*See also*, M.L.P., Commr., 2006: Sept. 19, M.L.P., St. Bd., 2007: March 7.

Commissioner determined that parent's evidence of residency was supportive of her position, but not conclusive. Commissioner upheld district's determination of non-residency and awarded tuition in the amount of $13,159.72. C.A.S. on behalf of minor children C.A.H. and C.B.S., Commr., 2008: Dec. 29.

Commissioner determined that petitioning parent maintained her domicile within the district, despite being absent from the home for two years while the home was re-built following a fire. B.F.-H., on behalf of minor child, A.C., Commr., 2009: Feb. 9.

Commissioner determined that parent changed he domicile and left student with grandmother for the purpose of attending school within the district. No evidence of family or economic hardship. Tuition assessed in the amount of $5,360.58. Clifton Bd. of Ed., 2009: Feb. 19.

Students – Uniforms
Commissioner determined that board adhered to statutory requirements in adopting a uniform policy. Parents failed to show that any harm would result to the student if required to wear a uniform. Rittberg-Snuffer, Commr., 2009: Jan. 7.

Students – Parent Groups
Commissioner determined that board did not discriminate against parent who was excluded from participating in classroom parties as a "room parent" where board policy delegated the management of classroom parties to the local PTA and where PTA policy required membership in the PTA as a pre-condition for approval as a "room parent". M.E.C., on behalf of minor children, C.C., K.C., and E.C., Commr., 2009: Jan. 12.

Procedures – 90-Day Rule
Commissioner dismissed, as untimely, parental petition seeking tuition reimbursement where parent unilaterally enrolled student in private

school because all available in-district schools were classified as in-need-of-improvement. D.Q. on behalf of minor child S.Q., Commr., 2009: Jan. 21.

Procedures – Settlements
Commissioner rejected and remanded settlement agreement where it omitted a board resolution approving the settlement and authorizing the board president to execute the agreement, nor was the agreement signed by the board attorney as the board's duly authorized representative in litigation. Hunter, Commr., 2009: Jan. 28.

Employees– Retirement
Commissioner determined that board violated it's contractual obligation toward retiring/resigning teachers' when it unilaterally accelerated the retirement/resignation dates of tenured employees. Board ordered to reimburse employees for verified medical, dental and prescription drug expenses incurred during the portion of the 60-day notice period when their health insurance was cancelled. Bloomfield Ed. Assn., Commr., 2008: Dec. 22.

Employees - Tenure Acquisition
Commissioner determined that financial officer/accounts payable employee performed clerical duties that made his position tenure eligible. Commissioner also determined that effective date of board's termination superseded superintendent's notice of termination; therefore, employee's length of service was sufficient to achieve tenure. Commissioner ordered board to reinstate employee with back pay and emoluments. Sharkey, Commr., 2009: Dec. 29.

Employees - Tenure Dismissal
Commissioner adopted board's dismissal of teacher who had consented to certificate suspension without the necessity of complying with tenure removal procedures. Commissioner determined that tenure protection does not protect teaching staff members who are not holders of "proper certificates in full force and effect." Schailey, Commr., 2009: Feb. 19.

Employees - Tenure Entitlements
Commissioner determined that tenured gym teacher who also received a stipend for coaching field hockey was entitled to her full salary without loss of sick time pursuant to *N.J.S.A.* 18A:30-2.1, but was not entitled to stipend after being injured as a result of her employment. Daganya, Commr., 2008: Dec. 30.

Employees - Nonrenewal
Commissioner determined that board was not arbitrary, capricious, or unreasonable in nonrenewal decision where non-tenured transportation supervisor had been recommended for renewal. Davidson, Commr., 2009: Jan. 5.

Employees – Military Service Credit
Commissioner determined that science teacher was entitled to credit for up to five years for non-teaching experience directly related to the assigned teaching position and up to four years credit for active military service with honorable discharge. Commissioner directed the Board to adjust petitioner's salary guide placement to reflect his military service

credit. Neely, Commr., 2009: Jan. 5.

Employees – Benefits
Where parties agreed that tenured kindergarten teacher was injured in an accident arising out of her course of duties, Commissioner determined that board improperly charged days against her accrued but unused sick leave where board failed to provide a reasonable accommodation upon teacher's request to return to duty. Chism, Commr., 2009: Jan. 7.

Employees – Increment Withholding
Commissioner determined that board's increment withholding from elementary bilingual teacher was arbitrary, capricious, and unreasonable where board approved 45 days of disability absences and provided only one of two customary annual evaluations. Rexach, Commr., 2009: Feb. 23.

Transportation – Contracts
Commissioner determined that statute did not authorize district to lease buses to groups not enumerated in *N.J.S.A.* 18A:39-22. Murphy Transportation Inc, Commr., 2009: Feb. 24.

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School Ethics Commission

Commission determined that no probable cause existed to credit allegations that a board member involved himself in a matter in which he had a personal involvement that could have created a benefit where the board member met with the building principal regarding the discipline imposed on a student for assaulting the board member's son. Gonzalez, SEC, 2008: Dec. 16.

Commission dismissed complaint alleging violations of multiple provisions of the Code of Ethics for Board Members, where board member sent an e-mail to the superintendent identifying a specific employee by name, questioning the employee's placement, identifying a former by name, and asking whether that employee could be re-hired. Gallon, SEC, 2008: Dec. 16.

Commission found no probable cause to credit allegations that board member violated *N.J.S.A.* 18A:12-24.1(f) by using his public office for personal gain when he sought a grade adjustment for his child; *N.J.S.A.* 18A:12-24.1(j) creates an exception for board members acting on behalf of immediate family members. Complainant ordered to pay $500.00 for filing frivolous complaint. Young, SEC, 2009: Jan. 27.

SEC found that board member violated *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members when he submitted an article, signed as board president, to the editor of a local newspaper without having first received board approval. Numerous other allegations were dismissed. SEC recommended penalty of censure. Dericks, SEC, 2009: February 24.

SEC found that board member violated N.J.S.A. 18A:12-

24.1(i) of the Code of Ethics for School Board Members when he sent a letter to the State Board President, Executive County Superintendent and Board President suggesting that the superintendent allowed his administrative staff to violate board policy. Numerous other allegations were dismissed. SEC recommended the penalty of censure. Hollander, SEC, 2009: February 24.

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State Board of Examiners

No decisions implicating school laws were published during this edition.

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New Jersey Council on Local Mandates

Council found that 2009 Appropriations Act provision regarding State Police patrolling of rural municipalities, which would require that each such municipality enter into an agreement with the State Treasurer or be treated as if it did, was an unconstitutional unfunded mandate. The fact that the $12.5 million cost is partially offset by a $ 5 million appropriation was not satisfactory. The “State mandate/State pay” directive would have little meaning if the legislature could avoid it by expressly electing to provide a specified partial amount of funding for a mandate and leaving an acknowledged balance to be shouldered by the local units. Shiloh, CLM, 2009: December 12

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Election Law Enforcement Commission

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New Jersey Government Records Council

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New Legislation

P.L.2009, c.4 (A1185) - Authorizes public entities to implement energy savings improvement programs.

P.L.2009, c.7 (S1605) - Permits board of trustees of school district pension fund in counties of the first class to invest 10% of funds in capital stocks or other securities issued by companies of foreign countries.

P.L.2009, c.15 (A3649) - Extends transmittal date of fiscal year 2009-2010 gubernatorial budget message to Legislature to March 12, 2009.

P.L.2009, c.19 (S21) - Adjusts required local employer contributions to PERS and PFRS for State fiscal year 2009.

P.L.2009, c.22 (S15) - Amends the Fiscal Year 2009 appropriation act to implement certain components of the Executive's plan to offset shortfalls in State revenues.

P.L.2009, c.23 (A770) - Extends payment of accidental death benefit in PFRS, SPRS, PERS and TPAF to survivors of certain members of reserve component of Armed Forces and National Guard.

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N.J.A.C. 6A:26-18 Educational Facilities, Section 15 Grants for Regular Operating Districts, Including County Vocational School Districts

N.J.A.C. 19:34 New Jersey Schools Development Authority (SDA)

N.J.A.C. 6A:30-3.1, 3.2, 3.3, 4.1, 5.5, 6.5, 6.8, 8.2, 8.3 and 6A:30 Appendix--Evaluation of the Performance of School Districts

N.J.A.C. 12: 17 and N.J.AC. 12:16 Family Leave Insurance Benefits

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N.J.A.C. 7:27D-4 Local Government Greenhouse Gas Reduction Program

N.J.A.C. 6A:28 School Ethics Commission (public comment extended to April 3, 2009)

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United States Supreme Court

Petition for writ of certiorari denied. D. G. v. N. Plainfield Bd. of Educ., No. 08-502, 77 U.S.L.W. 3358, decided December 15, 2008. See also D.G. ex rel. J.G. v. North Plainfield Bd. of Educ., 400 N.J. Super. 1 (App. Div. 2008)

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3rd Circuit Court of Appeals

NCLB

The Court of Appeals held that Congress, through the notice, transfer, and supplemental educational services provisions of the No Child Left Behind Act, did not intend to confer a private right of action upon aggrieved individuals such as parents and students. The provisions did not contain the kind of rights-creating language the Supreme Court has deemed critical to showing the requisite congressional intent to create individual enforcement rights. Newark Parents Ass'n v. Newark Pub. Sch., 547 F.3d 199 (3d. Cir. November 20, 2008).

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New Jersey District Court Decisions

Administrative Regulations

District court dismissed plaintiff school administrators' claims that challenged the constitutionality of the recently enacted accountability regulations, specifically those sections that applied to employment contracts of certain school administrators. *N.J.A.C.* 6A: 23A-1.1 et seq. Applying the principles of Burford v. Sun Oil, the district court opted to abstain from hearing a case concerning a regulatory scheme which covered matters of substantial state law and public concern. In a footnote, the judge indicated that it was his belief that the statutes that governed sick leave and vacation leave reimbursement did not apply to school administrators. N.J. Ass'n of Sch. Adm'rs v. Davy, Civil Action No. 08-4086, 2008 U.S. Dist. LEXIS 96056 (D. N.J. Nov. 25, 2008).

Attorney Fees

Attorney fee award by administrative law judge in special education matter upheld where that fee award was reduced by the ALJ for partial victory and unreasonable conduct. W.C. ex rel. R.C. v. Summit Bd. of

Educ., No. 06-5222, 2008 U.S. Dist. LEXIS 95448 (D. N.J. Nov. 24, 2008).

Civil Procedure
Complaint dismissed for lack of prosecution. J.M. v. Oceanport Bd. of Educ., No. 07-4670, 2008 U.S. Dist. LEXIS 94164 (D. N.J. Nov. 18, 2008).

Discovery
Motion for discovery of educational records granted. N.P. v. E. Orange Bd. of Educ., No. 06-5130, 2008 U.S. Dist. LEXIS 97507 (D. N.J. Nov. 26, 2008).

Insurance
District court grants motion to compel payment of invoices for legal and expert fees incurred by plaintiff in the D&D action up to May 15, 2008. Board of education may submit a supplemental request for fees pertaining to this motion to compel payment. North Plainfield Bd. of Educ. v. Zurich Am. Ins. Co., No. 05-4398, 2008 U.S. Dist. LEXIS 104944, (D. N.J. Dec. 30, 2008).

Motion for leave to file a second amended complaint denied. N. Plainfield Bd. of Educ. v. Zurich Am. Ins. Co., No. 05-4398, 2008 U.S. Dist. LEXIS 100403, (D. N.J. Dec. 11, 2008).

Special Education
Plaintiffs failed to establish that school district's proposed IEP for the 2007-2008 academic year was not reasonably calculated to confer significant learning and a meaningful educational benefit. M.P. v. S. Brunswick Bd. of Educ., No. 07-5975, 2008 U.S. Dist. LEXIS 103520 (D. N.J. Dec. 23, 2008).

District Court dismissed action as moot. Plaintiff sought home instruction pending determination of an appropriate program and placement. Action was moot since the plaintiff (1) was unavailable for, and not been seeking, instruction at home because his parents had admitted him to a private facility covered by the parents insurance and (2) did not pursue relief in an OAL Proceeding as anticipated in the ALJ Decision. P.T. v. Matawan-Aberdeen Reg'l Bd. of Educ., No. 08-2087, 2008 U.S. Dist. LEXIS 100722 (D. N.J. Dec. 12, 2008).

District court reversed administrative law judge decision that ordered out of district placement of special education student. Plaintiff's request for attorney fees denied. D.S. v. Bayonne Bd. of Educ., No. 2:08-CV-01726, 2008 U.S. Dist. LEXIS 94252 (D. N.J. Nov. 19, 2008).

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New Jersey Supreme Court

Abbott v. Burke
In a proceeding challenging the constitutionality of the School Funding Reform Act of 2008 (SFRA) the court found that the matter could not be resolved on the record before the court. The matter was remanded to a trial court judge, sitting as a special master, to conduct a plenary hearing

to develop a full record that addressed the issues raised by the parties. Defendants' burden would be to prove that SFRA's funding formula provided sufficient resources to enable the Abbott districts to deliver a thorough and efficient education, as defined by the New Jersey Core Curriculum Content Standards. Plaintiffs' burden of proof would be on factual issues relating to their specific claims of inadequate school funding for the current year. Abbott v. Burke, 196 *N.J.* 544 (2008).

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New Jersey Superior Court Appellate Division

Search and Seizure
Assistant principal's search of a student's car was based on the reasonable suspicion that defendant had been selling drugs at school. The car was parked in the school parking lot and the search was narrowly focused. In light of the strong state interest in maintaining order, safety, and discipline in the school environment, neither probable cause nor a warrant was required. Drugs found pursuant to the search did not have to be suppressed. State v. Best, 403 *N.J. Super*. 428 (App. Div. 2008).

Sending-Receiving
Sending district representatives are ineligible to vote on appointment of receiving district's solicitor, because it is not expressly authorized by statute, N.J.S.A. 18A:38-8.1. Legislature intended to limit the eligibility of sending district representative to vote to those matters expressly stated in statute. Evans v. Atlantic City Bd. of Educ., 404 N.J. Super. 8 (App. Div. 2008).

TPAF
Court affirmed TPAF determination denying disability retirement benefits to teacher. Teacher deemed not totally and permanently disabled from the performance of her regular and assigned teaching duties. Teacher not disabled from teaching for other employers. Bueno v. Board of Trs., 404 N.J. Super. 119 (App. Div. 2008).

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Commissioner of Education

90-Day Rule
Case addressed the date on which teacher's cause of action accrued on his claim that he was entitled to a recall position after a 2003 RIF. The Commissioner held that his cause of action accrued on December 2006 during previous litigation, wherein he had been put on notice by the board's brief on remand for back pay that his rights could have been violated. The teacher had argued that his claim did not arise until the Commissioner's final decision on remand on the matter of his entitlement to back pay. Therefore, his December 2007 claim was dismissed as untimely filed. Ziegler, Commr. 2008: Nov. 3.

Attorneys Fees
Neither *N.J.S.A.* 18A:37-3 nor any other statute authorizes the Commissioner to award counsel fees to a school district arising out of its pursuit of disciplinary action against a student; nor may a Board withhold or threaten to withhold diplomas in order to collect discipline-related counsel fees. Licciardi, Commr 2008: December 5.

Disqualification
Substitute teacher appealed ruling that he was automatically disqualified from school employment pursuant to *N.J.S.A. 18A:6-7.1(c)* following his guilty plea to assault by auto or vessel under *N.J.S.A. 2C:12-1c(2)*.

Commissioner held that a 4th degree crime of assault by auto involving drunk driving and a resulting injury cannot be deemed to approach the level of intentional crimes that are enumerated as automatic disqualifiers. Parshelunis, Commr 2008: November 25.

No Child Left Behind
Commissioner dismissed parent's request that district place her son in the school of her choice because the school in which he was placed did not meet AYP under the No Child Left Behind Act; NCLBA contains no provision for individuals to enforce the notice, transfer or SES provisions; enforcement action is vested solely in the Secretary of Education. F.R.P., Commr 2008: December 8.

Non-renewal
Board properly exercised its right to non-renew a teacher who allegedly sexually harassed a colleague. However, Commissioner rejected board's argument that teacher failed to exhaust administrative remedies by not requesting a Donaldson hearing. Korba, Commr 2008: December 15.

Residency
Where parents had been living temporarily (for approximately 5 months) in another district in order to care for a sick relative in that district, but continued to own and maintain contacts with their district home, the children were still entitled to education in the district. M.L., Commr 2008: November 12.

Res Judicata, Entire Controversy Doctrine, Collateral Estoppel
Provisional teacher claimed that board's failure to renew his contract violated laws and regulation governing provisional teachers, and discriminated against him. Matter was dismissed as it involved the same claims or arose out of claims that were dismissed by the Commissioner in previous litigation and on appeal in Superior Court. The teacher's contrived attempts to classify his claims in different terms or to name different individuals as respondents are rejected. El Hewie, Commr 2008: November 13 (**Consolidated cases)**

School Ethics Act
Allegations that board member exerted unauthorized pressure on the board administration, the Superintendent and new board members, with regard to his spouse's application for a position within the District, were deemed admitted as board member did not appear for the hearing; SEC recommended censure for violations of N.J.S.A. 18A:12-24(b)(using position to secure unwarranted advantage); N.J.S.A. 18A:12-24(f); (using public office to secure financial gain for a member of his immediate family; N.J.S.A. 18A:12-24.1(e) (taking private action that could compromise the board); N.J.S.A.18A:12-24.1(d) (administering schools); and N.J.S.A. 18A:12-24.1(f) (using schools for personal gain); censure ordered as board member is no longer on the board. DeTolla, Commr 2008; December 11.

Sick Leave
Where the board had permitted a newly hired SBA to carry over 128 accumulated sick days from his previous public school employment but had subsequently removed the 128 days on the direction of the assistant Superintendent, the Union's challenge to the grant of 128 days is dismissed on remand as moot. Carteret Educational Ass'n, Commr 2008: November 19.

Tenure Dismissal
Commissioner found that guidance counselor may not have had a full hearing before the ALJ with respect to presentation of testimony, evidence and submission of briefs; matter was remanded for further findings as to whether guidance counselor misrepresented his credentials and improperly served as acting principal from August 25, 2003 through his removal in December 2003, as well as spreading on the record the as to why remaining charges should be dismissed or withdrawn. Clayton, Commissioner 2008: December 18.

Tenure Rights
Tenured part-time Russian teacher who also covered food classes in the absence of the regular home economics teacher, and whose Russian position was abolished, did not have a tenure right to the food services position because that home economics position required an instructional certificate with an endorsement of "Teacher of Family and Consumer Sciences" and her instructional certificate bore the vocational endorsement of Teacher of Production, Personal or Service Occupations: Food Production. Her certificate did not qualify her to teach in the Family and Consumer Science position. Suchanek, Commr 2008: November 18.

Commissioner dismissed, without prejudice, a RIF'd teacher's claim that she had rights over a non-tenured teacher to the position of permanent substitute for the in-school suspension program that was assigned to a non-tenured applicant; remanded to county superintendent for a

determination of whether position was a teaching staff position subject to the tenure laws and if so which certification is required, or whether it only required a county substitute certificate. Macchia, Commr 2008: December 5.

Commissioner ruled that board reduced the salary in violation of the tenure rights of a custodial supervisor when it transferred him from a high school to another school, as this resulted in a loss of his contractual premium of $1,850. However, the proper remedy was not to reinstate the premium indefinitely, but rather to restore the difference in salary until it is surpassed by the negotiated salary he would receive at the new school. Potocki, Commr 2008: December 8.

Tuition

Private school for the handicapped could not demonstrate that DOE wrongly concluded that the school improperly included numerous items in tuition rate over several years; with only a few exceptions, these overcharges, discovered during an audit, must be returned to the sending districts and matter remanded to OAL to calculate proper amount of reimbursement; private school was not entitled to equitable estoppel despite DOE's failure to notify the school of the improper items early enough for it to have changed its tuition practices. Archway Programs, Commr 2008: December 4. **(Consolidated cases)**

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School Ethics Commission

SEC found that board member took private action that could have compromised the board and failed to protect employees in the proper performance of their duties. SEC recommended six-month suspension due to a prior *School Ethics Act* violation. Jacobs v. Delbury, SEC, 2008: Nov. 25.

SEC found that complainant failed to prove that respondent failed to confine his board action to policymaking, planning, and appraisal where respondent provided his personal opinion of an incident involving students to a local newspaper reporter. Mota v. Belino, SEC, 2008: Dec. 16.

SEC found that complainant failed to establish that respondent took private action that could have compromised the board when she allegedly verbally assaulted a candidate who applied to fill a vacancy on the board. Sarno v. Lally, SEC 2008: Dec. 16.

SEC determined that probable cause did not exist to credit allegations that board member acted in his official capacity in a matter in which he had an interest when he appeared at the school to discuss the discipline of a student who assaulted the board member's son. Gonzalez v. Petrozelli, SEC, 2008: Dec. 16.

SEC dismissed complaint that alleged a violation of the *School Ethics Act* where respondent sent an e-mail to the superintendent that named staff members by name, questioned an employee's experience, and questioned whether a specific former employee could be re-employed in the district. Gallon v. Logan-Leach, SEC, 2008: Dec. 16.

SEC found that board member violated the *School Ethics Act* where he failed to file personal/relative and financial disclosure statements required by N.J.S.A. 18A:12-25 and 26 in a timely manner. SEC recommended reprimand where disclosure statements were filed after the Order to Show Cause issued. SEC v. Waller, SEC, 2008: Dec 16.

SEC found that board member violated the *School Ethics Act* where she failed to file personal/relative and financial disclosure statements required by N.J.S.A. 18A:12-25 and 26 in a timely manner. SEC recommended suspension until statements were filed; removal if not filed within 30 days of Commissioner's decision or censure if filed prior to Commissioner's decision. SEC v. King, SEC, 2008: Dec. 18.

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recommended reprimand where disclosure statements were filed after the Order to Show Cause issued. SEC v. Doria, SEC, 2008: Dec. 18.

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SEC found that board member violated the *School Ethics Act* where he failed to file personal/relative and financial disclosure statements required by N.J.S.A. 18A:12-25 and 26 in a timely manner. SEC recommended reprimand where disclosure statements were filed after the Order to Show Cause issued. SEC v. Taylor, SEC, 2008: Dec. 16.

SEC found that board member violated the *School Ethics Act* where she failed to file personal/relative and financial disclosure statements required by N.J.S.A. 18A:12-25 and 26 in a timely manner. SEC recommended reprimand where disclosure statements were filed after the Order to Show Cause issued. SEC v. Burich, SEC, 2008: Dec. 16.

SEC found that board member violated the *School Ethics Act* where he failed to file personal/relative and financial disclosure statements required by N.J.S.A. 18A:12-25 and 26 in a timely manner. SEC recommended suspension until statements were filed; removal if not filed within 30 days of Commissioner's decision or censure if filed prior to Commissioner's decision. SEC v. Moore, SEC, 2008: Dec. 16.

SEC found that board member violated the *School Ethics Act* where she failed to file personal/relative and financial disclosure statements required by N.J.S.A. 18A:12-25 and 26 in a timely manner. SEC recommended reprimand where disclosure statements were filed after the Order to Show Cause issued. SEC v. Belosario, SEC, 2008: Dec. 16.

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P.L. 2008 c.106 - Reduces notice that school district is required to give superintendent of schools if district determines not to reappoint. Approved 12/04/2008.

P.L. 2008 c.126 - "Grace's Law;" requires health insurers, State Health Benefits Program and NJ FamilyCare to provide coverage for hearing aids for covered persons 15 and younger. Approved 12/19/2008.

P.L. 2008, c.124 - Revises the NJ STARS and NJ STARS II Programs. Approved 12/19/2008.

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N.J.A.C. 6A:9 – Professional Licensure and Standards

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United States Supreme Court

Court denied a writ of certiorari from a Third Circuit decision holding that a local board's mailbox policy did not violate the 1st Amendment rights of a teacher whose attempted use of the mailboxes to circulate a memo was disallowed when the building principal ordered the memo removed from the mailboxes. *Policastro v. Kontogiannis*, *129 S. Ct. 46 (2008). See also, Policastro v. Kontogiannis*, No. 06-1471, 2008 U.S. App. LEXIS 1387, (3d Cir. Jan. 24, 2008).

The Supreme Court denied a writ of *certiorari* from a First Circuit decision dismissing parental petition claiming a violation of their constitutional right to freedom of religion where kindergarten, 1st, and 2nd grade students were required to participate in instruction pertaining to homosexual families. *Parker v. Hurley,* 129 *S. Ct.* 56 (2008). *See also, Parker v. Hurley,* 474 *F. Supp. 2d* 261, 263 (D. Mass. 2007).

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3rd Circuit Court of Appeals

Students

Residency Third Circuit, relying on *Somerville Bd. of Ed. v. Manville Bd. of Ed.*, 332 *N.J. Super*. 6, (App. Div. 2000), *aff'd*, 167 *N.J*. 55 (2001) determined that the children of divorced parents who share legal and physical custody may have a dual domicile for purposes of allocating the cost of their education where those parents share joint physical and legal custody of a special needs child. *Cumberland Regional Bd. of Ed. v. Freehold Regional Bd. of Ed.,* No. 07-3110, 2008 U.S. App. Lexis 20636 (3d Cir. Sept. 29, 2008).

Health and Safety Third Circuit affirmed District Court grant of summary judgment in favor of district but reversed grant of summary judgment in favor of boys' wrestling coach where coach directed plaintiff/student to scrimmage against an opponent who was 90 lbs heavier and who subsequently injured plaintiff/student. There was no evidence that the district had a policy or unofficial custom that allowed a state-created danger. *Patrick o/b/o/ Rosenberg v. Great Valley School Dist*., No. 06-4270, 2008 U.S. App. Lexis 21340, (3d Cir. Oct. 9, 2008).

Special Education The 3rd Circuit dismissed parent petition seeking to appeal a matter where the local school board was ordered to pay the expenses of a guardian *ad litem* appointed by the court to protect the interests of autistic child for lack of standing. *Muse v. Upper Darby*

School District, No. 07-4111, 2008 U.S. App. Lexis 13625, (3d Cir. June 27, 2008).

Facilities

Breach of Contract According to the terms of the contract, the surety's consent to reduce the general contractor's retainage was not required; surety did not demonstrate prejudice in the allegedly unauthorized release of funds. *Great American Insurance Co. v. Norwin Sch. Dist.,* 544 *F.3d* 299 (3d Cir. 2008).

Court determined that district was not liable to reimburse parents for supplemental compensation paid to one-to-one aide hired by board to provide related services to autistic child. *Fisher v. Stafford Twp. Bd. of Ed.,* No. 07-1981, 2008 U.S. App. Lexis 17524, (3d Cir. Aug. 14, 2008).

Teachers who topped the list of eligible candidates filed suit when lower ranked candidates were interviewed and hired. The Third Circuit found, "One alleging a property interest in a benefit protected by due process must go beyond showing an unsubstantiated expectation of the benefit . . . [h]e must, instead, have a legitimate claim of entitlement to it." Third Circuit affirmed grant of summary judgment in district's favor. Candidates did not have any existing rights and were therefore not entitled to mandamus or declaratory relief. *Hayes v. Pittsburgh Bd. of Ed.,* No. 07-2027 /2028, 279 Fed. Appx. 108 (3d Cir. May 21, 2008).

Employees

Discrimination Third Circuit affirmed grant of summary judgment in favor of school district where substitute teacher alleged discrimination when district stopped assigning her to cover classes. Substitute failed to establish that she was disabled where district administrators were unaware that she suffered from cerebral palsy. In addition, as a substitute, she did not have a property interest in any position that would entitle her to due process. *Wright v. The Dallas School Dist., 286 Fed. Appx. 775, (3d Cir. 2008).*

Parents

Discrimination Third Circuit affirmed District Court dismissal of parental complaint alleging the school district retaliated against her for asserting IDEA rights where board attorney sent a letter to a local newspaper who employed the parent, questioning the propriety of assigning the parent to report on district activities while the parent was engaged in on-going IDEA litigation with the district. Parent failed to establish a causal connection between her protected activity and the alleged retaliation. *Hesling v. Seidenberger, 286 Fed. Appx. 773, (3d Cir. 2008).*

Parents of home-schooled children filed suit against local school districts alleging that the reporting and review requirements under Pennsylvania school law violated their civil rights under the Pennsylvania Religious Freedom Protection Act. The 3rd Circuit affirmed the district court's grant of summary judgment in favor of the district. *Combs v. Homer-Center School District,* 540 *F.3d* 231, (3d Cir. 2008).

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New Jersey District Court Decisions

Special Education

Prevailing Party District Court determined that parent was prevailing party where "stay-put" emergent relief order allowed student to attend a district high school on a 30-day trial basis. *F.B., o/b/o M.B., v. East Orange Bd. of Ed.,* No. 08-1206, 2008 U.S. Dist. Lexis 75800, (D. N.J. September 30, 2008).

Attorneys Fees District Court reduced the number of hours reasonably expended by plaintiff's attorney where bills demonstrated duplicated efforts by attorney and student practitioner and to reflect the fact that work performed by a law student as part of an educational process inevitably involves an extra time expenditure that could be avoided if the work were performed by a practitioner experienced in the field. *F.B., o/b/o M.B., v. East Orange Bd. of Ed.,* No. 08-1206, 2008 U.S. Dist. Lexis 75800, (D. N.J. September 30, 2008).

FAPE District Court upheld the school district's IEP moving a disabled child into a self-contained classroom as being the least restrictive environment. District Court found that a continuation of the mainstream program would not be appropriate where that program yielded extremely poor results. A program that would continue an IEP that demonstrated minimal progress would not satisfy the IDEA mandate that the IEP confer a meaningful educational benefit. *S.K. v. Parsippany-Troy Hills Bd. of Ed.,* No. 07-4631, 2008 U.S. Dist. Lexis 80616 (D. N.J. Oct. 9, 2008).

Tuition District was not liable to reimburse parents for private placement tuition where parents failed to notify the district that they intended to enroll child in private school. *R.P. v. Ramsey Bd. of Ed.,* No. 06-5788, 2008 U.S. Dist. Lexis 70884, (D. N.J. Sept. 17, 2008).

Civil Rights

Tort Claims Act Parent of classified student alleged defamation, harassment, false light, negligence, intentional infliction of emotional distress, civil conspiracy, and retaliation for exercise of her First Amendment rights where district and private school allegedly engaged in retaliation against parent for filing a complaint with the US DOE. District Court rejected collective defendants' motion to dismiss First Amendment claims, but granted various individual defendants' motions on various claims. *R.K. v. Y.A.L.E. Schools Inc.,* No. 07-5918, 2008 U.S. Dist. Lexis 88623 (D. N.J. Oct. 30, 2008).

Religious Freedom Father contested district policy prohibiting the performance of religious songs at school-sponsored events as hostile to religion. District Court of New Jersey upheld the board's policy as having a valid secular purpose, nor did the policy convey a message of disapproval of religion where the policy stressed the objective presentation of religion within the confines of the curriculum, allowed the performance of religious music that did not focus on a particular holiday, promoted the instruction of all religious music, even holiday music, inside the classroom. Moreover, the interpretation did not foster an excessive entanglement with religion. *Stratechuk v. South Orange-*

Maplewood School District, 577 F. Supp. 2d 731 (D. N.J. 2008).

Discrimination Plaintiffs sought to restructure the state's system of classification and inclusion of disabled students, to maximize their inclusion in general education program to the maximum extent possible. District Court granted defendant school districts motions to dismiss official capacity claims as duplicative. *Gerald v. Hopewell Valley Reg'l School,* No. 06-3833, 2008 U.S. Dist. Lexis 71342 (D. N.J. Aug. 29, 2008).

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New Jersey Superior Court Appellate Division

Facilities

Breach of Contract Appellate Division determined that district's HVAC and mold claims were not barred by the 10-year statute of repose, but district's roof and HVAC claims as well as the resulting mold damage claims were barred by six-year statute of limitations. *Evesham Twp. Bd. of Ed., v. Vitetta Group,* No. A-4196-06, (N.J. App. Div. Oct. 30, 2008) (slip op.).

Appellate Division affirmed trial court decision holding that subcontractor's failure to perfect mechanic's lien against district, did not preclude subcontractor from proceeding against district under a theory of *quantum meruit* where contractor failed to pay monies due and owing subcontractor for concrete services provided in a good and workmanlike manner. *A-Tech Concrete Co. v. West Orange Public Schools,* No. A-1944-07, (N.J. App. Div. Sept. 3, 2008) (slip op.).

Procedural Approval Appellate Division rejected school district's petition asserting that the Department was required to act upon the district's amendment to a previously approved pre-development plan within 90 days. However, the court determined that the Department failed to act upon the amendment within a reasonable time. The Court remanded to the Department for further proceedings. *In the Matter of the Failure of the Commissioner of Education to Act upon a Proposed Amendment to the Long Range Facilities Plan Submitted by the Elizabeth Board of Education,* A-1942-06, (N.J. App. Div. Aug. 20, 2008) (slip op.).

Employees

Discrimination Appellate Division affirmed the trial court's dismissal of sexual harassment claims after a jury verdict of no cause. Plaintiff failed to prove hostile environment. Court also affirmed the trial court's denial

of school district's motion for attorneys fees where board failed to demonstrate that the claim was brought in bad faith. *Duncan v. Atlantic City Bd. of Ed.,* No. A-4902-05, (N.J. App. Div. Oct. 22, 2008) (slip op.).

Appellate Division affirmed summary judgment in favor of defendant employer where plaintiff failed to establish a *prima facie* case of discrimination under the LAD and failed to demonstrate pretext in response to employer's legitimate non-discriminatory basis for termination. *Martinez v. Excellent Education for Everyone,* A-6464-06, (N.J. App. Div. Oct. 20, 2008) (slip op.).

Civil Rights

Attorneys Fees Appellate Division determined that plaintiff was not a prevailing party where the Law Division found that federal court had exclusive jurisdiction over plaintiff's Open Public Records Act complaint. *J.N. v. Mt. Ephraim Bd. of Ed.,* No. A-1767-07, (N.J. App. Div. Sept. 26, 2008) (slip op.).

Due Process In two separate matters, employees were investigated by the Institutional Abuse Investigation Unit (IAIU) based on allegations of child abuse. While the IAIU determined that the allegations were unfounded, it formally reported that two employees engaged in inappropriate conduct. The Court determined that where allegations are unfounded, IAIU staff are limited to facts that have been tested for accuracy or clearly corroborated when formally expressing concern about staff member conduct. *New Jersey Department of Children and Families' Institutional Abuse Investigation Unit, Respondent, v. S.P.,* 953 *A.2d* 790, (N.J. App. Div. 2008).

Appellate Division ordered reinstatement of teacher, with back pay and emoluments, after abatement of her disability 19 years after accepting disability retirement. *Klumb v. Manalapan-Englishtown Regional High School District,* No. A-3039-05 and A-0277-06 (N.J. App. Div. July 25, 2008) (slip op.).

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Commissioner of Education

Bonds
Pursuant to *N.J.S.A.* 18A:7G-12, Commissioner ordered the issuance of $800,000 in bonds to address various health and safety issues. District had three unsuccessful bond referenda defeated by the voters. *Milford*, Commissioner 2008: October 24.

Budget
Town council did not abuse its discretion when it considered Abbott

Bordered District Aid "Rim aid" in making its determination regarding reduction of the school district's proposed base tax levy. *Hillside*, Commissioner 2008: September 19.

Certification
Staff member's duties in the new position of Supervisor of Student Personnel Services/Guidance fell within the scope of the Director of School Counseling Services endorsement, which the staff member did not possess. Board directed to take action necessary to conform its delivery of student personnel/guidance services to applicable law governing staff certification, subject to review and approval by the Acting Executive County Superintendent. *Perri*, Commissioner 2008: September 10.

Certificate of math teacher suspended for a year pursuant to *N.J.S.A*. 18A:26-10 for unprofessional conduct by failure to provide 60 days notice prior to resignation from the district. *Alpine*, Commissioner 2008: September 23.

Criminal Background Checks
P.L. 2007 *c.* 322 not intended to apply to school employment or supersede *N.J.S.A.* 18A:6-7.1 *et. seq.* *Tyson*, Commissioner 2008: October 14.

Increment Withholding
Commissioner held that salary in year following an increment withholding should be the salary the employee would have received, less the amount withheld in the previous year, absent an additional withholding or a restoration by the board. *Morris*, Commissioner, 2008: September 4.

Non-Renewal
Board's non-renewal of technology teacher upheld. Action was based on evaluations and public comment and was not arbitrary, capricious, or unreasonable. *Wallace*, Commissioner 2008: October 30.

Reduction in Force
Recall rights of tenured secretaries in a reduction in force are not governed by statute or code. Board was not required to maintain a seniority list or call back rif'd secretary when openings occurred in the school district. *Dezuzio*, Commissioner 2008: September 18.

Residency
Commissioner granted summary judgment in residency dispute. Parents ordered to remit to the board tuition in the amount of $ 38,252.24 for the period of ineligible attendance of their two children. *Hamilton*, Commissioner 2008: September 5.

Adult student directed to pay tuition to the Board in the amount of $6,586.92 (114 days @ $57.78) for the period of her ineligible attendance. *White*, Commissioner 2008: September 10.

Sisters required to reimburse the board for tuition for the period of ineligible attendance of their children; M.J.-M to reimburse the Board for tuition in the amount of $15,392; N.J. to reimburse the Board for tuition in the amount of $7,128. *M.J-M and N.J.*, Commissioner, 2008: September 15.

Residency appeal dismissed for failure to prosecute. Board proved its entitlement to tuition reimbursement in the amount of $5,700.44. *A.P.*, Commissioner 2008: September 17.

Petitioner's children not entitled to free education as petitioner is not domiciled in the school district. Petitioner ordered to remit $ 7,550.40, representing the cost of tuition for 143 days of ineligible attendance. *A.S.*, Commissioner 2008: October 3.

Commissioner granted summary decision in residency dispute in favor of the Board. Parents ordered to remit to the Board tuition in the amount of $71,442 for the three years in which their children were ineligible for a free education in the district's schools. *Rutherford*, Commissioner 2008: October 9.

Parent found liable for tuition reimbursement in residency dispute; $12,431.08 for the period of ineligible attendance (181 days @ $68.68 per day). *O.B.*, Commissioner 2008: October 15.

Commissioner found parent liable in residency dispute. While students are currently residing in the district and are entitled to a free education, parent is directed to pay tuition to the board in the amount of $12,414 for the period of ineligible attendance. *M.B.*, Commissioner 2008: August 21.

School Ethics Act Training
Board member censured for failure to attend New Board Member Orientation in the first year of the board member's first term. Decision not to seek a second term rendered moot SEC's recommendation to remove her from the board. *Smith*, Commissioner 2008: September 11.

Board member removed for failure to attend New Board Member Orientation in the first year of the board member's first term. *Stuller*, Commissioner 2008: September 10.

Board member removed for failure to attend New Board Member Orientation in the first year of the board member's first term. *Jefferson*, Commissioner 2008: September 10.

Board member removed for failure to attend New Board Member Orientation in the first year of the board member's first term. *Lang*, Commissioner 2008: September 11.

Board member removed for failure to attend New Board Member Orientation in the first year of the board member's first term. *Hintz*, Commissioner 2008: September 11.

Board member suspended for failure to attend New Board Member Orientation in the first year of the board member's first term. Suspension to continue until training is completed. If training is not completed by Nov. 15, board member will be summarily removed from office. *Adornati*, Commissioner 2008: September 10.

Board member suspended for failure to attend New Board Member Orientation in the first year of the board member's first term. Suspension to continue until training is completed. If training is not completed by Nov. 15, board member will be summarily removed from office. *Ferraire*, Commissioner 2008: September10.

Board member suspended for failure to attend New Board Member Orientation in the first year of the board member's first term. Suspension to continue until training is completed. If training is not completed by Nov. 15, board member will be summarily removed from office. *White*, Commissioner 2008: September 10.

Board member suspended for failure to attend New Board Member Orientation in the first year of the board member's first term. Suspension to continue until training is completed. If training is not completed by Nov. 15, board member will be summarily removed from office. *Roethel*, Commissioner 2008: September 10.

Board member reprimanded for violation of the School Ethics Act. Board president voted to approve payments to a charter school at which he was an employee. *Stewart*, Commissioner 208: October 9.

Jurisdiction

Commissioner now hears all appeals from State Board of Examiners decisions. Appeal dismissed for failure to perfect in a timely manner. *Tedesco*, Commissioner 2008: September 8

Student Discipline

Charge that student used force against another student in locker room incident sustained. Penalty of one-day suspension deemed excessive under the circumstances of the incident. One-day suspension reduced to written reprimand. *L.L.*, Commissioner 2008: October 15

Tenure Dismissal

Tenured elementary school teacher dismissed. Charges of inefficiency upheld. District provided assistance and a reasonable opportunity for correction during a probationary period. Teacher failed properly implement Core Curriculum Content Standards, and Board academic achievement policies. *Jones*, Commissioner 2008: September 29.

Tenure charges of conduct unbecoming a teacher upheld. Proven charges included unprofessional and offensive behavior towards students and staff including physical abuse of students with disabilities. *Robinson*, Commissioner 2008: October 3.

Parent sought removal of teacher who allegedly struck and injured his

son during a field trip. Board investigation concluded that incident was an accident. Matter moot, given that board determined that no action was necessary. *G.J.*, Commissioner 2008: October 22.

Tenure charges of conduct unbecoming and allegations of improper touching dismissed against tenured school social worker; student witness was not credible and no corroborating evidence was presented. *Pitts*, Commissioner 2008: October 27.

Tenure charges of conduct unbecoming related to alleged sexual abuse upheld. *N.J.S.A.* 18A:6-7a did not preclude the Board from bringing tenure charges predicated upon the same allegations, notwithstanding IAIU determination that charges were unfounded. *Young*, Commissioner 2008: August 18.

In challenge to board's refusal to certify tenure charges brought by football coach against principal, Commissioner remanded case to board and ordered board to make proper discretionary decision within next 45 days. *Galante*, Commissioner 2008: August 21

Settlement remanded for further clarification. Failed to meet the *Cardonick* standard. *Kittrels*, Commissioner 2008: August 26

Tenure Entitlements
Board violated the tenure rights of a tenured basic skills teacher who served under her elementary endorsement, when it eliminated her basic skills instructor position, terminated her employment and continued to employ non-tenured elementary school teachers. Taibi, Commissioner 2008: September 24.

Staff member did not acquire tenure as Director of Student Services as she did not hold the appropriate certificate for that unrecognized title and therefore the board's action transferring her to Supervisor of Student Personnel Services/Guidance, a newly created recognized supervisory position did not violate her rights; however, her duties in the new position fell within the scope of the Director of School Counseling Services endorsement, which the staff member did not possess. Board directed to take action necessary to conform its delivery of student personnel/guidance services to applicable law governing staff certification, subject to review and approval by the Acting Executive County Superintendent. *Perri*, Commissioner 2008: September 10.

Workers' Compensation
Commissioner does not accept petitions invoking *N.J.S.A.* 18A:30-2.1 until a determination has been made by the Workers' Compensation Court (WC Court) that the subject injury was received in the line of duty, or a settlement has been reached in the WC Court by the parties without a determination of work-related causation, or a determination has been made that the claim constitutes an exception to the rule that the Commissioner defer jurisdiction until the WC Court makes its findings. *Chomsky*, Commissioner 2008: September 8.

Employee deemed not entitled to reimbursement of sick leave or sick leave injury benefits under *N.J.S.A.* 18A:30-2.1. Employee failed to prove injury was work related and failed to raise claim for lost wages in the Workers Comp court. *Ford*, Commissioner 2008: August 21.

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School Ethics Commission

SEC determined that board member's Open Public Records Act request did not violate the *Code of Ethics for Board Members*, did not compromise the board, and did not violate board member's duty to confine his actions to policy making, planning, and appraisal. *Noll v. Mott*, SEC, 2008: Sept. 23.

SEC determined, in matter involving the interviewing of candidates for and the hiring of a principal, that no evidence existed that the respondents failed to recognize that authority rests with the Board or that the respondents made personal promises or took private action that may have compromised the Board. Petitioner failed to prove that board members had "ex parte" conversation with employee about executive session discussions. *Madden and Scarpa*, SEC 2008: October 27.

SEC determined that board member violated the code of conduct and the code of ethics for school board members when he participated in several discussions regarding the employment of his spouse at a higher salary. SEC recommended the penalty of reprimand. *DeTolla*, SEC, 2008: October 27.

SEC determined that board member violated the Code of Ethics for School Board Members by attending a sensitive negotiations meeting outside the direct authority of the board, by becoming directly involved in activities that were the responsibility of school personnel, and by engaging staff in insulting and combative dialogue. SEC recommended the penalty of censure. *Matthews*, SEC, 2008: October 27.

SEC determined that board member violated the Code of Ethics for School Board members with respect to administering the schools through correspondence regarding the senior prank issue, as well as taking private action that could compromise the board through that correspondence. By his actions and the correspondence, the board member failed to support the principal and superintendent in the performance of their duties and by sending the correspondence solely to the board, acted other than at meetings because he disagreed with the superintendent's handling of the matter. His actions were in an area in which he had a conflict of interest in that the high school principal supervised his spouse. SEC recommended a six-month suspension. *Smith*, SEC, 2008: October 27.

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New Legislation

P.L.2008, c.70 (A1671) - Permits parent of twins or higher order multiples enrolled in public school to select shared or separate classroom placement of their children. Approved 9/2/08.

P.L.2008, c.83 (A844) - Allows certain local public entities to enter into contracts of up to 15 years for energy conservation or provision of renewable energy production at buildings owned by such entities. Approved 9/10/08.

P.L.2008, c.89 (S1962) Makes changes to PERS and TPAF concerning retirement age, eligibility, purchase of service credit; makes various changes to SHBP administration; merges Washington and Lincoln holidays for State employees in Presidents Day. Approved 9/29/08.

P.L.2008, c.93 (S1913) Increases the power of judges of compensation and provides them with the necessary tools to enforce workers' compensation law against insurers, employers, or attorneys who fail to comply with a judge's orders or deadlines. Approved 10/8/08.

P.L.2008, c.94 (S1914) - Strengthens enforcement against employers for failure to provide workers' compensation coverage. Employers who fail to provide workers' compensation will be subject to enhanced administrative and criminal penalties. Approved 10/8/08.

P.L.2008, c.95 (S1915) - Ensures that all eligible workers are covered by their employers by requiring employers to submit proof of workers' compensation coverage on their annual reports filed with the

Department of Treasury. Approved 10/8/08.

P.L.2008, c.96 (S1916) -Ensures that Workers' Compensation cases involving emergent medical issues are heard in a timely manner and that treatment and compensation is delivered when it is needed. As a result, claims involving a worker who is denied medical treatment will be prioritized when a doctor certifies that immediate care is needed. Approved 10/8/08.

P.L.2008, c.97 (S1917) - Revises membership of Compensation Rating and Inspection Bureau and clarifies its authority. Public representation on the governing board is expanded by three members representing labor, business and the general public. Approved 10/8/08.

SCR39 - Proposes constitutional amendment to require voter approval when the State borrows money by issuing State independent authority bonds backed by annual appropriations.

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40 N.J.R. 5509(a) Family Leave Insurance Benefits, proposes amendments and new rules throughout *N.J.A.C*. 12:15 and 12:17, and new chapter at *N.J.A.C*. 12:21, entitled "Family Leave Insurance Benefits." The proposed amendments and new rules would implement the Temporary Disability Benefits Law. Proposed October 6, 2008.

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Proposed Regulations

N.J.A.C. 6A:23A - Final Draft Regulations - Phase II, Accountability, (final draft 11/17/2008).

N.J.A.C. 6A:30, Evaluation of the Performance of School Districts.

Proposed October 6, 2008. As the Commissioner has provided a 60-day comment period in this notice of proposal, this notice is exempted from the rulemaking calendar requirement, pursuant to N.J.A.C. 1:30-3.3(a)5.

N.J.A.C. 17:1-1 through 15, Treasury General, Division of Pensions and Benefits; Proposed Sept 2, 2008. A 60-day comment period is provided for this notice of proposal; therefore, pursuant to *N.J.A.C.* 1:30-3.3(a)5, this notice of proposal is not subject to the provisions of *N.J.A.C.* 1:30-3.1 and 3.2 governing rulemaking calendars.

N.J.A.C. 6A:9 Professional Licensure and Standards. Proposed September 2, 2008. As the Department has provided a 60-day comment period in this notice of proposal, this notice is excepted from the rulemaking calendar requirement, pursuant to *N.J.A.C*. 1:30-3.3(a)5.

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3rd Circuit Court of Appeals

Due Process

Third Circuit affirmed District Court's order that the Child Online Protection Act ("COPA") facially violated the First and Fifth Amendments of the Constitution as it was not narrowly tailored to serve the Government's compelling interest in preventing minors from being exposed to harmful material on the Web, was not the least restrictive means available to effect that interest, and was substantially overbroad; court permanently enjoining the Attorney General from enforcing COPA. ACLU v. Atty Gen USA, *534 F.3d 18,* 2008 U.S. App. LEXIS 15423 (3d Cir. 2008).

Home Schooling

Parents of home-schooled children failed to demonstrate that requiring compliance with the reporting and review requirements of Pennsylvania's compulsory education law constitute interference with specific sincerely-held religious beliefs in violation of Pennsylvania's Religious Freedom Protection Act. *Combs v. Homer-Center Sch. Dist.*, 540 *F.3d* 231, 2008 U.S. App. LEXIS 17835 (3d Cir. 2008).

Special Education

The Third Circuit Court of Appeals found that the district court did not err when it decided that a parent was not entitled to reimbursement of amounts she spent to supplement salaries the Board paid aides who worked with her child. The parent did not challenge the child's IEP during the period she made those payments and her claim that the aides would have resigned if she had not supplemented compensation they received from the Board was pure speculation. *Fisher v. Stafford Twp. Bd. of Ed.*, No. 07-1891, 2008 U.S. App. Lexis 17524, (3d Cir. Aug. 14, 2008).

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New Jersey District Court Decisions

Students - Discrimination
District court denied defendants' motions for reconsideration of partial summary judgment (except as to municipality) in matter brought by parent against municipal and school district defendants for alleged discrimination and violation of parent and child's civil rights by using racially derogatory terms and participating in a conspiracy in violation of the Fourteenth Amendment, the NJLAD, and other laws. *Joyce v. City of Sea Isle*, No. 04-5345, 2008 U.S. Dist. Lexis 25880 (D. N.J. March 31, 2008), motion for reconsideration, 2008 U.S. Dist. Lexis 56524 (D. N.J. July 23, 2008).

Students – Special Education
In a special education matter involving allegations that the district failed to provide an appropriate placement for their Asperser's syndrome child, the court denied cross motions for summary judgment, as there were genuine issues of material fact**.** *L.Z. v. Springfield Bd. of Ed*., 07-cv-0694, 2008 U.S. Dist. Lexis 58414 (D. N.J. July 28, 2008).

Court granted numerous *in limine* motions to exclude particular defenses and evidence in a matter brought by a mother against the National Collegiate Athletic Association, Temple University, and others alleging that her son was designated as a non-qualifier for Division I intercollegiate athletic programs on account of his high school special education curriculum, which designation discriminated against him and affected his opportunity to receive an athletic scholarship in violation of the Americans with Disabilities Act ("ADA"), Section 504 of the Rehabilitation Act, and the New Jersey Law Against Discrimination ("NJLAD"). *Bowers v. NCAA*, 563 F. Supp2d 508, 2008 U.S. Dist. LEXIS 50556 (D. N.J. 2008).

Employees - Discrimination
In matter arising out of one staff member's suspension and another's dismissal, the court granted school district's motion for summary judgment for alleged violations of free speech and due process due to false accusations; malicious prosecution; employment retaliation for "whistle-blowing activity"; violation of the NJLAD for reprisals from a "protected activity"; civil conspiracy and common law wrongful discharge. *Calabria v. State Operated Sch. Dist. for City of Paterson*, No. 06-cv-6256, 2008 U.S. Dist. LEXIS 65264, (D. N.J. Aug. 26, 2008).

Employees – Free Speech
In a matter involving a teacher's involuntary transfer, the District court grants judgment to the defendant school district actors on teacher's Section 1983, substantive due process and other federal claims noting that her comments about her transfer were not protected speech on matters of public concern. Court remands to state court allegations of state violations including allegations of bad faith for falsely advising the Board that RICE Notices had been provided and failing to provide timely copies of executive session minutes. *Garvey v. Barnegat Bd. of Ed*., No. 07-6134, 2008 U.S. Dist. Lexis 57603 (D. N.J. July 21, 2008).

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New Jersey Supreme Court

Conflict of Interest
A board member's pursuit of legal claims against the board over his son's special education program constituted a disqualifying conflict of interest requiring his removal from office. The board member's conduct conflicted with the law prohibiting a board member from being interested "in any contract with or claim against the board." *Sea Isle City Bd. of Ed. v. Kennedy*, 196 *N.J.* 1 (2008).

Petition for certification granted. Appellate Division previously determined that collectively negotiated agreement did not confer right to arbitrate disciplinary termination where the collectively negotiated agreement did not contain the expansive language found in *Pascack Valley Regional High School Board of Education v. Pascack Valley Regional Support Staff Association, 192 N.J. 489 (2007)*. *Mount Holly Twp. Bd. of Ed. v. Mount Holly Twp. Ed. Ass'n*., 196 *N.J.* 346, 2008 N.J. Lexis 908.

Petition for certification denied. Appellate Division previously affirmed Law Division's remand of a special education matter to the OAL for lack of jurisdiction. *D.G. v. North Plainfield Bd. of Ed*., 196 *N.J.* 364, 2008 N.J. Lexis 982.

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New Jersey Superior Court Appellate Division

Construction
The NJDOE is directed to process the board's amendment to the board's previously submitted pre-development application to change the proposed site for the construction of a new vocational-technical high school, in light of the failure and refusal of NJDOE to act on the amendment for 2 years. *In the Matter of the Failure of the Commissioner of Education to act upon a Proposed Amendment to the Long Range Facilities Plan, Elizabeth BOE*, No. A-1942-06(App. Div. Aug. 20, 2008) (slip op.).

Contract
Court affirms the trial court's dismissal of claims by property owner against NJSCC and NJEDA, that the actions of these government agencies caused the property owner to lose a long-term tenant and constituted tortious interference with contract, tortious interference with a prospective economic advantage, and a "taking" without just compensation. *RAR Development Associates v. New Jersey Schools Construction Corp.* No. A-0057-06 (App. Div. July 9, 2008) (slip op.)

Due Process
The Court finds that municipal ordinances prohibiting convicted sex offenders from living within a designated distance of schools, parks, playgrounds, and daycare centers are preempted by state law and violate the due process, *ex post facto* and double jeopardy clauses of the New Jersey Constitution. *G.H. v. Galloway Twp*, 401 *N.J. Super*. 392 (App. Div. 2008).

Court remanded to Institutional Abuse Investigation Unit (IAIU) for modification of report language expressing concern about the teachers' conduct despite conclusion that allegations of abuse/neglect were unfounded; any statement about inappropriate conduct must be supported by tested and corroborated facts. IAIU was also ordered to cease and desist its practice of requesting corrective action when its investigation results in a finding of "unfounded." *New Jersey Dept of Children and Families' Institutional Abuse Investigation Unit v. S.P.*, Docket No. A-2522-06, A-4807-06 (App. Div. Aug. 27, 2008)(slip op.).

Open Public Meetings Act

The Court agreed with the trial judge's finding that the board violated the parent's right to free speech when he tried to address the coach's conduct at a board meeting. The Court found that the trial judge did not err in letting the jury decide whether the board had silenced the parent for content-based reasons. However, the Court reversed the $70,561 tax-offset award that had been entered by the trial court to mitigate the parent's tax consequences of receiving damages of $100,000 for emotional distress, $45,850 for prejudgment interest, and $307,410 for attorney fees. *Besler v. West Windsor-Plainsboro Regional School District*, A-0137-05 (App. Div. August 25, 2008)(slip op.).

Nonrenewal

Court affirmed State Board ruling dismissing the teacher's petition alleging discriminatory nonrenewal of contract based on age and national origin, for having been untimely filed; date she got notice of nonrenewal, and not the date other teachers were rehired, started the 90-day period for filing. Charapova v. Edison Bd. of Ed., No. A-0259-07 (App. Div. July 21, 2008)(slip op.).

Pension

Court reversed TPAF determination to deny credit for period of employment with Paterson BOE to former teacher who is six months short of the ten-year service credit needed to collect an ordinary disability retirement pension; remanded to determine whether equitable relief should be ordered to include contributions for period of time after his resignation from the Paterson board during which he had been paid workers' compensation, in light of failure to provide him with the information he needed to make an informed decision to purchase prior service credits. Reed v. TPAF, No. A-1024-06, (App. Div. July 15, 2008) (slip op.).

Health benefits

In response to challenge by CWA, NJEA and others, court held that SHBP's rule increasing the cap on retiree out-of-pocket prescription drug expenditures is consistent with statutory authority governing the prescription benefit plan, and that the pilot plan as adopted is reasonable and necessary to preserve the fiscal integrity of the plan. Communication Workers v. State Health Benefits Comm'n, consolidated appeals Nos. A-0962-06, A-2767-05, A-2803-05, (App. Div. Aug. 1, 2008) (slip op.).

Students – Residency
The Court reversed and remanded a residency case for a determination of whether the child was domiciled in Bloomfield under *N.J.A.C.* 6A:22-3.1(a)(1); State Board had found that child resided in Bloomfield with her mother, although she spent a great deal of time with her grandmother in another district. M.L.P. o/b/o C.L.P. v. Bloomfield Bd. of Ed., No. A-4265-06 (App. Div. July 8, 2008)(slip op.).

Tenure
In back-to-back appeals, Court affirmed State Board ruling that a tenured teacher who had retired on disability years ago was entitled to reinstatement when she recovered from the disability; and dismissed second appeal of a Law Division order because the appeal was from an interlocutory order. Klumb v. Manalapan-Englishtown Regional, No. A-0259-07 (App. Div. July 25, 2008)(slip op.).

Torts
Court affirmed trial court's summary judgment dismissal of plaintiff's complaint that board's negligence caused her personal injury, where door closed quickly on student's finger during a fire drill. Swiecicki v. Old Bridge Bd. of Ed., No. A5471-06 (App. Div. July 1, 2008) (slip op.).

Workers Compensation
Court affirmed workers compensation judge determination that school principal's injuries were compensable under the special mission rule. Petitioner's injuries were sustained when her chair collapsed while eating breakfast in a restaurant during an out-of-state convention she was required to attend by her employer. *Johnson-Tucker v. Plainfield Bd. of Ed.*, No. A5078-06 (App. Div. July 1, 2008)(slip op.).

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State Board of Education

***P.L.* 2008, C. 36**
N.J.S.A. 18A:6-9.1 - Commissioner's determinations considered final agency action; appeals; request for relief.

Notwithstanding the provisions of any law or regulation to the contrary, on and after the effective date of this act [July 7, 2008] determinations made by the Commissioner of Education in all controversies and disputes arising under the school laws shall be considered to be final agency action under the "Administrative Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), and appeal of that action shall be directly to the

Appellate Division of the Superior Court.

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Commissioner of Education

Board Membership - Ethics
Commissioner censured board member who twice administered the schools, in violation of *N.J.S.A.* 18A:12-24.1(d), once when she spoke to the facilities coordinator about a proposed employment action concerning her cousin-in-law and a second time when she appeared at a personnel committee meeting to discuss the proposed employment action. I.M.O. Graves; Comm'r; 2008: July 10.

Commissioner censured board member who failed to confine his board action to policy making, planning, and appraisal in violation of *N.J.S.A.* 18A:12-24.1(c) when he presided over two closed session meetings where the board discussed the tenure appointment of a principal who was the immediate supervisor of the board member's wife. I.M.O Filipek, Saddle Brook Board Of Education; Comm'r: 2008: July 23.

Students

Discipline
Commissioner determined that *N.J.A.C.* 6A:16-7.2 does not bar parent from appealing a short-term suspension to the Commissioner. Matter remanded to OAL. E.T. on behalf of minor child T.T.; Comm'r; 2008: July 7.

Residency
Commissioner dismissed parent residency appeal for failure to prosecute, but remanded to OAL for evidence of *per diem* tuition rate and dates of ineligible attendance. O.B. on behalf of minor child K.C.; Comm'r; 2008: July 14.

Commissioner granted parent's residency appeal where district failed to respond. Students to remain enrolled in district at no cost. L.P. on behalf of minor children J.P. and B.P.; Comm'r; 2008: July 14.

Commissioner determined that parents who intended to move into the district were not residents for tuition purposes. K.L. and K.L. on behalf of minor children, M.L. and C.L.; Comm'r; 2008 : July 23.

Commissioner determined that district surveillance efforts credibly established parent residence as being outside the district. Parent ordered to pay $14,352 for period of ineligible attendance. N.V. on behalf of minor children N.V.V. and V.N.V.; Comm'r; 2008: July 23.

Employees

Certification
Commissioner affirmed revocation of teaching certificates. I.M.O. the Suspension of the Teaching Certificates of Jordan; Commr; 2008: Aug.

13. Examiners previously revoked certification based on conduct unbecoming stemming from Jordan's lewd conduct in a local clothing store. *See,* I.M.O. the Certificates of Jordan; Exam; 2008: Feb. 28.

Indemnification
Commissioner determined that former special education teacher was entitled to indemnification where civil charges were dismissed without admissions of liability. Lonky; Comm'r; 2008: July 7.

Tenure Dismissal
Commissioner dismissed tenured health and physical education teacher for falsifying timesheets, tardiness, failing to prepare lesson plans, and being unprepared to teach. **Ash; Commr; 2008: July 14**.

Commissioner summarily dismissed tenured teacher who failed to respond to charges of incapacity. Commissioner urged board to consider filing an application for ordinary disability retirement on respondent's behalf pursuant to *N.J.S.A.* 18A:66-39. I.M.O. Tenure Hearing of LaCross; Commr; 2008: July 14.

Commissioner determined that board failed to provide tenured teacher charged with inefficiency with a modified professional improvement plan or a 90-day remediation period and positive assistance. Commissioner criticized board's attempt to re-characterize inefficiency charges as incompetence as circumvention of adopted tenure dismissal procedures. Matter remanded for factual findings on charges not involving inefficiency. I.M.O. the Tenure Hearing of Parise; Commr; 2008: Aug. 7.

Non-Renewal
Commissioner determined that board has virtually unfettered discretion in non-renewing non-tenured employees. Non-tenured employee who claims the facts on which the board based its decision are not supported by the record must demonstrate that the facts constitute a violation of constitutional or legislatively conferred rights.

Adams; Comm'r; 2008: Aug. 13.

Procedure - 90-Day Rule
Commissioner remanded tenure acquisition matter to OAL to determine timeliness where board asserted that formal notice that teacher was not tenured was not required where sufficient information had been communicated for teacher to know that board did not consider her to be tenured. Milano; Commr; 2008: July 25.

Settlements
Commissioner rejected proposed settlement that had been signed by the director of student/staff services, because it failed to include resolution approving the settlement and failed to delegate board authority to execute the settlement to the director. J.B. and D.B., on behalf of minor children; Comm'r; 2008 July 24.

Commissioner ordered pre-school services provider to re-pay $88,500 to district; the amount by which the pre-school provider underspent its budget. Budget guidance document relied on by pre-school provider

and ALJ was not a comprehensive manual of fiscal and recordkeeping requirements, but was only a tool for budget construction purposes. Catholic Family and Community Services; Comm'r; 2008: Aug. 8.

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School Ethics Commission

Ethics Decisions
SEC found no violation of the *School Ethics Act,* where board president conducted e-mail conversation with board members based upon the board's concern with the superintendent's attendance. SEC lacked jurisdiction to determine whether a *Rice* notice should have been issued to the superintendent. *Monillas v. Gabauer, SEC, 2008: July 22*.

SEC determined that board member who wrote a letter to two local newspapers alleging that a rival candidate for board office mishandled campaign funds did not violate the Act or Code of Conduct. SEC specifically held that *A03-07* clarification applies only to letters to the editor written by board members about matters that have been before for the board for consideration. Rukenstein v. Karp, SEC, 2008: July 22.

SEC found no personal involvement that created a benefit to a board member where board attorney provided personal services to board member while in office and where she voted to appoint attorney as board solicitor. SEC departed from reasoning of previous cases, I.M.O. Huber, SEC 1997: May 27, I.M.O. Davis and Jackson, SEC: 2002: Nov. 26, I.M.O. Patterson, SEC 2003: Sept. 23, and Advisory Opinion *A03-01* that found a conflict because the board attorney might be inclined to render advice favorable to his client/board member as being unduly dependent on the prospective conduct of the attorney, a party over which the SEC had no authority. Dressel v. Speizer, SEC 2008: August 26.

SEC found that board member had a personal conflict of interest where he voted to approve payment to the charter school that employed him as a principal. SEC recommended that the Commissioner issue a reprimand against the board member. I.M.O. Stewart, Atlantic City Bd. of Ed., SEC 2008: August 26.

SEC found no probable cause to credit allegations that board member, who was also a candidate for board office, used his official position to secure unwarranted privileges or advantages in violation of *N.J.S.A.* 18A:12-24(b) where board member/candidate used the district's automated call system to remind voters to vote on election day. Discenza, v. Quist, SEC 2008 : August 26.

SEC determined to dismiss complaint as time-barred. Pursuant to *N.J.A.C.* 6A:28-6.1(b), all complaints must be filed within one year of notice of the alleged violation. Here complaint was filed more than two years after the alleged violation and all pertinent information was available at that time. I.M.O. Glascoe and Rush, State-Operated School District of Paterson City, SEC 2008: August 26.

SEC granted respondent's motion to dismiss a complaint alleging

various violations of the *School Ethics Act*. The SEC determined that allegations relating to allegedly false statements made at a public meeting and alleged policy violations were not within its jurisdiction. No evidence of a final decision from a court or administrative agency finding that respondent failed to enforce all laws, rules, and regulations of the State Board of Education, and/or court orders pertaining to schools. Demetrakis v. Kellar-Jackson, SEC 2008: August 26.

SEC determined that board member's Open Public Records Act request did not violate the *Code of Conduct for Board Members*, did not compromise the board, and did not violate board member's duty to confine his actions to policy making, planning, and appraisal. Noll v. Mott, SEC, 2008: Sept. 23.

Advisory Opinions

Decisions on Training

Commissioner accepted SEC recommendation to suspend board member until he attended required 1st year training and remove him if training has not been completed by November 15, 2008. Commissioner rejected board member's busy personal and professional schedule as reason for non-attendance. Commissioner admonished respondent for failing to honor an obligation placed upon board members by law, since such failure has resulted in unnecessary expenditure of administrative and adjudicative resources at both State and local levels. Ferrarie, Upper Saddle River Bd. of Ed., Comm'r, 2008: Sept. 10.

Commissioner adopted SEC recommendation to remove board member who failed to attend required 1st year training. I.M.O. Stuller, Washington Twp. Bd. of Ed., Comm'r, 2008: Sept. 10.

Commissioner adopted SEC recommendation to remove board trustee who failed to attend required 1st year training. SEC v. Jefferson, Comm'r, 2008: Sept. 10.

Commissioner adopted SEC recommendation to suspend board member until he attended required 1st year training and remove her if training has not been completed by November 15, 2008. Roethel, Delaware Twp. Bd. of Ed.

Commissioner accepted SEC recommendation to suspend board member until he attended required 1st year training and remove him if training has not been completed by November 15, 2008. White, Mercer County Sp. Svc. Bd. of Ed.

SEC dismissed Order to Show Cause where board trustee demonstrated that she properly attended required 1st year training despite NJSBA's notice to the SEC of her failure to attend. SEC v. Kolbaba, Greater Brunswick Charter School.

Commissioner accepted SEC recommendation to suspend board member until he attended required 1st year training and remove him if training has not been completed by November 15, 2008. Commissioner rejected board member's assertion that his suspension would impose a hardship on the board as a basis for mitigation of the penalty. I.M.O. Adornati, Helmetta Bd. of Ed.

Commissioner adopted SEC recommendation to remove board member

who failed to attend required 1st year training. I.M.O. Lange, Central Boonton Bd. of Ed.

Commissioner adopted SEC recommendation to remove board member who failed to attend required 1st year training. I.M.O. Hintz, Rocky Hill Bd. of Ed.

SEC dismissed Order to Show Cause where NJSBA records indicating failure to attend required 1st year training were in conflict. SEC v. Wyatt, Roselle Bd. of Ed.

Commissioner censured former board member who failed to attend required 1st year training. Commissioner rejected board member's rational that she did not plan to run for a second term as a defense to the violation. However, that decision rendered moot the Commissioner's removal recommendation. I.M.O. Smith, Greenwich Twp. Bd. of Ed.

Decisions on Disclosure Statements
No decisions on Disclosure Statements were published during this period.

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2. *N.J.A.C.* 6:30-1.4 – Adult Education Programs: Special Adoption. *40 N.J.R. 4834(a).*

3. *N.J.A.C. 6A:4 – Appeals: Special Adoption. 40 N.J.R. 4606(a).*

4. *N.J.A.C. 6A:23A – Fiscal Accountability, Efficiency and Budgeting Procedures. 40 N.J.R. 4610(a).*

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   N.J.A.C. 6A:13 – Programs and Practices to Support Student Development: Special Adoption. 40 N.J.R. 4229(a).

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3rd Circuit Court of Appeals

Attorney Fees
Parent attorney who represented his family in IDEA proceedings was not entitled to attorney fees. *Pardini v. Allegheny Intermediate Unit,* No. 07-1403, 2008 U.S. App. LEXIS 10196 (3d Cir. May 12, 2008).

Student and parents were erroneously awarded attorney's fees as the "prevailing party" under the IDEA as they were allowed to retain the position of the ALJ's interim award that they had already spent. No entitlement to relief on the merits. *Deptford Twp. Sch. Dist. V. H.B.,* No. 07-1185, 2008 U.S. App. LEXIS 1086, (3d Cir. May 21, 2008).

First Amendment
Court of Appeals reversed the dismissal of the employee's First Amendment retaliation claim; the employee's allegations that the employer's officials violated Pennsylvania law clearly touched on matters of public concern. The district court erred in concluding that the disruption that resulted outweighed the employee's interest in engaging in the speech. *Stump v. Richland Twp.,* No: 05-3810, 2008 U.S. App. LEXIS 10277 (3d Cir. May 13, 2008).

Indemnification
Board's insurance company was not obligated to indemnify the board for attorneys' fees awarded to an employee in employee's action against the board. Employee's claims fell squarely within types of claims that the insurance policy excluded; policy provided that insurer would not make payment in connection with such claims and indemnification of employee's attorneys' fees would constitute such a payment. *Old Bridge Twp. Bd. of Educ. v. General Star Indem. Co.,* No. 07-1261, 2008 U.S. App. LEXIS 11846, (3d Cir. May 28, 2008).

IDEA
Parent's appeal from order directing school district to pay, pursuant to All Writs Act, 28 U.S.C.S. § 1651, guardian ad litem charged with implementing and enforcing consent decree favorable to parent's son in

parent's IDEA action against district was dismissed for lack of standing because parent was not a party "aggrieved by" the order. *Muse B. v. Upper Darby Sch. Dist.*, No. 07-4111, 2008 U.S. App. LEXIS 13625 (3d Cir. June 27, 2008).

Third Circuit held that Mother's appeal challenging orders entered by a district court in her IDEA suit was denied. Mother voluntarily and willingly entered into consent decree and was bound by its terms. Magistrate acted properly in appointing guardian ad litem for autistic son. Mother's irrational and inconsistent conduct had harmed son, making it impossible to implement consent decree. *Muse B. v. Upper Darby Sch. Dist.*, No. 07-1739, 2008 U.S. App. LEXIS 13620 (3d Cir. June 27, 2008).

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Attorney Representation
Motion to disqualify school board attorney denied. *Brennan v. Elizabeth Bd. of Educ.*, No. 07-CV-00329, 2008 U.S. Dist. LEXIS 21609 (D. N.J. March 19, 2008).

IDEA
District court lacked subject matter jurisdiction to entertain guardians' claims under the IDEA, seeking injunctive relief from state education agencies and a state official for IDEA violations. Guardians failed to exhaust their administrative remedies. *D.A. v. Pleasantville Sch. Dist.*, No. 07-4341, 2008 U.S. Dist. LEXIS 49941 (D. N.J. June 30, 2008).

Student and his parents could not pursue an IDEA claim under §1983 because the IDEA was intended to supplant the §1983 claim. Student and parents could not seek money damages under the IDEA. A school district was sufficiently alleged to have violated 29 U.S.C.S. § 794(a) of the Rehabilitation Act and the NJLAD by excluding the student, who suffered from severe depression, from educational programs and services. *D.G. v. Somerset Hills Sch. Dist.*, No. 07-4578, 2008 U.S. Dist. LEXIS 32093, (D. N.J., April 18, 2008); Reconsideration denied by D.G. v. Somerset Hills Sch. Dist., 2008 U.S. Dist. LEXIS 46857 (D. N.J., June 12, 2008).

Public School Contracts Law
In a contractor's suit against a school board to recover contract balances, the school board was not allowed to join a surety as a third-party defendant. The surety was not a necessary party under Fed. R. Civ. P. 19(a), the board's motion was untimely, and granting the motion would have resulted in undue prejudice and wasted judicial resources. *D&D Assocs. v. N. Plainfield Bd. of Educ.*, No. 03-1026, 2008 U.S. Dist. LEXIS 43063 (D. N.J. June 2, 2008).

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New Jersey Supreme Court

Certification
Petition for certification granted. Leang v. Jersey City Bd. of Educ., C-1103 September Term 2007, 62,622, 2008 N.J. LEXIS 809, (N.J. June 26, 2008). Appellate Division determined that where teacher was detained against her will and transported to a crisis center for allegedly threatening to kill students and faculty, supervising teacher and principal were not immune from liability for intentional tort and 42 *U.S.C.* § 1983 claims because they both participated in the teacher's detention. The board was immune from intentional tort claims because it had no liability for the willful misconduct of employees, but could be held liable for breach of contract. *Leang v. Jersey City Bd. of Ed.*, 399 N.J. Super. 329 (App. Div. 2008)

Petition for certification denied. *Gillespie v. Dep't of Educ. State Bd. of Educ., 2008 N.J. LEXIS 557 (N.J., Apr. 17, 2008)*. The Appellate Division had determined that the Department of Education properly denied a the petition of a tenured teacher subject to tenure charges, to amend *N.J.A.C*. 6A:3-5.1(a), which permits the State district superintendent to make probable cause determinations in certain tenure proceedings; the regulation was consistent with other statutes conferring authority on State superintendent in districts under State intervention and was adopted in accordance with the Administrative Procedures Act. *Gillespie v. Department of Ed.,* 397 *N.J. Super.* 545 (App. Div. 2008).

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Charter Schools
Charter school was responsible for paying the cost of a regular course of home instruction offered to a disabled student enrolled in the charter school. Local school district was not responsible for the cost. *Golden Door Charter School v. Jersey City State Op. School District* 400 N.J. Super. 578 (App. Div. 2008) June 17, 2008.

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State Board of Education

Procedural Issues

Failure to Perfect
State Board dismissed appellant's appeal of Commissioner's dismissal where petition was filed out of time and the Commissioner determined that relaxation pursuant to *N.J.A.C.* 6A:3.1.3(i) was not warranted. Appellant's brief in support of appeal was not filed timely and the State Board determined not to accept the brief and dismissed based on counsel's long history of late filings. Lygate, St. Bd., 2008: May 21.

Parent's appeal dismissed where appellant failed to submit an original signed notice of appeal and 17 copies of the brief in support of appeal. L.T on behalf of minor child P.T., St. Bd., 2008: May 21.

Motion to supplement the record denied. Information sought to be included could have been presented at the ALJ level. No suggestion that the information was unknown at the time of the administrative hearing. Leon Varjian v. Midland Park BOE, 2008: February 20

Charter Schools

Application
State Board denied charter school's petition to supplement the record with information from another charter school whose application had been approved as immaterial. I.M.O. the Denial of the Charter School Application of the Camden Environmental Charter School, St. Bd., 2008: June 18.

State Board denied charter school's petition to supplement the record with information from another charter school whose application had been approved as immaterial. I.M.O. the Denial of the Charter School Application of the Camden Career Education Charter School, St. Bd., 2008: June 18.

State Board denied charter school's petition to supplement the record with information from another charter school whose application had been approved as immaterial. I.M.O. the Denial of the Charter School Application of the Camden Career Education Charter School, St. Bd., 2008: June 18.

State Board affirmed the Commissioner's decision for the reasons stated therein. Colon-Serrano, St. Bd., 2008: June 18. Commissioner previously determined that attendance aide had acquired tenure due to the primarily clerical nature of her duties. However aide voluntarily left that position to become a classroom aide, she had no entitlement to continued employment within the district. *See,* Colon-Serrano, Comm'r., 2008: Jan. 28.

Private Schools

Approval Status
State Board reversed decision of Commissioner denying emergent relief application by private school for the disabled. Kentwood Academy, St. Bd., 2008: June 30. Commissioner had previously revoked school's approval status.

Tenure

Seniority Rights
State Board affirmed the Commissioner's decision for the reasons stated therein. Varjian, St. Bd., 2008: May 21. (Appeal filed before Appellate Division July 7, 2008). Commissioner previously dismissed petition of appeal where tenured math teacher failed to produce evidence of discrimination in board decision not to assign him to teach honors math classes upon his return to service after treatment for lymphoma. *See,* Varjian, Comm'r., 2008: Oct. 15.

State Board affirmed Commissioner's decision for the reasons stated therein. Aiello, St. Bd., 2008: June 18. Commissioner previously determined that tenured social worker with dual certification, who provided services only under her educational services certificate, was not entitled to employment over non-tenured teachers pursuant to a RIF because social worker had never performed services under her instructional certificate. *See,* Aiello, Comm'r., 2008: March 20.

Dismissal
State Board affirmed the Commissioner's decision for the reasons stated therein. I.M.O. the Tenure Hearing of Witmer, St. Bd., 2008: May 21, Commissioner previously determined to suspend contractually tenured superintendent for six months for unbecoming conduct that involved misdirection of vacation and personal leave time, intentional deception of the board, and abusing the authority of his position as superintendent by directing his subordinates to take actions regarding the carryover of vacation days and the rollover of personal days into sick leave days for respondent's own financial benefit. *See* I.M.O. the Tenure Hearing of Witmer, Comm'r., 2007: Dec. 24.

State Board affirmed the Commissioner's decision for the reasons stated therein, expressing regret in light of teacher's 41 years of satisfactory service. I.M.O. the Tenure Hearing of Gall, St. Bd., 2008: June 18. Commissioner previously dismissed tenured teacher in an institution for the developmentally disabled who claimed self-defense after child struck teacher's chest near an implanted defibrillator. Commissioner did not credit self-defense explanation and determined that Department of Human Service's policy unequivocally prohibited hitting a student. I.M.O. Tenure Hearing of Gall, Comm'r., 2007: Dec. 26.

State Board affirms Commissioner's decision for the reasons expressed therein. Commissioner sustained tenure charge of chronic absenteeism and persistent tardiness. Respondent secretary dismissed from tenured employment. I.M.O. Tenure Hearing of Battle, St. Bd. 2008: February 20.

Students

Residency
State Board dismissed appellant-parent's motion for emergent relief as having failed to meet the standards for emergent relief pursuant to *Crowe v. De Gioia,* 90 *N.J.* 126 (1982). Z.A. on behalf of minor child J.K., St. Bd., 2008: May 22. *See also,* Z.A. on behalf of minor child J.K, Comm'r., 2008: April 23.

State Board denied motion to supplement the record in residency case. A determination by Division of Developmental Disabilities to offer and fund a placement for an individual to meet his habilitation needs has no bearing on an interpretation of the laws applicable to a determination of

the school district responsible to provide a student a free public education. A.M.S., o/b/o A.D.S. v. Margate BOE and Jackson Twp., St. Bd.2008: January 9.

Transportation
State Board affirmed Commissioner's decision for the reasons expressed therein. Commissioner found that petitioner's failed to sustain their burden of establishing, by a preponderance of the credible evidence, that the Board's determination to discontinue its practice of providing bus transportation for students who resided less than a mile from their respective schools was arbitrary, capricious, or unreasonable or an abuse of its discretion. T.F.S. and C.S., o/b/o J.R.S. v. South Brunswick BOE, St. Bd. 2008: February 20.

Ethics

Sanctions
State Board affirmed the School Ethics Commission and Commissioner's decisions for the reasons stated therein. I.M.O. the Censure of Delbury, St. Bd., 2008: June 18. The Commissioner previously adopted SEC recommendation to censure board member. Delbury, Comm'r., 2007: Dec. 6. The School Ethics Commission previously determined that board member voiced questions and concerns directly to reporters without first seeking an administrative resolution, and contacted teachers and administrators directly without going through the superintendent in violation of the School Ethics Act. Delbury, SEC, 2007: Oct. 30.

Funding

Abbott
State Board affirmed the Commissioner's decision for the reasons stated therein. Neptune Twp. Bd. of Ed., St. Bd., 2008: June 18. Commissioner decision unavailable online.

Certification

Revocation
State Board reversed the decision of the State Board of Examiners decision to revoke the teaching certificates of a teacher who provided unfair assistance to students taking the Grade Eight Proficiency Assessment. I.M.O. the Revocation of the Teaching Certificates of Karis, St. Bd., 2008: June 18. *See also,* Karis, Exam, 2008: Jan. 22.

Employment

Non-Renewal
State Board affirmed Commissioner interlocutory decision regarding scope of issues remaining in litigation. Petitioner's claim that personnel file was "papered" was not addressed in Superior Court litigation and should not be removed from consideration in these proceedings. Eisenberg v. Fort Lee BOE, St. Bd. 2008: January 9.

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Commissioner of Education

Tenure

Dismissal
Commissioner increased penalty from 70 days' salary withheld to 120 days', where the board proved only two of the nine incidents alleged: the presentation by the teacher of a birthday gift to his minor female student, and the establishment of a clandestine email account for secret communications with her. Teacher must learn the need for self-restraint, prudence and controlled behavior in his interactions with students under his charge. I.M.O. Tenure Hearing of Dennis, Comm'r., 2008: May 8.

Forfeiture of pay and suspension ordered for science teacher who on several occasions demonstrated unprofessional conduct when he failed to control his temper, displayed poor judgment, and used force against a student (although not excessively under the circumstances) in the aftermath of a student fight. Commissioner finds ALJ's recommended penalty of dismissal too harsh in light of cases decided on similar facts, and ordered forfeiture of 120 days of salary already withheld and suspension without pay for four months while teacher obtains training in anger management, which he must successfully complete as a condition of return to duty. I.M.O. Tenure Hearing of Mierzwa, Comm'r., 2008: June 23.

Commissioner determined that, contrary to the employee's assertion, tenure charges were based on drug possession and not the teacher/vice principal's arrest, indictment, and participation in PTI. Therefore, employee's underlying conduct constituted conduct unbecoming and warranted his dismissal; the fact that the conduct took place off school premises was irrelevant; however, he was entitled to back pay from the date he completed PTI until the filing of tenure charges, as well as from the 121st day after filing of charges to the Commissioner's decision. I.M.O. Tenure Hearing of Thomas, Comm'r, 2008: May 23.

Seniority Rights
Board violated supervisor's tenure rights when it eliminated his position and appointed a non-tenured person as supervisor of early childhood education. His experience working in a Philadelphia learning center for preschoolers in the 70's qualified as "experience in preschool education," and as the regulation does not provide a time frame nor require "hands-on" experience. Board ordered to provide back pay and emoluments, less income received. Savage v. Vineland Bd. of Ed, Comm'r 2008: May 23.

Acquisition
Teacher hired in temporary absence of regular English teacher under a "Leave Replacement Employment Contract" did not accrue time toward tenure for that period of service that continued after the absent teacher returned from leave, even though the replacement teacher remained teaching the same classes in the same rooms. As there were no actual vacancies in the English department there were no tenure-track positions to which she could lay claim. Giacomazzi v. South Orange-Maplewood Bd. of Ed., Comm'r. 2008: June 13.

Termination

Where teacher received a notice of intent to terminate her employment from the Superintendent of Schools in June 2007, she was never officially terminated by a majority vote of the full board as required by *N.J.S.A.* 18A:27-4, and should receive back pay until January 5 when the board voted. As it was not raised in the petition, the Commissioner declined to address ALJ's conclusion that a mid-term termination of a teacher does not require statement of reasons or hearing as with a non-renewal. Martell-Dimaio, Comm'r, 2008: May 9.

Disqualification
Teacher unsuccessfully argued that her earlier conviction for abusing her own child should not disqualify her under *N.J.S.A.* 18A:6-7.1, from serving as Parent Center Educator. The Commissioner determined that while she does not have regular contact with students, she is present in school buildings while school is in session and there is potential access to students without safeguards; therefore, current position falls under purview of statute. Chavis v. NJDOE, Comm'r 2008: May 30.

Students

Residency
Student living with grandmother in Somerville was not entitled to attend Somerville schools as an "affidavit student;" grandmother did not support child *gratis* nor was there economic hardship; tension and arguments among family members was not a legal basis to assert a claim of entitlement to attend public schools free of charge. T.H. v. Somerville, Comm'r, 2008: May 9.

Matter deemed moot in case where parent whose residency was based on a month-to-month lease, abandoned her petition of appeal challenging the authority of the Board to require her to file a monthly certification of residency to have her two children retain continuing eligibility to attend Port Republic schools. Moreover, her claim was moot because she had removed her children from the school. D.B. v. Port Republic Bd. of Ed., Comm'r 2008: June 19.

Tuition Reimbursement
Where, after ample notice, a parent failed to answer the board's petition seeking tuition reimbursement for the ineligible attendance of her children in the district's schools, the Commissioner ordered that the parent pay back tuition in the amount of $29,303.08. Hamilton Bd. of Ed. v. D.K., Comm'r 2008: June 25.

Records
Commissioner rejected former guidance counselor's claims that "case notes" he retained at the end of his employment are personal memory aids rather than student records. Pursuant to *N.J.S.A.* 18A:36-19 and *N.J.A.C.* 6A:32-2.1, the records are student records which must be returned to the Board as the counselor is no longer assigned educational responsibility for these students. Welty v. Lafayette Bd. of Ed., Comm'r, 2008: May 12.

Honor Society
Board's decision not to invite student to National Honor Society in his junior year based on a single incident of cheating, was arbitrary and capricious as no determination had ever been made that cheating occurred. Matter conducted on an expedited basis to occur prior to student's graduation, since it would be rendered moot upon graduation. C.W. and S.W. v. Butler Bd. of Ed, Comm'r 2008: June 13.

Public Schools Contracts Law
Board of trustees acted reasonably in voting to approve the settlement that resolved lawsuits filed against the charter school by two creditors to recover monies owed in connection with the construction/renovation project undertaken by the charter school foundation. Crapelli v. Red Bank Charter School, Comm'r 2008: May 15.

Private Schools
Commissioner affirmed DOE's action to revoke the approval for a private school for students with disabilities, where as a result of expansion beyond approved capacity, the facility was insufficient for enrollment and not compliant with health and safety rules. All Can Excel v. NJDOE, Comm'r 2008: May 16.

Special Education
Commissioner denied emergent relief requested by *pro se* parent of 7-year old student who was suspended for violent disruptive behavior and placed on long-term suspension with home instruction. Certain issues were mooted by board's agreement to return student to classroom and provide expedited assessments by CST, and the parent's request for lost wages and other damages are denied as outside of Commissioner's authority. Finally, parent provided no basis to grant attorney's fees. B.G. v. East Orange Bd. of Ed., Comm'r 2008: May 20.

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School Ethics Commission

Advisory Opinions
The Commission advised that a board member would violate *N.J.S.A.* 18A:12-24(b) if he were to participate in the evaluation of the Superintendent where, prior to his becoming a board member, his employment with the district was terminated as a result of a decision made by the Superintendent. SEC Advisory Opinion, **A06-08**. (June 10, 2008)

Ethical Conduct
Board member administered the schools in violation of *N.J.S.A.* 18A:12-24.1(d) when she spoke with the Facilities Coordinator regarding his recommendation to transfer and demote her cousin, and discussed her distant cousin's employment with the personnel committee at its meeting. Evidence did not establish that she used her position to secure unwarranted privileges in violation of *N.J.S.A.* 18A:12-24(b) or surrendered her independent judgment for gain of friends in violation of *N.J.S.A.* 18A:12-24.1(f). Graves, Pleasantville Board of Education, SEC 2008: May 5, 2008.

CSA did not take private action that could compromise the board in violation of *N.J.S.A.* 18A:12-24.1(e) when he used school stationary for his personal use by placing his personal email address on it, as the Code of Ethics only applied to board members and not to the CSA. The Commission denied the CSA's request for sanctions as he did not demonstrate that the complaint was brought for political reasons, nor is there any information to suggest that the complaint should otherwise be

deemed frivolous. McCann v. Gass, SEC 2008: May 27.

SEC found that while a former board member did not did take private action that could compromise the board in violation of *N.J.S.A.* 18A:12-24.1(e) or use the schools for the gain of friends in violation of *N.J.S.A.* 18A:12-24.1(f) as alleged, with respect to the hiring of her fiancé when she remained in the room during the interview and participated in the interviews of the other candidates, she was cautioned that should she serve as a board member in the future, she must bear in mind the restrictions of *N.J.S.A.* 18A:12-24(c) regarding personal involvement that might reasonably be expected to impair her objectivity and should follow the SEC's previous findings regarding recusal. McCann v. Harris, SEC 2008: May 27

SEC dismissed complaint against board member took private action that could compromise the board in violation of *N.J.S.A.* 18A:12-24.1(e) and failed to provide accurate information in violation of *N.J.S.A.* 18A:12-24.1(g). Neither testimony nor evidence showed that she purported to represent the board or provided inaccurate information when she wrote a letter to the editor with her opinions indicating that she was board president, or when she appeared at a meeting of the PTO and answered questions. Dressel v. Kolupanowich, SEC 2008: June 24.

Board member did not take private action that may compromise the board in violation of *N.J.S.A.* 18A:12-24.1(e) or fail to provide accurate information in violation of *N.J.S.A.* 18A:12-24.1(g) when he wrote a letter to the newspaper containing personal attacks on, and his personal opinions about, a community activist. The SEC ruled that the letter was private action without sufficient nexus to a potential for compromising the work of the board; however the SEC cautioned board members that they should not express their *personal* opinions while using the designation of "board member" unless the member also states that the letter is not authorized by the board. Further, any inaccuracies were attributable to the member only in his role as a private citizen and not as a Board member, and were more an opinion, rather than a formal statement. "Inaccurate information" under *N.J.S.A.* 18A:12-24.1(g) must be more than a personal opinion. Benson v. Gearity, SEC 2008: June 24.

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New Jersey Government Records Council

GRC determined that complainant O'Shea was a prevailing party in that the complaint brought about a change in the custodian's conduct. Matter referred to OAL for a determination of reasonable attorneys' fees. O'Shea, GRC, 2008: April 30.

GRC determined that the Custodian of records shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of the OPRA request. Such unapproved meeting minutes are exempt from disclosure as advisory, consultative, or deliberative material pursuant to *N.J.S.A.* 47:1A-1.1. Martin O'Shea v. Township of Fredon, Custodian of Record GRC Complaint No. 2007-251, Decided February 27, 2008.

GRC determined that the Custodian of Records may not charge the proposed special service charge of $2,099.41 because it is not reasonable pursuant to *N.J.S.A.* 47:1A-5.d. Of the special service charge assessed, only $973.92, for the eight (8) hours to listen to the 911 calls and the six (6) hours to export the audio files from the selected dates and convert them into a .wav format, is reasonable. Richard Rivera Complainant v. Town of Guttenberg Custodian of Record GRC Complaint No. 2006-154, Decided February 27, 2008

GRC determined that the Custodian of Records failed to establish sufficient evidence authorizing a special service charge of $31.50 to produce one (1) audiotape of a Madison BOE meeting. The Custodian failed to meet the statutory criterion allowing a custodian to charge more than the actual cost of reproduction of a record. Therefore, the Custodian is limited to charging the actual cost of the audiotape, or $1.50. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. Martin O'Shea v. Madison Public School District Custodian of Record, GRC Complaint No. 2007-185, decided February 27, 2008

The draft of the Township of Edison 2008 budget and the pre-decisional worksheets for salaries and wages used to assist the township in its budgetary decision-making process are exempt from disclosure under *N.J.S.A.* 47:1A-1.1 because they constitute advisory, consultative and deliberative material. Jane Tousman v. Township of Edison Custodian of Record Complaint No. 2007-115, Decided February 27, 2008

Because the requested executive session minutes were approved by

the governing body as of the date of the Complainant's OPRA request, the Custodian's denial of same is unlawful. OPRA does not require the governing body to approve the release of records which have been previously approved as the minutes of a public or closed governing body meeting. While redactions of closed session minutes may be required before such minutes are disclosed pursuant to OPRA, a governing body may not delay access by approving the release of such government records. Linda Janney v. Estell Manor City

Custodian of Record Complaint No. 2006-205, Decided January 30, 2008

GRC determined that the Custodian of Records shall release the requested attendance records of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 with appropriate redactions. The Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis of the redactions. George Burdick v. Franklin Township Board of Education Custodian of Record Complaint No. 2007-74, Decided January 30, 2008.

GRC determined that the Custodian of Records shall release the Township's closed session minutes regarding discussions of the Hillside school district's base budget tax levy review, dated May 17, 2006 to the Complainant with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction. Thomas O. Johnston, Esq. (on behalf of the Hillside Board of Education) v. Township of Hillside Custodian of Records GRC Complaint No. 2006-202, Decided January 30, 2008.

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New Legislation

P.L. 2008 c.19 (S442) - Permits student whose high school special education program requires instruction beyond four years to participate with his class in graduation ceremony and to receive certificate of attendance.

P.L. 2008 c. 36 (A45) — Eliminates role of State Board of Education in the appeal of Commissioner of Education decisions in disputes arising under the State school laws.

P.L. 2008 c.39 (A2873) — Increases EDA bonding limit for State share of school facilities projects; specifies debt service for these bonds will first be payable from revenues received from gross income tax; establishes priority categories for non-SDA district projects.

P.L. 2008 c. 25 (S1910) — Provides DOE statutory authority for State-issued high school diplomas and rulemaking authority in regard to not for profit third parties that administer General Educational Development (GED) testing.

P.L. 2008 c. 37 (A2965) - Establishes Commissioner of Education as the rule-making authority under several school district accountability statutes.

P.L. 2008 c. 21 (S2044) — Provides additional retirement benefits to certain employees of State government; limits number of employees hired thereafter to fill vacancies created.

P.L. 2008 c. 35 (A2800) — Appropriates State and federal funds for the State budget for fiscal year 2008-2009.

P.L. 2008 c. 34 (A2811) — Repeals "New Jersey-New York Clean Ocean and Shore Trust (COAST) Committee Act" and statute establishing Commission on Business Efficiency in the Public Schools.

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Commissioner Emergency Accountability Final Regulations
(07/01/2008)

40 N.J.R. 2451(a) - N.J.A.C. 6A:30 Notice of Administrative Correction, Evaluation of the Performance of School Districts

Issue date: May 19, 2008

40 N.J.R. 3618(a) - N.J.A.C. 1:6B-17 Special Hearing Rules, Department of Education Tenure Hearings Consolidation, and Predominant Interest
Proposed: February 19, 2008 at 40 N.J.R. 834(a).
Adopted: May 13, 2008.

40 N.J.R. 3747(b) - N.J.A.C. 17:9-5.3 State Health Benefits Program Local Employer Payment of Charges
Proposed: December 3, 2007 at 39 N.J.R. 5069(a).
Adopted: May 14, 2008

ENVIRONMENTAL PROTECTION
COMPLIANCE AND ENFORCEMENT

40 N.J.R. 2451(b) - Re-adoption with Amendments: N.J.A.C. 7:30, PESTICIDE CONTROL PROGRAM

Proposed: December 3, 2007 at 39 N.J.R. 5010(a).
Adopted: April 11, 2008.

40 N.J.R. 2481(a) - N.J.A.C. 14:3, BOARD OF PUBLIC UTILITIES, All Utilities
Proposed: October 1, 2007 at 39 N.J.R. 4077(b).
Adopted: April 9, 2008

40 N.J.R. 2526(a) - N.J.A.C. 14:4-2, 3, 6, and 7 and 14:8-3 and 4, BOARD OF PUBLIC UTILITIES - Energy Competition Standards, Renewable Energy and Energy Efficiency
Proposed: April 16, 2007 at 39 N.J.R. 1405(a).
Adopted: April 15, 2008

COMMISSIONER DECISIONS: APPEALS

Notice from the Commissioner's School Law Webpage:

On July 7, 2008, through enactment of P.L. 2008, c. 36, State Board of Examiner and School Ethics Commission decisions which had previously been appealable to the State Board of Education became appealable to the Commissioner of Education. In the listings contained on the Commissioner's School Law Webpage, Commissioner decisions of this type, which are separate and distinct from decisions on controversies and disputes, are followed by the rubric **(APPEAL DECISION)**.

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3rd Circuit Court of Appeals

Civil Rights

Religion

Third Circuit held that policy that prohibited faculty participation in student-initiated prayer was *de jure* and *de facto* constitutional. Additionally, the Court held that the head football coach would violate the *Establishment Clause* of the *First Amendment* by participating in student-initiated prayer. *Borden v. East Brunswick Twp. Sch. Dist.*, No. 06-3890, 2008 U.S. App. Lexis 8011 (3d Cir. April 15, 2008).

Third Circuit affirmed that portion of the District Court's decision dismissing claims of failure to accommodate a sincerely held religious belief where teacher failed to inform the charter school that a libations ceremony, conducted by the charter school, conflicted with those beliefs. Third Circuit reversed and remanded that portion of the lower court's decision that held that the proscription against discrimination did not apply to at-will or fixed termination date employees. *Wilkerson v. New Media Technology Charter School Inc.*, No. 07-1305, 2008 U.S. App. Lexis 7526, (3d Cir. April 9, 2008).

Third Circuit affirmed District Court decision that granted school district's motion for summary judgment where non-tenured provisional teacher alleged that immediate termination caused injury because the needed to complete a provisional training program in order to be properly certified. While teacher may have a breach of contract claim, he had no constitutionally protected property interest in his position. *Goodmann v. Hasbrouk Heights School District,* Nos. 06-3676 and 06-3209, 2008 U.S. App. Lexis 8683 (3d Cir. April 21, 2008).

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New Jersey District Court Decisions

Civil Rights

Discrimination
District Court dismissed parent's amended complaint alleging NJLAD, Due Process, FERPA, Negligence, Emotional Distress, IDEA, ADA, and Rehabilitation Act violations failed on various procedural grounds. *Woodruff v. Hamilton Twp. Public Schools,* No. 06-3815, 2008 U.S. Dist. Lexis 29304 (D. N.J. April 8, 2008).

District court granted partial summary judgment in favor of school district and employees who allegedly engaged in discrimination and violated parent and child's civil rights under the *Fourteenth Amendment,* the *NJLAD*, and various other state and federal claims by using racially derogatory terms and participating in a conspiracy. *Joyce v. City of Sea Isle,* No. 04-5345, 2008 U.S. Dist. Lexis 25880 (D. N.J. March 31, 2008).

Special Education
District Court held that punitive damages are not available for violations of the ADA and Rehabilitation Act; that a plaintiff may not bring *IDEA, ADA,* or *Rehabilitation Act* claims pursuant to 42 *U.S.C.* 1983; that a plaintiff's use of the IDEA due process procedures does not preclude the plaintiff's '*ADA* and *Rehabilitation Act* claims; and that plaintiff parents had produced sufficient evidence of a hostile school environment to survive defendant's *R.* 12(b)(6) motion to dismiss for failure to state a claim. *J.M. and M.M. on behalf of A.M., J.M., and M.M. v. East Greenwich Twp. B. of Ed.,* No. 07-2861, 2008 U.S. Dist. Lexis 23463 (D. N.J. March 25, 2008).

District Court determined that the IDEA does not require that a student receive special education and related services from the district in order to be eligible for tuition reimbursement where parent unilaterally placed student in a private educational placement before receiving services from the district. *J.S. and J.S. on behalf of R.S. v. South Orange-Maplewood Bd. of Ed.,* No. 06-3494, 2008 U.S. Dist. Lexis 24031 (D. N.J. March 26, 2008).

District Court held that parents are not required, under the IDEA, to accept an inadequate placement in order to demonstrate the inadequacy of that placement before they can seek tuition reimbursement. *D.L. and K.L. on behalf of J.L. v. Springfield Bd. of Ed.,* No 05-5129, 2008 U.S. Dist. Lexis 17727 (D. N.J. March 6, 2008).

Attorney's Fees
District Court ordered a witness to appear for a deposition where she had failed to appear on several prior occasions. The Court reserved its decision as to whether to award attorney's fees for the failure to appear. *Swangin v. Edison Twp. Public Schools,* No. 07-1809, 2008 U.S. Dist. Lexis 17710 (D. N.J. March 7, 2008).

Due Process
District Court determined that no fundamental right to a public education is protected under the federal constitution. However, the 14th Amendment requires a rational review of an infringement of the right to a public education granted to state residents under the state constitution. *M.G. v. Crisfield,* No. 06-CV-5099, 2008 U.S. Dist. Lexis 16953 (D. N.J. March 5, 2008)

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New Jersey Superior Court Appellate Division

Special Education
Appellate Division determined that the Commissioner lacked jurisdiction to consider an appeal of an Office of Special Education Program's final decision. *N.J.A.C.* 6A:14-9.2 specifically authorized OSEP to issue final decisions and authorized no further right of administrative appeal except motions to reconsider. *Lenape Regional High School Bd. of Ed., v. NJ Dept. of Ed., Office of Special Education Programs*, 399 *N.J. Super.* 595.

Tort Claims Act
Appellate Division determined that where teacher was detained against her will and transported to a crisis center for allegedly threatening to kill students and faculty, supervising teacher and principal were not immune from liability for intentional tort and 42 *U.S.C.* § 1983 claims because they both participated in the teacher's detention. The board was immune from intentional tort claims because it had no liability for the willful misconduct of employees, but could be held liable for breach of contract. *Leang v. Jersey City Bd. of Ed.*, No. A-5777-05 (App. Div. April 2, 2008 (as corrected April 25)) (slip op.)

Public Contracts
Appellate Division upheld decision of SCC to debar construction company for three years. SCC was not arbitrary, capricious, or unreasonable in failing to promulgate and publish its own debarment regulations, *New Jersey Schools Construction Corp. v. Arkay Construction, Inc.*, No. A-2363-06 (App. Div. April 14, 2008) (slip op.)

Civil Procedure
Appellate Division affirmed trial court dismissal of parent motion for new trial or judgment notwithstanding the verdict where trial court allowed board attorney to testify on behalf of the board, despite the fact that he was not included on the witness list, where parent introduced attorney's letter regarding the placement of parent's special education child into evidence. Parent opened the door by admitting the letter into evidence, and could not claim prejudice in attorney's testimony. *D.G. v. North Plainfield Bd. of Ed.*, No. A-3988-05 (App. Div. April 9, 2008) (slip op.).

Disability
Appellate Division affirmed award of temporary disability and medical care benefits to an employee with previously existing conditions that fell and was injured on district property. Fall aggravated the previous injury. *Illions v. Sayreville Bd. of Ed.*, No. A-3195-06 (App. Div. April 14,

2008) (slip op.).

Funding
Appellate Division affirmed and remanded State Board decision ordering Commissioner of Education to conduct a needs assessment of each district subsequent to the passage of pending legislative proposals where Commissioner had previously failed to conduct that assessment. Commissioner ordered to determine whether the *School Funding Reform Act* would provide T&E in the involved districts. *Bacon v. N.J. Dept. of Ed.*, 942 A.2d 827 (App. Div. 2008).

Open Public Records Act
Appellate Division rejected city's redacted records as being non-compliant where the city failed to explain why the redactions were authorized in law and because it did not establish a basis for its need to keep the redacted records confidential under common law. *Mason v. City of Hoboken*, No. A-3992-06 (App. Div. March 31, 2008) (slip op.).

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New Jersey Superior Court, Law/Chancery Division

Open Public Meetings Act
Law Division determined that town council's executive session discussion with potential health care insurance vendor violated the *Open Public Meetings Act* but no action was taken. Law Division enjoined the council from future violations of OPMA by discussing public contract matters in executive session where the vendor is present. *Paff v. Washington Twp. Council,* No. MER-L-2205-07 (Law Div. March 14, 2008) (slip op.).

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State Board of Education

Charter Schools
State Board granted Commissioner's motion to reply to Charter School's appeal of the denial of its application for a charter. Camden Career Education Charter , St. Bd. 2008: April 16.

State Board granted Commissioner's motion to reply to Charter School's appeal of the denial of its application for a charter. Camden Environmental Charter, St. Bd. 2008: April 16. State Board dismissed charter school's appeal of denial of application, for failure to file a brief to perfect the appeal. Rites of Passage Preparatory Charter, St. Bd. 2008: April 16.

State Board granted Commissioner's motion to reply to Charter School's appeal of the denial of its application for a charter. Trenton Education Charter School, St. Bd. 2008: April 16.

Damages
State Board affirmed Commissioner's decision (on remand from the State Board) on the issue of mitigation of damages. The Commissioner had determined that a wrongfully- terminated employee was entitled only to five years worth of salary because during the final three years of the litigation, the board had no open position within the scope of the employee's certification. Ziegler, St. Bd. 2008: March 19.

Emergency Relief
State Board denied motion of teacher seeking emergent relief in matter involving revocation of his certificate. Jordan, St. Bd. 2008: March 31.State Board affirmed Commissioner's denial of petitioner's motion for emergency relief requesting that he prevail because of extended delay in issuance of the ALJ initial decision. El-Hewie, St. Bd. 2008: April 16.

School Ethics Act
State Board affirmed SEC determination that board member threatened a member of the public with profanity at a board meeting after the citizen called for the board member's resignation, a private action that could compromise the board, in violation of *N.J.S.A*. 18A:12-24.1 (e). Any time a board member reacts in a threatening manner toward a member of the public attending a board meeting, that reaction has the potential to compromise the board. The threat was also one of the most egregious violations of the public trust that a board member could commit. State Board Rejected Commissioner' penalty of 3 months suspension and imposed SEC's recommended penalty of one year suspension. Atallo, St. Bd. 2008: March 19, stay of penalty denied, Atallo, St. Bd. 2008: April 16.

State Board granted DAG's motion to participate in board member's appeal of his censure. Censure was ordered by Commissioner on finding that board member violated the Code of Ethics for School Board Members through actions which included: voicing questions and concerns directly to reporters without first seeking an administrative resolution, and contacting teachers and administrators directly without going through the superintendent. Delbury, St. Bd. 2008: March 19.

Transportation
State Board affirmed Commissioner's determination that parents failed to demonstrate that the board's location of a bus stop was dangerous or that the board acted arbitrarily, capriciously, or unreasonably in denying parent's request to relocate the bus stop. F.P. St. Bd. 2008: March 19.

Residency
State Board affirmed Commissioner's decision that parent's temporary custody arrangement with the child's grandparents while parent was on active duty with the U.S. Army did not shift the child's residency to that of the grandparents. A.M.S. St. Bd. 2008: March 19.

Tenure Dismissal
State Board affirmed Commissioner decision that teacher is guilty of charges involving dishonesty including theft of district and personal property and conducting business during instructional time, but finds that

dismissal is too harsh a penalty given her 24 years in the district, and adopts penalty set forth by the ALJ, namely six-month suspension without pay, withholding of increments for 2 prior and 2 future years. Long, St. Bd. 2008: April 16.

State Board affirmed Commissioner's order that tenured custodian be dismissed where his behavior was more than sufficient to establish excessive and chronic absenteeism and conduct unbecoming. Moore, St. Bd. 2008: April 16

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Commissioner of Education

Procedural Issues

90-Day Rule
Commissioner determined that district failed to file a timely appeal of county superintendent's determination of residency within the 30-day period allowed by *N.J.A.C.* 6A:23-5.2(d). District's petition dismissed. North Brunswick Twp. Bd. of Ed., Commr., 2008: March 3.

Commissioner adopted Initial Decision holding that the date that non-tenured teacher received notice of non-renewal commenced the 90-day period to file an appeal and that the issue was not of such compelling public interest that that rule should be relaxed. Salazar-Linden, Commr., 2008: March 3.

Commissioner adopted and modified Initial Decision dismissing teacher's petition on the basis of timeliness. Commissioner found that the superintendent's letter of non-renewal provided proper notice instead of board ratification of an employment-related settlement agreement; the 90-day rule is not tolled by virtue of petitioning the board to offer re-employment despite the non-renewal. Additionally, the board was not required to abolish his position in order for the teacher to claim that his employment was being discontinued. Lygate, Commr., 2008: March 17.

In a tuition dispute among sending/receiving districts, the Commissioner determined that although tuition disputes are required to be presented to the county superintendent for mediation, that process does not obviate the need to protect district rights via administrative measures. Commissioner found no basis to relax the 90-day rule. Waterford Twp. Bd. of Ed., Commr., 2008: March 24.

Jurisdiction
Commissioner determined that she lacked jurisdiction over the unauthorized use of compensatory time by district administrators. Because the board relied upon New Jersey Labor and Workers Compensation Law as well as the Federal Fair Labor Standards Act to secure relief the Commissioner lacked jurisdiction. North Brunswick Twp. Bd. of Ed., Commr., 2008: March 27.

Commissioner lacked jurisdiction to determine dispute over contractual procedural due process issues. No inextricably intertwined

constitutional issues were raised nor were tenure charges filed following an increment withholding. Diaz, Commr., 2008: April 25.

Certification

Acquisition
Commissioner adopted Initial Decision denying certification as a Teacher of the Handicapped despite the fact that the candidate worked in the district for several years under an emergency certificate. Candidate's undergraduate grade-point average was below the state mandate and candidate did not complete a matriculated program of study in a state-approved post-baccalaureate college program. In addition, no single college recommended him for certification as required under current regulations. Maslin, Commr., 2008: April 14.

Students

Discipline
Commissioner adopted and modified Initial Decision that found district was not arbitrary, capricious, or unreasonable where it imposed discipline upon D.L. that limited his participation in team sports and extracurricular activities, withheld parking and lunch privileges for the school year, and included a three-day in-school suspension for his tangential participation in a fight on district property. S.L. o/b/o Minor Child D.L., Commr., 2008: March 7.

Commissioner adopted Initial Decision dismissing parent's appeal of district's decision to transfer child to alternative school as moot where parent withdrew child from the district rather than send the child to an alternative school during the pendency of the proceedings. R.W. o/b/o Minor Child A.W., Commr., 2008: March 19.

Commissioner adopted Initial Decision finding that board's disciplinary actions in suspending students and removing them from the honors program for plagiarism and unauthorized downloads was not arbitrary, capricious, or unreasonable. T.B.-M. o/b/o/ M.M., Commr., 2008: April 7.

Residency
Commissioner adopted Initial Decision finding that child was domiciled within the district for that portion of the school year where the family was homeless and moved to several different locations. Commissioner declined to issue an order allowing the child to finish out the current school year as a nonresident student due to extreme financial hardship. S.J. o/b/o Minor Child V.J., Commr., 2008: March 3.

Commissioner adopted Initial Decision determination that child was domiciled in the district with her father despite the fact that the child's mother lived in Pennsylvania and possessed a court order giving her primary physical custody. R.A.R. o/b/o Minor Child B.D.R., Commr., 2008: March 5.

Commissioner adopted and supplemented Initial Decision finding that student was domiciled with his sister within the district and that economic hardship was the basis for his transfer into the district. Sister had obtained a court order awarding joint legal and residential custody of A.R. Commissioner declined to look behind the order. M.H.-C. o/b/o

Minor Child A.R., Commr., 2008: March 12.

Commissioner dismissed parent petition of appeal of the district's residency determination for failure to prosecute. Parent ordered to pay $13,952 for period of ineligible attendance. D.B. o/b/o Minor Child A.P.G-B, Commr., 2008: March 18.

Commissioner dismissed godparent appeal of district's residency determination for failure to prosecute. Godparent ordered to pay $3,314.44 for period of ineligible attendance. C.M. o/b/o H.R.S.B., Commr., 2008: April 10.

Commissioner determined to affirm district's residency determination and refused to accept parent's justification for withholding her domicile from the district. Parent claimed that she feared for her safety due to alleged threats from former landlord. Z.A o/b/o Minor Child J.K.

Employment

Non-renewal
Commissioner determined that board actions involving non-renewal were not arbitrary, capricious, unreasonable, or discriminatory and complied with all procedural requirements. El-Hewie, Commr., 2008: April 10.

Tenure

Acquisition
Commissioner adopted Initial Decision finding that bilingual/bicultural education teachers hired with emergency certification did not acquire tenure because services provided under a temporary/emergency certification do not accrue toward tenure unless full certification is subsequently obtained in the same service endorsement. Gerber, Commr., 2008: March 14.

Commissioner determined that Supervisor of Science was not properly certified as a supervisor where she held a certificate of eligibility for principal/supervisor. A supervisor's endorsement is required for persons in positions of the position of supervisor of instruction and who do not hold the requisite higher level administrative endorsement. Absent proper certification, times served in that position would not accrue toward tenure eligibility. Nelson, Commr., 2008: April 18.

Commissioner determined that secretary gained tenure by virtue of the fact that the district entered into a settlement agreement that designated a 55-week absence as a leave of absence. Due to that designation, the secretary did not suffer a break-in-service and therefore gained tenure. Billi, Commr., 2008: April 14.

Dismissal
Commissioner dismissed tenure dismissal action as moot where tenured teacher resigned his employment after criminal charges of endangering the welfare of a child were filed and teacher entered into pre-trial intervention program. I.M.O. the Tenure Hearing of Castel, Commr., 2008: March 17.

Commissioner dismissed tenured teacher for possession of CDS

despite completion of PTI and testimony of rehabilitation. I.M.O. the Tenure Hearing of Carter-Lee, Commr., 2008: March 19.

Commissioner adopted Initial Decision upholding board determination not to certify tenure charges filed against the superintendent by the local education association. Board decision not to certify was based on credibility determinations and was not arbitrary, capricious, or unreasonable. Carteret Ed. Assn., Commr., 2008: March 31.

Commissioner dismissed tenured custodian for excessive absenteeism and abandonment of position where the custodian failed to deny the charges. I.M.O. the Tenure Hearing of Battaglia, Bergen County Special Services School District, Commr., 2008: April 2.

Reduction in Force

Commissioner adopted Initial Decision upholding RIF where tenured social worker held both educational services and instructional certifications but only provided services as a social worker under the educational services certificate was terminated through a RIF. Social worker's tenure status is limited to positions within the educational services certification and is not entitled to tenure protection in positions requiring instructional certification. Aiello, Commr., 2008: March 20.

Commissioner declined to review tenured Spanish teacher's seniority after she was reinstated following a RIF with no break-in-service. Matter rendered moot by virtue of the reinstatement with no loss of emoluments. Gambino, Commr., 208: April 23.

Salary

Increment Withholding

Commissioner adopted Initial Decision holding that board's decision to withhold tenured teacher's increment was not arbitrary, capricious, or unreasonable where several formal and informal observations indicated a lack of classroom discipline and teacher failed to utilize in-service program designed to assist teachers with classroom discipline. Gementgis, Commr., 2008: March 5.

Ethics

Board Member Authority

Commissioner adopted School Ethics Commission penalty recommendation of public censure where board member unilaterally pressured school secretary to provide résumés of candidates for employment. Board member also obtained key to an administrator's locked office in order to review additional résumés and engaged in an argument that disrupted the working environment. Polinik, Wayne Twp. Bd. of Ed., Commr., 2008: March 10.

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School Ethics Commission

Commission determined to dismiss allegations that board member administered the schools; failed to refer matters for an administrative resolution, or failed to support and protect school personnel in the proper performance of their duties where he merely questioned an administrator, albeit, in a demanding tone. Jackson, SEC, 2008: April 1.

The Commission dismissed a complaint alleging various violations of the Code of Conduct for School Board Members where board president allegedly violated the Open Public Meetings Act, by conducting "secret meetings" to discuss public matters and the School Ethics Act by voting to approve the appointment of the board member's employer as the designated depository for school funds. Sarno, SEC, 2008: April 1.

The Commission dismissed a complaint alleging that a board member surrendered her independent judgment to special interest or partisan political groups where she left a board meeting, allegedly at the request of the city council president. No evidence that this action, if in fact true, was connected to any special interest or partisan political groups. Currie, SEC, 2008: April 1.

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Election Law Enforcement Commission

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New Jersey Division on Civil Rights

No reported School Law Decisions

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New Jersey Government Records Council

Custodian inaccurately asserted that the requested student transcript

did not exist, which was unlawful denial of access. Z.T. v. Bernards Township, GRC Complaint No. 2007-262, Decided April 23, 2008.

Vague requests that require the Custodian to research federal regulations to determine whether said regulations require that a record be created, places an undue burden on the Custodian, and are not requests for identifiable government records; Custodian is not required to conduct research in response to an OPRA request. Although denial is "deemed" by Custodian's failure to respond in writing within 7 days, this was not an unlawful denial of access because the requests were invalid. Taylor v. Elizabeth Bd. of Ed., GRC Complaint No. 2007-214, Decided April 23, 2008.

OPRA contains no exemption to disclosure for records which are a part of litigation. Even where an OPRA request involves the same subject as the litigation (in this case, windmills), a requestor is still entitled to obtain the requested records. Pisauro v. Township of Longbranch, GRC Complaint No. 2007-146, Decided April 23, 2008.

The fact that the Township Attorney had not yet authorized the closed session minutes for release was not a lawful basis for a denial of access. Johnston v. Hillside, GRC Complaint No. 2006-202, Decided January 23, 2008)

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New Legislation

A873: *P.L.* 2008 *c.*17 – Extends temporary disability insurance to provide family leave benefits to employees who require a leave to care for sick family members, infants, and newly adopted children.

A690: *P.L.* 2008 *c.* 14 – Requires boards of education to allow public comment during public board meetings

S1023: *P.L.* 2008 *c.*10 – Requires alternative arrangements for students who are unable to attend tests during their regular administration due to religious observances.

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New Regulations

40 N.J.R. 2122(a) – N.J.A.C. 17:3 Teachers' Pension and Annuity Fund
Proposed: December 3, 2007 at 39 N.J.R. 5058(b).
Adopted: March 6, 2008

40 N.J.R. 1829(b) - N.J.A.C. 6A:30 Evaluation of the Performance of School Districts
Proposed: October 15, 2007 at 39 N.J.R. 4375(a).
Adopted: March 7, 2008

40 N.J.R. 1921(a) - N.J.A.C. 15:23 NJ Professional Librarian Certification
Proposed: December 17, 2007 at 39 N.J.R. 5180(a).
Adopted: March 7, 2008

40 N.J.R. 1668(a) - N.J.A.C. 11:24 Health Maintenance Organizations
Proposed: August 20, 2007 at 39 N.J.R. 3466(a).
Adopted: February 15, 2008

40 N.J.R. 1373(b) - N.J.A.C. 18:35-1.1 Gross Income Tax - Civil Union Act; Partnerships and Earned Income Tax Credit; Deductibility of Certain IRC §401(k) Contributions

Proposed: November 5, 2007 at 39 N.J.R. 4559(a).
Adopted: January 29, 2008

Proposed Regulations

40 N.J.R. 1962(a) - N.J.A.C. 8:57 Communicable Diseases

40 N.J.R. 1772(a) - N.J.A.C. 13:17-7 Credentialing Rules for Exit Polling

40 N.J.R. 1777(a) – N.J.A.C. 18:24 Sales and Use Tax

40 N.J.R. 1814(b) - N.J.A.C. 19:33 NJ Schools Development Authority

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United States Supreme Court

No School Law Opinions Were Reported During January or February 2008.

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3rd Circuit Court of Appeals

Attorney Fees

Although an employee's claims against the school district under the ADA after a work-related accident, were dismissed by the district court in their entirety on summary judgment, the district court did not abuse its discretion when it denied the district's motion for attorney fees and sanctions as the employee evidently suffered from some sort of medical condition and his claim was not wholly without foundation. The decision to award fees to a prevailing defendant is not based on "hard and fast rules" and should be made on a "case-by-case basis." *Weisberg v. Riverside Twp. Bd. of Ed.*, No. 05-4190, 2008 U.S. App. LEXIS 1057, (3d Cir. January 11, 2008).

Free Speech

The Circuit Court ruled that a school board's policy restricting the use of teacher mailboxes to school business did not violate a teacher's free speech rights, either on the policy's face or as applied to the principal's removal of a memorandum addressing a labor dispute. The policy was not unconstitutionally overbroad as it had no actual or potential chilling effect on speech, considering that the teachers used the mailboxes both before and after this incident and that the policy was intended to prevent overstuffing and the loss of business documents. Further, the Court determined that the principal removed the memorandum because it created a disruption, and not because of the policy and therefore the policy created no ongoing harm or controversy. The free speech claim became moot as the court had no authority to offer declaratory relief, the plaintiff had not sought monetary damages, and there was no meaningful alternative relief available. *Policastro v. Kontogiannis*, No. 06-1471, 2008 U.S. App. LEXIS 1387, (3d Cir. Jan. 24, 2008).

Special Education

In a matter of first impression, court rules that parents were not entitled to their counsel fees under the IDEA's fee-shifting provision where the child had never been found to need special education services because of a learning disability. Although a court had ordered placement in an

out-of-district residential treatment program while an evaluation was pending, the child was ultimately not a “child with a disability” for IDEA purposes. *D.S. v. Neptune Twp. Bd. of Ed.*, No. 05-5652, 2008 U.S. App. LEXIS 3267(3d Cir. February 14, 2008).

The Third Circuit affirmed the district’s court’s “comprehensive and excellent opinion” granting judgment for the Board of Education, and denying reimbursement to the parents for private tuition, related services, evaluations and legal fees. The Court found that the parents refused to cooperate with the Child Study Team, and that the parents did not carry their burden of establishing that the IEP in place when they enrolled the child in private school failed to provide FAPE. The Court rejected the parents’ argument that the District court had failed to recognize the child’s brain injury in its opinion below. The Court also found that the administrative law judge's former position as a public school administrator was insufficient to establish bias requiring the ALJ's recusal. *M.S v. Mullica Twp. Bd. of Ed.*, No. 07-2466, 2008 U.S. App. LEXIS 2737, (3d Cir. February 7, 2008).

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New Jersey District Court

Special Education

A Board of Education was held in contempt for failure to comply with a preliminary injunction order to provide a student with compensatory education at the rate of fifteen weekly hours of ABA-related services. The Court held that unless the board complies or is excused for factors beyond its control, the board will be assessed a fine of $250 for each day of material non-compliance. *L.J. v. Audubon Bd. of Ed.*, No. 06-5350 (JBS), 2008 U.S. Dist. LEXIS 12337, (D. N.J. Feb. 19, 2008).

Court dismissed the motion made by Plaintiffs (three minors with Down Syndrome, their parents, and several organizations) for entry of final judgment as to dismissed claims and parties or for certification for immediate appeal of the ruling below, in a class action suit alleging a systemic failure on the part of the State of New Jersey to include the students in the least restrictive environment. *Grieco v. N.J. Dep't of Ed.*, No. 06-cv-4077, 2008 U.S. Dist. LEXIS 3284, (D. N.J. Jan. 15, 2008).

Where the board appealed the ALJ’s order to immediately pay for an independent learning evaluation, and the parent moved to dismiss for the board’s failure to comply with IDEA’s statute of limitations, the Court denied the parents’ motion (without prejudice); the Court held that Congress intended for Section 1415(i)(2)(B) to be treated as a statute of limitations subject to waiver, estoppel, and equitable tolling, and not to be treated as a jurisdictional bar. *Wall Twp. Bd. of Ed. v. C.M.*, No. 07-3904, 2008 U.S. Dist. LEXIS 7350, (D. N.J. Jan. 30, 2008).

District Court ordered the school district to maintain and pay for the student’s private school placement for the duration of the proceedings arising from disputes over the student’s IEP. The Court held that because the ALJ had earlier ruled that the parents’ decision to unilaterally move the student to the Craig school was appropriate, this ruling then served to establish the student’s "current educational placement" for purposes of “stay put” during proceedings over a new IEP. Traditional concepts of exhaustion of administrative remedies for

the new IEP were inapplicable once there had been a pertinent ALJ ruling. *P.R. v. Roxbury Twp. Bd. of Ed.*, No. 07-5935, 2008 U.S. Dist. LEXIS 8638, (D. N.J. Feb. 6, 2008).

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New Jersey Supreme Court

Indemnification
Where a board employee sued the board attorney in his capacity both as board attorney and as secretary pro tem, the board attorney was not entitled to indemnification for his defense costs under *N.J.S.A.* 18A:16-6 in his capacity as board attorney, but was entitled to indemnification to extent he was sued in his capacity as secretary pro tem. *Sahli v. Woodbine Bd. of Ed.*, 193 *N.J.* 309 (2008).

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New Jersey Superior Court Appellate Division

Public Contracts
The Court affirmed a partial summary judgment in favor of the defendant subcontractor retained to perform a geotechnical evaluation on district property. In the board's action for $6 million damages resulting from a construction delay caused by the discovery of pharmaceutical waste, the Court rejected the board's arguments that 1) the subcontractor's limitation of liability clause was void as against public policy, and 2) the board was not bound by the clause because it never indicated acceptance of that provision. *North Brunswick Bd. of Ed. v. French and Parello Associates, P.A.*, No. A-5413-06T1, (App. Div. Feb. 26, 2008) (slip op.).

Tenure Charges
The Appellate Division determined that the Department of Education properly denied a the petition of a tenured teacher brought on tenure charges, to amend *N.J.A.C.* 6A:3-5.1(a), which permits the State district superintendent to make probable cause determinations in certain tenure proceedings; the regulation was consistent with other statutes conferring authority on State superintendent in districts under State intervention and was adopted in accordance with the Administrative Procedures Act. *Gillespie v. Department of Ed.*, 397 *N.J. Super.* 545 (App. Div. 2008).

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No Reported School Law Decisions

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State Board of Education

Administrative Rules
Motion to supplement the record denied. Information sought to be included could have been presented at the ALJ level. No suggestion that the information was unknown at the time of the administrative hearing. *Leon Varjian v. Midland Park Bd. of Ed.*, 2008: February 20

Residency
State Board denied motion to supplement the record in residency case. A determination by Division of Developmental Disabilities to offer and fund a placement for an individual to meet his habilitation needs has no bearing on an interpretation of the laws applicable to a determination of the school district responsible to provide a student a free public education. *A.M.S., o/b/o A.D.S.*, St. Bd.2008: January 9.

Scope of Issues
State Board affirmed Commissioner interlocutory decision regarding scope of issues remaining in litigation. Petitioner's claim that personnel file was "papered" was not addressed in Superior Court litigation and should not be removed from consideration in these proceedings. *Eisenberg*, St. Bd. 2008: January 9.

Tenure Dismissal
State Board affirmed Commissioner's decision for the reasons expressed therein. Commissioner sustained tenure charge of chronic absenteeism and persistent tardiness. Respondent secretary was dismissed from tenured employment. *IMO Tenure Hearing of Battle*, St. Bd. 2008: February 20.

Transportation
State Board affirmed Commissioner's decision for the reasons expressed therein. Commissioner found that petitioners failed to sustain their burden of establishing, by a preponderance of the credible evidence, that the Board's determination to discontinue its practice of providing bus transportation for students who resided less than a mile from their respective schools was arbitrary, capricious, or unreasonable or an abuse of its discretion. *T.F.S. and C.S.*, o/b/o J.R.S., St. Bd. 2008: February 20.

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Commissioner of Education

Certification
Commissioner suspended teaching certificate of kindergarten teacher

who failed to give 60 days notice before resigning. *I.M.O. Hemerick*, Commr., 2008: Jan. 9

Contracts
Commissioner rejected Initial Decision granting pre-school provider a renewed contract for school year 2007-08. The board's failure to comply with non-renewal requirements contained in regulations did not prevent provider from receiving notice of non-renewal. Provider's corrective action plan and budget approval did not demonstrate provider's ability and willingness to meet Abbott standards. *Toddlertown Child Care Center*, Commr., 2008: Jan. 14.

Discrimination
Commissioner determined that employee who had suffered cancer, suffered no discrimination upon his return to service by virtue of the delegation of advanced math courses he taught before being diagnosed with cancer to other instructors. Teacher was not entitled to teach the courses he wanted to teach and was at all times assigned to teach courses within his certification. *Varjian*, Commr., 2007: Oct. 15.

Ethics
Board member threatened a member of the public with profanity at as board meeting, a private action that could compromise the board, violative of N.J.S.A. 18A:12-24.1 (e). Any time a board member reacts in a threatening manner toward a member of the public attending a board meeting, it has the potential to compromise the board. The threat was also one of the most egregious violations of the public trust that a board member could commit. SEC recommended one year suspension for the board member. *Atallo*, SEC, 2007: July 24. Commissioner reduced penalty to three month suspension as being inconsistent with prior decisions and insufficiently supported. Suspension stayed pending board member's appeal to State Board. *Atallo*, Commr., 2007: Oct. 25.

Graduation/Promotion
Commissioner dismissed complaint of student who challenged board decision not to issue her diploma. Student had attained 121 credits of the 140 necessary to graduate. *Dowling*, Commr., 2008: Feb. 5.

Increment Withholding
Commissioner dismissed petition of tenured physical education teacher who asserted that the board's increment withholding was arbitrary, capricious, and unreasonable. Teacher disciplined students by making them sit on a chair in a storage closet. Teacher had been previously warned about the inappropriateness of the disciplinary procedure and had received a three-day suspension with pay. *Newsome*, Commr., 2008: Jan. 4.

Commissioner determined that increment withholding was untimely and therefore illegally reduced the 12-month assistant principal's compensation where it was imposed after the commencement of the fiscal school year but before the commencement of the academic school year. *Giorgio*, Commr., 2008: Feb 19.

NJSIAA
Commissioner determined that NJSIAA did not engage in improper rulemaking when it conducted a needs-based survey of school districts in determining whether to accredit newly formed basketball referee's association. *Central Jersey South Officials Association,* Commr., Feb. 13.

Reduction-in-Force
Commissioner dismissed appeal as moot where board first reduced tenured teacher to 60% position and then reinstated her to a full time position. Teacher suffered no loss in pay or benefits. *Price*, Commr., 2008: Jan. 24.

Salary Litigation
Commissioner determined that teacher who was medically cleared to return from unpaid leave of absence on the date that schools closed for holiday recess was not entitled to compensation during the holiday recess. Board was entitled to unilaterally extend the teacher's unpaid leave pursuant to terms of the collective bargaining agreement. *Vuksan*, Commr., 2008: Feb. 1.

Settlements
Commissioner rejected proposed settlement agreement which had been signed by the board president. Settlement documents failed to include board resolution authorizing board president to execute on behalf of the board or the signature of the board attorney who was the board's duly authorized representative in litigation. Commissioner remanded to OAL to revise the Stipulation of Agreement. *Northey-Armstrong*, Commr., 2008: Jan. 31.

Commissioner rejected proposed settlement that only offered the board's desire to avoid the cost, uncertainty, and inconvenience of litigation. Board failed to spread forth on the record a reasonably specific explanation of why such charges need no longer be pursued or why it is now in the public interest not to pursue them. *I.M.O. the Tenure Hearing of Langley,* Commr., 2008: Feb. 19.

Student Placement
Commissioner dismissed matter as moot where parents withdrew child from district after district petitioned the Commissioner to assess the child who was gifted in math and science but deficient in language arts. *Monroe Twp. Bd. of Ed.*, Commr., 2008: Feb. 5

Student Records
Commissioner adopted Initial Decision upholding board decision to deny parental request to expunge certain records from student's school file. Petition was not timely filed even if parties agreed to an extension of the 90-day rule. (See Initial Decision for discussion of OPRA and student records.) *J.G. o/b/o/ Minor Child C.G.*, Commr., 2008: Jan. 11.

Student Residency
Commissioner adopted Initial Decision finding that parent failed to prosecute her appeal of board determination of non-residency. *S.M. o/b/o/ Minor Children S.M. and Y.M.*, Commr., 2008: Jan. 11.

Commissioner granted aunt's appeal of district's non-residency determination. Child's father left child with the child's aunt after promising to return from Europe. *F.A.C.*, Commr., 2007: July 30.

Commissioner adopted Initial Decision finding that parent failed to prosecute her appeal of board determination of non-residency. *C.I.S. on behalf of minor children A.P.S. and A.S.*, Commr., 2008: Jan. 18.

Commissioner ordered parent to pay $9,443 for child's period of ineligible attendance where parent failed to prosecute her appeal. *S.T. on behalf of minor child K.T.*, Commr., 2008: Feb. 7.

Tenure Acquisition
Commissioner determined that attendance aide had acquired tenure due to the primarily clerical nature of her duties. However aide voluntarily left that position to become a classroom aide, she had no entitlement to continued employment within the district. *Colon-Serrano*, Commr., 2008: Jan. 28.

Tenure Dismissal
Commissioner dismissed tenured math teacher who failed to respond to the charges. *Howard*, Commr., 2007: Oct. 26.

Commissioner dismissed tenure charges as moot where tenured secretary resigned from her tenured employment and held no certificate issued by the N.J. Dept. of Ed. *I.M.O. the Tenure Hearing of Taussi*, Commr., 2008: Feb. 19.

Commissioner dismissed tenured custodian who failed to respond to the charges. *I.M.O. the Tenure Hearing of Buongiorno*, Commr., 2008: Jan. 24

Tuition
Commissioner determined that tuition regulations superseded private agreement between a sending and receiving district regarding tuition payments. Mountainside ordered to pay $2,980,313.90 in past due tuition. *Mountainside Bd. of Ed.*, Commr., 2008: Jan. 17.

Commissioner found that non-resident students were entitled to remain in district for the balance of the school year, without paying tuition, where the board's denial of grandparent's tuition waiver application was without a rational basis. *C.H. o/b/o Minor Grandchildren, B.M., Z.M., and G.P.*, Commr., 2008: Jan. 23.

Transportation
Parent failed to establish that bus stop was dangerous or that board's decision to deny parental request to change the location of the stop was arbitrary, capricious, or unreasonable. *F.P. on behalf of minor child K.P.*, Commr., 2007: Oct. 17.

Click here for Commissioner of Education Decisions.

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School Ethics Commission

Collective Negotiations, Bargaining and Contracts
School Ethics Commission issued *Advisory Opinion A34-07*, clarifying prior *AOA14-00*. The SEC had previously advised that board members who are conflicted from negotiating, but not conflicted from voting, may fully participate on any outstanding issues where the Memorandum of Agreement includes salary guides and total compensation. SEC clarified by indicating that if the Memorandum of Agreement does not include salary guides and/or compensation, such board members should not discuss or vote on outstanding issues.

Disclosure Statements
School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of reprimand. *Napolitani*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Napolitani*, Commr., 2008: Feb. 1.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of reprimand. *Watt*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Watt*, Commr., 2008: Feb. 1.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of reprimand. *Weeden*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Weeden*, Commr., 2008: Feb. 1.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of reprimand. *Dineen*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Dineen*, Commr., 2008: Feb. 1.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of censure. *Goetze*, SEC, 2007: Dec. 18. Commissioner modified penalty recommendation to include censure instead of suspension until statements are filed and removal if statements are not filed within 30 days. *Goetze*, Commr., 2008: Feb. 1.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of suspension until statements are filed and removal if statements are not filed within 30 days. *Peterson*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Peterson*, Commr., 2008: Feb. 1.

School Ethics Commission determined that board member violated

N.J.S.A. 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of suspension until statements are filed and removal if statements are not filed within 30 days. *Munay*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Munay*, Commr., 2008: Feb. 4.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of reprimand. *Fayter*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Fayter*, Commr., 2008: Feb. 4.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of reprimand. *Davenport*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Davenport*, Commr., 2008: Feb. 5.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of reprimand. *Osorio*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Osorio*, Commr., 2008: Feb. 5.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of censure. *Dannelly*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Dannelly*, Commr., 2008: Feb. 19.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of reprimand. *Wyatt*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Wyatt*, Commr., 2008: Feb. 6.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of reprimand. *Houck*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Houck*, Commr., 2008: Feb. 6.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of reprimand. *Joshi*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Joshi*, Commr., 2008: Feb. 7.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of reprimand. *Moxie*, SEC, 2007:

Dec. 18. Commissioner adopted penalty recommendation. *Moxie,* Commr., 2008: Feb. 7.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of reprimand. *Moros*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Moros*, Commr., 2008: Feb. 7.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of reprimand. *Arbolino*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Arbolino*, Commr., 2008: Feb. 7.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of reprimand. *Grace*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Grace*, Commr., 2008: Feb. 11.

School Ethics Commission determined that board member violated *N.J.S.A.* 18A:25 and 26 where the board member's annual personal/relative and financial disclosure statements were not filed by April 30 and recommended a penalty of reprimand. *Stivala*, SEC, 2007: Dec. 18. Commissioner adopted penalty recommendation. *Stivala*, Commr., 2008: Feb. 11.

School Ethics Commission determined that board member violated School Ethics Act when she confronted the superintendent after a board meeting and had to be restrained by other board members. The instigation of the confrontation was significantly beyond the scope of a board member's duties. Commissioner recommended censure where board member was no longer on the board at the time of decision. *Grimsley*, SEC, 2007: Jan. 22. Commissioner adopted penalty recommendation. *Grimsley*, Commr., 2008: Feb. 19.

Employment Decisions
School Ethics Commission issued Advisory Opinion A30-07 advising that a board member whose spouse was employed as a security guard could not participate in the search for or hiring of a district superintendent if the current director of education became a candidate for superintendent. Director had indirect supervision over spouse.

Click here for School Ethics Commission decisions.

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State Board of Examiners

Board of Examiners revoked elementary and handicapped certificates of teacher who pled guilty in criminal court to unauthorized use of a computer (disorderly persons offense) where ALJ also found teacher had engaged in unbecoming conduct including affording young students unfettered access to the internet, showing his class pornographic web

sites, using profanity, and engaging in violent behavior. *Grendysa*, Exam, 2008: Jan. 17.

Board of Examiners revoked elementary certificate of teacher whose breach of security procedures in administering the GEPA test removed her ability to serve as a role model for students; her decision to resign and refrain from teaching in a public school district pending the resolution of her certification hearing did not warrant the imposition of a lesser penalty. *Karis*, Exam, 2008: Jan 17.

Board of Examiners revoked elementary certificate of teacher whose violation of testing procedures in administering the NJ ASK test to affect test results removed his ability to serve as role model for students. District incurred extra expense to re-administer portions of test. *Mascuch*, Exam, 2008: Jan 17.

Board of Examiners agreed with the ALJ that the teacher/co-owner of Abbott preschool did not have knowledge or consent to improper payroll accommodation for another staff member, and affirmed dismissal of the case against her. *Natalini*, Exam, 2008: Jan 17.

Click here for Board of Examiners decisions.

New Jersey Council on Local Mandates

No Reported Education Law Decisions

Click here for New Jersey Council on Local Mandates decisions.

Election Law Enforcement Commission

No Reported Education Law Decisions.

Click here for Law Enforcement Commission decisions.

New Jersey Division on Civil Rights

No School Law Opinions were reported during January or February 2008.

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New Jersey Government Records Council

GRC determined that the Custodian of records shall not disclose the requested executive session minutes if those minutes were not approved by the governing body prior to the date of the OPRA request. Such unapproved meeting minutes are exempt from disclosure as advisory, consultative, or deliberative material pursuant to N.J.S.A. 47:1A-1.1. GRC Complaint No. 2007-251, *O'Shea*, GRC, 2008: Feb. 27.

GRC determined that the Custodian of Records may not charge the proposed special service charge of $2,099.41 because it is not reasonable pursuant to N.J.S.A. 47:1A-5.d. Of the special service charge assessed, only $973.92, for the eight (8) hours to listen to the 911 calls and the six (6) hours to export the audio files from the selected dates and convert them into a .wav format, is reasonable. GRC Complaint No. 2006-154, *Rivera*, GRC, 2008: Feb. 27.

GRC determined that the Custodian of Records failed to establish sufficient evidence authorizing a special service charge of $31.50 to produce one (1) audiotape of a Madison BOE meeting. The Custodian failed to meet the statutory criterion allowing a custodian to charge more than the actual cost of reproduction of a record. Therefore, the Custodian is limited to charging the actual cost of the audiotape, or $1.50. The Complainant has achieved "the desired result because the complaint brought about a change (voluntary or otherwise) in the custodian's conduct." Therefore, the Complainant is a prevailing party entitled to an award of a reasonable attorney's fee. GRC Complaint No. 2007-185, *O'Shea*, GRC, 2008: Feb. 27.

The draft of the Township of Edison's 2008 budget and the pre-decisional worksheets for salaries and wages used to assist the township in its budgetary decision-making process are exempt from disclosure under N.J.S.A. 47:1A-1.1 because they constitute advisory, consultative and deliberative material. Complaint No. 2007-115, *Tousman*, GRC, 2008: Feb. 27.

Because the requested executive session minutes were approved by the governing body as of the date of the Complainant's OPRA request, the Custodian's denial of same is unlawful. OPRA does not require the governing body to approve the release of records which have been previously approved as the minutes of a public or closed governing body meeting. While redactions of closed session minutes may be required before such minutes are disclosed pursuant to OPRA, a governing body may not delay access by approving the release of such government records. *Linda Janney v. Estell Manor City*

Custodian of Record Complaint No. 2006-205, Decided January 30, 2008

GRC determined that the Custodian of Records shall release the requested attendance records of all full time employees and all members of the administration at Franklin Township School for the period of July 1, 2005 to June 30, 2006 with appropriate redactions. The Custodian must provide a redaction index detailing the nature of the information redacted and the lawful basis of the redactions. GRC Complaint No. 2007-74, *Burdick*, GRC, 2008: Jan. 30.

GRC determined that the Custodian of Records shall release the Township's closed session minutes regarding discussions of the Hillside school district's base budget tax levy review, dated May 17, 2006 to the Complainant with appropriate redactions, if any, including a detailed document index explaining the lawful basis for each redaction. GRC Complaint No. 2006-202, *Johnston, (on behalf of the Hillside Board of Education)*, GRC, 2008: Jan. 30.

Click here for Government Records Council Decisions.

New Legislation

No School Law Bills were signed into law during January or February 2008.

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New Regulations

RULE ADOPTIONS

1. 40 N.J.R. 834(a) - ISSUE DATE: FEBRUARY 19, 2008

   ***N.J.A.C.* 5A:2**
   Leaves of Absence for Military Duty for and by Members of the Organized Militia

2. *40 N.J.R. 881(a)* - ISSUE DATE: FEBRUARY 19, 2008

   ***N.J.A.C*. 11:7-1.1 and 1.5**
   Adopted Amendments: N.J.A.C. 11:7-1.1, 1.2, 1.3, and 1.4

   Insurance of Municipal Bonds, Asset-Backed Securities and Consumer Debt Obligations

3. *40 N.J.R. 891(a)* - ISSUE DATE: FEBRUARY 19, 2008

   ***N.J.A.C*. 6A:9-11.12**
   Eligibility and Qualifications of Persons for Appointment as Coaches for Teams Competing in Interscholastic Competitions and Events

4. 40 N.J.R. 781(a) – Issue Date: February 4, 2008

   ***N.J.A.C.* 6A:9-13.14**
   Notice of Administrative Correction: Requirements for Educational Services Certification - School Library Media Specialist

5. 40 N.J.R. 809(b) – Issue Date: February 4, 2008

   ***N.J.A.C*. 19:32-1.2**
   Notice of Administrative Correction

   School Facilities Projects: Section 15 Grant Procedures

   Construction of Rules

RULE PROPOSALS

I. 40 N.J.R. 104(a) - ISSUE DATE: JANUARY 7, 2008

   TREASURY GENERAL
   DIVISION OF PENSIONS AND BENEFITS
   STATE HEALTH BENEFITS COMMISSION

Proposed Amendment: *N.J.A.C*. 17:9-6.10
State Health Benefits Program
Retiree Prescription Drug Plan

II. 40 N.J.R. 113(b) - ISSUE DATE: JANUARY 7, 2008

RULE ADOPTIONS
EDUCATION
STATE BOARD OF EDUCATION

Adopted Amendments: *N.J.A.C*. 6A:9
Professional Licensure and Standards

III. 40 N.J.R. 151(a) - ISSUE DATE: JANUARY 7, 2008

RULE ADOPTIONS
HEALTH AND SENIOR SERVICES
PUBLIC HEALTH SERVICES BRANCH
DIVISION OF EPIDEMIOLOGY, ENVIRONMENTAL, AND OCCUPATIONAL HEALTHCOMMUNICABLE DISEASE SERVICE
VACCINE PREVENTABLE DISEASE PROGRAM

Adopted Amendments: *N.J.A.C*. 8:57-4.5, 4.7, 4.8, 4.10, 4.11, 4.12, 4.15 and 4.16
Adopted New Rules: *N.J.A.C.* 8:57-4.18, 4.19, 4.20 and 4.24 and 8:57-4 Appendix
Communicable Diseases
Immunization of Pupils in School

IV. 40 N.J.R. 199(a) - ISSUE DATE: JANUARY 7, 2008

RULE ADOPTIONS
OTHER AGENCIES
NEW JERSEY SCHOOLS DEVELOPMENT AUTHORITY

Adopted New Rules: *N.J.A.C*. 19:32-1 through 4
School Facilities Projects: Section 15 Grant Procedures

V. VI. 40 N.J.R. 834(a)
ISSUE DATE: FEBRUARY 19, 2008
Proposed New Rules: *N.J.A.C*. 1:6B-17

1:6B-17.1 Consolidation and Predominant Interest

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United States Supreme Court

3rd Circuit Court of Appeals

New Jersey District Court

New Jersey Supreme Court

New Jersey Superior Court Appellate Division

New Jersey Superior Court Chancery Division

New Jersey Division on Civil Rights

New Jersey Governement Records Council

State Board of Education

Commissioner of Education

School Ethics Commission

State Board of Examiners

New Jersey Council on Local Mandates

Election Law Enforcement Comission

United States Supreme Court

IDEA

Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied. *O'Brien v. Valley Forge Special Educ. Servs.,* No. 06-632, 127 *S. Ct.* 976; 166 *L. Ed. 2d* 709; 2007 U.S. LEXIS 99 (2007).

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3rd Circuit Court of Appeals

Age Discrimination in Employment Act (ADEA)

District court's order granting summary judgment to the employer on the employee's ADEA claim was affirmed. No dispute that the employer never filled the position of maintenance supervisor following the employee's demotion. Employee failed to establish *prima facie* case of age discrimination. *Grove v. Admiral Peary Area Voc.-Tech. Sch.,* No. 05-5118, 2007 U.S. App. LEXIS 4188, (3d Cir. February 23, 2007).

Americans with Disabilities Act

District court committed manifest error when granting summary judgment to appellees, NCAA and two universities, in athlete's discrimination suit. Material factual disputes existed as to whether athlete was "qualified individual" for ADA and 29 U.S.C.S. § 794(a) purposes when discrimination occurred. U.S. Const. amend. XIV immunity was validly abrogated under Title II of ADA. *Bowers v. NCAA,* Nos. 05-2262, 05-2268, 05-2269 and 05-2426, 475 F.3d 524; 2007 U.S. App. LEXIS 2150 (3d Cir. 2007).

First Amendment

Teacher's conduct in accompanying a student to therapy sessions was not protected by the First Amendment against infringement by school officials because there was no intent to convey a message supporting special education nor that the teacher's interactions with the student could be understood as conveying such a message. The teacher's actions did not constitute protected activity for purposes of a retaliation claim under 29 U.S.C.S. § 794 of the Rehabilitation Act. *Montanye v. Wissahickon Sch. Dist.,* No. 05-5286, 2007 U.S. App. LEXIS 4005 (3d Cir. Feb. 22, 2007).

Labor Relations

Court affirmed district court dismissal of teacher's 42 *U.S.C.S.* §§ 1981, 1983, 1985(3), tort, and breach of collective bargaining agreement and

breach of fair representation claims against union and school district because they were time-barred. As to Title VII claims, teacher failed to show that district's proffered reason for firing him, financial improprieties, was pretextual. Teacher had filed suit three years after receiving a termination notice. *Chatterjee v. Phila. Fedn. of Teachers,* No. 05-4390, 2007 U.S. App. LEXIS 1773 (3d Cir. Jan. 24, 2007).

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New Jersey District Court

First Amendment
Plaintiff alleged that charter school demoted and terminated him based on his race and national origin and in retaliation for his complaints of racial discrimination, in violation of the First and Fourteenth Amendments. District court found that the arbitration clause in Plaintiff's employment contract did not waive his right to a judicial forum for his Section 1981 and 1983 claims. Defendants' motion to dismiss denied. *Samukai v. Emily Fisher Charter Sch. of Advanced Studies,* Civil Action No. 06-1370, 2007 U.S. Dist. LEXIS 7164 (D. N.J. Jan. 29, 2007).

IDEA
District court affirmed ALJ's decision denying claim for reimbursement to parent for payments made to aides in connection with educational program provided to her 11-year-old son. ALJ found that board had offered FAPE in accordance with the IDEA and parent failed to follow regulations regarding reimbursement. *Fisher v. Stafford Twp. Bd. of Educ.*, No. 05-2020, 2007 U.S. Dist. LEXIS 14003 (D. N.J. Feb. 27, 2007).

Board's motion to dismiss action to enforce IDEA settlement agreement for lack of subject matter jurisdiction and untimeliness denied. *W.K. v. Sea Isle City Bd. of Educ.,* No. 06-1815, 2007 U.S. Dist. LEXIS 8342 (D. N.J. Feb. 5, 2007).

District court affirmed ALJ decision that the IEP offered by the District for the 2004-2005 school year would not have provided student with a free appropriate public education. Parents were entitled to reimbursement for their unilateral placement at a private school for the 2004-2005 school year. Under stay put, district was responsible for tuition payments beginning August 2005. *Montgomery Twp. Bd. of Educ. v. S.C. ex rel. D.C.*, No. 06-398, [8, 11, 12, 13] 2007 U.S. Dist. LEXIS 6071 (D. N.J. Jan. 26, 2007).

Board's motion to dismiss granted in appeal of ALJ's dismissal of plaintiff's due process complaint regarding student suspensions. Complaint deemed insufficient for failure to allege facts related to the suspensions and failure to propose a remedial plan. *M.S.-G v. Lenape Reg'l High Dist. Bd. of Educ.*, No. 06-02847, 2007 U.S. Dist. LEXIS 5414 (D. N.J. Jan. 24, 2007).

Board's motion to dismiss granted in appeal of ALJ's decision denying plaintiffs reimbursement of costs associated with placement at private educational institution. Board had provided an IEP that would provide FAPE and a meaningful educational benefit. Plaintiffs had failed to engage in IEP process in good faith. *E.G. v. Lakeland Reg'l High Sch.*

Bd. of Educ., No. 05-3607, 2007 U.S. Dist. LEXIS 4274 (D. N.J. Jan. 22, 2007).

Negligence
Defendant's Civ. R. 7.1(i) reconsideration motion was denied. Parents sought damages for loss of companionship, arising out of intentional injuries allegedly inflicted on their child by the individual, an employee of the school district. Individual defendant failed to show that court's denial of summary judgment on parents' loss of companionship claim was contrary to clearly settled New Jersey law. Legal precedent indicated that parents could recover for loss of companionship, arising from intentional injuries inflicted on child. *H.T. v. E. Windsor Reg'l Sch. Dist.,* No. 04-1633, 2007 U.S. Dist. LEXIS 2879 (D. N.J. Jan. 12, 2007).

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New Jersey Supreme Court

Indemnification
Certification was granted in a matter holding that a contracted board attorney was not entitled to indemnification under *N.J.S.A.* 18A:16-6. *Sahli v. Woodbine Bd. of Educ*., __N.J. ___(2007), 2007 N.J. LEXIS 48.

Law Against Discrimination
The Court ruled that a school district may be held liable under the New Jersey Law Against Discrimination (LAD), N.J.S.A. 10:5-1 to -49, when students harass another student because of his perceived sexual orientation. A school district will be liable for such harassment if it knew or should have known of the harassment but failed to take reasonable remedial actions, under a modified, *Lehmann* workplace standard. The Court rejected the Title IX deliberate indifference standard. The Court recognized that the new standard requires further guidance, and directed that each case must be assessed on its facts to determine whether a school district's conduct was reasonable in its efforts to end harassment in light of the totality of the circumstances, and a jury should consider DOE regulations, model policies, and other agency guidance. In this matter, the matter was remanded to the Director of the Division of Civil Rights. *L.W. v. Toms River Regional Schools Bd. of Ed*.___ N.J. ___(2007), 2007 N.J. LEXIS 184.

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New Jersey Superior Court Appellate Division

Budgets
The Appellate Division affirmed the interpretation given by the Commissioner in its declaratory judgment, as affirmed by the State Board of Education, of the interpretation of *N.J.S.A.* 18A:22-5, which defines a necessary majority for action by the Board of School Estimate (BSE), the body that reviews the school district's budget. A BSE majority must include (i) five of the eight members of the full BSE; and (ii) four of the six BSE members appointed by the two municipalities.

The Court rejected the Township of Maplewood's position that a vote of four of the six municipal members would not constitute a majority if three of the four votes were by members from the same municipality. *Township of Maplewood v. Township of South Orange Village.* ____N.J. Super ___(App. Div. Feb. 28, 2007), 2007 N.J. Super. LEXIS 57.

Condemnation/Eminent Domain

The court affirmed the ruling below which held that a school district that condemned a Sabrett hot dog manufacturing plant to build a new school, must pay the owner, Marathon Enterprises, Inc. $2,039,265.35 in relocation reimbursement expenses, taking into account the broad remedial purposes of the State's Relocation Assistance Act of 1971. *Jersey City School District v. Marathon Enterprises, Inc*., No. A-6188-03 (App. Div. January 4, 2007).

Insurance

The Court held that State Health Benefits Commission (SHBC) could not deny coverage for medically necessary treatment for a dependent autistic child. The Program's contractual exclusion of benefits for non-restorative speech, physical and occupational therapy, did not apply because the child's medical evaluations indicated that the therapy is the only treatment modality for an autistic child. Denial of the treatment amounts to exclusion from coverage of a class of dependents, notably afflicted children, based on the nature of their mental illness, which is beyond the limits of the statutory authority of the SHBC. *In the Matter of Jacob Micheletti*, 389 *N.J. Super.* 510 (App. Div. Jan. 17, 2007).

Ninety-Day Rule

The Court affirmed the State Board of Education's holding that a petition to the Commissioner of Education was properly dismissed as untimely. The underlying matter involved employees' claim for indemnification for legal fees and costs after having been acquitted of criminal charges emanating from their concealed ownership of a building that the School District was leasing. Indemnification was not the kind of absolute statutory entitlement that is exempt from the 90-day rule. *Parlavecchio et al. v. State Operated School District of Newark*, No. A-6634-04 (App. Div. Jan. 18, 2007).

Tenure Charges

The Court affirmed the rulings of the State Board and Commissioner in concluding that a school custodian engaged in conduct unbecoming a school employee by engaging in disruptive, abusive, and insubordinate behavior that warranted his dismissal. The Court further found that where the board did not rule on the merits of the initial charges, the employee was not prejudiced by the board's re-filing of charges within a reasonable period of time, the passage of the statutory time period from the filing of the initial charges should be viewed as a dismissal without prejudice and the re-filing occurred only slightly more than one month after the elapse of forty-five days from the filing of the initial charges. *In the Matter of the Tenure Hearing of Valdes*, No. A-1337-04 (App. Div. Jan. 22, 2007).

Harassment

After careful examination of the record in light of the issues raised, the Court affirmed the involuntary dismissal for lack of evidence/merit, of

portions of an employee's complaints in several consolidated actions involving harassment/discrimination claims of intentional infliction of emotional distress, due process, age discrimination, and retaliation. *Belcher v. Bd. of Ed. of the City of Trenton School District*, No. A-11983-05 (App. Div. Jan. 22, 2007).

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State Board of Education

Tuition
Following an Appellate Division dismissal for failing to exhaust administrative remedies, State Board dismisses matter concerning tuition disallowances for failing to file a timely appeal. (Cerebral Palsy League, St.Bd. 2007: Jan. 3).

Tenure Dismissal
State Board affirmed Commissioner dismissal of appeal of tenured custodian who asserted prejudice where the second administrative law judge reviewed transcripts instead of conducting an entirely new hearing after first judge recused himself. (McCullough, St. Bd. 2007: Jan 3.) See also (McCullough, Commr. 2006: Feb. 17.)

Transportation
In dispute over duty to transport, State Board denies motion to supplement record with additional photographs. Submission of additional photographs at the current stage of the proceedings would deprive the respondent of its right of cross-examination to test the authenticity and relevance of the alleged new evidence. (T.F.S., St. Bd. 2007: Jan 3.)

Revocation of Certificates
State Board of Education reverses State Board of Examiners decision to revoke certificates of teacher who was subject of DYFS investigation for disciplining students in unorthodox ways. Neglect was not substantiated, increment was withheld, tenure charges not filed. State Board concluded revocation too harsh a penalty. (Troublefield, St. Bd. 2007:Jan. 3).

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Commissioner of Education

Tuition
Commissioner denied parent's claim for tuition reimbursement for costs associated with an out-of-district placement where parent voluntarily removed his children from the district after the board restricted his access to the children's school following the parent's allegedly threatening and intimidating behavior. (Kelly, Commr. 2007: Jan. 3).

Student Residency
Commissioner accepted in part and rejected in part Initial Decision upholding district's determination of non-residency. ALJ inappropriately relied on board attorney representations regarding the district's residency investigations conducted during the previous school year instead of considering the actual investigative report or sworn testimony. (Y.E., Commr. 2007: Jan 8).

Commissioner determined that guardian was domiciled within the regional district despite the fact that guardian did not reside within the district for approximately 18 months. Guardian never abandoned his intention to return to his home within the district. (A.P., Commr. 2007: Jan. 18).

Commissioner upheld the board's determination of non-residency where student lived with aunt as an affidavit pupil due to aunt's illness, but parent paid for expenses such as clothing and school supplies and student stayed with parent for 30 of 34 school days. (S.B., Commr. 2007: Feb. 5).

Commissioner upheld board's determination of non-residency where parent failed to contest that determination. (Clifton City, Commr. 2007: Feb. 8).

Commissioner upheld board's determination of non-residency where parent failed to contest that determination. (Buena Regional, Commr. 2007: Feb. 8).

Tenure – Acquisition
Commissioner determined that Type II districts have no authority to appoint a business manager, business manager could not therefore be found to be employed in a position that the district was not legally authorized to have and therefore, tenure rights could not attach. Veteran's tenure statute did not confer tenure upon business manager because he was employed for a fixed period. (Ruby, II, Commr., 2007: Jan 22).

Tenure – Dismissal
Commissioner dismissed tenured employee who failed to respond to the district's charges of abandonment of position. (Rothacker, Commr. 2007: Feb 1).

Certification - Acquisition
Commissioner rejected and remanded Examiners decision that denied a teacher/candidate the opportunity to seek provisional employment in a

different district following two insufficient ratings from her current district. While the Examiner's interpretation of *N.J.A.C.* 6A:9-17.18(c) and (d) was correct, the Examiner's application under the circumstances of this matter was unreasonable. (Muench, Commr. 2007: Jan. 9).

90-Day Rule – Applied
Commissioner dismissed, as untimely, petition of non-renewed teacher to relax 90-day rule where teacher had previously filed a superior court discrimination action. Teacher's school law claims were separate and distinct from discrimination claims. Moreover, transfer from court to administrative agency pursuant to *R.*1:13-4 is only appropriate where filing is made in a forum that lacks jurisdiction. Here, the court had jurisdiction over the claims that were filed. (Bradford, Commr. 2007: Feb. 14).

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School Ethics Commission

Personal Involvement
Commission declined to find probable cause that board member acted in her official capacity in a family matter in which she or member of her immediate family had a direct or indirect financial or personal involvement in violation of *N.J.S.A.* 18A:12-24(c) where board member voted to appoint her brother's attorney as board solicitor. (Stewart, SEC, 2007: Jan. 23)

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United States Supreme Court

Federal Impact Aid

Supreme Court determined that the methodology used by the Secretary of Education to identify districts that were allowed to reduce state aid to districts to offset federal aid was reasonable where the statute permitted two methods of identifying those districts. *Zuni Public School District No 89, et al. v. Department of Education et al.*, _____ U.S._____ (2007), *2007 U.S. Lexis 4335* (April 17, 2007).

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3rd Circuit Court of Appeals

Retaliation

Where the district insisted that parents execute a waiver of all federal and state claims related to parent's unilateral placement of their child in a private school that was not approved by the state, the 3rd Circuit found no retaliation because district's refusal was related to the private school's status as a non-approved school, not to the parent's exercise of a right or privilege. Lauren W., v. DeFlaminis, 480 F.3d 259 (3d Cir, 2007).

Tuition Reimbursement

3rd Circuit determined that parents of a special education student were entitled to tuition reimbursement for their unilateral placement in a private school that had not been approved by the state. *Lauren W., v. DeFlaminis*, 480 *F.3d* 259 (3d Cir, 2007).

Free Appropriate Public Education

3rd Circuit held that parent failed to demonstrate that the district student failed to progress while receiving related services from the district or that the services rendered were inadequate where parent's experts did not observe student while related services were provided. *M.S. v. Mullica Twp., Bd. of Ed.*, No. 06-533, 2007 U.S. Dist. LEXIS 26952 (D. N.J. April 12, 2007).

Civil Procedure

The Third Circuit determined that the trial court's unfavorable views of plaintiff did not originate from an extrajudicial source and therefore did not merit recusal nor was it timely where plaintiff was aware of grounds for recusal but did not act until the trial court issued an adverse ruling.

Allen v. Parkland School District, No. 06-1560, 2007 U.S. Dist. App. LEXIS 9671 (3d Cir. April 27, 2007).

Civil Rights

3rd Circuit dismissed appeal of substitute teacher who alleged that the district engaged in various civil rights violations when it determined to reduce his services to the district after the teacher filed a complaint. *Roberts v. Newark Public Schools,* No. 05-5405, 2007 U.S. Dist. App. LEXIS 9529, (3d Cir. April 25, 2007).

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New Jersey District Court

Free Appropriate Public Education

District court upheld ALJ determination that district provided FAPE two out of three years. The proper standard for determining FAPE is "significant learning and meaningful educational benefit". However, district failed to provide FAPE where it placed student in college preparatory classes without proper support. *Jackson v. Ocean City Bd. of Ed*., No. 04-2223, 2007 U.S. Dist. LEXIS 21604 (D. N.J. March 26, 2007).

Attorneys Fees

District court held that plaintiff prevailed on significant issues in the litigation which achieved some of the benefit plaintiff sought in bringing the suit, despite the fact that the plaintiff did not prevail on the "driving force" behind the proceedings. The court noted that to the extent the degree of relief is relevant, it is only relevant to the amount of the fee award, not its availability. Attorney's fees limited to the degree of success attained by plaintiff based upon a careful review of an adequately supported fee application. *J.N. v. Mt. Ephraim Bd. of Ed.*, No. 05-02520, 2007 U.S. Dist. LEXIS 21629, (D. N.J. March 26, 2007).

District court determined that plaintiff's lodestar calculation of attorney's fees was unreasonable. Court reduced excessive hours. *P.N. v. Clementon Bd. of Ed.,* No 02-1251, 2007 U.S. Dist. LEXIS 29289, (D. N.J. April 20, 2007).

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New Jersey Supreme Court

Certification

Petition for certification denied. *Gunther v. Bd. of Educ. of Howell*, 2007 N.J. LEXIS 365, Decided March 16, 2007.

OPMA

There is common law right to videotape a meeting of a public body in New Jersey, subject to reasonable restrictions. The common law right is

neither absolute nor unqualified. Public bodies may impose reasonable guidelines to ensure that the recording of meetings does not disrupt the business of the body or other citizens' right of access. However, if a public body chooses to exercise the opportunity to formulate guidelines, that decision in no way postpones the accrual of the right to videotape until guidelines are established. The borough and mayor violated the citizen's right by imposing arbitrary and unreasonable restrictions that prevented the citizen from videotaping the municipal council meeting. *Tarus v. Borough of Pine Hill,* 189 *N.J.* 497; 916 *A.2d* 1036; Decided March 7, 2007.

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New Jersey Superior Court Appellate Division

Certification
Appellate Division affirmed decision of the State Board of Education, which affirmed the determination of the State Board of Examiners revoking teacher's instructional certifications as a Teacher of Social Studies, Teacher of Elementary School, and Teacher of the Handicapped. *In the Matter of the Revocation of the Certificates of Laurie Rosen by the State Board of Examiners*, Unpublished Opinion, Dkt. No. A5306-05, Decided April 3, 2007

Discovery
A trial court abused its discretion in a discrimination suit by not granting plaintiffs' motion to extend discovery as, pursuant to R. 4:24-1(c), plaintiffs demonstrated sufficient good cause for an extension since no arbitration or trial date had been set and no prejudice was demonstrated by the non-moving party. *Leitner v. Toms River Reg'l Schs,*

Unpublished Opinion Dkt. No. A-3460-05T1, Decided April 13, 2007.

Forfeiture
Appellate Division affirmed judgment of conviction entered in the Law Division on appeal de novo on the municipal court record, *R*. 3:23-8(a), memorializing the finding that he was guilty of violating *N.J.S.A*. 2C:14-4a, lewdness graded as a disorderly persons offense. Appellate Division also affirmed the simultaneous order which provided that, as a result of the conviction, in addition to the sentence imposed, he forfeit his board of education employment. *State of New Jersey v. Stratos Mandalakis* Unpublished Opinion, Dkt. No. A1787-05, Decided April 19, 2007.

Law Against Discrimination
Appellate Division affirmed Law Division summary judgment ruling in favor of defendants, board of education, principal, and superintendent in matter of non-renewal of non-tenured teacher. After receiving notice of non-renewal teacher resigned and withdrew herself from consideration for rehire. Teacher had been out on approved medical leave and raised claims under the New Jersey Law Against Discrimination. *Michelle Stempkowski v. Brian J. Doherty, Robert Gratz and the Newton Schools/Board of Education* Unpublished Opinion, Dkt. No. A4802-05, Decided April 26, 2007.

Non-renewal
Appellate Division affirmed Law Division summary judgment ruling in favor of defendants, board of education, principal, and superintendent in matter of non-renewal of non-tenured teacher. After receiving notice of non-renewal teacher resigned and withdrew herself from consideration for rehire. Teacher had been out on approved medical leave and raised claims under the New Jersey Law Against Discrimination. *Michelle Stempkowski v. Brian J. Doherty, Robert Gratz and the Newton Schools/Board of Education* Unpublished Opinion, Dkt. No. A4802-05, Decided April 26, 2007.

OPMA
Board secretary's handwritten notes, taken during a board of education's executive session to aid her in preparing formal typed minutes of session, did not have to be disclosed under *N.J.S.A*. 47:1A-1.1 of New Jersey Open Public Records Act. The formal minutes themselves, not the secretary's handwritten notes, were the public record. The Government Records Council (GRC) had concluded that the handwritten notes were a work-in-progress, as opposed to a completed draft. Further, requiring the board secretary's preliminary handwritten notes to be deemed a government record and be disclosed would defeat the purpose of the disclosure exception for executive sessions in the New Jersey Open Public Meetings Act, and defeat the board's right to approve its minutes. *O'Shea v. Board of Educ.*, 391 *N.J. Super.* 534; 918 A.2d 735; Decided April 5, 2007.

OPRA
Board secretary's handwritten notes, taken during a board of education's executive session to aid her in preparing formal typed minutes of session, did not have to be disclosed under *N.J.S.A*. 47:1A-1.1 of New Jersey Open Public Records Act. The formal minutes themselves, not the secretary's handwritten notes, were the public record. The Government Records Council (GRC) had concluded that the handwritten notes were a work-in-progress, as opposed to a completed draft. Further, requiring the board secretary's preliminary handwritten notes to be deemed a government record and be disclosed would defeat the purpose of the disclosure exception for executive sessions in the New Jersey Open Public Meetings Act, and defeat the board's right to approve its minutes. *O'Shea v. Board of Educ.*, 391 *N.J. Super.* 534; 918 A.2d 735; Decided April 5, 2007.

Pensions
Appellate Division affirmed a final decision of the Board of Trustees of the Teachers' Pension and Annuity Fund, which affirmed an initial administrative law judge decision, concluding that petitioner industrial arts teacher was not entitled to pension credit for the $3,000 he earned annually in his position as Computer Coordinator. *Nick Chomicki v. Board of Trustees of the Teachers' Pension and Annuity Fund*, Unpublished Opinion, Dkt. No. A4371-05, Decided April 10, 2007.

Appellate Division affirmed Final Decision of the Board of Trustees of the Teachers' Pension and Annuity Fund ("TPAF") denying teacher's request to purchase service credits for time teaching for approved private schools for the disabled. *Andrea Goldberg v. Board of Trustees, Teachers' Pension and Annuity Fund.* Unpublished Decision, Dkt. No.

A4646-05, Decided March 7, 2007.

Certification
Appellate Division affirmed decision of the State Board of Education, which affirmed the determination of the State Board of Examiners revoking teacher's instructional certifications as a Teacher of Social Studies, Teacher of Elementary School, and Teacher of the Handicapped. *In the Matter of the Revocation of the Certificates of Laurie Rosen by the State Board of Examiners*, Unpublished Opinion, Dkt. No. A5306-05, Decided April 3, 2007

Tort Claims Act
Teacher's tort action against her employing school district was barred by the exclusivity provision of the Workers' Compensation Act, *N.J.S.A.* 34:15-8, since the accidental injuries she incurred due to a student-on-student fight did not fall under the intentional wrong exception as they were incurred within the context of her employment. *Kibler v. Roxbury Bd. of Educ.*, Unpublished Opinion Dkt. No. A-4358-05T2, Decided April 11, 2007.

TPAF
Appellate Division affirmed decision of the State Board of Education, which affirmed the determination of the State Board of Examiners revoking teacher's instructional certifications as a Teacher of Social Studies, Teacher of Elementary School, and Teacher of the Handicapped. *In the Matter of the Revocation of the Certificates of Laurie Rosen by the State Board of Examiners*, Unpublished Opinion, Dkt. No. A5306-05, Decided April 3, 2007

Appellate Division affirmed Final Decision of the Board of Trustees of the Teachers' Pension and Annuity Fund ("TPAF") denying teacher's request to purchase service credits for time teaching for approved private schools for the disabled. *Andrea Goldberg v. Board of Trustees, Teachers' Pension and Annuity Fund*, Unpublished Decision, Dkt. No. A4646-05, Decided March 7, 2007.

Workers Compensation
Teacher's tort action against her employing school district was barred by the exclusivity provision of the Workers' Compensation Act, *N.J.S.A.* 34:15-8, since the accidental injuries she incurred due to a student-on-student fight did not fall under the intentional wrong exception as they were incurred within the context of her employment. *Kibler v. Roxbury Bd. of Ed.*, Unpublished Opinion Dkt. No. A-4358-05T2, Decided April 11, 2007.

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State Board of Education

Budget Restoration
State Board granted Commissioner's motion to permit DAG to participate on behalf of the Commissioner, in the township's challenge to Commissioner's restoration of $5, 170, 982 of the Township's reductions to school's general fund base budget tax levy. IMO Application for Budget Restorations, Willingboro, St. Bd. 2007: March 7 (decision on motion).

Board Policy- Uniforms
State Board affirmed ruling below denying parents emergent relief from application of the district's school uniform policy; parents filed outside the 90-day limitation period set forth in *N.J.A.C*. 6A:3-1.3(d) and provided no factual or legal justification which would warrant relaxation of this rule, nor did they establish grounds for medical or religious exemptions. Coles, St. Bd. 2007: April 4.

Certificate Suspension/Revocation
State Board modified penalty of State Board of Examiners; rather than revocation of certificate, teacher's certificate is suspended for two years, for the unbecoming conduct of engaging in horseplay including placing ice cubes down student's blouse. I.M.O. Chavez, St. Bd. 2007: April 4.

Procedural Issues
Pro se parents' motion to reduce fee to obtain transcript of hearing was denied, as State Board had no authority to waive transcript requirement established by Administrator Director of the Courts. Nor were parents permitted to include compact discs containing audio of the testimony from the hearing to be included in the record, as recordings are "unofficial" and cannot be substituted for the transcript. T.F.S., St. Bd.., 2007: April 4

Special Education
State Board affirmed Commissioner's determination (in a global decision affecting several complaints) that she lacked jurisdiction over appeals of Office of Special Education OSEP complaint investigations; these OSEP determinations are final agency decisions and as such, are appealable to the Appellate Division. Lenape, St. Bd. 2007: April 4.

Students–Admission/ Enrollment
State Board affirmed Commissioner's ruling that a student's request to be placed in another district due to off-campus sexual assault by another student was moot, because the student removed herself from the State. However, the State Board noted that the student may have a harassment claim cognizable in another forum. C.V., Commr. 2006: Sept. 12.

State Board affirmed Commissioner's determination that parent failed to prove that the district acted arbitrarily, capriciously, or unreasonably, where district transferred student to an alternative educational program for disciplinary and academic reasons. V.W., St. Bd. . 2007: March 7.

Students–Placement
State Board reversed Commissioner's 2004 ruling that board did not violate student's right to a free public education when it gave the student no option but to attend a non-credit basic skills adult program, after she had failed all her classes due to poor attendance record; State Board finds that an adult school may not be used as a vehicle for providing an alternative educational plan for students who, by virtue of their age, still have an entitlement to T&E. G.C., St. Bd., 2007: April 4 .

Students–Residency
State Board affirmed Commissioner Decision reversing Initial Decision finding of non-residency where student spent each school week with a grandparent who was not domiciled within the district. Parent resided in the district; therefore her child was entitled to free public education within the district. M.L.P., St. Bd. 2007: March 7.

State Board affirmed Commissioner Decision that student was entitled to free education in the district; she remained domiciled there despite temporarily staying with mother's boyfriend. D.D., St. Bd. 2007: April 4.

Tenure Dismissal Charges
State Board dismissed Board's appeal for failure to perfect, leaving Commissioner's decision intact. Commissioner had found that Board failed to prove truthfulness of allegations of unbecoming conduct except for one involving using derogatory language in class; loss of tenure was not warranted; Commissioner ordered forfeiture of 120 days loss of salary already withheld and directed board to arrange for training in anger management, conflict resolution and handling difficult and disruptive students. Poston, St. Bd. 2007: April 4.

Tuition
State Board affirmed Commissioner decision holding that regulations establishing a maximum allowable salary for purposes of the tuition rate chargable to public school districts applied to President/CEO of multi purpose social service organization, a position which the DOE analogized to a CSA/Executive Director. Youth Consultation Service, Inc., St. Bd, 2007: March 7

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Commissioner of Education

Pension Benefits
Private school for the disabled appealed the Department's determination to disallow the cost of increased pension benefits – paid under the school's Social Security Integration Pension Benefit plan – from its final approved tuition rate for the fiscal year. Audit findings showing that benefits paid to four of petitioner's employees did not meet the equitable standard of distribution required by N.J.A.C. 6A:23-4.5(a)23. Commissioner concludes that these expenses are disallowed. Argument of equitable estoppel can only be invoked to prevent manifest injustice; does not allow petitioner to ignore regulations. The Deron

School, Commr. 2007: March 7.

Non-Renewal
Non-renewal upheld where appeal violated 90-day rule and petitioner did not hold proper certification for the position. Clanton, Cmmr, 2007: March 12.

Special Education
Charter School is responsible for costs of special education student on home instruction, not local school district. Golden Door Charter School, Cmmr, 2007: March 15.

NJSIAA
Commissioner affirmed decision and penalty of the NJSIAA which found that petitioners had engaged in athletic recruitment in violation of Article V, Section 4D of the NJSIAA bylaws. Boys' basketball team and its coach were placed on probation, and disqualified from tournament competition, for a period of two years. Leap Academy University Charter School, Cmmr, 2007:Apr. 3.

Residency
Commissioner determines that student not eligible for a free public education in the district. Student's parents lived in another country and there was no claim made of any kind of hardship. Parents ordered to pay for period of ineligible attendance. M.P. and D.P., Commr, 2007:Apr. 2.

Student Discipline
Suspension for having firearm on school grounds upheld, notwithstanding that firearm was a toy gun. D.H., Cmmr, 2007: Apr. 5.

Tenure Dismissal
Tenure Dismissal of custodian for excessive absenteeism, insubordination and unbecoming upheld. Custodian failed to appear and offered no explanation for absence at hearing. Williams, Cmmr, 2007: Apr. 11.

Teacher properly dismissed from tenured position for criminal conviction and forfeiture of teaching certificates following sexual misconduct with students. Thorp, Cmmr, 2007: March 19.

Reductions-in-Force
Board improperly reduced tenured social worker. Board ordered to remit back-pay, subject to recoupment, pending outcome of other litigation concerning whether certain actions were tantamount to resignation, and pending tenure charges. Parise, Cmmr, 2007:Apr. 11.

Budget
Commissioner determines that board not entitled to additional funds to pay for food service workers in its preschool food program. Fact that funds provided in previous years does not create precedent. Vineland

Bd. of Educ., Cmmr: 2007: Apr. 12.

90-Day rule
Board failed to file claim for overpayment of tuition within 90 days. Claim as to surplus dismissed as board has already received relief under education regulations. Pemberton Township, Cmmr: 2007: Apr. 12.

Teacher's challenge to Board's acceptance of her resignation dismissed for failing to file a claim within 90 days. Snow, Cmmr: 2007 Apr. 20.

Tenure Acquisition
Commissioner determines that petitioner was removed in violation of tenure rights. Petitioner had acquired tenure as principal, vice-principal and assistant principal, all separately tenurable positions. Commissioner orders that petitioner be restored to position as principal with back pay and benefits. Austin, Cmmr: 2007 Apr. 26.

Ethics
Penalty of censure determined by Commissioner for failure to file financial disclosure form in a timely manner. Dooley-Malloy, Cmmr: 2007 Apr. 27.

Board member removed from board after filing claim against board in contravention of *N.J.S.A.* 18A:12-2. Cedar Grove, Cmmr: 2007 Apr. 30.

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School Ethics Commission

Ethics
SEC clarified advice given in A02-06 and advised that a board member would not violate N.J.S.A. 18A:12-24.1(e) or (g) by sending a letter to the editor expressing his opinion about the budget as long as, in the letter, he identifies himself as a board member and indicates that the letter is not authorized by nor written on behalf of the board, and he provides accurate, non-confidential information, and he ensures that his private action does not compromise the board. SEC Advisory Opinion A03-07, 2007: Apr. 2.

Board member did not violate the Code of Ethics for School Board Members when, as chair of the negotiations committee, he called other board members seeking their input into negotiations. SEC has no jurisdiction over possible OPMA violations. Pethick, SEC: 2007: March 27.

Board member did not violate the Code of Ethics for School Board Members when a press release was issued misrepresenting the district budget. No evidence to show that he had prepared press release. Nor did board member violate the code when he sent a letter to the editor and the budget subsequently failed to pass. Although information provided by the respondent does not rise to the level of being inaccurate, the Commission cautions that when a board member provides such specific information in a letter to the editor, he or she may

be challenged about the information when it does not comport with the understanding of other board members. Further, the listing of a board member's name and status as a board member on a candidate's flier and website as an endorsement of the candidate does not rise to the level of a violation of the School Ethics Act. Request for sanctions denied. McCurdy, SEC 2007: April 24.

No violations of the School Ethics Act found when board member sent telephone message to citizens testing a "reverse 911" system and reminding them to vote at next election or when he kept another board member out of closed session, told a board member that all training courses needed to be approved by the board and initiated a censure against another board member among other allegations. DeLuna, SEC 2007: April 24.

Board member did not violate the School Ethics Act when she did not attend a board meeting but stayed outside in the hallway. Request for sanctions denied. Allmond, SEC 2007: April 24.

No probable cause found to credit the allegations that a principal allowed someone to impersonate him, allegedly interfered with police called to the building, and when he filed an incident report. Jeffries, SEC 2007: April 24.

Board member did not violate the School Ethics Act when she allegedly made scurrilous, unfounded, and libelous statements about staff members. The SEC found no evidence to credit the complaint, which was dismissed with prejudice. Costa, SEC 2007: April 24.

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State Board of Examiners

Certifications

Examiners suspended the Teacher of Elementary Certificate of Eligibility with Advanced Standing, of holder arrested and charged with endangering the welfare of children, pending the resolution of the criminal matters. Futrell, Examiners 2007: Jan. 25.

Examiners revoked the Junior High School Teacher certificate, based on holder's guilty plea to a charge of criminal sexual contact. Gambone, Examiners 2007: Jan. 25.

Examiners accepted the voluntary surrender of holder's certificates with the full force and effect of a revocation. Clothier, Examiners 2007: March 5.

On appeal, the Examiners upheld their prior determination of ineligibility where the candidate failed to obtain the requisite 2.5 Grade Point Average by three-tenths of a point, despite graduating from West Point Military Academy. Maier, Examiners 2007: Feb. 22.

Examiners revoked the Teacher of Italian certificate, Teacher of Spanish certificate, Supervisor certificate, Principal/Supervisor Certificate of Eligibility, School Administrator Certificate of Eligibility, and Principal certificate, based on conduct underlying a tenure settlement agreement. Mazzarella, Examiners 2007: March 2.

On appeal, the Examiners upheld their prior determination of ineligibility based on applicant's failure to complete advanced courses of study and failure to complete the relevant portion of the Praxis test. Piccoli, Examiners 2007: Feb. 22.

Examiners voted to backdate candidate's provisional certificate to February 1, 2006 where applicant's coursework was submitted but subsequently lost by the Department of Education. Platzner, Examiners 2007: Feb. 22.

On appeal, the Examiners upheld their initial denial of eligibility for a certification due to failure of the candidate to maintain a 2.5 Grade Point Average from Notre Dame University where the GPA did not include coursework from other educational institutions. Savage, Examiners 2007: Feb. 22.

Examiners suspended the Teacher of Elementary School Certificate of Eligibility, a Teacher of Health Certificate of Eligibility, Teacher of Students with Disabilities certificate, and Teacher of Elementary School and Teacher of Students with Disabilities Provisional certificates, of as teacher who resigned while tenure charges of unbecoming conduct were pending. Skerbetz, Examiners 2007: March 2.

Examiners revoked the certificate of a social worker who had pled guilty to endangering the welfare of a child. Simon, Examiners 2007: Feb. 22.

Examiners denied certification to candidate who had been previously convicted of drug possession offenses. Gatewood, Examiners 2007: March 30.

Examiners summarily revoked certificate of teacher whose tenure had been revoked for inefficiency and other conduct. Graham, Examiners 2007: April 2.

Examiners determined that former business administrator's guilty plea to theft by failure to make required disposition of property constituted cause for revocation of certificate. Hayden, Examiners 2007: April 2.

Examiners accepted certificate holder's proposal for the suspension of her Principal/Supervisor certificate and her Principal/Supervisor Certificate of Eligibility for a period of one year effective immediately. Hayes, Examiners 2007: April 24.

Examiners revoked the county substitute certificate of certificate holder that had been arrested for aggravated sexual assault and official misconduct. Karas, Examiners 2007: April 24.

Examiners revoked the certification of elementary teacher that was convicted of endangering the welfare of children. As a result of the conviction, Peters was disqualified from public service pursuant to *N.J.S.A.* 18A:6-7.1 *et seq.* Peters, Examiners 2007: April 2.

Examiners accepted the voluntary surrender of holder's principal/supervisor certificate with the force and effect of a revocation. Reinoso, Examiners 2007: April 24.

Examiners suspended elementary School Certificate of Eligibility, Elementary School certificate, and a Principal/Supervisor Certificate of

Eligibility, based on certificate holder's conviction of conspiracy to commit arson and arson, pending appeal. Richardson, Examiners 2007: April 2.

Examiners revoked the certificate holder's Certificate of Eligibility with Advanced Standing, based on his conviction of assault by auto. Scalzo, Examiners 2007: April 2.

On appeal, the Examiners upheld their prior determination of ineligibility where the candidate failed to obtain the requisite 2.5 Grade Point Average by one one-hundredth of a point. Snyder, Examiners 2007: March 30.

Examiners suspended the County Substitute Credential, of a certificate holder who had been arrested on charges of aggravated criminal sexual assault, pending the outcome of the criminal proceedings. Sorrell, Examiners 2007: April 2.

Examiners revoked the Teacher of Health & Physical Education Certificate of Eligibility with Advanced Standing, Teacher of Health & Physical Education certificate, and a Teacher of Driver Education certificate, based on her guilty plea to charges of harassment by offensive touching. Tapp, Examiners 2007: April 2.

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New Jersey Council on Local Mandates

No Council decisions reported during the period.

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New Jersey Division on Civil Rights

No Director's orders issued during the period.

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New Jersey Government Records Council

Complainant affirmatively asserted that he had instituted an action in Superior Court regarding the denial of access. Complaint disposition - pending action in Superior Court. Stieffel v. West Amwell Elementary School District, GRC Complaint No. 2007-77, Decided March 28, 2007

GRC finds that, while resumes of successful candidates and redacted Counsel bills were eventually provided, the Director of Special Services and Custodian of Records violated Executive Order 26 and *N.J.S.A.* 47:1A- 5e of OPRA by not providing immediate access. Because the custodian provided conflicting certifications regarding the denial of access, it is possible that the actions were intentional and deliberate and not merely negligent, heedless or unintentional. Matter forwarded to OAL for a hearing. Mendes v. Tinton Falls Board of Education Custodian of Record, GRC Complaint No. 2006-201, Decided March 28, 2007.

Employee fields of study, certificates, names of higher education institutions, copies of certificates, diplomas and transcripts are government records (information that discloses conformity with specific experiential and educational qualifications for government employment) and should be released with appropriate redactions where necessary. Custodian is not required to create documents in response to records requests. Custodian's calculation of $546.28 as a special service charge was invalid; not required to create any documents. While seeking legal advice is encouraged, custodian should have requested permission to respond to request outside the seven day period. It is possible that the actions were intentional and deliberate and not merely negligent, heedless or unintentional. Matter forwarded to OAL for a hearing. Bonnano v. Garfield Board of Education, GRC Complaint No. 2006-62, Decided March 28, 2007.

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United States Supreme Court

First Amendment
District's student assignment plans using race as a factor were not narrowly tailored to achieve the compelling goal of diversity. *Parents Involved in Community Schools v. Seattle School Dist. No. 1, U.S. (2007).*

Schools may discipline for student pro-drug message at school-sponsored function. *Morse v. Frederick, U.S. (2007).*

Athletic Association Rule prohibiting high school coaches from recruiting middle school athletes does not violate the First Amendment. *Tennessee Secondary School Athletic Assn. v. Brentwood Academy, U.S. (2007).*

Special Education
Parents do not need to be represented by counsel and have independent enforceable rights under the IDEA. *Winkelman v. Parma City Sch. Dist., 127 S. Ct. 1994 (2007)*

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3rd Circuit Court of Appeals

Section 1983 Actions
District did not violate a teacher's civil rights where he was forced to resign because he did not have appropriate certification. *Coreia v. Schuylkill County Area Vocational-Technical Sch. Auth., No. 06-3005, (3d Cir. June 20, 2007)*

Special Education
Children eligible for early intervention services under IDEA. Attorney's fees are not available under Part C of the IDEA. *Andrew M. v. Del. County Office of Mental Health & Mental Retardation, 2007 U.S. App. LEXIS 14027 (3d Cir. 2007)*

Allegations that officials failed to adequately investigate the student's unidentified and untreated dyslexia are not actionable under 42 USC 1983, given the comprehensive remedial schemes of the IDEA and the Rehabilitation Act. *A.W. v. Jersey City Pub. Sch., 2007 U.S. App. LEXIS 12167 (3d Cir. 2007).*

Workplace Accommodation
Court affirms summary judgment for school district against teacher who alleged that it failed to provide the reasonable accommodation of working less than the required workday. *Kurek v. North Allegheny School District, No. 06-2276, (3d Cir. May 1, 2007).*

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New Jersey District Court

Special Education
Plaintiffs failed to exhaust administrative remedies in dispute over least restrictive environment. *Grieco v. N.J. Dep't of Educ*., 2007 U.S. Dist. LEXIS 46463 (D.N.J. 2007).

Plaintiffs' claims that district violated the ADA and the Rehabilitation Act by failing to provide student with a 504 plan dismissed. However, claim that school personnel created a hostile environment survive summary judgment. *Woodruff v. Hamilton Twp. Pub. Sch*., 2007 U.S. Dist. LEXIS 46468 (D.N.J. 2007).

Plaintiff is not entitled to appointment of *pro bono* counsel in special education appeal where factors for appointment of counsel have not been satisfied. *Montclair Bd. of Educ. v. M.W.D. ex rel. D.W.D*., 2007 U.S. Dist. LEXIS 46212 (D.N.J. 2007).

Plaintiff's unilateral placement of child in private school for special education services and request for attorneys fees upheld. *J.S. v. Springfield Twp. Bd. of Educ*., 2007 U.S. Dist. LEXIS 44611 (D.N.J. 2007).

First Amendment
District did not violate First Amendment rights of parent by restricting him while on school property and banning him from communicating with coaches. Further, challenge to board policy that is in conformance with Open Public Meetings Act dismissed. *Cunningham v. Lenape Reg'l High Dist. Bd. of Educ*., 2007 U.S. Dist. LEXIS 45805 (D.N.J. 2007).

Insurance
District complaint that insurance broker failed to place carrier on notice of claims against the district dismissed. *D.E. v. N. Hunterdon-Voorhees Reg'l High Sch. Dist*., 2007 U.S. Dist. LEXIS 45121 (D.N.J. 2007).

Termination
District is dismissed from federal causes of action in matter relating to alleged teacher termination. Court declines jurisdiction over remaining state law claims. District's claim against third party for intentional interference in contractual relationship dismissed. *Goodmann v. Hasbrouck Heights Sch. Dist*., 2007 U.S. Dist. LEXIS 45684 (D.N.J. 2007).

Student Domicile

Court determines that pupil can have more than one domicile, requiring districts to split the cost of out-of-district placement. *Cumberland Reg'l High Sch. Dist. Bd. of Educ. v. Freehold Reg'l High Sch. Dist. Bd. of Educ*., 2007 U.S. Dist. LEXIS 44212 (D.N.J. 2007).

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New Jersey Supreme Court

Board of Education Duties
NJ Supreme Court determined that schools have a duty to exercise reasonable care in supervising students at dismissal. Districts required to adopt a dismissal supervision policy, provide adequate noticed to parents, and to comply with reasonable parent requests regarding dismissal. Matter remanded for jury determination of the reasonableness of district's dismissal actions. *Jerkins v. Anderson, N.J. 2007 NJ Lexis 696 (2007).*

Abbott
NJ Supreme Court denied plaintiff's motion to order the legislature to authorize additional construction funding by June 30, 2007 as premature. *Abbott v. Burke, M-1088, 2007 N.J. Lexis, 588, (N.J. May 24, 2007).*

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New Jersey Superior Court Appellate Division

Students – Health and Safety
Appellate Division determined that the Institutional Abuse Investigation Unit of the N.J. Dept. of Human Services acted appropriately in issuing findings that teacher's disciplinary conduct was unjustified and inappropriate despite it's determination that allegations of abuse were unfounded. However, Court found that the Unit inappropriately sent letters to teacher and superintendent and ordered that they be amended to provide more information and to clarify that the findings were not binding upon the district. *I.M.O. Physical Abuse Concerning A.I., 393 N.J. Super. 114 (App. Div. 2007).*

Appellate Division upheld State Board of Education removal of board member who had filed a complaint against the board alleging a violation of a consent order regarding his disabled child. The complaint disqualified the member from continuing in office, despite the conduct-based exception contained in the School Ethics Act. A member must be qualified for office before his conduct can be regulated. *Sea Isle City Bd. of Ed. v. Kennedy, 393 N.J. Super. 93 (App. Div. 2007)*.

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New Jersey Superior Court, Law/Chancery Division

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State Board of Education

Board of Education Authority
State Board affirms Commissioner determination that board of education's refusal to issue student laptop computer for the 2005-2006 school year was reasonable and permissible, as student's parents refused to comply with school district computer use policy. R.H., St. Bd. 2007: May 2

State Board dismisses appeal for failure to perfect. Appellant did not file brief in timely manner, either initially or after 20 day extension of time to file. Commissioner had affirmed action of board of education limiting appellant's access to district's elementary school. L.A., St. Bd. 2007: June 6

Custodians
State Board affirms the decision of the Acting Commissioner to dismiss the matter as moot. Local association alleged that board procedures subcontracting custodial, maintenance and bus transportation services for the 2002-03, 2003-04 and 2004-05 school years violated public bidding laws. Lyndhurst, St. Bd. 2007: May 2

Credentials
State Board grants DAG request to remand matter back to State Board of Examiners for further review. State Board of Examiners had revoked appellant's county substitute credential because of aggravated assault conviction but had been unaware that appellant had been admitted into pre-trial intervention program. Kaufman, St. Bd. 2007: May 2

Non-renewal
State Board affirmed Commissioner's decision dismissing challenge to 2001 teacher non-renewal as untimely. No reason to relax the 90 day regulation of limitations. Bradford, St. Bd. 2007: June 6

Personnel Records
Motion to compel production of personnel file and minutes of board meeting in appeal of non-renewal denied. Motion filed nearly four years after initial petition filing with Commissioner and nearly a year after filing appeal with State Board. No explanation given for delay. Anderson, St. Bd. 2007: May 2

Public School Contracts Law
State Board affirms the decision of the Acting Commissioner to dismiss the matter as moot. Local association alleged that board procedures subcontracting custodial, maintenance and bus transportation services for the 2002-03, 2003-04 and 2004-05 school years violated public

bidding laws. Lyndhurst, St. Bd. 2007: May 2.

Student Residency
State Board affirms Commissioner's determination that student was entitled to free public education in the school district. Domicile of child is domicile of parent. Fact that mother sent child to live with her parents when she discovered that her live-in boyfriend was a convicted sex offender did not affect domicile. E.A.E., St. Bd. 2007: May 2

State Board affirms Commissioner's determination that student was not a resident of the district for the time period January – June 2006, that parent owed the district tuition for that time period, that the matter be remanded to the OAL for a plenary hearing on the student's current residency status and that the parent ensure that the student attend school pending resolution of the matter. Y.E., St. Bd. 2007: June 6

School Ethics Act
State Board grants Motion to Supplement the Record with a certification from the board president that appellant had filed certification at the board's behest and in furtherance of its interests and that the board president did not view the filing as a private action. School Ethics Commission had found that appellant had taken private action that could compromise the board, violated the School Ethics Act, and recommended the penalty of censure. Commissioner agreed. Chiego, St. Bd. 2007: June 6

School Funding
State Board denies Motion to Supplement the Record in township appeal of $ 5,170,982 in restoration of budget reductions by the Department of Education. Certification and credentials of state's interim fiscal monitor are not material to the issues presented on appeal. Willingboro, St. Bd. 2007: June 6

Seniority
State Board affirms commissioner determination that petitioner, teacher of practical nursing did not demonstrate that she possessed greater seniority that teacher retained by school district in RIF. Petitioner forfeited her tenure by declining a recall in 2002. Kelly, St. Bd. 2007: May 2

Certification
State Board granted Deputy Attorney General's request to remand matter back to State Board of Examiners for further review. State Board of Examiners had revoked appellant's county substitute credential because of aggravated assault conviction but had been unaware that appellant had been admitted into pre-trial intervention program. Kaufman, St. Bd. 2007: May 2.

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Commissioner of Education

Board Policy
The delay of three years from the conducting of a parent survey to the implementation of its student uniform policy, did not render the policy invalid where the community had consented and the requirements of *N.J.S.A*. 18A:11-8, including those with regard to disadvantaged students, were met. *Dare*, Commr. 2007: May 18.

Certification-Suspension
School psychologist's certificate is suspended for one year pursuant to *N.J.S.A.* 18A:26-10 and *N.J.S.A.* 18A:28-8 for providing only 18 days' notice of resignation from his position to accept another job; although ALJ would have limited suspension to three months, Commissioner disagrees. *Capshaw*, 2007: June 12.

90-Day Rule
Commissioner dismisses parent's petition for reimbursement for summer chemistry class their daughter had taken after failing chemistry; their petition was barred by the 90-day rule as the 90 days began to run as of the district's decision in May 2006 not to investigate or correct the alleged mistreatment of S.B. by her chemistry teacher; even absent a timeliness problem the Commissioner did not have jurisdiction to award consequential damages. *T.B. and M.B*., 2007: May 24.

Venue
Petitioners who filed with the Commissioner alleging that their child's application for admission to the Governor's School of Engineering and Technology was rejected on the basis of racial discrimination, could not simply transfer the matter to the Division on Civil Rights (DCR) as if originally filed with that agency; rather, they must file new complaint with DCR while instant complaint is held in abeyance. *J.C.,* Commr. 2007: June 12.

The proper place to appeal the county superintendent's determination with regard to educating homeless children following a determination of the last known residence of the children's mother, is with the Division of Finance in the Department of Education pursuant to *N.J.A.C*. 6A:17-2.8(b) and *N.J.A.C*. 6A:23-5.2(d-f). The Commissioner lacks jurisdiction for failure of the board to exhaust its administrative remedies. *West Orange*, 2007:May 31.

Employee Disqualification
Commissioner reverses the Department of Education's ruling of disqualification, finding that teacher's violation in 1997 of the Food Drug & Cosmetic Act regarding GHB is not an offense involving a CDS warranting disqualification under from school employment under *N.J.S.A.* 18A:6-4.13 et seq. and 18A:6-7.1 et seq., as the substance was not classified as a controlled dangerous substance at the time of the offense. *Brigham,* Commr., 2007: May 15.

Indemnification
Teacher was appropriately denied reimbursement pursuant to N.J.S.A. 18A:16-6 and *N.J.S.A.* 18A:16-6.1, of legal fees incurred in connection with her successful defense against a criminal complaint for disorderly

conduct. The conduct did not arise out of her teacher duties. *Crews*, 2007: May 31.

Leaves of Absence
Teacher returning teaching on a part-time basis following a work-related injury was eligible for benefits under *N.J.S.A*. 18A:30-2.1 through mid-May 2005; the fact that her workers' compensation benefits had stopped upon her voluntary return to part-time service in March 2005, did not affect her eligibility for benefits for 1 year. *Schuenemann,* Commr., 2007: May 9.

Tuition
Parents were prevented, on the principle of "accord and satisfaction," from obtaining reimbursement for tuition they paid to the school district for the attendance of their non-resident children, as the parties had earlier entered into and fulfilled a settlement agreement permitting the children to attend for a reduced amount of tuition paid in installments. *Barry,* Commr., 2007:May 9.

Sending-Receiving
Commissioner concurs with ALJ that sending district board members are not entitled to vote on the selection of a board attorney. *Evans,* Commr., 2007: May 1.

Students – Residency
Commissioner found no credible evidence to change its original order requiring that the respondents reimburse the board for the period of the three children's ineligible attendance at the district's school. Hamilton, Commr., 2007: May 31.

Student was not entitled to free education as affidavit student since resident who supported the student in her home gratis did so for a temporary period, but did not intend to keep and support him for longer than the school year; also, his mother failed to demonstrate that she was incapable of supporting or providing care for her son due to family or economic hardship; Commissioner granted the Board's application for tuition reimbursement for student's ineligible attendance. *S.H.,* Commr., 2007: June 13.

Parent who was seeking assurances about placement of student upon reenrollment, changed mind and decided to home school student; there was no longer any controversy and matter is dismissed. *K.V.*, Commr., 2007: June 14.

No entitlement to a free education in district; mother was only temporarily staying in district while she and her husband were separated until her family unit was reunited. *M.L.*, Commr., 2007: June 19.

Tenure Dismissal
Board's termination of teacher who possessed elementary teaching certificate did not violate her tenure rights as she had never acquired tenure where she had been employed as media specialist - first as a long term substitute for a teacher on leave, and then under an emergency certificate - and where she taught Character Education, a subject for which no certificate is required. Matter remanded for findings

with regard to whether there was an entitlement to 60-days notice of termination. Boyce, Commr., 2007: May 21.

Physical education teacher is ordered removed from his position for insubordination toward his supervisors; habitual lateness and absence from work; use of disrespectful and unprofessional language and vulgar gestures towards colleagues; and use of inappropriate language toward a student. *I.M.O. Hill*, Commr., 2007: May 15.

Tenure Acquisition
Teacher who did not possess the appropriate endorsement did not acquire tenure as a County Apprenticeship Coordinator; although he had served in the position, it was under a waiver permitting the district to hire a less-than-fully certified person and cannot be construed as tenure-eligible service. *LaGrutta*, Commr., 2007: June 7.

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School Ethics Commission

Conflict of Interest
Board member who was experiencing marital problems with his spouse, a district employee, and who filed a complaint against her for criminal mischief and so notified the board, did not violate the ethics act where, although his wife was subsequently suspended and demoted, there was no evidence that his actions were the reason for her suspension and demotion, or for the layoff of her daughter; there was no showing that he had used his position to secure unwarranted privileges or advantages, *Sol Pineiro-Gonzalez*, SEC, 2007: May 22.

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State Board of Examiners

Complaint Dismissal
Filed petition alleging improper conduct dismissed. Actions do not rise to the level of certificate revocation or suspension El-Hewie v. Aloia, Exam. 2007: April 4

Order to Show Cause dismissed following ALJ finding that principal had not ordered anyone to disable the fire alarm system at the school. Board modifies the decision insofar as the Board of Examiners may consider information from any source, but must independently prove allegations prior to suspension or revocation. Brown, Exam. 2007: May 7

Filed petition alleging improper conduct dismissed. Actions do not rise to the level of certificate revocation or suspension. El-Hewie v. Cosgrove, Exam 2007: April 4

Order to show cause dismissed against teacher where it was shown that physical contact with student in fight was a result of self-defense and an

attempt to break-up the fight, not physical abuse as alleged. Koonce, Exam. 2007: May 4

Board of Examiners vacates its earlier decision to revoke County Substitute Credential. Kaufman, Exam. 2007: May 7

Forfeiture

Following guilty plea for endangering welfare of child and official misconduct, teacher forfeited her certificates. Teacher ordered to return them to Board within 30 days. Burke, Exam. 2007: May 3.

Revocation

County Substitute Credential revoked after criminal history check revealed conviction for possession of CDS. Baez, Exam. 2007: May 4

Teacher of Music pled guilty to charges of endangering the welfare of a child, criminal trespass, and possession of weapons on school grounds. Certificates revoked. Engelke, Exam. 2007: May 4

Teacher of Music, Principal/Supervisor and School Business Administrator certificates revoked following conviction for mail fraud and filing a false income tax return. Notwithstanding efforts to rehabilitate, one instance, if flagrant enough is sufficient to warrant revocation of certificates. Luongo, Exam. 2007: May 4

Following tenure dismissal, Teacher of Social Studies and Teacher of Bilingual-Bicultural Education certificates revoked for conduct unbecoming a teacher. Teacher made sexually inappropriate comments and gestures, including making a motion simulating masturbation and talking about his sex life in class. Teacher also inappropriately touched a fellow teacher on her legs, identified female students in class who had reported his conduct to the administration as a means to intimidate them, encouraged a student not to cooperate with the investigation into his conduct and ignored three written warnings. Mujica, Exam. 2007: May 4

Teacher of the Handicapped certificates voluntarily surrendered. Surrender has the force of revocation. Staton, Exam. 2007: May 4

Revocation of county substitute credential ordered where credential holder convicted of attempting to elude police, disqualifying him from public employment. Sullivan, Exam. 2007: May 4

In matter involving revocation of Teacher of Handicapped certificates for defrauding State Health Benefits Plan, Appellate Division remanded the case for hearing on the single issue of whether certificate holder was unfairly and selectively singled out for certificate revocation from other perpetrators in SHBP scheme. On remand ALJ determined that other perpetrators who were brought to attention of Examiners also faced revocation. ALJ's decision adopted by Examiners. Toler, Exam. 2007: May 7

Notwithstanding claims of rehabilitation, Teacher of Elementary School certificates revoked following guilty plea to charges of official misconduct. Zucker, Exam. 2007: May 7

Suspension

Suspension of Teacher of Health and Physical Education certificates ordered, pending resolution of charges for sexual offenses involving filming without consent. McHarris, Exam. 2007: May 7

Procedure
Examiners decline to relax 60 day time limit for provisional teacher appeal of final evaluation and certification recommendation. Good cause not shown. Podewils, Exam. 2007: May 4.

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GRC found that the board secretary violated OPRA by failing to provide immediate access or a lawful basis for denial of access to copies of certain expenditures where board secretary provided a letter indicating that the district was compiling records responsive to the request. Board secretary failed to obtain written agreement extending the time to respond. (Hascup, GRC, 2007: April 25).

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New Jersey District Court

Special Education
District Court reversed ALJ's denial of summary judgment to parents, and ruled that parents were entitled to reimbursement for the unilateral placement of their daughter in a private school. The District Court determined that although no witness from the private school testified as to appropriateness of the private placement, several doctors and experts testified as to the appropriateness of the private school. Parents who unilaterally place their child into a private school need not prove either that the private school is approved by the board of education to teach special education, or that there were appropriate schools closer to home; these factors are relevant only when a public school is providing FAPE. Nor did the parents forfeit their right to reimbursement for failure to notify Holland Township of their dissatisfaction with the IEP and intent to send K.D. to a nonpublic school at Holland Township's expense ten days prior to K.D.'s removal. Under the circumstances, the Court would exercise its discretion to order that plaintiffs be reimbursed for the cost of tuition from the date the parents formally informed the district of their dissatisfaction with its program (6 months after enrollment in the private school) -- until the end of K.D.'s enrollment in June. The court noted that the student had attended Holland Township without receiving an appropriate education for over six years, and without having her IEP substantially modified in her last several years of attendance. The parents thus were justified in waiting several months to notify Holland Township, until they were certain she was improving in the unilateral placement, despite their failure to strictly comply with the formal notice requirements; they waited less than one year to notify the district, which was reasonable. Further, the parents took reasonable steps to inform the district of their dissatisfaction with the student's IEP, and the district

was formally on notice of that dissatisfaction by the date Plaintiffs requested reimbursement, although these notices did not formally comply with code or the requirements listed in the PRISE booklet. *F.D. v. Holland Twp. Bd. of Ed.*, No. 05-5237, 2007 U.S. Dist. LEXIS 49293 (D. N.J. July 9, 2007).

The parties are directed to brief whether the district's unilateral decision to exclude a student from school in September 2003, which resulted in him missing seventeen days of school, violated section 504 of the Rehabilitation Act, as neither the Third Circuit nor the U.S. Supreme Court have explicitly addressed the question of whether section 504 claims are limited to recovery for intentional acts. Further, although the student failed to exhaust administrative remedies, the Court declined to dismiss the student's claims that the district's failure to provide an extended school year summer program and transportation violated the right to FAPE under the IDEA; dismissal of at this point, three years after the filing of their Complaint, would be a waste of judicial resources, inconsistent with the purposes of administrative process, and an inequitable use of the IDEA exhaustion requirement. Further briefing ordered. School district's motion for summary judgment is granted on the parents' request for recovery under whether § 1983; given the comprehensive scheme of judicial remedies under IDEA for violations, Congress did not intend Section 1983 to be available to remedy issues involving identification, evaluation, educational placement, or provision of FAPE. (See, *A.W. v. Jersey City Public Schools*, 486 *F.3d* 791 (3d Cir. 2007) "reasoning in Matula is no longer sound."), *L.T. v. Mansfield Twp. Sch. Dist.,* No. 04-1381, 2007 U.S. Dist. LEXIS 58924 (D. N.J. August 10, 2007).

While the 2003 IEP violated the IDEA because it did not contain goals and objectives, this did not amount to a denial of FAPE since the parents and administrators had all of the relevant information although it was not contained in the four corner of the IEP. Adequate parental involvement and participation in formulating an IEP, not adherence to the laundry list of items given in section [IDEA], appear to be the Court's primary concern in requiring that procedures be strictly followed. Nor did the district's failure to deliver a separate written notice that some requests would not be included in the IEP, violate the IDEA, since the IEP itself contained notice that these requests would not be included. Nor did the district fail to provide FAPE by offering small group instruction in a fashion where the student was progressing educationally, even though a better or best situation could have been offered. While the district's failure to provide a copy of the second (unadopted) draft of the IEP was improvident, it did not amount to a violation of FAPE given the parents' involvement all along in the process and the parent's decision already made to discard the draft. Finally, the IEP conferred a meaningful educational benefit and nothing in the record indicated that the ALJ erred in agreeing with the district's experts. *G.N. v. Bd. of Educ. of Livingston*, No. 05-3325, 2007 U.S. Dist. LEXIS 57081, (D. N.J. August 6, 2007).

Drug Testing

The Court dismissed, for lack of subject matter jurisdiction, a parents' IDEA / § 504 claims because Plaintiffs failed to exhaust their administrative remedies with respect to those claims arising out of their 16-year old son's positive drug tests and subsequent expulsion. Alternatively, these claims must be dismissed because § 1983 is no longer an available means to remedy the alleged violations. The federal court further declined to exercise supplemental jurisdiction over state

law claims. *Gutin v. Washington Twp. Bd. of Ed.*, No. 04-1947, 2007 U.S. Dist. LEXIS 53298 (D. N.J. July 23, 2007).

Property Interest

The court granted the school board's motion to dismiss an action instituted against it by developers of property. The developers claimed that a successful legal action brought earlier by the Board of Education to enjoin the sale of certain city-owned land to the Plaintiff developers, which resulted in a restraining order against the sale of the site and prompted the City to rescind its development, proximately caused the loss of the developer's development agreement with the city. The developers claimed further that the board's action was motivated by the personal political considerations of the board members, and that a board member defamed him by falsely telling the press that he had bribed the board member. The court found that while the Board's actions proximately caused the loss of the development agreement, the Redevelopment Agreement did not create a property interest that was protected under the Fourteenth Amendment. Because the 1983 claim must be dismissed, the court declined to address arguments regarding the individual board members' liability under Section 1983, including his claim of defamation. Plaintiffs' causes of action for tortious interference with a contractual relationship, state law defamation, and violation of the New Jersey School Ethics Act, remain viable claims in this action. *Rodriguez v. Fajardo*, No. 06-4996, 2007 U.S. Dist. LEXIS 48217 (D. N.J. July 3, 2007).

Counsel Fees

The Court granted the Defendant school board's motion to vacate a default entered against it in an action for prevailing party counsel fees under IDEA, as well as its motion for leave to file an Amended Answer, where the answer was served late due to questionable service of process and good faith was not in question. *L.J. v. Audubon Bd. of Ed*., No. 06-5350, 2007 U.S. Dist. LEXIS 62080 (D. N.J. Aug. 22, 2007).

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New Jersey Supreme Court

Employment

Certification denied in appeal of dismissal of suit alleging an "intentional wrong" for teacher injury suffered during student fight at school. Kibler v. Roxbury Bd. of Educ., 192 N.J. 292 (N.J. 2007).

Public Records

Certification denied in appeal of determination that handwritten notes, used in preparation of official board minutes, are not public records. O'Shea v. W. Milford Bd. of Educ., 192 N.J. 292 (N.J. 2007).

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New Jersey Superior Court Appellate Division

Tenure Dismissal
Court upheld dismissal of tenured corrections facility teacher for conduct unbecoming following his arrest for eluding, resisting arrest, and obstruction. Teacher also failed to inform supervisor of arrest in timely manner as required by Department of Corrections regulation. Wachendorf, No. 3635-05T3, (App. Div. July 3, 2007).

CEPA
Court dismissed CEPA claim where employee alleged complaints of private, not public, harm. Gray v. Camden Bd. of Educ., No. A-5463-05T5 (App. Div. July 3, 2007).

Personal Injury
Summary judgment properly granted for school district where it is entitled to immunity for slip and fall due to treatment of snow and ice. Chambers v. Howell Township et. al., No. A-0081-06T2 (App. Div. July 12, 2007).

Special Education
Court affirmed dismissal of board challenge of calculation of special education reimbursements as moot. East Brunswick Bd. of Educ. v. NJDOE, No. A-5178-05T5 (App. Div. July 19, 2007).

Employment
Court affirmed that, in claim for back pay, petitioner is due back pay, less mitigation. McCullough, No. A-1951-05T3 (App. Div. August 3, 2007).

Contracts
Claim alleging that school district violated the school laws when it entered into a local services agreement dismissed. State Board and Commissioner properly dismissed CEPA claim as they do not have authority to hear such a dispute. Raimondi, No. A-5555-05T3 (App. Div. August 7, 2007).

Revocation
Before certificates can be revoked, teacher is entitled to a sanctions hearing where he may present oral testimony. IMO Certificates of Fox, No. A-5021-05T3 (App. Div. August 29, 2007).

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State Board of Education

Criminal History
State Board affirmed Commissioner's determination that where maintenance worker was disqualified from school employment based on prior history of drug involvement; he could make no claim for reinstatement or back pay. Petitioner failed to name board as a respondent as directed by the Commissioner in the previous hearing. Petition of Appeal dismissed. (Nunez, State Board, 2007: July 18).

90-Day Rule
State Board reversed the Commissioner's determination that the date the 90-day period for filing commenced when teacher learned that similarly-situated colleagues were being recalled but she was not. Therefore, the teacher's petition was deemed untimely by the State Board. Teacher was aware of allegedly discriminatory conduct prior to her non-renewal but failed to file a complaint until after she was not recalled. (Charapova, State Board, 2007: August 1).

School Ethics Act
State Board set aside Commissioner's affirmation of SEC censure recommendation where the SEC had previously found that board member violated the School Ethics Act by filing a certification in a related matter as taking private action that could have compromised the board. (I.M.O. Chiego, State Board, 2007: August 1).

Home Instruction
State Board determined that charter school is responsible for costs of special education student on home instruction, not local school district. (Golden Door Charter School, State Board, 2007: August 1).

Certification
State Board affirmed State Board of Examiners suspension of the teaching certificates of a special education teacher for one year for engaging in inappropriate sexual language in the classroom and for engaging in conversations with students about his fictional homosexual lover and offering to rub a student's testicles after the student received a groin injury. (Skerbitz, State Board, 2007: August 1).

Settlements
State Board approved settlement agreement awarding back pay and health benefits where administrator waived entitlement to be placed on the district's preferred eligibility list. Commissioner had previously determined that board violated administrator's tenure tacking rights. (Smith, State Board, 2007: August 1).

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Commissioner of Education

Board Membership
Board member's spouse's Workers' Compensation claim against the school district was an inconsistent interest precluding board membership under *N.J.S.A.* 18A:12-2. Where the spouse's claim existed when the board member assumed office, his membership on the board was susceptible to being declared void. Commissioner further held that the provisions of *N.J.S.A*. 18A:12-2 do not apply to board candidates whose conflict is capable of being cured prior to seating if the candidate is elected. (See *Thomas v. Edwards State Board, November 3, 1993*) Commissioner did not remove respondent from his position on the board. The Board and respondent were deemed equally culpable for failing to recognize and resolve the disqualifying conflict prior to respondent's assumption of office. For that reason, the Commissioner deemed both the Board's challenge and respondent's cure to have occurred *nunc pro tunc*, so that respondent's Board membership could be now validated by an immediate re-administration of his oath of office. Respondent board member was entitled to indemnification of costs, subject to the provisions of *N.J.S.A*. 18A:12-20 as to accuracy and reasonableness. Matter was not moot and needed to be heard as a matter of significant public interest. Houser, Commissioner, 2007: July 30.

Certification
Tenured English and Journalism teacher resigned without providing the 60-day notice required by her contract and by *N.J.S.A.* 18A:28-8. Teaching certificate suspended for one year from the date of the decision. Kovalovich, Commissioner, 2007: August 10.

Commissioner vacated the board of education's head basketball coach appointment. Appointed head coach was not properly certified, the first criteria of N.J.A.C. 6A:9-5.19. Additionally, qualified, certified applicants existed and no application for waiver to the county superintendent was made or granted. Commissioner declined to appoint a new coach as the potential new coach was not a party to the proceeding nor was his appointment requested as part of the relief. Paterson Eastside, Commissioner, 2007: July 13.

Discovery
Commissioner agreed with ALJ that petitioner parent had wantonly and willfully violated the ALJ's Prehearing Discovery Order. Petitioner's assertions were incredible and unbelievable. Board's motion for sanctions was granted with the appropriate remedy being deemed suppression of the claim and dismissal of the petition. L.A. and C.A. o/b/o P.M.A., Commissioner, 2007: July 18.

Dismissal
Matter involving appointment of principals dismissed for lack of prosecution. Herron, Commissioner, 2007: August 13.

Emergent Relief
Motion for Emergent Relief for approval to continue application process as a private school for the disabled denied. Petitioner cannot prevail on

the merits of the claim and is seeking an exception to the requisites of the process which is not granted to other applicants. Approval by the Office of Special Education Programs would grant preferential treatment compromising the integrity of the application process. Y.E.S., Commissioner, 2007: August 15.

Graduation
Commissioner upheld board of education decision denying student the ability to participate in graduation exercises. Board's decision was based on long-standing policy prohibiting students who had not met all graduation requirements from participating in graduation exercises. ALJ's order was received by the Commissioner just before the graduation ceremony with insufficient time to review the audio tape or issue a final decision, making the issue moot. J.Z. o/b/o C.Q., Commissioner, 2007: July 23.

Increment Withholding
Board proved tenure charges of unbecoming conduct against tenured secretary. Secretary, on several occasions, left work early without permission, failed to heed Board policy prohibition against selling commercial items, despite warnings, and used disrespectful and unprofessional language. Suspension for six months and loss of salary increment deemed appropriate penalty. McCain, Commissioner, 2007: July 16.

Commissioner restores increment withheld from tenured mathematics supervisor. Petitioner proved that board's withholding was arbitrary, capricious, and unreasonable and motivated by personal animosity of her supervisor. No independent evaluation was done by the board and the reasons set forth by the supervisor were largely without merit. Kohn, Commissioner, 2007: July 19.

Indemnification
Petitioner's claim for payment of accrued vacation/personal days and health insurance waiver deemed moot. Payment in full for post-judgment interest made entire matter moot. Kaprow, Commissioner, 2007: July 23.

90-Day Rule
Tenured vice principal who was transferred from a 12-month high school vice principal position to a 10-month elementary school vice principal position alleged that the transfer was retaliatory, in bad faith and would result in a lesser future salary expectation. Vice principal began his new position on August 31, but did not file his petition until December 2006, beyond the 90-day limitation period. Even if petition were not time barred, previous case law has established that future increases in salary or salary expectation are not appropriate factors in considering the validity of a transfer. Petition was dismissed. Wilbeck, Commissioner, 2007: July 9.

Non-Renewal
Two non-tenured teaching staff members sought reemployment, alleging that their termination was not for stated budgetary reasons. While petition was time-barred and was dismissed, Commissioner noted that where a non-tenured teacher challenges a board of education's decision

to terminate her employment on the grounds that the stated reasons are not supported by the alleged facts, she is entitled to litigate the question only if the facts she alleges, if true would constitute a violation of constitutional or legislative-conferred rights. Middletown, Commissioner, 2007: August 16.

Public Funds

Deputy Commissioner deducted $88,373 from the board's 2006-07 school budgets as a result of the Board having improperly expended that sum on political advertising presenting incomplete information and advocating only one side of a controversial question regarding the purchase of two parcels of land. The color brochure and four television spots, presented incomplete information, were exhortative and one-sided in violation of *Citizens to Protect Public Funds,* 13 *N.J.* 172 (1953) and were an ineffective and inefficient use of State money. Abbott Funds/Elizabeth, Commissioner, 2007: July 6.

Residency

By court order, residential custody of student was shared between mother and grandmother; mother on the weekends and grandmother during the week. Student's residency for school purposes followed that of the grandmother during the week. Student was entitled to a free public education in the grandmother's school district. V.S-L. o/b/o Z.M.M., Commissioner, 2007: July 9.

Student deemed ineligible to attend school in the district. Student was neither domiciled in the district nor living in the home of another domiciled in the district because of family or economic hardship. Parent required to pay tuition to the board in the amount of $3,751.02 plus $59.54 per day for each day of the student's attendance in the district after April 4, 2007. D.R.P. o/b/o B.L. DeP, Commissioner, 2007: July 25.

Student entitled to a free public education in the school district as a properly enrolled affidavit student. Student lived with grandmother, who assumed all personal responsibility for the student and intends to support the student gratuitously beyond the school year. Parents are not capable of supporting student due to a family or economic hardship and did not send him to the grandmother simply to receive a free education in the school district. R.A.J. o/b/o C.A.P., Commissioner, 2007: July 27.

Students deemed not to be residing with grandmother in district. While two court orders granted grandmother "residential custody" of the students, based on surveillance of grandmother's residence, it was determined that students actually resided with their mother in another community. No credible evidence that students actually lived with grandmother. Petitioner ordered to disenroll students and remit $15, 472.08 in tuition to the school district. B.W. o/b/o S.L and N.A., Commissioner, 2007: August 21.

School Ethics Act

Given respondent's resignation from the Board, her eventual filing of the necessary disclosure statements, and her inactivity during the second half of 2005, the Commissioner deems a reprimand to be the appropriate penalty for the late filing, and admonishes respondent for her dilatoriness, which has resulted in a waste of administrative and

adjudicative time at the local, county and State levels. Harrison-Bowers, Commissioner, 2007: August 8.

Settlements

Settlement of tenure charges approved for tenured teacher accused of insubordination and unbecoming conduct. Two weeks after communications among attorneys and the court indicated that parties had agreed to settlement, teacher refused to sign settlement agreement, having changed her mind. Enforcement motion denied as Commissioner does not have jurisdiction to enforce settlements. Jones, Commissioner, 2007: August 9 .

Student Records

Principal's letter regarding student suspension may not be expunged. *N.J.A.C.* 6A:32-7.8(b) allows student records which are no longer educationally relevant to be destroyed only while the student is still enrolled in a district. Student had permanently left the district and moved to Pennsylvania. Disposal of the records of a student who has left the district is governed by the Destruction of Public Records Law, which mandates that student disciplinary records be maintained until two years after the student's graduation or termination from the school system or age 23, whichever is longer. Since the student had not reached the age of 23, the student record was not ripe for destruction. Student disciplinary records are not nullified because a student moves to another state. S.S. and E.S. o/b/o E.S., Commissioner, 2007: August 24.

Tenure

Board proved tenure charges of insubordination, conduct unbecoming and neglect of duty against three teachers, based on allegations that they were involved in a fraudulent attempt to receive payment for attendance at meetings of their respective School Leadership Councils – when no such meetings ever took place – and then attempted to cover up the facts during the district's investigation by filing fabricated documents and giving false information. Dismissal was the appropriate penalty, notwithstanding prior unblemished records, absence of venal motives, and circumstances that helped explain their conduct. Duran, Vinson and Jones, Commissioner 2007: July 5.

Rationale provided by the petitioning school district in its renewed request for leave to withdraw the tenure charges satisfied the six standards required by *N.J.A.C.* 6A:3-5.6(a), and provides satisfactory explanations concerning: the district's need for a teacher to provide educational services to students on long-term suspension; why the respondent would be suitable for this position; and how her reassignment would best serve the public interest. Request to withdraw tenure charges granted. Swaminathan, Commissioner 2007: July 5.

Tenured special education teacher was dismissed from his teaching position with the New Jersey State Juvenile Justice Commission following his arrest for alleged possession of heroin and failure to timely report his arrest and criminal charge for drug related activity in violation of the JJC's Drug Free Workplace Policy. Such conduct constituted conduct unbecoming a teaching staff member, particularly in a position such as his where he teaches children, many of whom are involved with illicit drugs. Guarni, Commissioner, 2007: July 23.

Time served as interim principal does not count toward tenure as principal until resignation becomes effective and vacancy exists. Tenure is not acquired at the end of the two year period but after completion of the two year probationary period with reemployment. Walton, Commissioner, 2007: August 8.

Tuition
Department of Education properly disallowed $ 66,000 from the private special education school's tuition reimbursement. School failed to provide the mandated four hours of instructional time on 70 days of the 2003-04 school year when half-day sessions were held. Titusville Academy, Commissioner, 2007: July 6.

Student from Colombia living with brother in district is neither domiciled in district nor living in the home of someone domiciled in the district due to family or economic hardship. Brother must pay board tuition in the amount of $5,163.84, plus $78.24 per day for each day of student's attendance after June 6, 2007. J.A.M. o/b/o C.A.M., Commissioner, 2007: August 15.

Students, whose father was incarcerated, were living with mother. Mother lived in another school district and wanted students to remain in their schools for the sake of continuity until father returned and resumed custody. Mother did not appear nor provide reason for nonappearance. Commissioner ordered tuition reimbursement for the 2006-2007 school year in the amount of $14,812.56. L.D.R. o/b/o T.M and P.M., Commissioner, 2007: August 16.

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School Ethics Commission

School Ethics Act
Board member threatened a member of the public with profanity at a board meeting, a private action that could compromise the board, violative of *N.J.S.A*. 18A:12-24.1 (e). Any time a board member reacts in a threatening manner toward a member of the public attending a board meeting, it has the potential to compromise the board. The threat was also one of the most egregious violations of the public trust that a board member could commit. SEC recommended one year suspension for the board member. Atallo, School Ethics Commission, C32-05 and C24-05, July 24, 2007.

Board member sent an email to the superintendent, criticizing the superintendent's handling of a matter involving the board member's spouse and asking for an accounting of the superintendent's personal leave, copying the entire board of education. The email was sent to the superintendent just hours before a scheduled disciplinary hearing. The SEC accepted the conclusions of the Administrative Law Judge and found that the board member violated N.J.S.A. 18A:12-24 (b) and (c) of the Code of Conduct and N.J.S.A. 18A:12-24.1 (c) and (i) of the Code of Ethics for School Board Members. The SEC recommended a three month suspension for the board member. Kanaby, School Ethics Commission, C53-05, July 24, 2007.

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New Jersey Council on Local Mandates

Regulation requiring reduction in maximum age span in elementary special education classes from four years to three years is an unfunded mandate, violating the NJ Constitution. I/M/O the Special Services School Districts of Burlington, Atlantic et al. (Council on Local Mandates 7-26-07) .

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Election Law Enforcement Commission

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New Jersey Division on Civil Rights

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New Jersey Government Records Council

Personnel Records
Records custodian properly redacted social security numbers and home addresses from requested copies of certificates and transcripts. Grades properly redacted, even though records custodian relied on wrong statute for redaction. Question remains of whether board maintains diplomas on file, referred to OAL. Bonanno v Garfield Bd. of Educ, No. 2006-62 (GRC July 25, 2007).

Attorney Bills
Requestor's complaint dismissed where custodian certified that attorney bills would be provided in unredacted form in compliance with request. Siebert v. Reading Township, No. 2004-150 (GRC July 25 2007).

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3rd Circuit Court of Appeals

ADEA

A teaching job applicant's federal claims were properly dismissed. 42 U.S.C.S. §§ 2000e-2(a), 1981, did not provide relief for alleged age discrimination. Issue preclusion applied to bar applicant's previously-litigated ADEA claim. 5 U.S.C.S. § 552 did not apply to state agency. The No Child Left Behind Act did not create a private right of action. Dunleavy v. New Jersey, No. 07-1058, 2007 U.S. App. LEXIS 24307 (3d. Cir. October 16, 2007).

Equal Protection

Because the casino exemption to the New Jersey Smoke-Free Air Act, which prohibits smoking in virtually all enclosed indoor places of public access, workplaces, and in any area of a public or nonpublic elementary or secondary school, did not infringe on a fundamental right, it needed only to have a rational basis. The Court of Appeals agreed with the district court that a rational basis existed and thus the challenger failed to state a claim that the inclusion of the casino exemption violated the Equal Protection Clause. Amiriantz v. New Jersey, No. 07-1274, 2007 U.S. App. LEXIS 25020 (3d. Cir. October 25, 2007).

Racial Discrimination

School district was properly granted summary judgment on teacher's 42 U.S.C.S. § 1981 racial discrimination claim because record lacked evidence that would allow fact finder to reasonably infer that school's intensive supervision and assignment of honors class to another teacher were motivated by discriminatory animus rather than complaints received. Public employment in a teaching profession was not a property interest that was entitled to the protections of substantive due process. Burnett v. Sch. Dist., No: 06-3771, 2007 U.S. App. LEXIS 22567 (3d. Cir. September 20, 2007).

Special Education

Parent's motion to recover fees and costs charged by a consultant for her services, under IDEA, was properly denied as parent was not a

prevailing party by virtue of having obtained an acceptable IEP because parent and school district developed an IEP through negotiations out of court, and no court endorsed the agreement with a judicial imprimatur. A.W. v. E. Orange Bd. of Educ., No. 05-2294, 2007 U.S. App. LEXIS 22196 (3d. Cir. September 14, 2007).

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New Jersey District Court

Due Process
Motion to dismiss denied. Plaintiff alleged facts sufficient to state a conspiracy between the local education association and superintendent of schools such that the local education association could be considered as acting under the color of state law for the purposes of 42 U.S.C.S. § 1983 liability. The allegations raised were sufficient to allege that the local education association was a willful participant in the superintendent's alleged violation of Plaintiff's due process and First Amendment rights. Plaintiff's allegations were also sufficient to state a claim for Defendants' breach of the duty of fair representation. *Veggian v. Camden Bd. of Educ.*, Civil Action No. 05-70(NLH), 2007 U.S. Dist. LEXIS 73449, (D. N.J. October 2, 2007).

Equal Protection
Burford abstention was appropriate on plaintiffs' claim that defendants' failure to comply with the Comprehensive Educational Improvement and Financing Act (CEIFA), *N.J.S.A.* 18A:7F-1 *et seq.*, violated plaintiffs' equal protection rights. Defendants moved to dismiss because timely and adequate state court review was available, and federal court review of the matter would have interfered with the state's efforts to regulate an area predominated by state interests, state aid for public education under *N.J.SA*. 18A:7F-1 et seq. If the court were to grant the relief sought by plaintiffs, it would directly interfere with the state's efforts to assess the needs of its school districts. *Wash. Twp. Bd. of Educ. v. Davy*, Civil Action No. 07-968 (MLC), 2007 U.S. Dist. LEXIS 75327, (D. N.J. October 10, 2007).

First Amendment
Preliminary injunction was warranted allowing two students to continue to wear to school buttons featuring a photograph of the Hitler Youth as a protest against school uniforms; it was likely that First Amendment claims would succeed because it had not been shown that the buttons had caused a disruption or a fear of disruption at school. The buttons were not vulgar, lewd, obscene, or plainly offensive and therefore could not be barred on that basis; the photograph was not profane and did not contain sexual innuendo. Stifling of the students' protected expression constituted irreparable harm. A preliminary injunction was therefore warranted allowing the students to wear the buttons, but the students were not allowed to distribute the buttons at school. DePinto v. Bayonne Bd. of Educ., Civil Action No. 06 - 5765 (JAG), 2007 U.S. Dist. LEXIS 69588, (D. N.J. September 19, 2007).

Non-Renewal

High school music teacher alleged that his contract non-renewal constituted First Amendment retaliation under 42 U.S.C. § 1983 and age discrimination pursuant to the Age Discrimination in Employment Act of 1976, 29 U.S.C. § 621 *et seq.* and the New Jersey Law Against Discrimination, *N.J.S.A.* 10:5-1 *et seq.* No evidence was presented, either direct or circumstantial, that cast sufficient doubt on the board's articulated reasons for refusing to renew Plaintiff's employment contract. Summary judgment was granted as to all claims. *Saia v. Haddonfield Area Sch. Dist.*, Civil Action No. 05-2876, 2007 U.S. Dist. LEXIS 67018, (D. N.J. September 10, 2007).

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New Jersey Supreme Court

Labor
The Supreme Court, in reversing the Appellate Division, ruled that the board's decision to terminate a custodian's employment was a disciplinary action subject to arbitration; although the employee's individual employment contract did not require arbitration of a mid-year termination, the collective bargaining agreement's definition of arbitrable discipline was sufficiently general to cover mid-year terminations. The protections of the collective bargaining agreement trumped the provisions of the individual employment contract. Pascack Valley Reg'l High Sch. Bd. of Educ. v. Pascack Valley Reg'l Support Staff Ass'n, ___N.J. ___(2007), 2007 N.J. LEXIS 1244.

The Supreme Court, by virtue of a tied ruling, affirmed the Appellate Division's opinion upholding the school board's decision to terminate a non-tenured teacher for performance reasons upon 60 days' notice as required by the individual employment contract. The Appellate Division had ruled that termination was not subject to the grievance and arbitration provisions of the collective bargaining agreement. When the parties have not included any provision in the collective negotiation agreement that clearly creates a right to challenge a mid-term termination through a grievance proceeding, the terms of the individual contract, otherwise in accordance with applicable statutory provisions, are enforceable as written. Northvale Bd. of Educ. v. Northvale Educ. Ass'n, __ N.J.__ (2007), 2007 N.J. LEXIS 1245.

Unemployment Compensation
Teacher who fraudulently received unemployment benefits during the time she was employed, would be required to repay the benefits wrongfully received, as well as a fine and a one-year disqualification; she was not entitled to any set-off for the period during which she was truly unemployed but did not apply for unemployment benefits. Sawyer v. Board of Review, Sept. 18, 2007 No. A-4346-05T24346-05T2 (App. Div., Sept. 18, 2007).

Real Property
Appellate Division affirmed an order for summary judgment dismissing school board's complaint in lieu of prerogative writs against the City, Mayor, and Town Council. The Court held that the municipality had no obligation to transfer property to the Board of Education, despite the *Abbott* Board's desire to obtain the land for a vocational high school.

The Court declined to draw from the *Abbott* decisions a process that would allow a board of education to compel its municipality to convey land for school construction, outside the statutory condemnation process. Elizabeth Board of Education v. Elizabeth, No. A-0090-06T5 (App. Div. Sept. 28, 2007).

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State Board of Education

90-Day Rule
State Board affirmed Commissioner dismissal of parent's petition for reimbursement for summer make-up chemistry class their daughter had taken; petition was barred by the 90-day rule as the 90 days began to run from the date of the district's decision not to investigate or correct the alleged mistreatment of S.B. by her chemistry teacher; even absent a timeliness problem the Commissioner did not have jurisdiction to award consequential damages. (T.B. St. Bd. 2007: Sept 5), see also (T.B. and M.B., 2007: May 24).

Tuition
State Board affirmed that parents were not entitled to reimbursement for tuition they paid to the school district for the attendance of their non-resident children, as the parties had earlier entered into and fulfilled a settlement agreement permitting the children to attend for a reduced amount of tuition paid in installments. (Barry St. Bd. 2007: Sept 5), see also (Barry, Commr., 2007: May 9).

Revocation of Certificates
State Board affirmed the State Board of Examiners decision to revoke certificates where appellant "harassed the teaching staff he supervised, made derogatory comments about staff members to their colleagues, interfered with their ability to conduct their classes, and threatened their tenure." Revocation of the appellant's instructional certification, in addition to his administrative certification, is sufficiently related to the facts to be justified. (Mazzarella, St. Bd. 2007: Sept 5).

Upon Appellate Division remand, matter referred to OAL on issue of mitigation of the revocation sanction for kissing a student. (Fox, St. Bd. 2007: Sept. 20).

State Board affirmed Examiners decision on certificate revocation. ALJ's decision provided an appropriate basis for finding that appellant's testimony was not credible and conformed with the legal requirements for assessing credibility of witness testimony. (Kersaint, St. Bd. 2007: Oct. 17).

Tenure Dismissal
State Board affirmed dismissal of physical education teacher from his position for insubordination toward his supervisors; habitual lateness and absence from work; use of disrespectful and unprofessional language and vulgar gestures towards colleagues; and use of inappropriate language toward a student. Even assuming that some of the conduct was inefficient, there was ample evidence of unbecoming conduct. (Hill, St. Bd. 2007: Oct. 17). See also (I.M.O. Hill, Commr., 2007: May 15).

Increment Withholding
State Board upheld withholding of increment where board alleged that teacher engaged in conduct unbecoming in hitting student with a ruler. Teacher's denials not sustainable. (Morris, St. Bd. 2007: Oct. 17). See also (Morris, Commr 2006: Dec 1).

Student Discipline
Appeal of 10 day suspension for weapons possession dismissed for failure to perfect. (R.O. St. Bd. 2007 Oct 17).

School Funding
State Board affirmed restoration of $5,170,982 in reductions from the general fund base budget tax levy made by the Township of Willingboro in its certification of the tax levy necessary to support the annual school budget. (I.M.O. Application Pursuant to N.J.A.C. 6A:23-8.10 for : Restoration of Budget Reductions, St. Bd. 2007: Oct. 17).

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Commissioner of Education

Students

Residency
Parent's temporary custody arrangement with the child's grandparents while parent was on active duty with the U.S. Army did not shift the child's residency to that of the grandparents. (A.M.S. Commr., 2007: Sept. 7).

Commissioner upheld the enforcement of a residency settlement against the district where the settlement agreement contained language voiding

the enforcement if the parent failed to establish residency. Matter returned to superior court for a determination of fees and costs. (Port Republic Bd. of Ed., Commr., 2007: Oct. 9).

Commissioner determined that student was domiciled within the district with aunt where father lived in the Czech Republic. (F.A.C., Commr., 2007: July 30).

Commissioner dismissed parent's residency appeal as parties mutually agreed t resolve the issues. (Shamong, Commr., 2007: Aug. 15).

Transportation
Commissioner determined that parents failed to demonstrate that the board's location of a bus stop was dangerous or that the board acted arbitrarily, capriciously, or unreasonably in denying parent's request to relocate the bus stop. (F.P., Commr., 2007: Oct. 17).

Board Governance

Ethics
Commissioner reduced suspension of board member from three months to one month where SEC found that board member violated the *School Ethics Act* when he emailed the district superintendent in an attempt to secure an unwarranted privilege for his wife regarding leave time. Commissioner held that SEC recommended penalty was inconsistent with penalties issued in prior decisions. (I.M.O. Kanaby, Commr., 2007: Sept. 10).

Commissioner rejected SEC penalty recommendation of one-year and instead imposed a three-month suspension, but stayed implementation of the penalty pending board member's appeal to the State Board of Education. Commissioner found that the Commission's recommended penalty was inconsistent with penalties issued in prior decisions and insufficiently supported. (I.M.O. Atallo, Commr., 2007: Oct. 25).

Tenure

Mitigation of Damages
On remand from the State Board on the issue of mitigation of damages, the Commissioner determined that wrongfully terminated employee was entitled only to five years worth of salary because during the final three years of the litigation, the board had no open position within the scope of the employee's certification. (Ziegler, Commr., 2007: Sept. 17).

Seniority Rights
Commissioner dismissed tenured math teacher's petition alleging a violation of his tenure rights where upon his return from treatment for lymphoma, he was assigned to teach different math classes and suffered a reduction his advisory role in extra-curricular activities. (Varjian, Commr. 2007: Oct. 15).

Dismissal
Commissioner dismissed tenure charges, without prejudice, against a tenured staff member for the board's failure to specify the alleged unprofessional conduct in the tenure charges. Charges were so general in nature that teacher was unable to submit a written statement of position, failed to state a time or dates of the alleged violations, or provide the names of alleged victims of his unprofessional conduct.

(King, Commr. 2007: Sept. 18).

Commissioner summarily ordered the dismissal of tenured secretary for chronic absenteeism and tardiness over a nine-year period, despite the lack of detrimental impact on district operations. (Battle, Commr., 2007: Sept. 20).

Commissioner determined that tenure charges were rendered moot where employee's public office was forfeited in a judgment issued by the sentencing court. (Iglesias, Commr., 2007: Oct. 2).

Certification
Commissioner approved vacation of order to show cause. (Grant-Rauschkolb, Commr., 2007: Aug. 23).

Tuition

Administrative Costs Commissioner determined that salaries and related benefits of certain private school for children with disability employees should be disallowed or limited where uncertified individuals were serving in positions requiring certification; where employees were improperly functioning in unrecognized position titles without Department approval; and where the salary of an individual functioning in an administrative position which does not require certification was in excess of the lowest maximum allowable salary in the county where the school is located. (Youth Consultation Services, Commr., 2007: Oct. 4).

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3rd Circuit Court of Appeals

Personnel Benefits

Third Circuit determined that early retirement payments to faculty were taxable as wages under the *Federal Insurance Contribution Act* (FICA). Compensation paid to an employee for services constituted wages under FICA whether the compensation was for future earning potential or as a reward for past service. Payments offered in return for relinquishing tenure rights were taxable as compensation. *University Of Pittsburgh v. United States, No. 06-1276,* 2007 U.S. App. Lexis 25641 (3d Cir. Nov. 2, 2007).

Special Education

Third Circuit held that District Court improperly rejected ALJ determination that board of education had failed to provide disabled student with appropriate education given that the student displayed above-average intelligence but was performing below grade-level. District court must accept state agency's credibility determinations unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion. *Ringwood Bd. of Ed. v. K.H.J. on behalf of K.F.J.*, No. 05-5222, 2007 U.S. App. Lexis 28876 (3d Cir. Dec. 12, 2007).

Civil Rights

Third Circuit dismissed parental complaint alleging that public health center violated unemancipated minor daughter's constitutionally protected right to bodily integrity, parental guidance, and freedom of religious exercise where the health center provided daughter with emergency contraception that could abort a pregnancy without notifying her parents. Anspach v. City of Philadelphia Dept. of Public Health, No. 05-3632, 2007 U.S. App. Lexis 22527 (3d Cir. Sept. 21, 2007).

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New Jersey District Court

Civil Procedure
District Court declared that *pro se* parents lacked standing to represent minor child's section 504, ADA and NJLAD claims, although parents could proceed with their own parental claims. *Woodruff v. Hamilton Twp. Public Schools,* No. 06-3815, 2007 U.S. Dist. Lexis 93569 (D. N.J. Dec. 20, 2007).

Special Education
District Court granted parent's preliminary injunction directing school district to conduct a functional behavioral assessment and incorporate it into student's IEP; provide student with 15 hours per week of ABA related services; and designate school personnel responsible for implementing the student's IEP. Court declined to enter an order of contempt. *L.J., a minor individually and by his parents, V.J. & Z.J., v. Audubon Board of Education,* No. 06-5350, 2007 U.S. Dist. Lexis 81527 (D. N.J. Nov. 5, 2007).

District court determined that a pre-school child need not have "previously received" services from a local school district in order to qualify for reimbursement where parents unilaterally placed child in a private school prior to enrolling the child in public school. *W.C. and S.C. on behalf of R.C. v. Summit Bd. of Ed.,* No. 06-5222, 2007 U.S. Dist. Lexis 95021 (D. N.J. Dec. 31, 2007).

District Court granted parents' request for preliminary injunction where parents demonstrated likelihood of success on the merits, that student would suffer irreparable harm if the injunction were denied, preliminary relief would not result in even greater harm to the district, and that the public interest favored such relief. Motion for civil contempt against the district denied. *L.J. individually and by his Parents, V.J. and Z.J v. Audubon Bd. of Ed.,* No 06-5350, 2007 U.S. Dist. Lexis 81527 (D. N.J. Nov. 5, 2007).

Public Contracts
District Court granted summary judgment in favor of certain defendants and board of education in specific breach of contact claims where general contractor alleged search and seizure and due process violations; 1st *Amendment* retaliation claims; conspiracy; illegal garnishment; N.J. Trust Fund Law violations; unjust enrichment; tortious interference with contract; breach of contract; fraud; civil conspiracy; and malicious prosecution claims. Board's motion for summary judgment as to defamation; libel and slander; destruction of prequalification for public works contracts without due process; 1st amendment; and breach of contracts claims denied. *D&D Associates v. North Plainfield Bd. of Ed.,* No. 03-1026, 2007 U.S. Dist. Lexis 93867 (D. N.J. Dec. 21, 2007).

Procedural Rules
District Court dismissed *pro se* complaint without prejudice for the second and final time. Complaint failed to set forth (1) a short and plain statement of the grounds upon which the Court's jurisdiction depends, and (2) a short and plain statement of the claim showing that Plaintiff is entitled to relief. *Gadsden v. N.J. Ed. Assn. et al.* No. 07-4861, 2007 U.S. Dist. Lexis 89000 (D. N.J. Dec. 4, 2007).

Discrimination

District Court granted summary judgment in favor of defendants where it was clear that plaintiff's employment with the board of education ended for reasons unrelated to discrimination. *King v. Cape May County Board of Freeholders et al.*, 04-4234, 2007 U.S. Dist. Lexis 84063 (D. N.J. Nov. 14, 2007).

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New Jersey Supreme Court

Certification Decisions
Petition for certification granted in *N.J.S.A.* 18A:12-2 conflict of interest case. *Board of Educ. of Sea Isle City v. William Kennedy*, 192 *N.J.* 478 (2007). Appellate Division previously upheld State Board of Education removal of board member who had filed a complaint against the board alleging a violation of a consent order regarding his disabled child. The complaint disqualified the member from continuing in office, despite the conduct-based exception contained in the School Ethics Act, holding that a member must be qualified for office before his conduct can be regulated. *Sea Isle City Bd. of Ed. v. Kennedy, 393 N.J. Super. 93 (App. Div. 2007)*.

Certification denied. Appellate Division had previously determined that school district could subcontract the services of a school business administrator pursuant to *N.J.S.A.* 40:8A-3 instead of sharing services pursuant to *N.J.S.A.* 18A:17-24.1. *Raimondi v. Westwood Regional School District Bd. of Ed.,* 193 *N.J.* 222, 2007 N.J. Lexis 1504. *See also, Raimondi v. Westwood Regional School District Bd. of Ed.*, No. A-5555-05, (App. Div., Aug. 7, 2007) (slip op.).

Petition for certification denied. *Burke v. Teachers' Pension & Annuity Fund*, 192 *N.J.* 477 (2007).

Petition for certification denied. *Lenape Reg'l High Sch. Dist. Bd. of Educ. v. Lenape Dist. Support Staff Ass'n*., 193 *N.J.* 223 (2007).

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New Jersey Superior Court Appellate Division

Disability Retirement
Appellate Division reversed PERS Board of Trustees denial of petitioner's application for accidental disability retirement as untimely under N.J.S.A. 43:15A-43. PERS Board erred by not considering the totality of factors, including when delayed manifestation occurred, why the filing was delayed, and prejudice to the PERS. Matter remanded for a more fact-sensitive analysis. *In re Crimaldi*, 396 *N.J. Super.* 599 (App. Div. 2007).

Open Public Records Act
Numerical and statistical data redacted from the New Jersey Department of Education's school funding simulation memo were not exempt from disclosure under *N.J.S.A*. 47:1A-1.1 of the New Jersey Open Public

Records Act. They did not constitute intra-agency "deliberative material" within the meaning of § 47:1A-1.1, as they were not "opinions, recommendations, or advice." Education Law Center also had a common law right to the memo, as its request was based on a concern about a public matter, and the Department did not show that its decision-making ability would be chilled by disclosure. *Education Law Ctr. v. NJDOE*, 396 *N.J. Super.* 634 (App. Div. 2007)

Appellate Division affirmed Government Records Council decision, which upheld Board's contention that it possessed no records responsive to appellant's OPRA request. While appellant lacked standing to complain about the duplication rates charged by the board because no fee was charged, the Appellate Division concluded in dictum that the GRC's interpretation of *N.J.S.A.* 47:1A-5(b), as applied to small public agencies, is deserving of deference. GRC believes that it would be inappropriate and overly-rigid to apply the statute in the same precise way to each and every public agency. *Windish v. Mount Arlington Bd. of Ed. Custodian of Records*, No. A0579-06 (App. Div. Dec. 12, 2007) (slip op.).

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State Board of Education

Sending Receiving
State Board affirmed Commissioner ruling that, in light of *N.J.S.A.* 18A:38-8.1, sending district board members are not entitled to vote on the selection of a board solicitor. Evans, St. Bd. 2007: November 7.

Tenure
State Board affirmed Commissioner decision holding that teacher who did not possess the appropriate endorsement did not acquire tenure as a county apprenticeship coordinator; although he had served in the position, it was under a waiver permitting the district to hire a less-than-fully certified person and cannot be construed as tenure-eligible service. Lagrutta, St. Bd. 2007: Nov. 7.

Regional Districts
State Board affirms the determination of the Commissioner of Education that the "Librera" methodology method for allocating costs among constituent districts remains in place in the Manchester Regional School District, and that Prospect Park and Haledon must repay the amounts they underpaid in the 2006-2007 school year in accordance with the schedule set forth in the Commissioner's July 9, 2007 determination. IMO Manchester, St. Bd. 2007: Nov. 7.

State Board reaffirmed the scope of its earlier directive to remand issues regarding the cost apportionment plan to the Commissioner for amplification of the record, on question of whether the apportionment plan fulfills the terms of the New Jersey Supreme Court's remand. State Board retains jurisdiction. IMO Referendum for Withdrawal of North Haledon from Manchester, St. Bd. 2007:Nov. 7. (Decision on motion).

Public Funds
State Board affirmed Commissioner's ruling that school board improperly spent funds, and Deputy Commissioner's remedy of $88,373 deduction from the board's 2006-07 school budget, where the Board improperly spent that sum on political advertising, presenting incomplete information and advocating only one side of a controversial question regarding the purchase of two parcels of land. The color brochure and four television spots, presented incomplete information, were exhortative and one-sided in violation of *Citizens to Protect Public Funds,* 13 *N.J.* 172 (1953) and were an ineffective and inefficient use of State money IMO Elizabeth, St. Bd. 2007: Nov. 7.

Indemnification
State Board affirmed Commissioner's determination that petitioner's claim for payment of accrued vacation/personal days and health insurance waiver should be deemed moot. Payment in full for post-judgment interest made entire matter moot. Kaprow: St. Bd. 2007: December 5.

Increment Withholding
State Board affirmed penalty of suspension for six months and loss of salary increment after board brought tenure charges against secretary who left work early without permission on several occasions, failed to heed Board policy against selling commercial items despite warnings, and used disrespectful and unprofessional language. Tenure Hearing of Mc Cain, St. Bd. 2007: Dec. 5.

Teacher Certificates
State Board reversed the decision of the State Board of Examiners to revoke the certificate of a teacher for a hearing, to permit the teacher to present evidence in mitigation; a hearing on the papers did not satisfy due process concerns. Certificates of V.R., St. Bd. 2007: Dec. 5.

Charter Schools
State Board dismissed (for failure to perfect) the charter school's appeal of the denial of its application for lateness. Winslow, St. Bd. 2007: Dec. 5.

Contracts
Abbott preschool appealing the non-renewal of its contract, sought an expedited ruling from the Commissioner (who had obtained an order extending the time frame for decision); State Board denied preschool's motion under the standard for interlocutory review of an administrative ruling. Toddlertown, St. Bd. 2007: Dec. 5.

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Commissioner of Education

Public Contracts
Commissioner does not have jurisdiction over contractual bidding dispute arising between vendor and municipality. Matter dismissed. Integrated Security Technology, Inc. Commr: 2007:Nov. 7.

Commissioner upheld ratification vote where initial vote to award a food services contact was improper due to the participation of sending district representatives. Compass Group USA, Commr., 2007: Dec. 7.

Ethics
Commissioner rejected SEC penalty recommendation of removal; determined penalty of reprimand appropriate for board member who had not attended training until just prior to Commissioner's decision. Feldsott, Commr, 2007: Nov. 14

Commissioner concurred with the penalty of removal recommended by the SEC and additionally admonished the respondent for failing to attend the required training, in that such disregard of the law resulted in a waste of administrative and adjudicative time at both State and local levels. Cubas, Commr, 2007: Nov 14.

Commissioner concurred with the penalty of removal recommended by the SEC and additionally admonished the respondent for failing to attend the required training, in that such disregard of the law resulted in a waste of administrative and adjudicative time at both State and local levels. Boxley, Commr, 2007: Nov. 14.

Commissioner found that the appropriate penalty for the respondent's failure to attend training in a timely manner is a reprimand, so as to admonish him for disregarding the law and causing wasted administrative and adjudicative time at both State and local levels. Luna, Commr, 2007: Nov 14.

Commissioner found that the appropriate penalty for the respondent's failure to attend training in a timely manner is a reprimand, so as to admonish him for disregarding the law and causing wasted administrative and adjudicative time at both State and local levels. Langston, Commr, 2007: Nov 14.

Commissioner found that the appropriate penalty for the respondent's failure to attend training in a timely manner is a reprimand, so as to admonish him for disregarding the law and causing wasted administrative and adjudicative time at both State and local levels. Padilla, Commr, 2007: Nov 14.

Commissioner adopted School Ethics Commission recommendation to censure board member who violated the Code of Ethics for School Board Members through actions which included: voicing questions and concerns directly to reporters without first seeking an administrative resolution, and contacting teachers and administrators directly without going through the superintendent. Delbury, Commr., 2007: Dec. 6.

Tenure Dismissal
Following his arrest and indictment on criminal charges alleging possession of cocaine and drug paraphernalia, and subsequent completion of a pre-trial intervention program (PTI), board sought removal of tenured vice-principal. Commissioner rejected the ALJ's conclusion that the respondent's agreement to participate in a PTI was an admission of the allegations against him. The Commissioner remanded the matter to the OAL for a hearing on the facts underlying the tenure charges. I.M.O. Tenure Hearing of Thomas, Commr, 2007: Nov. 26

Commissioner concurred that the record of tenured custodian's behavior is more than sufficient to establish excessive and chronic absenteeism and conduct unbecoming. Respondent dismissed from his tenured employment. I.M.O. Tenure Hearing of Moore, Commr, 2007:Nov. 29.

Commissioner dismissed tenured custodian who failed to contest charges of excessive absenteeism and abandonment of position. I.M.O. Tenure Hearing of Sowinski, Commr., 2007: Dec. 14.

Commissioner suspended contractually tenured superintendent for six months for conduct unbecoming for failing to report vacation days, misdirecting leave time, intentionally deceiving the board, and abusing his authority. I.M.O. Tenure Hearing of Witmer, Commr., 2007: Dec. 24.

Commissioner dismissed tenured clerk for conduct unbecoming and insubordination for unsatisfactory work product, poor time management, and problems working with staff. Commissioner deemed charges admitted where clerk refused service of process. I.M.O. Tenure Hearing of Bailey, Commr., 2007: Dec. 26.

Commissioner rejected and remanded settlement agreement that failed to indicate board approval of the settlement and failed to indicate that board president and business administrator/board secretary had authority to execute the settlement. Agreement was not signed by board attorney. I.M.O. Tenure Hearing of Crandall, Commr., 2007: Dec. 26.

Commissioner dismissed tenured teacher in an institution for the developmentally disabled who claimed self-defense after child struck teacher's chest near an implanted defibrillator. Commissioner did not credit self-defense explanation and determined that Department of Human Services policy unequivocally prohibits hitting a student. I.M.O. Tenure Hearing of Gall, Commr., 2007: Dec. 26.

Student Residency
Commissioner determined that settlement agreement did not support removal of children from district schools if the family failed to establish residency by a date certain. Port Republic, Commr., 2007, Oct. 9.

County Superintendent's determination of homelessness upheld, and district of origin is responsible for costs of tuition and transportation. Belleville, Commr, 2007: Nov. 19.

Dispute over residency dismissed where affidavits submitted to district established that pupil entitled to free education in the district. D.Y., Commr, 2007: Nov. 19.

Commissioner granted parent's residency appeal and dismissed district

claim for tuition with prejudice. N.B o/b/o/ Minor Child D.B., Commr., 2007: Dec. 3.

Commissioner dismissed parent's residency appeal for failure to prosecute. Commissioner assessed tuition in the amount of $7,751. D.G. Sr., o/b/o/ D.G. Jr., Commr., 2007: Dec. 19.

Health and Safety
Commissioner directed tenured science teacher to submit to psychiatric and physical examination where his irrational and threatening conduct toward fellow teachers over the past several years demonstrated a deviation from normal physical and mental health. Lyndhurst Bd. of Ed., Commr., 2007: Dec. 5.

Student Discipline
Commissioner granted parent petition to reinstate child to regular education program after he was suspended for making threats against students that had allegedly bullied and harassed him. Commissioner reminded district of its obligation to ensure a harassment-free educational environment. O.E. o/b/o Minor Child A.E., Commr., 2007: Dec. 7.

Commissioner upheld 10-day suspension of student who engaged in a fight outside the high school. Given the student's prior history of suspensions and the off-campus altercation involving the same student to which police were called, there was a need to deter aggression. M.W. on behalf of minor child T.C., Commr., 2007: Dec. 27.

Reduction in Force
Commissioner dismissed petition of custodian who alleged a violation of his tenure rights following the board's reduction in force. Custodian had been employed for a series of fixed terms and district policy did not provide tenure status to custodians. Sloan, Commr., 2007: Dec. 27.

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School Ethics Commission

Petitioner alleged that board member violated N.J.S.A. 18A:12-24(a) and (c) and N.J.S.A. 18A:12-24.1(e), (f), (g) and (h) of the Code of Ethics for School Board Members when, at the November 20, 2006 Executive session of the Board, the respondent shared with the Board a letter from the complainant to the respondent's spouse that was critical of the Board's Gifted and Talented Education program (GATE) in which the respondent's spouse was involved. SEC dismissed complaint because there was no cause to credit the allegations. Goitiandia, SEC, 2007: Dec. 18

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New Jersey Division on Civil Rights

There were no relevant Director's orders issued during the period.

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New Jersey Government Records Council

GRC was unable to determine if custodian unlawfully denied access to employee education certificates and school board meeting transcripts and tapes. Matter referred to OAL for hearing. Semprevivo v. Pinelands Regional School District Board of Education, GRC Complaint No. 2007-135, Decided October 31, 2007.

GRC determined that on site inspection of bid proposal was not a reasonable substitute for copies of the requested records. Grauer v. NJ Department of Treasury, GRC Complaint No. 2007-3, Decided November 28, 2007.

GRC referred matter to OAL to determine if council member was in contempt of the GRC's order to provide copies of emails from October 1-20, 2006. Johnson v. Borough of Oceanport, GRC Complaint No. 2007-107, Decided November 28, 2007.

GRC determined that staff attendance records are government records, specifically payroll records, and are subject to public access. Burdick v. Franklin Township Board of Education, GRC Complaint No. 2007-74, Decided October 31, 2007.

GRC determined that denial of access was authorized by law. Complainant's 7 page 59 item request spanning over 12 years would result in substantial disruption of the agency's operations. Caggiano v. Borough of Stanhope, GRC Complaint No. 2006-220, Decided September 26, 2007.

GRC determined that custodian's failure to produce the "School Agreement" as part of a request for information related to the contract for Channel One between the Nutley Board of Education and Channel One was an unreasonable denial of access under OPRA. Quirk v. Nutley Board of Education, GRC Complaint No. 2007-187, Decided October 31, 2007.

GRC dismissed complaint as frivolous. Complaint was issued in bad faith only for the purpose of harassment. Caggiano v. Borough of Stanhope, GRC Complaint No. 2007-161, Decided October 31, 2007. See also Caggiano v. Borough of Stanhope, GRC Complaint No. 2007-182, Decided October 31, 2007.

GRC determined that failure of custodian to respond within 7 days is deemed a denial. Because there is insufficient evidence in the record to ascertain to what extent the executive session minutes requested by the Complainant contained privileged and confidential information, the GRC should conduct an *in camera* review of the completed executive session minutes to determine to what extent *N.J.S.A.* 47:1A-10 or any other exemption applies to these documents. Seiler v. Old Bridge Economic Development Corp. GRC Complaint No. 2006-69, Decided October 31, 2007.

DYFS records deemed exempt from disclosure. Hanks v. NJ Department of Children and Families, Division of Youth and Family Services, GRC Complaint No. 2007-17, Decided October 31, 2007.

GRC determined that even though the custodian eventually made the requested floor plans available to the complainant after she realized that the initial denial was a mistake, the custodian violated OPRA by denying the complainant access to the requested records. No willing or knowing violation found. May v. Township of Edison, GRC Complaint No. 2007-16, Decided October 31, 2007.

GRC determined that custodian's failure to grant or deny access, seek clarification or request an extension of time in writing within the statutorily mandated seven business days was deemed a denial. Custodian's charge of $69.39 was reasonable pursuant to OPRA because the custodian charged the enumerated copy costs in N.J.S.A. 47:1A-5.b. for paper copies of letters, emails and faxes, and what appears to be the actual cost for copies of audio tapes. Restino v. Township of Cherry Hill, GRC Complaint No. 2007-138, Decided December 19, 2007.

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New Legislation

	Bill	Introduced	Last Action	Progress	Status	Scheduled
	A500 P.L.2007 c.260	01/03/2008	01/13/2008	Pamphlet Law	APP	
		Roberts (D5) — The "School Funding Reform Act of 2008."				
	S3025 P.L.2007 c.304	12/17/2007	01/13/2008	Pamphlet Law	APP	
		Lesniak (D20) — Clarifies that certain political contribution disclosures that must be made annually to ELEC and prior to entering into certain public contracts apply only to for-profit business entities and not to nonprofit entities.				
	S2975 P.L.2007	12/03/2007	01/13/2008	Pamphlet Law	APP	
		Buono (D18) — Revises laws concerning hate crimes and bullying;				

	c.303	establishes Commission on Bullying in Schools.				
☑	S2888 P.L.2007 c.294	11/08/2007	01/13/2008	Pamphlet Law	APP	
		Codey (D27) — Requires payment of interest by employer on delinquent payroll taxes imposed under "Local Tax Authorization Act."				

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STATE BOARD OF EDUCATION

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Programs to Support Student Development
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SPECIAL ADOPTION

EDUCATION
COMMISSIONER OF EDUCATION

39 N.J.R. 5106(a)

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SCHOOL ETHICS REPORTER

This is the first issue of **School Ethics Reporter,** *a new publication of the New Jersey School Boards Association Legal Department. The publication is an upgrade of the School Ethics Commission Update memorandum periodically issued to NJSBA's AMPSA membership. The fresh and improved look is courtesy of the fine creative efforts of Adriana DiGiacomantonio of NJSBA's Publications Department. The format will continue to include a summary of School Ethics Commission public Advisory Opinions and decisions and Commissioner of Education decisions interpreting the School Ethics Act during the relevant time period. Each issue will also contain an article analyzing a particular area of School Ethics Act law. This inaugural issue will feature an analysis of the status of board member negotiations participation as of December 2000. We hope you like the new format and welcome your comments.*

Reporting Period
January 1, 2000 to December 1, 2000

THE FOLLOWING IS A SUMMARY OF School Ethics Commission (SEC) public Advisory Opinions and decisions and Commissioner of Education decisions regarding interpretations of the School Ethics Act issued during the time period January 1, 2000 through December 31, 2000. A brief summary of each of these Advisory Opinions and decisions follows. Copies of the full Advisory Opinions and/or decisions may be obtained by contacting the NJSBA Legal Department or the SEC. Copies may also be obtained through the Department of Education's Web site, accessible via link from the Legal section of NJSBA's Web site at www.njsba.org.

Advisory Opinions

1. **A02-00 – March 2000**—An Advisory Opinion was requested regarding a board member's service on the board's negotiations committee where the union was an NJEA affiliate. The board member's spouse was a teacher employed in another district where an NJEA affiliate was the bargaining representative. The spouse was not a union member, had no NJEA affiliation, paid no representation fee, and no agency shop clause existed in the contract. The SEC advised that the board member could not participate on the negotiations committee. The recent 1999 amendment to *N.J.S.A.* 18A:12-24(c) and the State Board decision in *Pannucci* did not change the SEC's former position of non-participation. The board member's spouse had an indirect financial involvement with the NJEA that would reasonably be expected to impair the board member's objectivity. The fact that the two districts were in different counties did not diminish the appearance of influence.

2. **A07-00 – May 2000**—An Advisory Opinion was requested as to whether a board member could simultaneously serve as president of a local PTA in the same district. The SEC advised that such service was permissible. The two positions were deemed not inherently in conflict but in fact compatible. The SEC cautioned that the board member must avoid conduct that may violate *N.J.S.A.* 18A:12-24(c), (f) or (g). Abstention may be necessary in some instances.

3. **A10-00 – June 2000**—An Advisory Opinion was requested by a board member whose spouse was a teacher in a one building K-8 school district. The question presented was whether the board member could fully participate in the initial appointment of the superintendent, principal and vice principal, including discussion and voting, or on other employment issues regarding those positions. Each of the aforementioned positions were located in the same building as the spouse.

   The SEC advised that the board member could fully participate in the search for the named administrators and could vote on the appointments without violating the School Ethics Act. Once the administrators were hired and became supervisors of the spouse, the board member would be prohibited from participation in future employment issues regarding these individuals such as performance reviews, contract negotiations or promotions. In the circumstances set forth, the board member and spouse would have a personal involvement in the employment issues of the supervising administrators that would constitute a benefit to them. A financial involvement

continued

might be present as well depending on the performance evaluation. To participate in discussions and vote on employment issues in this circumstance would violate N.J.S.A. 18A:12-24(c).

4. **A14-00 – November 2000**—An Advisory Opinion was requested by a board attorney on behalf of a represented board as to whether members of the board who were employed as teachers in other school districts would be able to participate in contract negotiations with the local teachers' association. The local teachers' association was a bargaining unit of the same statewide union (NJEA) that represented the board members in their employment role in the other districts. The employing districts were all within the State of New Jersey but were not contiguous to the board members' district.

   The SEC advised that these board members could vote on collective bargaining agreements with the local teachers' affiliate in the district in which they serve, as per Pannucci. However, the same board members would violate *N.J.S.A.* 18A:12-24(c) if they were to participate in negotiations or be present at negotiations with the local teachers' affiliate. The SEC does not want board members who are prohibited from negotiating to negotiate by the back door by making their voices known during closed-session negotiations update meetings. Board members who are eligible to vote on the contract as per Pannucci may participate in closed-session meetings where the tentative memorandum of agreement is discussed without violating *N.J.A.C.* 18A:12-24(c). Until the tentative memorandum of agreement is reached the board members in question should not participate in discussions concerning the collective bargaining agreement, including the discussion of parameters prior to the start of negotiations.

5. **A16-00 – November 2000**—An Advisory Opinion was requested as to a board member's ability to negotiate a collective bargaining agreement with the local education association when the board member's brother held a maintenance department position and was a member of the local education association. The brother was financially independent and did not reside with the board member. The SEC advised that the board member would violate the Act by participating in negotiations or voting on the contract with the local education association. The SEC found that while no financial benefit accrued to the board member, a personal involvement existed with the brother's employment contract that was or created a benefit to the board member. The SEC considers an involvement to be personal "whenever a school official has a relationship that the public may perceive as being predominant to the best interest of the district." Reading the amended *N.J.S.A.* 18A:12-24(c) in conjunction with the legislative intent of the Act, the public trust would be violated by allowing the board member to negotiate and vote on his relative's contract. The SEC noted that the board member would similarly violate the Act if he were to participate in discussions and vote on his brother's subsequent appointments or promotions.

Complaints—Violations Found

1. ***In the Matter of Frank Pannucci*, 2000 *S.L.D.* March 1—State Board aff'g Commissioner 97 *N.J.A.R.2d (EDU)* 338.** At its November 26, 1996 meeting, the SEC held that a board member violated the Act when he voted on a collective bargaining agreement negotiated with the same statewide union (NJEA) to which he belonged. The board member was a member of the Brick Township Board of Education (Ocean County) and was employed as a teacher in East Orange (Essex County). The SEC recommended the penalty of censure. The Commissioner of Education agreed (1/28/97). More than three years later the State Board reversed the SEC and Commissioner (3/1/00), rejecting the view that status as a member of another local affiliate of the same statewide union should, on a *per se* basis, preclude a board member from voting on a collective bargaining agreement. The connection between a vote by a board member and the salary structure of a whole class of employees statewide was deemed by the State Board to be far too attenuated to justify mechanically barring all board members with ties to a statewide union from voting.

2. ***In the Matter of Bruce White*, 2000 *S.L.D.* June 1—Appeal dismissed on standing grounds, 2000 *S.L.D.* September 6, State Board**. At its January 31, 2000 meeting the SEC determined that a board member whose wife had an out-of-district union affiliation as a teacher and who himself had an out-of-district union affiliation as a supervisor violated the Act when he negotiated and voted on two teachers' contracts and three administrators' contracts. The SEC recommended removal of the board member. The Commissioner remanded the matter to the SEC in light of State Board ruling in *Pannucci*, 2000 *S.L.D.* March 15. On return, the SEC held that its previously found voting violations were reversed by *Pannucci*. The other violations, however, were not impacted by the *Pannucci* decision. The SEC reaffirmed that Mr. White's negotiating actions violated *N.J.S.A.* 18A:12-24(c) and added that the facts also established a violation of *N.J.S.A.* 18A:12-24(a) and (b). The SEC reaffirmed its prior recommended penalty of removal. The Commissioner disagreed and ordered a 45-day suspension from the date of the decision, June 1, 2000. The State Board dismissed the appeal, September 6, 2000, finding no standing for the complainants, one of whom was the original filer of the complaint. The School Ethics Act does not confer on the individual who files the complaint the right to prosecute the matter.

3. ***In the Matter of Frederick Confessore*, 2000 *S.L.D.* June 16.** At its April 25, 2000 meeting the SEC found that an Assistant Superintendent, who had an ownership interest in a local day care center, violated *N.J.S.A.* 18A:12-24(b) when he set forth that the district would have to use all local day care centers for its pre-K program, sent a letter to district residents promoting his day care center using his title and acted contrary to the SEC's second Advisory Opinion letter. The SEC recommended a one-month sus-

pension. The Commissioner agreed and ordered a one-month suspension without pay. Given the Assistant Superintendent's position in a special needs Abbott district, implementation of the sanction was deferred pending appeal to the State Board.

4. ***In the Matter of Alexander Sipos*, 2000 *S.L.D.* June 10.** At its May 23, 2000 meeting, the SEC found that a board member, chairperson of the personnel committee, violated the Act by twice making motions to pass resolutions that resulted in the appointment of his spouse to positions in the district. Such actions constituted acting in the board member's official capacity in a matter in which he had a financial involvement that might reasonably be expected to impair his objectivity. The fact that the board member believed that his position as personnel committee chairperson required him to move all personnel appointments and that the board member did not vote on the resolution did not excuse the violation. The SEC recommended the penalty of censure. The Commissioner agreed.

5. ***In the Matter of Martin Arocho*, 2000 *S.L.D.* July 13.** At its May 23, 2000 meeting the SEC determined that a board member violated *N.J.S.A.* 18A:12-24(c) by voting to contract for pre-K services with the corporation with which the board member was employed. While the board member's employment as a youth outreach worker did not involve pre-K services, a financial involvement did exist. The SEC believed that the board member could continue to work for the corporation and serve on the board of education so long as he abstained from matters concerning the corporation. The SEC recommended the penalty of censure. The Commissioner agreed.

Complaints Dismissed

1. ***Leidner v. Kuchtyak*, Docket No. C11-99, (January 31, 2000)**—A school administrator did not violate the Act when he allegedly interfered with and facilitated the changing of a board member's vote from "no" to "yes" on a personnel item. The SEC was unaware of any statute, regulation or rule of Robert's Rules of Order that required the maker of a motion to vote for it. The SEC was critical of the board's procedures finding that the board created confusion and lost the confidence of the public by doing so.

2. ***In the Matter of George Schwenger and John Knorr*, Docket No. C12-99, (January 31, 2000)**—A board member whose spouse was formerly the CSA's confidential secretary and who was transferred to a bargaining unit position and a board member who was formerly the school district SBA did not violate the Act when they voted for the CSA's non-renewal. While the SEC determined that the non-renewal votes were based in large part on retaliation, satisfaction from retaliation was not the type of benefit intended by the Legislature when it amended the personal involvement section of *N.J.S.A.* 18A:12-24(c).

3. ***Villa v. Gutierrez*, Docket No. C13-99, (January 31, 2000)**—A board member in a Type I school district who was also a bilingual administrative analyst employed by the city in its community development division did not violate the Act by virtue of his employment. His city employment was not in substantial conflict with the proper discharge of his board member duties in the public interest. Recusal may be necessary on certain issues. The board member's vote on a contract for pre-k services did not violate the Act as he did not have an interest in the organization or have a personal or financial involvement therein.

4. ***Byrd, et al. v. Page*, Docket No. C21-99, (February 22, 2000)**—A board member did not violate the Act when he accepted a loan from the Interim Superintendent or with regard to his district-issued cellular phone usage. The Interim Superintendent did not gain or seek to gain any status, position or compensation as a result of extending the loan to the board member. The board member did not use his position to secure unwarranted cellular phone privileges or advantages. The board's telephone policy was not applicable to the facts at hand.

5. ***Brooks v. Cecchini*, Docket No. C19-99, (March 28, 2000)**—A board member whose wife was a teacher's aide did not violate the Act when he made comments in executive session prior to the ratification of the collective bargaining agreement. The board member's remarks were not geared in any way toward altering the memorandum of agreement or influencing the pending litigation at PERC. The remarks were throw-away comments that did not inject anything substantive into the discussion.

6. ***Curioni and Castelluzo v. Baldino and Capizzi***, Docket No. C23/C25-99, (April 25, 2000)—A board member and SBA did not violate the Act by changing a "yes" vote to an abstention regarding the employment of the board member's spouse. The board member's subsequent abstention was circumstantial evidence that he did not intend to vote for his spouse. The SBA's action was not the use of his position to secure unwarranted privileges or advantages for the board member. The board was reminded to allow the public to know what action was being taken and how the members of the board were voting.

7. ***Tullo v. Capriglione*, Docket No. C15-99, (May 23, 2000)**—A board member did not violate the Act by serving as a member of the board and teaching in the board's high school while being employed and evaluated by the county vocational board of education. The board member teacher was part of a satellite vocational program offered at the high school. The SEC concluded that there was no inherent conflict between the two positions.

8. ***Reggio and McHugh v. Randazzo and Stead*, Docket No. C24-99**, (May 23, 2000)—A CSA and SBA did not violate the Act through receipt of compensation from the board for serving as Clerk of the Works for the school district's construction project. No violations of *N.J.S.A.* 18A:12-24(b), (d) or (f) were found. Neither administrator used information not generally available to the public for their own financial gain. Neither used his position to secure unwarranted privileges or advantages. The Clerk of the Works position would not reasonably be expected to prejudice their judgment in their administrative duties. No inherent conflict existed.

9. ***Ordini and White v. Vickner,*** Docket No. C01/C02-00, (June 27, 2000)—A board member whose spouse was a teacher in district did not violate the Act by voting to ratify support staff collective bargaining agreements or by participating in executive session discussions regarding the agreements. The board member relied on Advisory Opinion A08-98 which did not address the same statewide union issue between multiple in-district bargaining units. No contract linkages existed between the agreements. The Commission believed that if a board member with a spouse in the same statewide union could vote under *Pannucci*, that board member could also see the contract and have it explained to him in executive session prior to the ratification vote. Prospectively, negotiations with same statewide-affiliated union groups, *in-district* will not be permitted.
10. ***Thornhill v. Scott*, Docket No. C03-99, (June 27, 2000)**—The SEC dismissed a complaint in which a vendor claimed that a maintenance supervisor violated the Act by using and damaging a competitor's equipment. The complainant did not set forth a claim under which relief could be granted under the Act.
11. ***McGhee v. McGhee and Ricci*, Docket No. C08-00, (November 28, 2000)**—The SEC dismissed a complaint filed against a teacher and supervisor claiming that the supervisor's evaluation of the teacher, her first cousin and lifelong friend, violated the Act. Teachers are not considered school officials and are not subject to the Act. The SEC dismissed the complaint against the teacher for lack of jurisdiction. The complaint against the supervisor was filed June 19, 2000 and related to a January 1995 evaluation. The complaint was filed well beyond the one-year statute of limitations filing period and was dismissed.
12. ***Bass v. Coleman*, Docket No. C04-00, (October 24, 2000)**—The SEC held that a board member's negative vote on a resolution that sought to approve the lease of space in a particular public school building to a charter school did not violate the Act. Neither the board member nor any of his immediate family members were members of the church which was also leasing the school building. The board member was a minister of another church that was connected to the first church via an "umbrella" organization. No unwarranted privileges or advantages were shown. No personal involvement that constituted a benefit to the board member or financial gain to the board member was shown.
13. ***Holland—Novins v. Block*, Docket No. C03-00 (October 24, 2000)**—The SEC dismissed a multi-faceted complaint filed against a former board member. The complaint raised several allegations regarding the former board member's conduct regarding the employment of her daughter and promotion of her husband as well as the changing of school policies that allegedly benefited her school-aged children. While no violations were found, the SEC noted that while the provisions of the School Ethics Act are broad in scope they do not cover all conduct of school officials that one may consider inappropriate.

Training Decisions

The Commissioner of Education issued four decisions during the period regarding board members who failed to attend board member training during the first year of their first term of office. The decisions of the Commissioner varied, depending on the facts in the case and whether the board member had provided good and sufficient reasons for not attending training.

- A board member who gave as reasons for not attending training, her child's birthday, a snowstorm and the need to attend to her "adopted" great-grandmother was removed from office.
- A board member who gave as an excuse for not attending training, survival of his new business, and who had registered for the October 2000 training session was suspended pending attendance at training with removal for failure to attend training by October 2000.
- A board member who responded that his demanding seven-day work schedule precluded prior attendance at required training and who had planned to attend October training was suspended pending attendance at training with removal for failure to attend training by October 2000.
- A board member who did not attend training due to personal obligations was suspended pending attendance at training with removal for failure to attend training by October 2000.

Filing Decisions

No filing decisions were issued in the period.

Procurement Legislation Raises New Ethical Issue

Chapter 440 of the public laws of 1999, effective April 17, 2000, significantly amended the Public Schools Contracts Law, *N.J.S.A.* 18A:18A-1 *et seq.*, as well as the local and state government contracting laws. Included in this legislation were amendments to the public bribery statutes, *N.J.S.A.* 2C:27-1, *et seq.*, particularly 2C:27-4, Compensation for past official behavior, 2C:27-6, Gifts to public servants, and 2C:27-9, Public servant transacting business with certain persons. *N.J.S.A.* 2C:27-7 was repealed.

These amendments appear to have deleted certain *mens rea* aspects of the law and created a *per se* standard of violation when gifts of a non-trivial benefit are received. Benefits of less than $200 are contemplated as non-trivial benefits. Offenses under the revised statutes can be second, third or fourth degree crimes, creating the potential of criminal liability for school officials in areas never heretofore contemplated.

Given the recent enactment of the amendments, no case law has developed to interpret the new language. Combined with the seemingly conflicting penalties and levels of offenses for various actions, it is recommended that board attorneys review the amendments and advice be given to board members and school administrators as to the impact of the amendments on school officials' actions.

Board Member Participation In Negotiations—Where Are We Now?

Since April 15, 1992, the effective date of the School Ethics Act, the ability of board of education members to participate in collective negotiations has undergone an evolutionary process. Prior to the School Ethics Act, the Commissioner of Education (Commissioner) had consistently held under *N.J.S.A.* 18A:12-2 that board members, regardless of whether they had relatives, spouses or children employed in the district, could fully participate in the negotiations process, including voting. The Commissioner's logic was that the contractual benefit to the spouse, child or other relative, was no greater than that given to any other member of the bargaining unit. The School Ethics Act, as interpreted by the School Ethics Commission (SEC), changed that standard. The board member's role in negotiations has become much more limited when relatives are employed in the district, or when the board member or members of the board member's immediate family are employed in other school districts.

Over the first seven years of SEC existence, a body of case law had developed so that board members, school administrators and school attorneys had a good sense of who could participate in negotiations and under what circumstances. Two events occurred in the 1999-2000 time period that had a significant effect on the status of negotiations participation. The first occurred on October 15, 1999 when Governor Whitman signed into law *P.L.* 1999 c. 256 amending the personal involvement standard of the School Ethics Act. The second was on March 1, 2000 when the State Board issued its long-awaited decision in *In the Matter of Frank Pannucci* that rejected the School Ethics Commission's position on contract voting when a board member had an out-of-district same statewide union affiliation conflict. In an effort to provide a historical context, *School Ethics Reporter* will examine the state of negotiations participation prior and subsequent to these two significant developments in school official ethics law.

Participation in negotiations by school officials has indeed been the focus of the SEC. Twenty of the thirty-five public Advisory Opinions issued by the SEC between April 1992 and October 15, 1999 addressed the collective negotiations process and its applicability to school officials; either board members or school administrators. Several complaint decisions issued by the SEC during that time period also addressed the negotiations process; six decisions in which violations of the Act were found and five decisions in which the complaints were dismissed with no violation having been found. Parameters as of October 15, 1999 were as follows:

Out-of-District Union Affiliation Conflicts—October 1999

Board members whose immediate family members were employed out-of-district and were represented by, or received a benefit from a contract negotiated by, the same statewide union with which the board was negotiating (usually NJEA) could not participate in the negotiations process. Immediate family member is a term of art under the Act and is defined as the spouse or dependent child of a school official residing in the same household. Board members so situated were prohibited from:

- participating in closed-session discussions where negotiations parameters were established;
- participating on the negotiations team;
- participating in closed-session discussions where negotiation updates were given to the full board by the negotiations team;
- participating in post-settlement, pre-ratification discussions;
- voting on the contract;
- participation in post-ratification discussions regarding the contract; or
- participating in the grievance process, (depending on the nature of the grievance).

Board members whose non-immediate family member relatives such as emancipated children, brothers, sisters and sons-in-law, had an out-of-district same statewide union affiliation, were able to fully participate in the collective negotiations process, absent other conflicts. For example, if an emancipated child who was working outside of the district with a same statewide union affiliation was providing financial support to the parent/board member, a conflict situation would occur that would prohibit negotiations participation. Absent conflicts of this type, however, non-immediate family member out-of-district union affiliation did not limit a board member's ability to participate in the negotiations process.

In-District Conflicts—October 1999

A board member whose spouse, dependent child, emancipated child, son-in-law, daughter-in-law, brother, sister or fiancée were working in-district and the family members were part of, or received the benefit from a contract with the collective bargaining unit with which the board was negotiating, could not participate in negotiations. Board members so situated, like those with prohibited out-of-district union affiliations, were prohibited from participating in closed- session discussions where negotiation parameters were established, participating on the negotiations team, participating in closed-session discussions where negotiation updates were given to the full board by the negotiations team, participating in post-settlement pre-ratification discussions, voting on the contract or participating in post-ratification discussions regarding the contracts. In certain circumstances these board members were also prohibited from participating in the grievance process, depending on the nature of the grievance.

The SEC established that the above prohibitions did not extend to the relationship of sister-in-law or to relatives in other contractual units that were not members of the same statewide union or that did not have linkages between the contracts. If multiple bargaining units existed in the district and if the units were members of the same statewide union, the prohibitions would extend into those units as well. If collective bargaining units in the district had contract linkages the prohibition would similarly extend.

Doctrine Of Necessity—October 1999

In those circumstances where a majority of board members found themselves in conflict precluding a voting quorum, the SEC established, through Advisory Opinions and decisional law, that all board members could fully participate in the vote on the collective bargaining agreement. Board members would receive information pertaining to the agreement through the agenda, presumably through the informational packet distributed to board members a few days before the meeting at which the tentative agreement would be discussed. At that meeting all board members, including those permitted to participate via the doctrine of necessity, could discuss the tentative agreement being considered for ratification.

In a limited circumstance, the SEC held, through an Advisory Opinion, that board members could participate on the negotiations team by the doctrine of necessity. That circumstance involved a situation where four of five board members had disqualifying conflicts. The SEC reasoned that since one member did not a committee make, a negotiations committee could not be formed without the inclusion of some of the conflicted board members. The one non-conflicted board member would need to be a member of the committee and any or all of the conflicted board members could be part of the committee as well.

As such, the status of the law regarding negotiations participation by board members was firmly established as of October 15, 1999. Two events occurred in the 1999-2000 time period that turned board member participation in negotiations upside down. The first occurred on October 15, 1999 when Governor Whitman signed into law an amendment to the School Ethics Act. *P.L.* 1999 c. 256. The amendment revised the personal involvement standard under *N.J.S.A.* 18A:12-24(c). The pre-amendment subsection (c) read:

> No school official shall act in his official capacity in any manner where he, a member of his immediate family or business organization in which he has an interest has a direct or indirect financial or *personal* involvement that might reasonably be expected to impair his objectivity or independence of judgement. (emphasis added)

It was this statutory section that served as the basis for much of the analysis as to whether board members could participate in negotiations or had direct or indirect personal or financial relationships that would preclude them from participating. The October 1999 amendment severed the personal from the financial standard and separately defined it as follows:

> No school official shall act in his official capacity in any matter where he or a member of his immediate family has a personal involvement *that is or creates some benefit to the school official or member of his immediate family.* (emphasis added)

The new standard seemed much more objective in nature as it appeared that some benefit to the board member was necessary to create a conflict via personal involvement. Previously, it was simply a question as to whether the public would reasonably perceive that a board member's objectivity or independence of judgement would be impaired. The statutory change in personal involvement language called into question all those decisions and Advisory Opinions that were based on the previous personal involvement standard. Would the SEC now view these relationships differently? Could Advisory Opinions and decisions issued under the old standard still be relied upon? How would the SEC interpret the new personal involvement standard? These questions needed to be answered by the SEC and in fact were addressed in several decisions and Advisory Opinions over the past year.

The other significant event of the 1999-2000 time period was the March 1, 2000 State Board decision in *In the Matter of Frank Pannucci*, 2000 S.L.D March 1. In *Pannucci*, the State Board reversed the Commissioner and SEC decisions below, rejecting the SEC's position that the status of a member of a local affiliate of the same statewide union should, on a per se basis, preclude a board member from voting on a collective bargaining agreement. The connection between the vote by the board member and the salary structure of a whole class of employees statewide was deemed by the State Board to be far too attenuated to justify automatically barring all board members with ties to a statewide union from voting.

The *Pannucci* State Board decision reversed six years of SEC and Commissioner case law regarding contract voting by a board member with an out-of-district same statewide union affiliation. While establishing that the SEC's voting interpretation was incorrect, the State Board decision opened up a Pandora's box of questions regarding negotiations participation. The questions included:

- Since *Pannucci* was limited to the contract vote, what impact would it have, if any, on the SEC interpretations on other aspects of negotiation participation?
- *Pannucci* involved a case where the board of education in which the board member was employed sat five counties and more than fifty miles apart from the board on which he served. Would there be a geographical component to negotiations participating in general and contract voting in particular?
- Would, perhaps, a situation exist where employing and sitting boards were located close enough that the public could still reasonably perceive that the person's objectivity and independence of judgment would be effected, particularly in a case in the same county, or neighboring districts where the board member would have a direct or indirect financial involvement in the outcome of the contract on the board in which he sat?

The following SEC decisions have clarified board member negotiation participation in the post-*Pannucci*, post-amendment era.

- **Advisory Opinion A02-00, March 2000.** A board member whose spouse was a teacher in another district and who received the benefit of a same statewide union negotiated contract could not participate on a negotiations committee. The spouse was not a union member, had no NJEA affiliation, paid no representational fee and no agency shop clause existed in the contract. The 1999 amendment and Pannucci decision did not affect the SEC's previous position on negotiations team participation.
- **In the Matter of Bruce White, 2000 S.L.D. June 1, appeal dismissed State**

Board, lack of standing, 2000 S.L.D. September 6. It would appear that geographical location will not be a factor in contract voting. The SEC decided a matter involving a board member whose spouse had an out-of-district union affiliation (NJEA) in a contiguous school district and who himself had an out-of-district union affiliation as a supervisor. The SEC held that the State Board's holding in Pannucci effectively reversed its initial decision on contract voting. That decision had found a violation when the board member voted on five different collective bargaining agreements; two teachers' and three administrators'. If *Pannucci* overruled contract voting prohibitions in an out-of-district same statewide union affiliation situation involving two contiguous districts, it is hard to imagine a situation where contract voting would be precluded simply based on an out-of-district statewide union affiliation. Other conflicts would appear to be necessary.

The SEC's stance on negotiations participation, other than voting, remained unchanged to a great degree. The SEC held that the board member had violated the Act when he negotiated two teachers' contracts and three administrators' contracts and recommended removal. The Commissioner disagreed with the recommended penalty and ordered a forty-five day suspension.

- **Ordini and White v. Vickner, Docket No. C01/C02-00, June 27, 2000.** A board member whose spouse was a teacher in the district did not violate the Act by voting to ratify a support staff collective bargaining agreement or by participating in certain executive session discussions. The board member had relied on Advisory Opinion A08-98 which did not address the same statewide union issue between multiple bargaining units in the same district, even where no contract linkages existed. The SEC determined that if a board member with a spouse in the same statewide union could vote under Pannucci, they could also see the tentative agreement and have it explained to them in executive session prior to the ratification vote. The SEC noted prospectively that negotiations with the same statewide affiliated union group in-district would not be permitted.

- **Advisory Opinion A16-00, December 2000.** A board member was not permitted to negotiate a collective bargaining agreement with a local education association when his brother held a maintenance position and was a member of that local education association. The SEC found that while no financial benefit accrued to the board member, a personal involvement existed with the brother's employment contract that was, or created, a benefit to the board member. The SEC considered an involvement to be personal whenever the school official had a relationship that the public could perceive as being predominant to the best interest of the district. The public trust would be violated by allowing the board member to negotiate and vote on his relative's contract.

Post-amendment, Post-Pannucci Negotiation Participation: A Summary

Given the case law in the post-amendment, post-*Pannucci* era, the following parameters appear to exist as to board member negotiations participation as of January 1, 2001.

Out-of-District Union Affiliations

a. Board members who have an immediate family member out-of-district same statewide union affiliation are prohibited from establishing negotiations parameters prior to the start of bargaining, participating on a negotiations team or sitting in on closed-session negotiations updates to the board provided by the team. The point at which board members with out-of-district same statewide union affiliations can participate in negotiations is when the tentative memorandum of agreement has been reached. At that point, the conflicted board members may be apprised of the terms of the tentative memorandum of agreement, may sit in on closed-session discussions concerning the agreement and ultimately vote on the contract.

b. With *Pannucci* permitting board members with out-of-district union affiliations to vote on collective bargaining agreements, the application of the doctrine of necessity to contract voting is no longer an issue. However, the doctrine may still be applicable to negotiations team membership. Should the board be in a situation where all but one of the members are found to be in conflict, then all board members could be part of the negotiations team pursuant to the doctrine of necessity. The non-conflicted board member must be one of the negotiations team members.

c. Board members with out-of-district same statewide union affiliations with relatives other than immediate family members may fully participate in negotiations, absent other conflicts.

In-District Relationships

a. Board members with "relatives" employed in the district who are part of the bargaining unit in question or who receive the benefit of the contract through an agency shop clause or otherwise are unable to participate in any aspect of negotiations including establishing negotiations parameters prior to the start of bargaining membership on the negotiations team, closed session negotiations updates provided by the negotiations committee, discussion of terms of the tentative memorandum of agreement, voting on the collective bargaining agreement and post-ratification discussions regarding the agreement. The specific use of the term "relative" in Advisory Opinion A16-00 appears to limit negotiation participation for board members who have "relatives" employed in the collective bargaining unit in question or in any other bargaining units represented by the same

statewide union with which the board is negotiating, whether there are linkages or not. The School Ethics Act defines "relative" to be spouse, natural or adopted child, parent or sibling of the school official. Whether or not individuals such as a son-in-law, daughter-in-law or fiancé would be similarly prohibited is uncertain. It would appear that the SEC was using the term "relative" as a term of art in Advisory Opinion A16-00, although it was not expressly stated.

b. In a doctrine of necessity situation that would allow individuals with in-district conflicts to vote, the parameters for access to information would likely be the same as those with out-of-district union affiliation conflicts, although no specific post-amendment Advisory Opinion or decision has addressed the issue. That is, when the memorandum of agreement is established, those board members who could vote pursuant to the doctrine of necessity would have access to the tentative memorandum of agreement, could participate in closed-session discussions regarding the agreement and ultimately vote on its contents. As with out-of-district union affiliation conflicts, where all but one of the board members are found to be in conflict, participation would likely extend to the negotiation team, parameter setting and negotiation updates as well.

As we have learned since the inception of the School Ethics Commission, the status of board member participation in negotiations is a fluid phenomenon. As more and more decisional law is established either through Advisory Opinions or adjudicated complaints, a clearer picture will develop. The *School Ethics Reporter* will continue to periodically report on updates in the law in this area.

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SCHOOL ETHICS REPORTER

This is the second issue of **School Ethics Reporter,** *a new publication of the New Jersey School Boards Association Legal Department. The publication is an upgrade of the School Ethics Commission Update memorandum periodically issued to NJSBA's AMPSA membership. The fresh and improved look is courtesy of the fine creative efforts of Adriana DiGiacomantonio and Melissa Antler of NJSBA's Publications Department. The format will continue to include a summary of School Ethics Commission decisions and public Advisory Opinions and Commissioner of Education decisions interpreting the School Ethics Act during the relevant time period. Each issue will also contain an article analyzing a particular area of School Ethics Act law. This issue will feature an update on negotiations participation and a review of newly enacted administrative code affecting school official activity under the School Ethics Act. We hope you like the new format and welcome your comments.*

Reporting Period
January 1, 2001
to
December 1, 2001

THE FOLLOWING IS A SUMMARY OF School Ethics Commission (SEC) public Advisory Opinions and decisions and Commissioner of Education decisions regarding interpretations of the School Ethics Act issued during the time period January 1, 2001 through December 31, 2001. A brief summary of each of these Advisory Opinions and decisions follows. Copies of the full Advisory Opinions and/or decisions may be obtained by contacting the NJSBA Legal Department or the SEC. Copies may also be obtained through the Department of Education's Web site, accessible via link from the Legal section of NJSBA's Web site at www.njsba.org.

ADVISORY OPINIONS

1. **AO3-01 – April 2001—** The SEC advised that a board member would violate *N.J.S.A.* 18A:12-24 (c) of the School Ethics Act if she were to participate in decisions regarding the board attorney's reappointment or payment of the board attorney's bills when the board attorney had prepared a simple will and powers of attorney for the board member and the board member's spouse. The board attorney had been the board attorney for over two years and had charged the usual and customary fee for the preparation of the documents.

   The SEC believed that the attorney's representation of the board member created a personal involvement that constituted a benefit to the board member. The other board members could perceive that the board member could desire the attorney's continued representation of the board because the attorney had served as her personal counselor and might provide opinions that favored her viewpoint. In addition, a reasonable person could believe that the board member could benefit from her vote to reappoint the attorney, albeit not financially.

   The SEC distinguished its instant advice from its prior decision in *Huber,* C19-96 (May 27, 1997), where no violation of the Act was found. In the present situation, the representation of the board member occurred while the board member was in office and while the attorney was serving as the board attorney. The votes in question to reappoint and to pay attorney fees were much closer in time to the representation than in *Huber.*

   The SEC cautioned against private representation of board members since board attorneys represent the full board, not individual board members.

   The Advisory Opinion was requested by a school board attorney on behalf of a school board member whose board the attorney represented.

2. **AO7-01 – May 2001—** The SEC advised that an executive director of a company, which was the landlord to a charter school, could serve as a trustee of the charter school. The company received a financial gain by subletting a facility to the charter school. While the executive director could serve as a trustee of the charter school, she would violate *N.J.S.A.* 18A:12-24 (c) of the School Ethics Act if she were to participate in discussions or vote on matters having to do with the lease or future purchase of the property.

   The SEC found the positions of charter school trustee and executive director of the company to not be

inherently in conflict. The trustee's employment would not impair her independence of judgment in the exercise of her official duties. However, participating in her official capacity in any matter having to do with the lease of the property or even the discussion of purchasing property elsewhere could result in a loss of revenue to the trustee's employer. The executive director/trustee had an indirect financial involvement as her employment was indirectly tied to the success of her employer. Acting in her official trustee capacity regarding the lease would result in a violation of the Act.

The SEC expressed concern that the executive director/trustee should be mindful that if the lease were out of line with the fair market value of the property or if no other properties were sought, that she could possibly violate *N.J.S.A.* 18A:12-24 (b) or (f) of the Act by having secured unwarranted privileges or advantages for the company or herself or by using information not generally known to the public to secure financial gain for herself or the company.

3. **AO1-01 – October 2001 –** The SEC advised that several board members, whose spouses were employed as full-time teacher aides, would violate *N.J.S.A.* 18A:12-24 of the School Ethics Act if they were to participate and vote on the teachers' association collective bargaining agreement. The teacher aides were not members of the local teachers' association. The SEC further advised that the board president, whose spouse was one of the teacher aides, would not violate the Act if he were to appoint members and/or the chairperson of the negotiations committee.

The SEC advised that while the spouses were not members of the teachers' association and did not work under a collective bargaining agreement, they would indirectly benefit from the negotiated agreement as teacher aides had historically received percentage increases in pay that were equal to or greater than that of the teachers' association members. Accordingly, the board members had an indirect financial involvement that might reasonably be expected to impair their objectivity and an indirect personal involvement that constituted a benefit to themselves and their spouses. The board members would violate *N.J.S.A.* 18A:12-24 (c) by acting in their official capacity in a prohibited matter if they were to negotiate or vote on the teachers' association contract.

The SEC's specifically noted that its opinion was not based on the fact that the aides reported to teachers who were members of the teachers' association. While this fact would prevent the board members from participating in decisions on matters regarding the specific teachers who supervise their spouses, it would not per se prevent the board members from participating in negotiations and voting on the teachers' association contract. The key issue was the historical percentage increases in pay.

As to the board president, the SEC viewed the appointment of persons to the negotiations committee differently than it viewed participation in negotiations because the board president had no control over the committee members after he appointed them. The negotiations committee members were free to negotiate however they pleased. The SEC was not able to conclude that a reasonable person would believe that the board president could not be objective in appointing members to committees who would best serve the district solely because his spouse was a teacher aide.

The Advisory Opinion was requested by a school board attorney on behalf of a school board member whose board the attorney represented.

COMPLAINTS— VIOLATIONS FOUND

1. ***In the Matter of Patricia Haines,* 2000 S.L.D. November 27.** At its September 27, 2000 meeting, the SEC found that a board member violated *N.J.S.A.* 18A:12-24 (c) of the School Ethics Act when she voted on a board resolution authorizing the issuance and sale of new school bonds with Commerce Bank designated as the paying agent. The board member was a vice-president of Commerce National Insurance Services, a wholly owned subsidiary of Commerce Bank/North.

While Commerce National Insurance Services was only a subsidiary of a sister corporation of Commerce Bank N.A., the SEC believed that the relationship was the type of indirect financial involvement contemplated by the Legislature when it enacted the School Ethics Act. The SEC concluded that when, as here, a board member's employer shares a parent company with the corporation that seeks to contract with the board, an indirect financial involvement is created that might reasonably be expected to impair the board member's objectivity or independence of judgment.

Taking into account the nature of the relationship, the fact that Commerce Bank had been the primary depository for the board prior to the board member becoming a board member and that no one had objected to the vote, the SEC recommended a penalty of reprimand. The Commissioner agreed, noting that the SEC considered the various aggravating and mitigating factors.

2. ***In the Matter of Rosemary Jackson,* 2001 S.L.D. July 27.** At its May 22, 2001 meeting, the SEC found probable cause to credit the allegation that a board member violated *N.J.S.A.* 18A:12-24 (c) of the School Ethics Act when she voted to approve a bill list that contained a bill from her employer. The SEC and the board member entered into a settlement agreement wherein they agreed that the board member inadvertently violated the Act and that the SEC would recommend the penalty of reprimand to the Commissioner. The SEC consented to the settlement at its June 26, 2001 meeting and recommended the penalty of reprimand. The Commissioner agreed.

3. ***In the Matter of Bruce White,* 2001 S.L.D. September 10.** At its July 24, 2001 meeting, the SEC found that a board member violated *N.J.S.A.* 18A:12-24 (c) of the School Ethics Act when he voted on the payment of tuition to the Mercer County Vocational Technical School, where he was employed as a principal. The SEC

concluded that the board member had an indirect financial involvement that a reasonable person could perceive would impair his objectivity or independence of judgment. The tuition monies paid to the VoTech School were not earmarked for any particular purpose and went onto the general fund, indirectly benefiting the board member/principal. The SEC recommended the penalty of censure, being mindful of the board member's previous School Ethics Act violation and the fact that he was no longer a member of the board and had retired as a principal. The Commissioner agreed.

4. ***In the Matter of Frederick Confessore,* 2001 S.L.D. October 3, State Board.** The State Board affirmed the SEC's April 25, 2000 determination that an assistant superintendent violated *N.J.S.A.* 18A:12-24 (b) of the School Ethics Act when, as a one-third owner of a daycare facility located in the school district, he 1) represented that the district would need to use all three daycare facilities licensed in the district to fulfill its pre-school responsibilities; 2) sent a letter to NJDHS to ensure that no other daycare facilities would be permitted to provide such services; 3) sent correspondence from his daycare facility to residents of the district soliciting pre-school children for the center using his title as assistant superintendent; and, 4) contravened the representations he had made to the SEC and violated the SEC's caution to him.

   The State Board also affirmed the Commissioner's one-month suspension of the assistant superintendent as the appropriate sanction.

COMPLAINTS DISMISSED

1. ***Hanzel v. Achee* , Docket No. C10-00, (December 19, 2000, amended decision January 23, 2001)** – A board member did not violate the School Ethics Act when his company sold t-shirts and other athletic merchandise to the board of education, its coaches and staff during his term of office. The board member did not participate in discussions or votes on invoices that came before the board. After the initial two orders, the board member's company ceased doing business with the board during the board member's term. There was insufficient information to find that the board member engaged in a business or transaction in substantial conflict with the proper discharge of his duties in the public interest. The board member did not use his status as a board member to solicit the business transactions in question and did not act in his official capacity regarding the transactions.

2. ***Hoboken Education Association v. Anthony,* Docket No. C11-00, (December 19, 2000) –** A board member did not violate the School Ethics Act when he negotiated and presented to the board the renewal of the lease of the charter school in which his children were students. The board member did not use his position to secure unwarranted privileges for himself or his immediate family. The board member had no financial involvement in the charter school lease that might reasonably be expected to impair his objectivity. The board member's children did not receive any material gain from the charter school lease to any greater extent than other students attending the school.

3. ***Orban v. Rosevear,* Docket No. C12-00, (December 19, 2000) –** A board member, whose spouse was an elementary principal in the district, did not violate the School Ethics Act when he participated in the board's search for a superintendent. The board member properly relied on the board attorney's advice and Advisory Opinion A10-00. In A10-00 the SEC advised that, a board member, whose spouse was a teacher in a one building K-8 school district, could fully participate in a superintendent search and vote on the appointment without violating the Act. Participation in future employment decisions would be prohibited, however. While the size of the district was larger in this case, the ultimate decision and reasoning was essentially the same. The board member and spouse did not have a direct or indirect financial involvement that could reasonably be expected to impair the board member's objectivity or independence of judgment in participating in the selection process. No personal involvement existed. No participation in future employment decisions regarding the superintendent would be permitted.

4. ***Sarti-Rodriguez v. Highlands Board of Education,* Docket No. C13-00, (January 23, 2001) –** Several board members did not violate the School Ethics Act when they participated in and approved the use of school facilities for a PTO-sponsored forum for Township Council candidates. No unwarranted privileges or advantages for other candidates or members of the board of education were found. No indirect or direct financial or personal involvement by the board members was shown. No monetary gain could result from the action of any board member to approve the PTO meeting in question.

5. ***LoPresti v. Lindhardt-Mazer,* Docket No. C08-01, (June 26, 2001) –** A board member did not violate the School Ethics Act when she participated in a closed-session discussion and voted against the appointment of a teacher who had previously coordinated the School Age Care program in which the board member's son had participated. The SEC could discern no benefit to the board member or any immediate family member from voting on the appointment. Retaliation, if any, is not deemed a benefit. See Schwenger/Knorr, Docket No. C12-99, (January 31, 2000)

6. ***Noe v. Manoes,* Docket No. C05-01, (August 28, 2001) –** A board member did not violate the School Ethics Act when he was in the same building but was not present in the room and did not participate in a discussion where an employee of a board vendor was allegedly asked to donate $1000 to a board member's political campaign. The campaign donation request was accompanied with a threat that the custodial, maintenance and grounds work contract of the employee's company would not be renewed if a donation were not made. The SEC concluded that the board member did not participate in the discussion, hence, no violation of the Act.

7. ***Noe v. Bartram,* Docket No. C07-01, (August 28, 2001) –** A board member did not violate the School Ethics Act

when she was present in the room but did not participate in the discussion where an employee of a board vendor was allegedly asked to donate $1000 to a board member's political campaign. The campaign donation request was accompanied with a threat that the custodial, maintenance and grounds work contract if the employee's company would not be renewed if a donation were not made. The SEC concluded that the board member did not participate in the discussion, hence, no violation of the Act.

8. ***Hodges v. Ball,*** **Docket No. C15-01, (August 28, 2001) –** A board member, whose spouse was a teaching assistant in the district and a member of the local education association, did not violate the School Ethics Act when he participated in closed-session meetings where collective negotiations were discussed. The activity in question occurred more than one year prior to the filing of the complaint; outside the one-year SEC statute of limitations period for filing. No extenuating circumstances were involved. The board member did not violate the Act when he discussed his wife's employment (number of hours) with the superintendent at a board meeting. The board member testified that he was questioning an item on the agenda because he thought a mistake had been made. While no financial or personal involvement was shown, based on the reason for the question, the SEC cautioned the board member that comments resulting in any future complaints would be closely scrutinized.

9. ***Sooy v. Peddle and Carpenter,*** **Docket No. C24-01, (September 25, 2001) –** A superintendent and board member did not violate the School Ethics Act when they were alleged to have used the school district's e-mail system to endorse and/or solicit the endorsement of certain board of education candidates. The e-mail was disseminated by the local education association, which was permitted, pursuant to its contractual agreement with the board, to use the interschool email system for association business. Neither the superintendent nor the board member sent the message in question or used their official positions to secure unwarranted privileges or advantages for the superintendent, board member or others.

10. ***Sooy v. Peddle,*** **Docket No. C25-01, (September 25, 2001) –** A superintendent did not violate the School Ethics Act when he allegedly authorized the transmittal of derogatory e-mail regarding certain board members and an e-mail endorsement of certain association-supported board members. The e-mail was disseminated by the local education association, which, pursuant to its contractual agreement with the board, was permitted to use the interschool e-mail system for association business. The facts demonstrated that the superintendent did not use his official position to secure unwarranted privileges or advantages for himself or others. Had the superintendent sent or authorized the e-mails in question, he could have violated the Act.

11. ***In the Matter of Sara Davis,*** **Docket No. C10-01, (October 23,2001) –** A board member, who was a retired teacher from the district, did not violate the School Ethics Act when she participated in collective negotiations while simultaneously participating in a board of education prescription insurance program for retirees. The contract negotiated by the board member did not affect the prescription drug benefit received by the retiree/board member. The board member did not use her position to secure unwarranted privileges or advantages for herself. At the time the contract went into effect, the board member did not have a financial involvement that might reasonably be expected to impair her objectivity nor did she have a personal involvement that created a benefit for her. The SEC cautioned that school officials must take care in participating in negotiations where it may appear that they are recipients of benefits.

12. ***Diglio v. Dunleavy,*** **Docket No. C14-01, (October 23, 2001) –** A board member did not violate the School Ethics Act when he suggested that a company in which he was a minority shareholder be permitted to submit a quote on school district health insurance coverage. The board member also did not violate the Act when he nominated a law firm to be the board's counsel where a partner in the law firm served on the board of directors of the company for which the board member was a shareholder. The law firm also made contributions to the political party for which the board member was treasurer. There was no showing that the board member used his position to secure unwarranted privileges or advantages for himself, the company or the law firm. No financial or personal involvement was found that might be reasonably expected to impair the board member's objectivity of independence of judgment. Additionally, the board member did not solicit or accept anything of value in return for the suggestion that the health insurance proposal be submitted or for the nomination of the law firm.

13. ***Kearns v. Gagliardi,*** **Docket No. C19-01, (October 23, 2001) –** A superintendent of schools did not violate the School Ethics Act when board members obtained student information and used it for political purposes. The student information was contained in mailing labels used for the dissemination of campaign literature in a mayoral campaign. The superintendent did not knowingly permit the release of the information and did not use his position to secure unwarranted privileges or advantages for himself or others.

14. ***Kolodziej v. Kurnath,*** **Docket No. C27-01, (October 23, 2001) –** A board member did not violate the School Ethics Act when he attended the NJEA convention without board authorization, submitted a request for reimbursement without receipts and was reimbursed. After consultation with the board attorney, the board member returned the money to the board. No unwarranted privileges or advantages were shown. The board member had adhered to a consistent 12-year board practice of reimbursement for attendance at the NJEA convention. The board member did not have a direct or indirect financial involvement in his reimbursement request that might reasonably be expected to impair his objectivity or independence of judgment. He never participated in any votes related to his reimbursement request. His par-

ticipation in discussion was limited to defending himself against the allegation that his reimbursement submission was somehow improper.

15. ***Kolodziej v. Perkins,* Docket No. C28-01, (October 23, 2001) –** A school business administrator did not violate the School Ethics Act when she authorized reimbursement of expenses to a board member who attended the NJEA convention. The school business administrator's acceptance of the board member's itemized statement of expenses without receipts was consistent with a 12-year board practice, if not policy. The school business administrator did not use her position to secure unwarranted privileges for the board member. She did not engage in any activity that presented a conflict to her proper discharge of duties.
16. ***Lyden v. Walsh, Docket No. C16-01, (November 27, 2001) –*** A complaint was dismissed for failure to comply with *N.J.S.A.* 18A:12-29(a) of the School Ethics Act. The proper certification was not provided as the complaint was not based on the personal knowledge of the complainant.
17. ***Kearns v. Anthony, Docket No. C18-01A, (November 27, 2001) –*** A board member/president did not violate the School Ethics Act when another board member disseminated campaign literature using school district mailing labels containing student information as part of a mayoral campaign that he managed. The board member/president had no first hand knowledge of the other board member's request of mailing labels or the purpose for which they were to be used. The board member/president's position as a mayoral campaign manager did not require him to send out campaign mailings or have knowledge of them. No unwarranted privileges or advantages for himself or others were shown.
18. ***Maynard v. Glinsman,* Docket No. C30-01, (November 27, 2001) –** A board member did not violate the School Ethics Act, particularly the Code of Ethics for School Board Members, *N.J.S.A.* 18A:12-24.1, when she allegedly disclosed executive session information to an Internet news agency. Since the conduct alleged occurred prior to its enactment, the Code of Ethics for School Board Members did not apply. No unwarranted privileges or advantages for the board member or others as a result of releasing information acquired in executive session were shown. No employment or service was undertaken that might reasonably be expected to prejudice her independence of judgment in the exercise of her official duties as a board member. The SEC took no position on the appropriateness of the disclosure.

TRAINING DECISIONS

The SEC and Commissioner of Education issued rulings on fifteen board of education members who failed to attend board member training during the first year of their first term of office. The decisions of the SEC and Commissioner varied, depending on the facts in the case and whether the board member had provided good and sufficient reasons for not attending training.

- In eleven cases the SEC recommended the suspension of a board member who had failed to attend board member training with automatic removal if the board member failed to attend training by October 2001. In these eleven cases the Commissioner agreed and so ordered. Reasons given by board members for failure to attend training included:
  - family obligations;
  - a belief that the board member was exempt;
  - work and travel schedule;
  - appointment to fill ten-month vacancy- did not think would run again;
  - unaware of training requirement;
  - personal illness and surgery;
  - painful post-periodontal surgery recovery period;
  - spouse's illness; and
  - multiple children graduations.
- The Commissioner held that a board member who could not attend training due to her personal disability should not be suspended as had been recommended by the SEC. However, the board member would be removed from office if she did not attend the October training session.
- The Commissioner held that a board member who did not attend training should not be suspended as had been initially recommended by the SEC. Unique circumstances existed including his father's lengthy illness, the fact that he was the sole proprietor of a family business, the fact that he was a previous three-term board member from 1986-1995 and the fact that he was the chairperson of the buildings and grounds committee during the period of a $ 15 million construction project. However, the board member would be removed from office if he did not attend the October training session.
- The Commissioner held that a board member who was involved in evacuation and disaster recovery efforts for his New York employer subsequent to 9/11 should not be suspended from office. The suspension had been initially recommended by the SEC in June 2001 and previously agreed to by the Commissioner in early September 2001. However, the board member would be removed from office if he did not attend the October training session.
- A board member who did not attend training due to a heart condition and the need for extensive recuperation resigned from her board, rendering the matter moot.

FILING DECISIONS

The SEC and the Commissioner of Education issued nine decisions during the period regarding school officials who failed to properly file their Financial and/or Personal/Relative Disclosure Statements. The decisions of the SEC and Commissioner varied depending on the facts in the case and the response of the school official.

- A charter school trustee who first failed to file and then twice filed incomplete disclosure statements was recommended for removal from office by the SEC. The trustee twice declined to answer any questions on the Financial Disclosure Statement. The Commissioner agreed with the SEC's recommendation and ordered the trustee removed from office.

- In six cases the SEC recommended a 30-day suspension for school officials who failed to properly file a Financial Disclosure Statement and a Personal/Relative Disclosure Statement with automatic removal from office if they failed to file within the 30-day period. The Commissioner of Education agreed, admonishing the school officials in that the failure to file had caused an inordinate amount of administrative and adjudicative time to be wasted by local, county and state education officials.
- In two cases the SEC and Commissioner of Education addressed the issue of the scantily completed disclosure form. In both instances, after an initial failure to file either a Financial or Personal/Relative Disclosure Statement, the SEC recommended a 30-day suspension for the school official with automatic removal from office if they failed to file within the 30-day period. In each case the school official submitted a scantily completed disclosure form to the Commissioner, who forwarded it to the SEC for a determination of acceptability. The Commissioner agreed with the SEC recommendation, admonishing the school official in that the failure to file and then file in a less than complete manner had caused an inordinate amount of administrative and adjudicative time to be wasted by local, county, and state education officials.

Board Member Participation in Negotiations – An Update

In its inaugural issue, *School Ethics Reporter* addressed the status of board member participation in negotiations in the form of two articles; *Board Member Participation in Negotiations – Where Are We Now and Post-amendment, Post-Pannucci Negotiations Participation – A Summary.* These two articles set forth the state of the law regarding board member negotiations participation as of January 1, 2001. This update contains negotiations participation related decisions of the School Ethics Commission (SEC) from the time period January 1, 2001 through December 31, 2001.

Advisory Opinions

In ***Advisory Opinion AO1-01*** the School Ethics Commission (SEC) advised that several board members, whose spouses were employed as full-time teacher aides, would violate the School Ethics Act if they were to participate and vote on the teachers' association collective bargaining agreement. While the teacher aides were not members of the teachers' association and did not work under a collective bargaining agreement, they would indirectly benefit from the teachers' negotiated agreement as the aides had historically received pay increases that were equal to or greater than those received by the teachers' association members. The SEC concluded that the board members had an indirect financial involvement in the collective bargaining agreement that might reasonably be expected to impair their objectivity and an indirect personal involvement that constituted a benefit to themselves and their spouses.

In the same opinion, the SEC also advised that the board president, whose spouse was one of the teachers' aides, would not violate the School Ethics Act if he were to appoint members and/or the chairperson of the board's negotiations committee. The SEC viewed the appointment of persons to the negotiations committee differently than it viewed participation in collective negotiations as the board president had no control over the committee members after he appointed them.

This opinion marked the first time that the SEC found a linkage between a collective bargaining agreement and the salary increases provided to relatives who were not members of any collective bargaining unit so as to preclude participation in negotiations. Originally written January 23, 2001, the SEC made the opinion public on October 23, 2001.

Complaint Dismissals

The SEC issued two complaint dismissals regarding board member participation in negotiations during the calendar year 2001.

In ***Hodges v. Ball,*** Docket No. C15-01, decided August 28, 2001, the SEC found that a board member, whose spouse was a teaching assistant in the school district and a member of the local education association, did not violate the School Ethics Act when he participated in closed session meetings where collective negotiations were discussed. The activity in question occurred more than one year prior to the filing of the complaint; outside the one-year SEC statute of limitations for filing.

In addition, the board member did not violate the Act when he discussed his wife's employment (number of hours) with the superintendent at a board meeting. The board member testified that he was questioning an item on the agenda because he thought a mistake had been made. The SEC cautioned the board member that comments resulting in any future complaints would be closely scrutinized.

In ***In the Matter of Sara Davis,*** Docket No. C10-01, decided October 23,2001 the SEC found that a board member, a retired teacher from the district, did not violate the School Ethics Act when she participated in collective negotiations while simultaneously participating in a board of education prescription insurance program for retirees. The negotiated contract, which resulted from the negotiations in which the board member participated, did not affect the prescription drug benefit received by the retiree/board member. As such, the board member did not use her position to secure unwarranted privileges or advantages for herself. At the time the contract went into effect, the board member did not have a financial involvement that might reasonably be expected to impair her objectivity nor did she have

a personal involvement that created a benefit for her. The SEC cautioned that school officials must take care in participating in negotiations where it may appear that they are recipients of benefits.

State Board Adopts Code of Ethics Requirements

At its July 1, 2002 meeting, the State Board of Education adopted new administrative code, amending *N.J.A.C.* 6: 3 School Districts and *N.J.A.C.* 6A: 30 *Evaluation of the Performance of School Districts.* These amendments were proposed to comport with P.L. 2001, c. 178, which amended the School Ethics Act, *N.J.S.A.* 18A: 12-21 et. seq. and added the Code of Ethics for School Board Members, codified at *N.J.S.A.* 18A: 12-24.1.

The amendments at *N.J.A.C.* 6: 3 – 1.3 *Requirements for the Code of Ethics for School Board Members and Charter School Board of Trustees Members* require boards of education and charter school boards of trustees to:

- Discuss the School Ethics Act and the Code of Ethics for School Board Members annually, at a regularly scheduled meeting.
- Adopt policies and procedures regarding the training of district board of education and charter school board of trustees members in understanding the Code of Ethics.
- Provide documentation that each member of the board of education or charter school board of trustees has received and reviewed the Code of Ethics for School Board members.

In addition, each member of the district board of education or charter school board of trustees is required to sign an acknowledgment of receipt of the Code of Ethics for School Board Members. The acknowledgement requires each district board of education member and charter school board of trustees member to read and become familiar with the Code of Ethics.

The amendments at *N.J.A.C.* 6A: 30 add a new element as a requirement for certification for school districts. The new element requires school districts to adhere to governance and management practices in accordance with the School Ethics Act, including the newly adopted Code of Ethics for School Board Members, and the newly adopted administrative code requirements set forth at *N.J.A.C.* 6: 3-1.3. The county superintendent will review this element as part of the abbreviated on-site visit required for Group 1 monitoring certification. Group 1 school districts are those districts that have met State standards for student performance and behavior and which receive an abbreviated on-site evaluation. The element is also applicable to Group 2 districts as well. Group 2 school districts are those school districts that have not met State standards for student performance and behavior and which receive a full on-site evaluation.

The new element is set forth in the Manual for the Evaluation of Local School Districts, September 2002, as Element 9: Code of Ethics Requirements for School Board Members. Documentation for this monitoring element will include:

- Verification that the board of education has annually discussed the Code of Ethics at a regularly scheduled public meeting, presumably through board meeting minutes.
- Verification that each board member had received and reviewed the Code of Ethics and signed an acknowledgement of receipt. Acknowledgement of receipt forms will be filed in the county office.
- Verification that board policies and procedures exist regarding the training of district board of education members in understanding the Code of Ethics.

The link with the monitoring process is intended to impact school districts in a positive way, resulting in an even higher standard of conduct for school board members.

State Board Adopts School Ethics Commission Code Revisions

At its December 16, 2002 meeting, the State Board of Education adopted several amendments to *N.J.S.A.* 6A: 28 *School Operations*, subchapter one, *School Ethics Commission*. The amendments were intended to bring the School Ethics Commission procedures into compliance with P.L. 2001, c. 178, which amended the School Ethics Act, *N.J.S.A.* 18A: 12-21 et. seq., adding the Code of Ethics for School Board Members, codified at *N.J.S.A.* 18A: 12-24.1.

The amendments at *N.J.A.C.* 6A: 28-1.9 created a new complaint form to be used by those persons who are only alleging that a violation of the Code of Ethics for School Board Members, *N.J.S.A.* 18A: 12-24.1, has occurred. Complaints alleging violations of both the Code of Ethics for School Board Members and a violation of any other provision of the School Ethics Act are to be filed using the traditional School Ethics Act Complaint Form.

The amendments at *N.J.A.C.* 6A: 28-1.11 establish an expedited process for answering complaints alleging solely a violation of the Code of Ethics for School Board Members. The expedited process is necessary because of the shortened time period of 90 days within which the School Ethics commission must render a decision. The respondent still has 20 days to answer as it is expected that most respondents will seek counsel. However, should the respondent fail to respond, a notice shall be sent, informing the respondent that, unless a response is received in 10 days, each allegation in the complaint will be deemed admitted. The School Ethics Commission will then make a determination as to whether probable cause exists or the complaint should be dismissed. This is one less notice than the three provided for answering complaints that allege a violation of a section of the School Ethics Act other than the Code of Ethics for School Board Members.

The amendments at *N.J.A.C.* 6A: 28-1.13 establish the procedure by which the School Ethics Commission reviews complaints alleging a violation of the Code of Ethics for School Board Members only. It includes the 90 day requirement for School Ethics Commission determination of whether a board member has violated the Code of Ethics and that the complainant has the burden of proof. No probable cause determination is made in the determination process nor is a complaint under this section ever sent to the Office of Administrative Law for a hearing. The School Ethics Commission proceeds directly to a determination of whether a violation of the Code of Ethics has occurred, given the shortened decision-making time frame. Procedures for appearing before the School Ethics Commission under this section are identical to those currently in place.

SCHOOL ETHICS REPORTER

This is the third issue of **School Ethics Reporter,** *a new publication of the New Jersey School Boards Association Legal Department. The publication is an upgrade of the School Ethics Commission Update memorandum periodically issued to NJSBA's AMPSA membership. The fresh and improved look is courtesy of the fine creative efforts of Adriana DiGiacomantonio and Melissa Antler of NJSBA's Publications Department. The format will continue to include a summary of School Ethics Commission decisions and public Advisory Opinions and Commissioner of Education decisions interpreting the School Ethics Act during the relevant time period. Each issue will generally contain an article analyzing a particular area of School Ethics Act law. This issue features an update on School Ethics Commission decisions during the 2002 calendar year and an article by NJSBA Assistant Counsel Carl Tanksley on the issue of incompatable positions. We hope you like the new format and welcome your comments.*

Reporting Period

January 1, 2002 to December 31, 2002

THE FOLLOWING IS A SUMMARY OF School Ethics Commission (SEC) public Advisory Opinions and decisions and Commissioner of Education decisions regarding interpretations of the School Ethics Act issued during the time period January 1, 2002 through December 31, 2002. A brief summary of each of these Advisory Opinions and decisions follows. Copies of the full Advisory Opinions and/or decisions may be obtained by contacting the NJSBA Legal Department or the SEC. Copies may also be obtained through the Department of Education's Web site, accessible via link from the Legal section of NJSBA's Web site at www.njsba.org. The updated School Ethics Commission decision list now contains a direct link to the relevant Commissioner decision where appropriate.

ADVISORY OPINIONS

1. **A05-02 - April 2002 -** The School Ethics Commission (SEC) advised that three members of a board of education who had immediate family members who were employed in a school district that received the board's students would violate *N.J.S.A.* 18A: 12-24 (c) of the School Ethics Act if they were to vote on the tuition contract with the receiving district. The board members' school district was a small K-8 district that sent its high school students to a neighboring K-12 district. The three board members each had a spouse who was employed by the receiving school district as a teacher, teacher's aide and secretary, respectively.

   The SEC found that if the board members were to vote on the tuition contract, they would be acting in an official capacity in a matter where members of their immediate family would have an indirect financial involvement that might reasonably be expected to impair the board member's objectivity or independence of judgment. The immediate family members' employer, the receiving school district, acquired funds from the tuition contract, funds that were not specifically earmarked for any purpose. The funds went into the general fund and benefited the receiving school district at large and the immediate family members and the board members indirectly.

   The SEC noted that it had previously found a violation on a complaint alleging similar facts, where the board member was employed as a principal in the receiving district and voted on the tuition contract. The SEC advised that the Act does not distinguish between whether the board member or the board member's spouse is employed in the receiving district. Either way a vote on the tuition contract would violate the Act.

2. **A14-02 – November 2002 -** The SEC advised a school board on three issues. First, it advised that a board member, whose brother-in-law taught in another school district and was a member of the same statewide union with which the board was negotiating, would not violate the School Ethics Act if he were to participate in negotiations with the local education association. The SEC had previously advised (Advisory Opinion A08-98) that a board member with a sister-in-law in a local bargaining unit could participate in negotiations with that unit without violating *N.J.S.A.* 18A:12-24 (c) of the Act. It was less likely that the public would perceive that the board member's objectivity would be impaired when the brother-

continued

in-law taught in another school district and was not a member of the local education association with which the board would be negotiating. This opinion was consistent with prior SEC rulings on out-of-district same statewide union affiliations, limiting disqualifying conflicts to immediate family members, (i.e., board member, spouse or dependant child living with the board member.)

Second, the SEC advised that the Doctrine of Necessity should not be invoked to allow the entire board of education to participate in negotiations when there are three board members without conflicts who could serve on the negotiations committee. The SEC has only invoked the Doctrine of Necessity for negotiations committee service in the circumstance when only one board member was not in conflict. Only in that unique circumstance have conflicted board members been allowed to serve on the negotiations committee, with the *caveat* that the non-conflicted board member must be one of the committee members. (Advisory Opinion A55-95)

Third, the SEC advised that the school business administrator, who had a conflict of interest that prevented him from participating in the negotiations process, could participate in negotiations without violating the Act for the limited purpose of providing technical assistance, as necessary, limiting his comments to the financial information that he possessed. There was no need to invoke the Doctrine of Necessity.

3. **A13-02 – December 2002 -** The SEC advised a board of education on three questions regarding negotiations participation. First, the SEC provided advice as to whether six board members whose candidacy was endorsed by the local education association, three in 2001 and three in 2002, would violate the School Ethics Act if they were to participate in negotiations and vote on the collective bargaining agreement with the local education association. The SEC advised that the three board members who were endorsed in 2001 would not violate the Act by participating in negotiations involving the local education association or voting on the collective bargaining agreement. However, the three board members who were endorsed in 2002 would violate the Act if they were to negotiate and vote.

In reaching this opinion, the SEC analyzed whether the board members had a personal involvement with the local education association and its collective bargaining agreement that constituted a benefit to them under *N.J.S.A*. 18A:12-24(c) As to the six board members endorsed in 2001 and 2002, the SEC found that the benefits received from the association endorsement rose to a level of more than just casual support. The association distributed newsletters that encouraged its members to vote for the board members, hosted a hot dog rally where the board members could address the public, conducted a phone bank to promote their campaigns and printed and distributed palm cards that indicated the ballot numbers of the board members. The association held a position of prominence in the campaigns of the board members and accounted for their increased visibility in the community.

The SEC additionally found that the issues of the campaign, particularly the collective bargaining agreement, were of concern to the association and remained an issue of public debate and controversy, particularly in the year in which negotiations were to begin.

The association's contract was scheduled to expire in June 2003, with negotiations expected to begin in November 2002 and possibly proceed into the spring of 2003. As such, the association's support was strategically placed to impact teacher negotiations with respect to board members endorsed in 2002, but was less significant as to the members endorsed in 2001. For the board members endorsed in 2002, the limited time lapse between the April 2002 endorsement and the beginning of negotiations in November 2002 was significant. For those endorsed in 2001, the conflict had dissipated because negotiations would not begin for more than a year and the board members would not be up for re-election until 2004, well after the collective bargaining agreement would have been reached.

Second, the SEC advised that the two board members who were scheduled for re-election in 2003 would violate *N.J.S.A*. 18A: 12-24 (c) of the Act if they were to continue to participate in the collective bargaining process with the association, should the association endorse their campaigns for election during the course of negotiations in the same manner that it endorsed board members in 2001 and 2002. Receiving the endorsement of the association during the middle of negotiations would create an even greater concern about the timing of the endorsement and the endorsement would occur when negotiations were a subject of even greater public debate and controversy.

Third, the SEC advised that, as to the negotiations committee, there would be no need to invoke the Doctrine of Necessity in the spring of 2003 after negotiations had commenced since, at a minimum, the three board members endorsed in 2001 would be permitted to negotiate the collective bargaining agreement. Since three board members cannot ratify a contract, however, it may be necessary to invoke the Doctrine of Necessity to vote on the contract, assuming that the board members who are up for re-election in 2003 are endorsed by the local association in the same manner as board members were endorsed in 2001 and 2002.

The SEC provided advice as to two other sections of the School Ethics Act regarding candidacy endorsement by a local education association. Absent a showing that the board members had knowledge or reason to believe that the association intended to influence their decisions by endorsing them, the board members did not have a conflict under *N.J.S.A*. 18A: 12-24(h) that would preclude their participation in negotiations. Second, board members who receive a local association endorsement, absent additional information, cannot be assumed to have surrendered their independent judgment to the association in violation of *N.J.S.A*. 18A: 12-24.1(f).

COMPLAINTS – VIOLATIONS FOUND

1. ***In the Matter of James Carpenter, 2002 S.L.D.* January 31, affirmed State Board, 2002 *S.L.D.* May 1.** At its November 27, 2001 meeting, the SEC found that a board member violated *N.J.S.A.* 18A: 12-24 (c) of the School Ethics Act when he participated in discussions and voted on the motion to name the Pennsville National Bank as the depository for the Pennsville Board of Education. The board member had been an employee of the bank since 1989 and an assistant bank president since 1990. He was a trust officer for the bank and had no responsibility for its retail operation.

   While the board member maintained that he had a low level position at the bank, the SEC found that the position was not of such a low level that the public would not be concerned with the appearance of impropriety that would be created by his participation in the discussion and vote on the matter in question. The board of education was a major client of the bank and the loss of the board as a client could have negative repercussions on the board member's employment. He had an indirect financial involvement that might reasonably be expected to impair his objectivity and independence of judgment.

   Although he was not responsible for the retail operation of the bank, owned no bank stock and received no compensation other than his salary and benefit package, he was a bank employee who would be impacted by the business that the bank generated. The public would have a justifiable impression that its trust was being violated when the board member voted in favor of his employer to continue as the board of education's depository.

   The SEC recommended the penalty of reprimand. The SEC considered that counsel for the board member advised that the board member would not vote in the future on any matters pertaining to the Pennsville National Bank. The Commissioner agreed. The State Board affirmed. 2002 *S.L.D.* May 1.

2. ***In the Matter of Michelle Russo,* 2002 *S.L.D.* April 18.** At its February 26, 2002 meeting, the SEC found that a board member violated *N.J.S.A.* 18A: 12-24 (b) of the School Ethics Act when she appropriated school district mailing labels containing student names, identification numbers and homeroom numbers in order to mail campaign literature for her husband's mayoral campaign.

   The SEC concluded that the board member used her position to secure unwarranted privileges and advantages for herself and others by acquiring school district mailing labels and using the labels for her husband's mayoral campaign. The SEC also found that the board member used her official board member status to obtain the labels, making her ultimately responsible for the misuse of the labels and violating the Act.

   The SEC recommended the penalty of censure. The Commissioner agreed.

3. ***In the Matter of Edward Vickner,* 2002 *S.L.D.* July 16.** At its May 28, 2002 meeting, the SEC found that a board member violated *N.J.S.A.* 18A: 12-24 (c) of the School Ethics Act when he commented in a public budget meeting that the stipend paid to team leaders was low. The board member's spouse was a team leader in the middle school. The board member's comments had the potential to influence the preparation for budget discussions for the next fiscal year, which included negotiating the next teachers' contract. While the contract would not expire until the following fiscal year it was not uncommon in this and other school districts for preliminary discussions to occur in the year prior to the expiration of the contract. As such, the board member spoke on a matter in which he had a financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. Further, he had a personal involvement with an increase in the team leader stipend that created a benefit to his spouse.

   The SEC additionally found that the board member violated *N.J.S.A.* 18A: 12-24 (e) and (g) of the Code of Ethics for School Board Members when he sought out and disclosed student information to the board of education after being advised by the superintendent of schools that the information was confidential. The accusation that the complainant's son should not have graduated took the matter beyond the mere discussion of pupil records in executive session. The board member's action constituted private action that could have compromised the board in violation of *N.J.S.A.* 18A: 12-24.1(e). Additionally, the board member failed to hold confidential matters pertaining to the schools which, if disclosed, would needlessly injure individuals in violation of *N.J.S.A.* 18A: 12-24.1 (g).

   Considering the nature of the offenses and the fact that the board member had suffered the ultimate penalty of not being re-elected to the board of education, the SEC recommended the penalty of censure. The Commissioner agreed.

4. ***In the Matter of Lorraine Dunckley,* 2002 *S.L.D.* September 6.** At its meeting of July 23, 2002 the SEC found that a board member violated *N.J.S.A.* 18A: 12-24 (c) of the School Ethics Act by voting on a bill list, which included a reimbursement to her husband and her, and by voting on a tuition payment to the school where her husband was employed.

   The board member acted in her official capacity when she voted in favor of the placement of a special education student at the school district in which her husband taught. The vote, even though it was for only one student, affected her husband's employer, which was his source of income. The SEC concluded that there was an indirect financial involvement that might reasonably be expected to impair her objectivity. Had the board member's abstention precluded the placement from taking place, the SEC might have ruled differently.

   The board member voted on bill lists that included reimbursement to her for educational services that she was obligated to pay for initially with respect to her classified child. As part of a settlement agreement regarding her child's special education program, the board member was to pay the child's school of attendance directly

and the board was to reimburse her for the tuition cost. Voting on the bill list constituted voting on a matter in which the board member and her spouse had a financial interest that might reasonably be expected to impair the board member's objectivity or independence of judgment, in violation of *N.J.S.A.* 18A:12-24 (c).

The SEC also found that the board member violated *N.J.S.A.* 18A:12-26 (a) (3) of the Act by failing to disclose the board of education as a source of prepaid conference attendance expenses on her financial disclosure form.

Considering the nature of the offenses and the fact that several of the board members who filed the complaint had violated the School Ethics Act in similar fashion, the SEC recommended the penalty of censure for the combined violations. The Commissioner agreed.

5. ***In the Matter of Judy Ferraro,* 2002 *S.L.D.* September 23.** At its meeting of July 23, 2002, the SEC found that a board member violated *N.J.S.A.* 18A:12-24(b) of the School Ethics Act by soliciting a $1000 donation for her political action committee from a school district vendor's employee. The SEC also found that the board member violated *N.J.S.A.* 18A:12-24(e) of the Act by making a veiled threat regarding the vendor's contract if the donation were not given.

   The board member invited the vendor's employee into a campaign headquarters where five board of education members were present and working. The vendor's employee was aware that the board members had the power to cancel the vendor's contract and was justifiably threatened. While she did not actually solicit the donation, by her actions, the board member attempted to use her position to secure unwarranted privileges for herself and others in violation of *N.J.S.A.* 18A: 12-24(b).

   The board member's invitation to the vendor's employee to enter the building and engage in conversation that indicated that vendors were expected to donate to political campaigns, made her as culpable as the person who solicited the contribution. The campaign donation request was accompanied with a threat that the vendor's custodial, maintenance and grounds work contract would not be renewed if the contribution were not made. The campaign contribution or lack thereof was intended to influence the board member in the discharge of her official duties, in violation of *N.J.S.A.* 18A: 12-24 (e).

   The SEC believed that the offenses were serious enough to warrant the board member's removal from office. However, since the board member was no longer a member of the board, the SEC recommended censure, the highest sanction available. This way the public would be made aware of the board member's violation by the reading of a public resolution by the board. The Commissioner agreed.

6. ***In the Matter of Hugh Gallagher,* 2002 *S.L.D.* November 6.** At its meeting of July 23, 2002, the SEC found that a board member violated *N.J.S.A.* 18A:12-24(b) of the School Ethics Act by soliciting a $1000 donation for a political action committee from a school district vendor's employee. The SEC also found that the board member violated *N.J.S.A.* 18A:12-24(e) of the Act by making a veiled threat regarding the vendor's contract if the donation were not given.

   The board member was one of five board of education members present and working at a campaign headquarters. The board member met with the vendor's employee and was present when a campaign contribution was solicited. The campaign donation request was accompanied with a threat that the vendor's custodial, maintenance and grounds work contract would not be renewed if the contribution were not made. The vendor's employee was aware that the board members had the power to cancel the vendor's contract and was justifiably threatened. By his actions, the board member attempted to use his position to secure unwarranted privileges for himself and others in violation of *N.J.S.A.* 18A: 12-24(b).

   The board member made the solicitation to the vendor's employee with an indication that vendors were expected to donate to political campaigns in a way that was commensurate with the amount of money they made from the district. The board member's actions indicated that his vote could be affected by the response to the solicitation. The campaign contribution or lack thereof was thus intended to influence the board member in the discharge of his official duties, in violation of *N.J.S.A.* 18A: 12-24 (e).

   The SEC believed that the offenses were serious enough to warrant the board member's removal from office. However, since the board member was no longer a member of the board, the SEC recommended the highest sanction available, censure. This way the public would be made aware of the board member's violation by the reading of a public resolution by the board. The Commissioner agreed.

7. ***In the Matter of Vince Ordini,* 2002 *S.L.D.* December 3.** At its meeting of October 29, 2002 the SEC found that a board member violated *N.J.S.A.* 18A: 12-31 of the School Ethics Act in conjunction with *N.J.A.C.* 6A:28-1.7(b) and *N.J.S.A.* 18A: 12-24(b) of the Act when he fraudulently obtained an advisory opinion from the SEC, misleading the SEC into believing that the situation he posed was his when it actually related to another board member. The matter arose from a complaint brought by an SEC member who did not participate in the matter.

   When the board member sought an advisory opinion, his primary intent was to obtain the SEC's opinion on whether another board member had acted improperly when he commented on a team leader stipend, not to seek guidance on his own future boardsmanship. With the advisory opinion in hand, the board member could be confident that he would be able to prove that the other board member had violated the Act. The SEC held that the Act implicitly required that a school official set forth truthful information and that truthfulness is crucial to the SEC's ability to render appropriate advice. The SEC found that the board member did not set forth conduct or activity that he sought to undertake when he requested an advisory opinion, in violation of *N.J.S.A.* 18A: 12-31 and *N.J.A.C.* 6A: 28–1.7 (b).

   The SEC also found that the board

member used his position to seek an advisory opinion that would ultimately set up a finding of a violation of the Act against another board member. He would not have been able to request the advisory opinion had he not been a board member at the time of the request. The SEC concluded that the board member used his position to secure unwarranted privileges and advantages for himself in violation of *N.J.S.A.* 18A: 12-24(b).

The SEC found that the board member's conduct in seeking the advisory opinion combined with his unacceptable conduct when he appeared before the SEC warranted the highest penalty available. Misleading the SEC as a school official seeking an advisory opinion was conduct that violated the public trust. The SEC recommended that the board member be removed from office. The Commissioner agreed.

8. ***In the Matter of Gilbert Shepard,* 2002 *S.L.D.* December 16.** At its June 26, 2002 meeting the SEC found probable cause to credit the allegations that a board member violated *N.J.S.A.* 18A: 12-24(b) of the School Ethics Act by posting flyers supporting his re-election in the administrative building, by soliciting campaign donations and votes from school district employees and by accepting the donation of free office space to be used as a campaign headquarters from a vendor to the school district. The SEC and the board member entered into a settlement agreement where they agreed that the board member violated the Act by posting flyers supporting his re-election in the administrative building. The parties agreed that the board member would receive the penalty of censure. The SEC withdrew the finding of probable cause on the other allegations and consented to the settlement at its September 24, 2002 meeting. The Commissioner agreed.

COMPLAINTS DISMISSED

1. ***Rice and Nunez v. Gallagher,* Docket No. C31-01, (January 22, 2002)** The SEC dismissed a complaint, filed against a board of education member, charging that the board member violated *N.J.S.A.* 18A: 12-24 (b), (c), and (e) of the School Ethics Act when he allegedly advocated, lobbied and voted upon contracts involving several vendors which were either clients or sought after clients of his law firm or businesses that referred clients to his law firm. In dismissing the complaint, the SEC referred the matter to the Office of Attorney Ethics for review.

The SEC found that there were insufficient facts to demonstrate that the board member, who was also an attorney, used his official position to secure unwarranted privileges or advantages for himself or others. None of the vendors that were awarded contracts or any of the unsuccessful bidders had business relationships with the board member's law firm. There were insufficient facts to demonstrate that the board member advocated, lobbied or voted on contracts involving clients or sought after clients of his law firm or businesses that referred clients to his law firm. The SEC could not discern any privileges or advantages that were inured or could inure to the board member.

There were insufficient facts to demonstrate that the board member undertook any employment or service that might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties. His firm did not have any business relationships that would preclude him from advocating or voting upon contracts involving these vendors.

The SEC was concerned with some of the board member's representations regarding his status at the law firm, the firm's client references and tentative clients. The representations appeared unclear and misleading to the SEC.

2. ***Fenichel v. Hartsough,* Docket No. C33-01, (January 22, 2002)** The SEC dismissed a complaint filed against a board member, charging that the board member violated the School Ethics Act, including the recently enacted Code of Ethics for School Board Members, when, prior to a school board meeting, the board member referred to a citizen as a "cancer" in the community and stated that he, the board member, would never allow that person to speak before any board he chaired.

The SEC found that there were insufficient facts to demonstrate that the board member attempted to use his position to secure unwarranted privileges or advantages. While noting that the comments were shocking and offensive, the SEC could not discern any privileges that inured or could inure to the board member as a result of the statements made. While offensive, the comments did not qualify as decision making regarding the educational welfare of children or action that would undermine the development or maintenance of public schools that meet the individual needs of children. There were insufficient facts to demonstrate that the board member failed to recognize the authority of the board or made a personal promise or took private action that would compromise the board.

This was the first decision of the SEC that involved an interpretation of the recently enacted Code of Ethics for School Board Members.

3. ***Diaz v. Barker,* Docket No. C29-01, (February 26, 2002)** The SEC dismissed a complaint filed against a board member and the board of education charging that the board and the individual board member violated the School Ethics Act when they voted not to appoint the complainant to the position of head baseball coach for allegedly political and racial considerations. After a review of the facts, the SEC dismissed the matter for lack of jurisdiction.

The SEC concluded that matters concerning the alleged discriminatory hiring practices of a school district should be addressed by the school district. The SEC was informed that a grievance had been filed on behalf of the complainant by the local teachers' association, but was held pending the SEC decision. The SEC referred the matter back to the district where it will proceed to arbitration.

4. ***Vickner v. Ordini,* Docket No. C34-01, (February 26, 2002)** The SEC dismissed a complaint filed against a board member charging that the board member violated *N.J.S.A.* 18A: 12-24 (a) and (d) of the School Ethics Act when he made

signs for a middle school parking lot and, through his business, sold them to the board of education. The complaint also alleged that the board member violated the Act when he displayed his business logo on a school anniversary banner displayed in an elementary school.

With respect to the middle school signs, the SEC found there to be insufficient facts to demonstrate that the board member engaged in any business, transaction, or professional activity, which was in substantial conflict with the proper discharge of his duties in the public interest. The signage was requested on an emergent basis and was provided to the board of education at cost. The board member did not receive a profit from the transaction. In addition, the SEC found that it had insufficient evidence to conclude that the board member's conduct prejudiced or could prejudice his independence of judgment in the exercise of his official duties.

With respect to the school anniversary banner, the SEC similarly found no conflict. Signage was provided to the PTO, a private organization not funded or governed by the board. The board member's service to the PTO did not present a conflict with his duties as a board member. Further, the SEC found that it had insufficient evidence to conclude that the board member's conduct prejudiced or could prejudice his independence of judgment in the exercise of his official duties.

While not finding a violation of the Act, the SEC noted that the board should clarify its procedure and policy regarding emergent acquisitions. The SEC recommended that the board seek bona fide quotations from at least three vendors that can provide requested services on an emergent basis in order to eliminate the need to use board member services in these situations.

5. ***Petrillo and Costello v. Alexander,*** **Docket No. C02-02, (May 28, 2002)** The SEC dismissed a complaint filed against a board member, charging that the board member violated the School Ethics Act when he made remarks at a board meeting wherein he described the actions of other board members regarding the nonrenewal and denial of tenure to a supervisor as "an economic lynching" and "a hate crime."

There was no information to support the allegation that the board member's support of the special education supervisor was not in terms of the educational welfare of the children of the school district. There was no allegation that the board member was acting other than independently at the board meeting when he made his comments. There was no information to show that he was using the schools for personal gain or for the gain of friends.

The SEC concluded that the board member had a First Amendment right to voice his concerns and beliefs. While he could have used less loaded language, the SEC found no section of the Board Member Code of Ethics that was violated by his comments. If the SEC were to so rule, it would chill board members' debate by their not knowing when their statements or opinions might be challenged in another forum should they lack the statistical facts to support their statements or opinions. The SEC did not believe that the public would ultimately benefit from a finding of a violation in these circumstances.

6. ***Taylor v. Masol,*** **Docket No. C04-02, (June 25, 2002)** The SEC dismissed a complaint filed against a board member, charging that the board member violated the School Ethics Act when she voted in favor of a merit bonus for the superintendent of schools when her husband was employed as an attendance officer in the school district. The attendance officer was not supervised or evaluated by the superintendent and, being located in a different building, had no contact with the superintendent. There was no opportunity for the attendance officer to be treated any differently because of the board member's vote. As such, there was no financial involvement with the superintendent's merit bonus that might reasonably be expected to impair the board member's objectivity or independence of judgment. There was also no personal involvement that could constitute a benefit, hence no violation of *N.J.S.A.* 18A: 12-24 (c). No facts were found to support the allegation that the superintendent had a personal relationship with the board member and her spouse/attendance officer before the superintendent's appointment.

7. ***Quinones v. Morejon,*** **Docket No. C09-02, (June 25, 2002)** The SEC dismissed a complaint filed against a board member as it found no provisions of the School Ethics Act to be violated within the allegations raised. The SEC forwarded the complaint to the Office of Controversies and Disputes in case the complainant decided to pursue the claim that the board member did not live in the school district in question.

8. ***Feldman v. Ambrus,*** **Docket No. C05-02, (July 23, 2002)** The SEC dismissed a complaint filed against a board member charging that the board member violated the School Ethics Act when he attempted to barter his vote as a member of the board in an effort to assure that three candidates for the board who he supported would run unopposed for election. He allegedly also bartered his vote and the vote of other sitting board members to guarantee that the complainant would be elected board president. The SEC concluded that the board member was attempting to secure a privilege for someone who never wanted it in the first place, the complainant. The SEC could not find a violation of *N.J.S.A.* 18A: 12-24(b) on that basis.

While the SEC did not condone the board member's actions, it found that the complainant overreacted when he turned the matter over to the prosecutor and perpetuated a public relations war that he clearly won. The SEC stated that it would not entangle itself in the politics of local boards of education.

9. ***Ferrante v. Wade,*** **Docket No. C21-02, (July 23, 2002)** The SEC dismissed a complaint filed against a superintendent of schools alleging that the superintendent violated the School Ethics Act by negotiating a major contract with the NJEA. The complainant did not identify any provisions of the Act that were violated. In addition, the alleged violation occurred in May

1999, nearly three years ago and outside the one-year statute of limitations for filing a complaint under *N.J.A.C.* 6A:28-1.8(a).

10. ***Graham v. Roman,* Docket No. C25-02, (November 26, 2002)** The SEC dismissed a complaint filed against an interim board secretary in a Type I school district charging that the interim board secretary violated *N.J.S.A.* 18A:12-24(d) of the School Ethics Act through his simultaneous service as the interim board secretary and the full-time borough administrator for the municipality. The SEC found the interim board secretary to be a "school official" under the Act as, while not a certified school business administrator, he had the authority to make recommendations regarding hiring and purchasing. However, the SEC found no substantial conflict between the two positions, as the interim board secretary had no responsibilities for the budget, financial records or bills. The SEC admonished the school official that so long as he continued to serve as interim board secretary, he must continue to recuse himself from any matters before the board of education concerning the budget, financial matters and any other potential sources of conflict between the borough and the board.
11. ***Carteret Education Association v. Loutfy and Mangieri, Docket No. C07-02, (December 17,* 2002)** The SEC dismissed a complaint filed against two board members charging that they violated *N.J.S.A.* 18A: 12-24 (b) of the School Ethics Act when they inspected the personnel file of a teaching staff member when, allegedly, no matter involving that teaching staff member was pending before the board of education. The SEC found that the board of education discussed the teaching staff member just six days prior to the review of the file, board minutes noting that the position and salary of the teaching staff member were to become a subject for negotiations. As such, a matter was pending before the board of education. Both board members were members of the negotiations committee. No unwarranted privileges or advantages for the board members or others were shown.

    The SEC determined that the board needed to establish procedures for determining who can view an employee's personnel file and under what circumstances. Such procedures could have either prevented the incident from occurring or discouraged the filing of the complaint.
12. ***Macina v. Friedberger, Giarratano and Puzio,* Docket No. C13-02/C14-02/C15-02, (December 17, 2002)** The SEC dismissed complaints made against three board members charging that the board members violated *N.J.S.A.* 18A:12-24 (a), (c), and (d) and *N.J.S.A.* 18A:12-24.1 (f) of the School Ethics Act when they received a candidacy endorsement and financial support from the local education association. Since the endorsement was the sole basis for the complaint and two of the board members were not board members at the time of the endorsement, the SEC had no jurisdiction over those two individuals. As to the third individual, there was no showing that the board member performed any service for or surrendered his independent judgment to the local education association.

TRAINING DECISIONS

The SEC and Commissioner of Education issued rulings on seven board of education members who failed to attend board member training during the first year of their first term of office. The decisions of the SEC and Commissioner varied depending on the facts of the case and whether the board member had provided good and sufficient reasons for not attending training.

- In five of the cases, the SEC recommended the suspension of a board member who had failed to attend board member training with automatic removal if the board member failed to attend training by October 2002. In each of these five cases, the Commissioner agreed and so ordered. Reasons given for failure to attend training included:

  Personal and work-related circumstances;

  A misunderstanding of the training requirement;

  Unable to schedule time for training;

  Personal and fundamental reasons and due to lack of confidence in the NJSBA;

  As a father of seven school-aged children, the schedule of the training programs made it impossible for him to attend.
- In two other cases, the board member did not respond to either the SEC or the Commissioner. In each of these two cases the SEC recommended that the board member be removed from office. The Commissioner agreed and ordered the board member removed from office.

FILING DECISIONS

During 2002, the SEC and Commissioner issued only one decision regarding school officials who failed to properly file their Financial and/or Personal/Relative Disclosure Statements. The SEC recommended that the board member be suspended from office for a period of 30 days with the understanding that he would be automatically removed from office if, within the 30 days, he failed to file the properly completed disclosure forms. Within the 30-day period, the board member submitted signed, but inadequately completed, personal/relative and financial disclosure statements. The Commissioner adopted the SEC recommendations and further admonished the board member for his failure to file the requisite statements, in that such inactivity caused an inordinate amount of administrative and adjudicative time to be wasted by local, county, and state educational officials. The Commissioner ordered that the board member be suspended from office for a period of 30 days with automatic removal from the board if he failed to file the properly completed forms within the 30-day period.

Incompatible Offices: When Conflicts Cannot Be Cured By Abstention

This article is the first in a series designed to examine various aspects of *N.J.S.A.* 18A:12-21 *et seq.*, the School Ethics Act (SEA). This article will focus on decisions of the School Ethics Commission (SEC) that have determined that school officials have held incompatible offices. Future articles will focus on SEC determinations in the areas of political involvement, voting on personnel issues, participation in negotiations and other areas of prohibited conduct.

On April 15, 1991, the SEA became effective in the state of New Jersey. In promulgating the Act, the State legislature found

> a. In our representative form of government, it is essential that the conduct of members of local boards of education and local school administrators hold the respect and confidence of the people. These board members and administrators must avoid conduct which is in violation of their public trust or which creates a justifiable impression among the public that such trust is being violated.
>
> b. To ensure and preserve public confidence, school board members and local school administrators should have the benefit of specific standards to guide their conduct and of some disciplinary mechanism to ensure the uniform maintenance of those standards among them.[1]

Incompatible Offices

Generally speaking, holding dual public office is not prohibited unless the offices require the dual holder to perform duties that are contradictory or require the holder to use information on behalf of one office to the detriment of the other. However, at times, certain instances arise where the loyalties of one office conflict with those of a second. In these instances where such loyalties divide, the dual office holder is required to recuse himself both from the deliberation and voting upon that matter. There may also be certain situations where no particular matter is under scrutiny, but where the nature of the two positions held by the school official are by that very nature, in conflict to such an extent that it cannot be cured by abstention, thus vacating one of the positions is the only acceptable resolution.

One of the earliest decisions interpreting the SEA was *Irvington v. Steele*[2]. Michael Steele became the Irvington School district's business administrator on June 25, 1989. In May the following year, Steele took office as Mayor of Irvington. Subsequently, Steele requested an advisory opinion from the SEC as to whether a mayor of a town with a Type I school district may also serve as the district's school business administrator. On April 28, 1993, the SEC advised Steele that the offices were incompatible. After the SEC issued the advisory opinion,[3] the Irvington municipal council filed an ethics complaint against Steele with the SEC. On September 20, the council also filed a complaint against the board of education. The complaints alleged violations of 18A:12-24(a), (c) and (d), which provide in pertinent part,

> No school official shall:
>
> (a) [E]ngage in any business, transaction, (sic) or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest;
>
> (c) [A]ct in his official capacity in any matter in which he has a direct or indirect financial or personal involvement that might reasonably be expected to impair his objectivity or independence of judgment;
>
> (d) [U]ndertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties.

On January 11, 1994, Steele requested a leave of absence from his position as school business administrator in order to concentrate on his bid for reelection. The superintendent denied his request, but on February 23, 1994, the board overruled the superintendent and granted Steele a one-year leave of absence, without pay, effective March 1, 1994.

In contesting the ethics complaint, Steele argued that *N.J.S.A.* 18A:6-8.4 authorized him, as a district employee, to hold public office. The administrative law judge (ALJ) in the OAL disagreed, finding that the SEA imposed additional prohibitions on high-level school officials. Moreover, the ALJ found a conflict in that Steele, as mayor of a municipality having a Type I school district, was responsible for appointing all seven members of the board of education. Those appointed members were then responsible for fixing Steele's salary and working conditions as the district's school business administrator. Thus, Steele, as mayor, was placed in the unique position of appointing those who employed him. Moreover, the mayor automatically sat as chair of the board of school estimate, the body responsible for reviewing the district's proposed budget and certifying the amount of money to be appropriated for the use of the district's schools. That proposed budget was prepared at the direction of the school business administrator. Therefore, Steele, as chair of the board of school estimate, had the duty to review his own work product as school business administrator. In determining that the two offices were incompatible, the ALJ found it a clear conflict for a school business administrator who develops the school district budget to review that same budget in his capacity as mayor and chair of the board of school estimate. Such a configuration would, most certainly, "reasonably be expected to impair [Steele's] objectivity or independence of judgment." The ALJ therefore recommended that the Commissioner issue a public reprimand of Steele.

However, as to the board of education, the ALJ determined that because Steele was tenured as a school business administrator, the board had no choice but to keep Steele in the school business administrator position. The ALJ noted that only the Commissioner of Education had the authority to remove Steele from his tenured position, either as a result of the certification of tenure charges or on the recommendation of the SEC. Therefore, the ALJ recommended that the complaint against the board be dismissed.

The SEC agreed with the ALJ as it pertained to Steele's conflict and further agreed that the Legislature's intent in passing the SEA was to impose a "greater standard of ethical conduct on a small number of top-level administrators who hold positions of special trust and responsibility…"[4] However, the SEC

went on to note that although Steele was no longer mayor of Irvington because he failed to win reelection, he continued in his office as school business administrator. As such, he continued to benefit by working for those members that he previously appointed to the board of education. The SEC found that those members appointed by Steele were potentially beholden to him but now oversaw his work as school business administrator. In order to eliminate the perceived conflict, the SEC recommended that Steele be suspended from his position as school business administrator for a one year minimum and until the majority of members he appointed were either replaced or reappointed by the current mayor.

In turning to consideration of the board's actions, the SEC reversed the ALJ's findings, finding instead that the Board was in violation of the Act when it voted to overrule the superintendent's denial of Steele's request for a leave of absence. In support of this reversal, the SEC relied upon a letter from the County Superintendent to the board setting forth his conclusions from a review of A06-93 that the SEA prohibited Steele from holding dual offices. That publicly released opinion advised that the board members would create individual conflicts if they determined to take action on Steele's reinstatement.

In finding that the board violated the SEA, the SEC also relied upon *N.J.S.A.* 18A:12-24(c), which provides that a school official may not act where he has a direct or indirect personal or financial interest. In further support of that finding, the SEC relied upon Advisory Opinion, AO1-92, which also advised that a school official may take no action with regard to an individual with whom he has a conflict, and when the board takes action with regard to that individual, the school official must abstain from voting. Because Steele had appointed all seven members to the board of education, all seven members had a conflict and should have abstained. The SEC therefore recommended a penalty of public censure against the board since the board knowingly preserved Steele's conflict notwithstanding warnings and advisory opinions that his dual employment was a violation of the SEA.

Upon review, the Commissioner agreed with the SEC's penalty recommendations and suspended Steele from his position as school business administrator for one year and ordered public censure for the board. By suspending Mr. Steele from his position for a full year, the Commissioner served notice to all school board members and school administrators that the new law would be strictly enforced. The Commissioner was unpersuaded by Steele's reliance on the advice of counsel in an "unsettled area of law". The Commissioner noted that legal opinions sought and received in 1990, prior to the passage of the SEA, indicated that dual office holding of the kind contemplated in the Steele matter were not prohibited. However, with the enactment of the SEA, Steele, the board, "along with all boards and administrative officials in New Jersey were placed on notice that they were subject to an enhanced standard of ethical behavior to assure public trust and confidence in the administration of the state's public schools." The State Board of Education ultimately upheld the Commissioner's decision and penalty. This decision has set the standard for conflict-of-interest determinations.

Interestingly, just a few years after the *Steele* decision, the Irvington Board of Education was again involved in an incompatible office matter, *I.M.O. David Fuller, Irvington Board of Education*.[5] In this matter, David Fuller began employment as the Township Business Administrator in 1990. As the Township Business Administrator, Fuller was responsible, along with the mayor, for the preparation of the township budget for submission to the township council for approval. Additionally, Fuller was responsible as the administrative head of the township and was paid to perform those duties and any others assigned by the township council. In 1991, the mayor of Irvington appointed Fuller to the school board, where Fuller served as president and on the finance, buildings and grounds, personnel and bylaws, policy and curriculum committees.

On August 24, 1995, a complaint was filed before the SEC alleging that Fuller violated *N.J.S.A.* 18A:12-24(a) and (c) by holding the positions of Township Business Administrator and school board member simultaneously. Upon consideration, the SEC found probable cause existed regarding the incompatible office allegation. The SEC advised Fuller that serving in both positions could violate *N.J.S.A.* 18A:12-24(a), (c) and (d) and invited Fuller to respond to its finding. In his response, Fuller argued that an evidentiary hearing should be scheduled to determine whether he abstained from votes involving potential conflicts.

In its decision, the SEC bluntly determined that abstention was irrelevant to the issue of whether Fuller could sit as a board member. Accordingly, any potential sanction was necessarily dependent on Fuller's ability to serve in both offices, not on whether he abstained from any particular decision. The SEC held that where the offices were incompatible, removal from one office was the only appropriate resolution of the conflict.

The issue before the SEC was whether the public could reasonably perceive that Fuller's independence of judgment was prejudiced and whether the conflicts were so pervasive that Fuller could not hold both positions under *N.J.S.A.* 18A:12-24(d).

In determining that the offices of township business administrator and school board member were incompatible offices, the SEC relied upon the fact that the township business administrator was vitally interested and involved in the preparation and passage of the municipal budget. As a school board member, Fuller was responsible for voting on programs that could have an impact on the school district's budget. The SEC recognized that where the school district's budget was defeated by the voters, the Township Business Administrator was the individual who was intimately involved with municipal finances and whose employment could depend on keeping taxes low. This person would also then be called upon as a board member to make school decisions that would affect taxes for township residents. The SEC reasoned that, in these circumstances, the public could reasonably perceive that Fuller could make decisions as a board member with his employment duties as Township Business Administrator in mind. In addition, Fuller was appointed to the board by the mayor and as Township Business Administrator was under the supervision and control of the mayor. Again, the public could reasonably perceive that Fuller would act to advance the interests of the mayor rather than the interests of the district. Here, due to the far reaching affect on taxes, the SEC found the conflict to be so pervasive that *N.J.S.A.* 18A:12-24(d) prohibited the holding of both positions and that recusal

would not cure the conflict. Because the SEC deemed the dual offices incompatible, it recommended to the Commissioner that Fuller be removed from the board unless he resigned one of his dual positions.

Fuller failed to resign. Therefore, the Commissioner, after reviewing Fuller's comments to the SEC's determination, noted his limited jurisdiction regarding disputes of SEC determinations, accepted the penalty recommendation and ordered that Fuller be removed from his board position.

A third SEC decision interpreting the holding of dual offices is found in *I.M.O. Abdi Gass*.[6] Prior to becoming a board member in Chesilhurst Township, Abdi Gass was employed as a financial consultant for Chesilhurst Borough. He continued in this employment after becoming elected to the board of education. In 1998, a complaint was filed against Mr. Gass alleging that he violated the SEA while serving as board president by undertaking employment or service as financial consultant.[7] That employment, the complaint alleged, might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties, in violation of *N.J.S.A.* 18A:12-24(c).

The SEC found that Gass assisted the chief financial officer of the borough in bill payments and payroll and those duties would not be expected to prohibit him from being objective in his duties as a board member. The SEC further found that Gass did not have the responsibility of recommending changes to the board's budget in the event the annual school district budget were to be defeated by the voters. Therefore, the SEC found no probable cause to credit allegations that Gass had violated the SEA. However, the SEC cautioned that if Gass were ever to assume such responsibilities, his position as borough consultant would conflict with his duties as a board member in violation of *N.J.S.A.* 18A:12-24(d). Additionally, the SEC found that Gass had an indirect involvement with the borough that could create a conflict in violation of *N.J.S.A.* 18A:12-24(c) on certain issues on which the borough and the board may be adversarial or have competing interests. Therefore, the SEC restricted Gass from participating in matters involving the borough to the extent that the interests of the board and the borough diverged.

In May 2003, a second complaint, again alleging a violation of *N.J.S.A.* 18A:12-24(c), was filed against Gass, this time, alleging that he was actually functioning as the borough's financial officer and not just as a consultant. Additionally, the complaint alleged that Gass violated *N.J.S.A.* 18A:12-24(g), by representing the borough's position in the defeated budget negotiations process contrary to the budget presented by the superintendent and approved by the board.

In response to this second complaint, Gass argued that his duties as a consultant were confined to ensuring that computer systems, data processing and the backing up of data were properly maintained and effectively managed so that borough operations were not undermined. Gass maintained that the primary duty of the chief financial officer was to assist the mayor and council in the annual budget development process. However, the chief financial office had no experience in the preparation of a municipal budget. Gass asserted that not he, but an independent auditor, assisted in the development of the annual budget and the preparation of the annual financial statement and supplemental debt statement.

However, the SEC found that Gass was considered by the borough for an appointment to the position of Financial Consultant, but the borough council tabled that resolution. In addition, Gass held a certificate as Municipal Finance Officer, a certificate not held by any other municipal employee, including the Chief Financial Officer. In looking to the duties of the chief financial officer, the SEC found that while her duties included preparing the municipal budget, she had never actually performed that function.

Despite Gass' testimony that an independent auditor assisted the mayor in the preparation of the budget, the SEC, in determining that Gass violated the SEA, found that Gass voted on the district budget, made a motion to lower the budget, voted against the budget he previously supported, submitted a proposed budget to the superintendent and presented the revised budget to the borough council in clear contravention of its prior advisory opinion. The SEC was particularly concerned with Gass' actions in light of the specificity of the prior Advisory Opinion and gave considerable weight to that opinion in making its determination of a violation of the Act in the subsequent allegation. Therefore, it can be said that it's not nice to ignore the SEC.

The SEC specifically found that Gass acted in his official capacity in a matter in which he had an indirect financial involvement that might reasonably be expected to impair his objectivity in violation of *N.J.S.A.* 18A:12-24(c). The SEC also found probable cause to credit the allegation that Gass represented the borough council's position in a matter pending before the board in violation of *N.J.S.A.* 18A:12-24(g). The SEC found that Gass advocated in support of the borough's proposed budget reductions during the district's budget meeting to discuss the defeated budget. Central to this finding was the fact that Gass advocated for budget cuts that exceeded the superintendent's recommendations and matched precisely the reductions recommended by the borough.

In light of the fact that Mr. Gass abruptly resigned from the board upon the finding of probable cause, the SEC recommended a penalty of censure and the Commissioner agreed. In *Gass* it is apparent that had the board member complied with the initial advisory opinion, he would have been able to maintain both his position as a financial consultant to the borough and his position of school board member.

Conclusion

In questions of incompatible offices, it is always advisable to consult with the board attorney prior to committing to the questionable office. While such a consultation may not protect the board member from the finding of a violation, it may contribute to a mitigation of any recommended penalty. Where the law is unclear, it is advisable to seek an advisory opinion from the School Ethics Commission. Board members can rely on such advisory opinions to guide their actions as public officers.

(Footnotes)

1 *N.J.S.A.* 18A:12-22.
2 95 N.J.A.R.2d (EDU) 123, stay denied St. Bd. 95: June 7, aff'd St. Bd. 95: Sept. 6.
3 A06-93.
4 95 *N.J.A.R.2d* (EDU) 129, 131.
5 1998: SLD Jan. 21, *Fuller.*
6 2003: SLD March 31, *Gass.*
7 1998: SLD Nov. 24, *Gass*

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SCHOOL ETHICS reporter

This is the fourth issue of School Ethics Reporter, a publication of the New Jersey School Boards Association Legal Department. The publication is an upgrade of the School Ethics Commission Update memorandum periodically issued to NJSBA's AMPSA membership. The fresh and improved look is courtesy of the fine creative efforts of Adriana DiGiacomantonio and Melissa Antler of NJSBA's Publications Department. The format will continue to include a summary of School Ethics Commission decisions and public Advisory Opinions and Commissioner of Education decisions interpreting the School Ethics Act during the relevant time period. Each issue will generally contain an article analyzing a particular area of School Ethics Act law. For the first time this issue directly links each opinion or decision to the actual decision found on the Department of Education website. For those decisions in which a violation of the School Ethics Act was found, separate links are listed for the School Ethics Commission (SEC) and the Commissioner (CMR) decisions.

The following is a summary of School Ethics Commission (SEC) public Advisory Opinions and decisions and Commissioner of Education decisions regarding interpretations of the School Ethics Act issued during the time period January 1, 2003 through December 31, 2003. This reporting period was one of the most prolific decision-making periods in SEC history with 78 opinions and decisions being issued. A brief summary of each of these Advisory Opinions and decisions follows. Copies of the full Advisory Opinions and/or decisions may be obtained through the direct links provided for each opinion or decision. Copies may also be obtained by contacting the NJSBA Legal Department, the SEC or through the Department of Education's Web site, accessible via link from the Legal section of NJSBA's Web site at www.njsba.org. The updated School Ethics Commission decision list now contains a direct link to the relevant Commissioner decision where appropriate.

ADVISORY OPINIONS

1. **A14-03 - August 2003 -** The School Ethics Commission (SEC) advised that a superintendent of schools would violate *N.J.S.A.* 18A:12-24(e) of the School Ethics Act if he were to accept funding (travel, meals and accommodations) from a school district vendor to a vendor-sponsored conference at which the superintendent was making a presentation. The SEC centered its analysis on Policy Guideline #1, which prohibits school officials and their immediate family members from accepting offers of meals or entertainment from vendors that are limited to clients or customers of the vendor. The SEC found that the vendor's payment of travel, meals and accommodations for the superintendent and a guest was likely offered to influence the superintendent to recommend his district's continued use of the vendor's product. The fact that the superintendent was providing a service to the vendor through his presentation only lessened the value of the gift. The SEC advised that accepting the offer of travel, meals and accommodations to attend a vendor's conference would be accepting a gift with the understanding that the gift was offered for the purpose of influencing him in the discharge of his official duties in violation of *N.J.S.A.* 18A:12-24(e).

2. **A19-03 – August 2003 –** The School Ethics Commission (SEC) advised a school board president that he could sign off on a variety of documents, notwithstanding the fact that he was an out-of-district NJEA member and his spouse was a district employee and a member of the local NJEA affiliate. The documents included the retainer agreement with the law firm representing the board in negotiations, the monthly bill list which included payment to the attorneys handling labor negotiations, the payroll certification authorizing payment to district employees, and the collective bargaining agreement between the board and the local NJEA affiliate. The board president did not vote on the appointment of the law firm representing the board in labor negotiations, would not be participating in negotiations and would not be voting on the collective bargaining agreement.

   The SEC advised that signing these documents would not violate *N.J.S.A.* 18A:12-24(c) of the Act.

   The SEC determined that it was unlikely that a financial or personal benefit would inure to the board president since his signing was simply the ratification of board action. The board

must vote to retain a law firm for negotiations, to pay that firm, to enter into a collective bargaining agreement and to pay its employees. Since the documents are not being signed without passage of a board resolution, the public would not likely perceive the action as a financial or personal benefit to the board president. No potential violation of *N.J.S.A.* 18A:12-24(c) would exist.

In making this determination, the SEC looked to the reasoning set forth in Advisory Opinion A14-00. Similar to that analysis, the SEC found that the perfunctory act of signing the collective bargaining agreement would not violate the Act. The signature of the board president is required to represent that which has already been negotiated and agreed upon by the board. The same reasoning would hold true for signing the law firm retainer agreement, certifying the bill list, including payment to the law firm, and signing off on the monthly payroll, since the ministerial act of signing is necessary to ratify the board's action.

The board member was reminded to continue to abstain on voting on the monthly payroll with respect to his spouse.

COMPLAINTS – VIOLATIONS FOUND

1. ***In the Matter of Sara Davis and Rosemary Jackson*, 2003 *S.L.D.* February 27. Motion for Stay pending appeal to the State Board denied, 2003 *S.L.D.* March 11. SEC • CMR** At its November 26, 2002 meeting, the SEC found that two board members violated the School Ethics Act, specifically *N.J.S.A.* 18A:12-24(b) and (c) of the Code of Conduct, by the actions they took to bring about the appointment of an attorney who had represented them on personal matters prior to his appointment as board solicitor. The SEC found that the two board members went to great lengths to have their personal attorney appointed as board solicitor.

   The SEC found that the first board member used her position to secure unwarranted privileges and advantages in violation of *N.J.S.A.* 18A:12-24(b) when she sought an opinion from the attorney candidate, as to whether a conflict of interest would exist if she were to vote on his appointment as board solicitor, when she called special meetings to try to have the board reconsider or rescind its vote to send out an Request for Proposals after the motion to appoint the solicitor was declared failed and when she appointed the attorney who had done personal work for her to be board solicitor.

   The SEC found that the second board member used her position to secure unwarranted privileges and advantages in violation of *N.J.S.A.* 18A:12-24(b) when she undertook a number of actions; asking the board attorney candidate to submit his resume to seek the appointment as board solicitor, seeking an opinion from the board attorney candidate as to whether her voting for him would be a conflict of interest, making a motion and voting to appoint the attorney at the reorganization meeting, seconding and voting in favor of a motion to rescind the vote to send out the Request for Proposals, making the motion and voting in favor of rescinding action taken on all professional services and voting in favor of the motion to appoint the attorney.

   The SEC found that both board members violated *N.J.S.A.* 18A:12-24(c) based on the attorney's prior representation of them in a personal capacity. Although the attorney's representation of both board members in ethics cases and one board member in a personal injury matter had concluded, the facts of this matter demonstrated that the attorney candidate was still providing representation to the two board members just prior to the board's reorganization meeting. The representation was not so far in the past that the conflict had dissipated. In that sense the instant matter was more like that in Advisory Opinion A03-01 (April 24, 2001) than *In the Matter of Huber*, C19-96 (May 27, 1997).

   The personal involvement created a benefit for both board members. The benefit of having their personal attorney as board solicitor is that when the law is not clear, the board members will perceive that the attorney will be more likely to give them advice that is favorable to their position. The SEC concluded that the board members acted in their official capacity in a matter in which they had a personal involvement that constituted a benefit to them.

   The SEC recommended the penalty of censure for both board members. The SEC considered, as a mitigating circumstance, the fact that the board members sought and relied upon legal advice, albeit from their personal attorney, the attorney candidate. The Commissioner agreed with the penalty for the first board member and disagreed with the penalty for the second board member. The second board member had been previously reprimanded by the SEC and warranted a more severe sanction. The second board member was suspended for two months.

   A Motion for a Stay, pending appeal to the State Board, was denied by the Commissioner.

2. ***In the Matter of Frank Pizzichillo*, 2003 *S.L.D.* March 6. SEC • CMR** At its January 28, 2003 meeting, the SEC found that a board member violated the School Ethics Act, specifically *N.J.S.A.* 18A: 12-24.1(e) and (g) of the Code of Ethics for School Board Members, when he revealed confidential employee documents to a member of the public. The documents included information regarding a school administrator's stipend, correspondence from the school administrator's attorney to the board and the school administrator's payroll records.

   The board member argued that the documents were public documents because the employee had, pursuant to her rights under the Open Public Meetings Act, requested that her personnel matter be discussed at a public meeting rather than in executive session. The SEC found no authority for the proposition that because the employee documents were given to the board at a public meeting, that all of the documents became public and could be distributed to anyone by any board member. The SEC concluded that the documents contained confidential employee information and that the board could be subject to adverse consequences if the employee were to find out that her payroll records had been circulated to a member of the public that had no relationship to her dispute with the board. The SEC held that the board member failed to recognize that authority rests with the board

of education and took private action that could compromise the board in violation of *N.J.S.A.* 18A:12-24.1(e).

The SEC further held that by disclosing the documents to a member of the public, the board member failed to hold confidential a matter pertaining to the schools which, if disclosed, would needlessly injure an individual or the schools in violation of *N.J.S.A.* 18A: 12-24.1(g).

The SEC recommended the penalty of reprimand. The SEC was persuaded that the penalty should be minimal, as it found credible the board member's stated belief that the documents were not confidential due to discussion of the employee at a public meeting. The Commissioner agreed.

3. ***In the Matter of Abdi Gass*, 2003 *S.L.D.* March 31. SEC • CMR** At its January 28, 2003 meeting, the SEC found that a board member violated the School Ethics Act, specifically *N.J.S.A.* 18A: 12-24(c) and (g) of the Code of Conduct, when he served as "borough consultant" but actually served as the borough's financial officer while a member of the board of education.

In a prior SEC opinion, *In the Matter of Abdi Gass*, Docket No. C-13-98 (November 24, 1998) the SEC specifically advised the board member that he had an indirect financial involvement with the borough due to his position as "borough consultant" and would violate the Act if he were to participate as a board member in budget discussions. The board member deliberated and voted on the district budget despite the SEC's prior cautioning that he should not participate in budget matters. Specifically, he made a motion to lower the budget, voted against a budget he had previously supported and submitted proposed budget cuts to the CSA. By so doing, not only did he act in clear contravention of the SEC's prior decision, he acted in his official capacity in a matter in which he had an indirect financial involvement that might be reasonably expected to impair his objectivity in violation of *N.J.S.A.* 18A: 12-24(c).

The SEC further held that through his participation in discussions regarding a defeated school budget and possible borough council budget cuts, the board member represented the borough council in a matter pending before the board in violation of *N.J.S.A.* 18A:12-24(g).

The SEC would have recommended removal but for the board member's abrupt and immediate resignation upon the SEC's finding of probable cause. The SEC recommended the most severe available penalty of censure. The Commissioner agreed.

4. ***In the Matter of Denise Schmidt*, 2003 *S.L.D.* April 14. SEC • CMR** At its February 25, 2003 meeting the SEC found that a board member violated the School Ethics Act, specifically N.J.S.A. 18A:12-24.1(e) of the Code of Ethics for School Board Members, by using school equipment to copy and distribute to certain school staff, a letter that contained false and demeaning information regarding fellow board members. The board member admitted to making copies of the letter and providing them to members of the superintendent's secretarial staff. The board member paid the board for the cost of the copies.

The SEC found that the letter was so disparaging of the board members that giving it to staff members who might not have received it by other means could compromise the board by decreasing its credibility among the staff and the public that it serves. By copying the letter and distributing it to staff, the board member had the potential to compromise the board in violation of *N.J.S.A.* 18A:12-24.1(e).

Because it was never alleged that the board member had any involvement in the writing or mailing of the disparaging letter, but rather that she simply made and distributed copies in the board office, the SEC recommended the penalty of reprimand. The Commissioner agreed.

5. ***In the Matter of Faye Ball*, 2003 *S.L.D.* May 12. SEC • CMR** At its March 25, 2003 meeting, the SEC found that a board member violated the School Ethics Act, specifically *N.J.S.A.* 18A: 12-24(b) of the Code of Conduct, when, using her official title, she requested a "delay" in the issuance of an SEC decision regarding a member of her board of education. The board member was concerned that other members of her board of education were lobbying the SEC for a release of the decision prior to the upcoming school election.

The SEC found that the board member's request for a "delay" in the release of an SEC decision and the use of her official title as a New Jersey Department of Education employee and local board of education member on the letterhead of her request was sufficient evidence that she attempted to use her official position to influence the SEC to delay the issuance of its decision in a matter that would have clearly benefited her fellow board member. The request constituted an attempt to secure an unwarranted privilege for her fellow board member in violation of *N.J.S.A.*18A: 12-24(b).

Noting that the board member acknowledged that her concerns could have been more appropriately presented to the board of education, the board solicitor or by formal complaint to the SEC, the SEC recommended the penalty of reprimand. The Commissioner agreed.

In a unique procedural twist, a member of the SEC filed the complaint in this matter. The Commission member did not participate in the decision.

6. ***In the Matter of Mary Adams*, 2003 *S.L.D.* May 30. SEC • CMR** At its May 1, 2003 meeting the SEC found that a board member violated the School Ethics Act, specifically *N.J.S.A.* 18A:12-24(c) of the Code of Conduct, by voting on three separate occasions on bill lists containing bills that were submitted by a printing company owned by her husband and for which she worked as an employee. While the board member testified that she had not voted "yes" but had actually abstained, the minutes of the meetings, which she had reviewed and approved, indicated that she had voted "yes".

The SEC found that since the board member's husband was an immediate family member and owned the printing firm, he had a direct financial involvement in matters regarding that firm that might reasonably be expected to impair her objectivity and independence of judgment. Since the board member was an employee of the printing firm, she had an indirect financial involvement in matters concerning the company that might reasonably be expected to impair her objectivity. The SEC held that the

board member's votes to approve payment to her husband's company constituted action in her official capacity in a matter in which she or a member of her immediate family had a direct or indirect financial involvement in violation of *N.J.S.A.* 18A:12-24(c).

The SEC recommended the penalty of reprimand. The Commissioner agreed.

7. ***In the Matter of Julia Hankerson*, 2003 *S.L.D.* August 14. SEC • CMR** At its June 24, 2003 meeting the SEC found that a board member violated the School Ethics Act, particularly *N.J.S.A.* 18A: 12-24.1(c), (d), (e), (g), and (h) of the Code of Ethics for School Board Members; many of the violations having occurred after the board member had attended her New Board Member Orientation training.

The board member ignored the recommendation of the superintendent and allowed a school business administrator to be hired without the superintendent's recommendation, contrary to *N.J.S.A.* 18A:27-4.1. By so doing, she failed to vote to appoint the best-qualified personnel available after consideration of the recommendation of the superintendent in violation of *N.J.S.A.* 18A: 12-24.1(h).

The board member gave orders to a school district employee to perform tasks for her, without first consulting with the superintendent. By so doing, she did not confine her board action to policy-making, planning and appraisal, in violation of *N.J.S.A.* 18A:12-24.1(c), and administered the schools rather than, together with her fellow board members, making sure that the schools were well run, in violation of *N.J.S.A.* 18A:12-24.1(d).

The board member had RICE notices sent to certain school district employees, proposing their termination, without consulting with the superintendent. The SEC found that the board member had the employees terminated without any recommendation from the superintendent, greatly exceeding her authority as board president. By so doing, she failed to confine her board action to policy-making, planning and appraisal, in violation of *N.J.S.A.* 18A: 12-24.1(c). While the board member argued that the board took the action, not she, the SEC emphasized the fact that she knew that there was no recommendation to terminate and that, in fact, the superintendent was opposed to the terminations.

The board member hired a technology specialist contrary to the superintendent's recommendation, substituting her preference without consideration of the superintendent's choice and failing to vote to appoint the best-qualified personnel available after consideration of the recommendation of the superintendent, in violation of *N.J.S.A.* 18A: 12-24.1(h). It was not appropriate for the board to simply appoint someone without taking into consideration the superintendent's recommendation.

The board member created the position of behavior specialist and had a candidate appointed to the position without the recommendation of the superintendent. She interviewed the candidate herself, clearly overstepping her role as a board member and failing to confine her board action to policy-making, planning and appraisal, in violation of *N.J.S.A.* 18A:12-24.1(c).

The board member nominated, interviewed and recommended the hiring of a teacher and a nurse without the superintendent's recommendation. By so doing, she administered the schools in a clear attempt to subvert the superintendent rather than, together with her fellow board members, making sure that the schools were well run, in violation of *N.J.S.A.* 18A:12-24.1(d).

The board member removed the superintendent from the agenda of teacher in-service orientation and directed him to conduct interviews rather than attend the orientation. Pulling the superintendent from the teachers' orientation clearly undermined his authority with staff and compromised his ability to serve as superintendent. By so doing, she took private action that could compromise the board of education, in violation of *N.J.S.A.* 18A: 12-24.1(e).

The board member advised the association president and an administrator that the contract of the superintendent would not be renewed, prior to giving the superintendent notice. The SEC found it reprehensible that the board member would discuss her intent to get rid of the superintendent with his subordinates. By so doing, she failed to hold confidential matters pertaining to the schools, which would needlessly injure the superintendent and the schools, in violation of *N.J.S.A.* 18A:12-24.1(g).

The SEC recommended the penalty of removal, finding that the board member acted in blatant disregard of the Code of Ethics for School Board Members even after going to board member training. The SEC determined that her submission of false revised minutes in order to defend herself undermined her credibility. The SEC was presented with evidence that employees who testified against her in her first hearing were terminated before the second hearing. Such retaliatory conduct made the argument for removal even more compelling for the SEC. The Commissioner agreed and ordered the board member removed.

8. ***In the Matter of Juan Santiago*, 2003 *S.L.D.* August 19. SEC • CMR** At its July 22, 2002 meeting the SEC found that a board member violated the School Ethics Act, specifically *N.J.S.A.* 18A:12-24.1(j) of the Code of Ethics for School Board Members, when he copied the board of education, school district assistant superintendents, building principals, the State Department of Education and the New Jersey School Boards Association on a letter that he had sent to the superintendent of schools requesting the demotion of an assistant superintendent.

The SEC found that the ethics violation occurred when, instead of writing the letter in confidence and waiting for the superintendent's response, he copied it to the board, assistant superintendents, building principals, the State Department of Education and the New Jersey School Boards Association. By not waiting for an administrative solution before notifying others of the complaint, the board member acted on a complaint prior to the failure of an administrative solution, in violation of N.J.S.A. 18A:12-24.1(j).

The SEC recommended the penalty of reprimand. The Commissioner agreed.

9. ***In the Matter of Randie Zimmerman*, 2003 *S.L.D.* August 21. SEC • CMR** At its July 22, 2003 meeting, the SEC

found that a board member violated the School Ethics Act, specifically *N.J.S.A.* 18A:12-24.1(e) and (g) of the Code of Ethics for School Board Members, by taking private action that compromised the board, sending letters under her title of board president and not acting in concert with her fellow board members.

The SEC determined that the board member took private action using her position as board president when she complained about the conditions in a kindergarten classroom located in her board's receiving district. The strongly worded letter, suggesting that a fire code violation existed, which was copied to the county superintendent, could have compromised her board and damaged its relationship with the receiving district. By so doing, she took private action that could have compromised the board in violation of *N.J.S.A.* 18A:12-24.1(e).

The board member failed to provide accurate information when she stated that a fire code violation existed and that a first-year teacher was placed in the room because the teacher could not complain without the risk of losing her job. Failure to discuss these strong allegations with her board or give the administration an opportunity to address the issues concerned constituted a failure to act in concert with her fellow board members. By failing to provide accurate information and act in concert with her fellow board members to interpret to the staff the aspirations of the community for its school, the board member acted in violation of N.J.S.A. 18A:12-24.1(e).

The SEC recommended the penalty of reprimand, taking into consideration the fact that the board member was trying to do the right thing in making inquiries on behalf of a constituent. However, by signing the negative letter of the parents as if it were her own and adding her title as board president, she went too far. The Commissioner agreed.

10. ***In the Matter of Thomas Keelen*, 2003 *S.L.D.* September 22. SEC • CMR** At its June 24, 2003 meeting, the SEC adopted the initial decision of the administrative law judge, who found that a board member violated the School Ethics Act, specifically *N.J.S.A.* 18A:12-24(b) and (e) of the Code of Conduct, by soliciting a $1000 contribution to his borough council election campaign from an employee of a board of education vendor, implying that the contribution, or lack thereof, would effect the vendor's possibility of future contracts with the board of education.

The SEC concluded that the board member's conduct constituted an attempt to use his official position to secure an unwarranted privilege for himself in violation of *N.J.S.A.* 18A:12-24(b). Further, the solicitation of a political contribution for the purpose of influencing him directly or indirectly in the discharge of his official duties was in violation of *N.J.S.A.* 18A:12-24(e).

The SEC would have recommended the penalty of removal, if the board member were still on the board. Since he was no longer a board member, the SEC recommended the highest penalty possible, censure. The Commissioner agreed.

11. ***In the Matter of Paul Schaeder*, 2003 *S.L.D.* November 10. SEC • CMR Motion for Stay denied by Commissioner. 2003 S.L.D. December 11. State Board affirms in part, reverses in part. 2004 S.L.D. September 1.** At its September 23, 2003 meeting, the SEC found that a charter school trustee violated the School Ethics Act, specifically *N.J.S.A.* 18A:12-24.1(c) and (d) of the Code of Ethics for School Board Members, when, without the consultation of the board of trustees, he acted as a "one-member board" and forced the Chief Academic Officer of the charter school to resign. The SEC further found that the trustee violated the School Ethics Act, particularly *N.J.S.A.* 18A:12-24(b) of the Code of Conduct when he hired a former board of trustee member as an Information Technology Consultant within a month after the trustee resigned from the board.

In an interesting defense, the board of trustee member argued that the Code of Ethics for School Board Members did not apply to charter school trustees, as they are not board members. The Code of Ethics, as enacted, should only apply to "board members" as that term is defined in *N.J.S.A.* 18A:12-23, he argued. The SEC was not convinced.

The SEC found that the termination of the Chief Academic Officer was initiated and completed by the trustee, who only sought full board of trustee approval after the fact. The circumstances defied all notions of fairness and respect owed to the Chief Academic Officer of a school. The trustee's actions on such an important issue went beyond policy making, planning and appraisal and were done without board consultation in violation of *N.J.S.A.* 18A:12-24.1(c).

In addition, the trustee did not act in concert with his fellow board members. He unilaterally decided that the Chief Academic Officer should be terminated, as shown by the attorney's bill, and admittedly kept a fellow trustee uninformed because he believed that the trustee would disagree with his decision and possibly inform the employee or her supporters. By so doing, the trustee administered the schools instead of acting with his fellow board members to see that the schools were well administered in violation of *N.J.S.A.* 18A:12-24.1(d).

The SEC found that the manner in which the hiring of the Information Technology Consultant took place was an unwarranted privilege and advantage that the former trustee received from the trustee. The hiring occurred in a stealth manner and payment of thousands of dollars was made without benefit of a contract. No actual vote to approve the hiring ever occurred. The public was shielded from the process. No notice was provided that there was a need for the position. Why the former trustee was preferred to other providers and the fact that other providers charged much more should have been part of the public discussion, not just in closed session. The trustee used his position to secure an unwarranted privilege and advantage for the former trustee in violation of *N.J.S.A.* 18A:12-24(b).

The SEC recommended the penalty of removal. The trustee acted as a one-member board and in so doing had egregiously violated the Code of Ethics for School Board Members and the standards of conduct expected of board members in general. The Commissioner agreed.

A Motion for a Stay was denied by Commissioner and an appeal to the State Board followed.

The State Board affirmed the decision of the SEC with respect to the ethi-

cal violation concerning the termination of the Chief Academic Officer, reversed as to the ethical violation concerning the hiring of the Information Technology Consultant and reversed the Commissioner's penalty of removal, recommending the penalty of reprimand. The State Board directed that the trustee be reinstated.

In reaching its decision, the State Board determined that the SEC had, in rendering its decision on the merits of the case, improperly relied on testimony given at the probable cause hearing, which was not subject to cross-examination. The failure to allow cross-examination of this testimony violated principles of fairness and risked undue prejudice to the trustee.

As to its reversal of the violation concerning the hiring of the Information Technology Consultant, the State Board found no indication in the record that unwarranted privileges or advantages were secured in the hiring of the former trustee. Nor did the record support the contention that the trustee singularly made the decision to hire the consultant.

Given the fact that the sanction of removal was predicated on two violations, one of which had been set aside, the State Board directed that the trustee be reinstated and that reprimand was the appropriate remedy.

12. ***In the Matter of Ronald Udy, David A. Ewart and Frank B. Frazier*, 2003 *S.L.D.* November 10. SEC • CMR Reversed and remanded, State Board 2004 *S.L.D.* April 7.** At its September 23, 2003 meeting, the SEC found that three board members violated several provisions of the School Ethics Act, particularly the Code of Ethics for School Board Members, when they overruled the recommendation of the superintendent not to renew the school district's former director of guidance, who lacked proper certification for the position, voted to create a new administrative position without the recommendation of the superintendent and rehired an employee who lacked proper certification for the newly created position.

The SEC found that by overruling the superintendent's recommendation to non-renew the school district's former director of guidance and rehiring her as director of guidance, notwithstanding the fact that she did not possess the proper certification, all three board members failed to enforce the regulations of the State Board, in violation of *N.J.S.A.* 18A:12-24.1(a). By voting to create a new position of Supervisor of Guidance for the former director, the three board members similarly failed to enforce the regulations of the State Board. The SEC further found that by voting to retain the former director of guidance and voting to create a new position for her, while she did not possess the necessary certification and there was no evidence that she had completed the necessary coursework to obtain the certification, the three board members used the schools for the gain of a friend, in violation of *N.J.S.A.* 18A:12-24.1(f).

The SEC found that one board member, through his motions to retain the former director of guidance and to create a new position for her, when there was no evidence that she held the requisite certification, went beyond his duty of policy making, planning, and appraisal, in violation of *N.J.S.A.* 18A:12-24.1(c). The same board member's extensive experience, having been employed in the school district for 32 years and having served as superintendent of schools, presumed an extensive knowledge base of school law. The SEC found that this board member attempted to undermine the authority of the superintendent of schools when he made the various motions in this matter. By so doing he administered the schools in violation of *N.J.S.A.* 18A:12-24.1(d).

The SEC recommended the penalty of censure for two of the three board members. For the third board member, the former superintendent of schools, the SEC recommended the penalty of removal. The Commissioner agreed.

Concerned with certain alleged procedural errors, the Commissioner stayed implementation of the penalty pending State Board appeal.

On appeal, the State Board reversed and remanded, finding that SEC violated the board members due process rights when it decided the merits of the matter after notifying them that the proceeding was for a determination of probable cause. By so doing, the SEC deprived the board members of their right to properly defend themselves against the merits of the allegations. The matter was remanded to the SEC for a determination on probable cause. The State Board directed that if the SEC found that probable cause existed that a violation of the School Ethics Act had occurred, the matter should be transferred to the Office of Administrative Law for a hearing.

13. ***In the Matter of Dr. Jonathan Hodges*, 2003 *S.L.D.* December 15. SEC • CMR** At its October 31, 2003 meeting, the SEC found that a board member violated the School Ethics Act, specifically *N.J.S.A.* 18A:12-24(a) of the Code of Conduct, when he had an interest in a preschool that contracted with the board and when he voted to approve payment to the preschool.

The board member was an original incorporator of the preschool and sold his interest upon being elected to the board in April 2002. The agreement of sale stipulated that the purchase price would be paid to the board member in monthly payments over a 15-year period. While the SEC recognized that the board member did not have a current interest in the preschool, he would have a legal claim to his former partner's assets, which include the preschool, in the event of a default in payment. Additionally, the board member received at least one check that was drawn on the general business account of the preschool. This transaction was in substantial conflict with the proper discharge of the board member's duties in the public interest, since the preschool received funding from the school district, in violation of *N.J.S.A.* 18A:12-24(a).

The SEC recommended the penalty of reprimand. A higher penalty was not recommended since the board member took precautions to try to comply with the law and the board no longer contracted with the preschool. The Commissioner agreed.

Comments were also submitted to the Commissioner by the complainant in the underlying school ethics matter. The Commissioner did not consider the comments as the complainant has neither standing nor the right to prosecute in school ethics matters. See *In re Pannucci* State Board 2000 *S.L.D.* March 1.

14. ***In the Matter of John F. Kroschwitz,***

***II and Wendy Sturgeon*, 2003 *S.L.D.* December 19. SEC • CMR** At its October 31, 2003 meeting, the SEC found that two board members violated the School Ethics Act, specifically *N.J.S.A.* 18A:12-24.1(f) of the Code of Ethics for School Board Members, when they surrendered their independent judgment concerning the district's food service contractor to a special interest group, the local education association, which supported their candidacy and opposed renewal of the contract. One board member also violated *N.J.S.A.* 18A:12-24.1(j) of the Code of Ethics for School Board Members when she took her complaints directly to the media instead of first giving the administration an opportunity to address them.

The SEC believed that the motivating factor behind one board member's visits to the schools and both board members appearance on television describing the poor conditions in the school's kitchens was the union's opposition to the private cafeteria services vendor's contract with the board. The SEC found a connection between the union's endorsement of the two board members, the surreptitious investigation into the kitchens without the knowledge of the school administration and the choice to present the information to the media rather than to the administration. The board members were more concerned with seeing that the contract was not renewed than with correcting the problem. The SEC found that the board members surrendered their independence of judgment to a special interest group, the local education association, in violation of *N.J.S.A.* 18A:12-24.1(f).

The SEC found that through the undertaking of numerous actions, the second board member failed to refer all complaints to the chief school administrator and act on complaints at public meetings only after the failure of an administrative solution in violation of *N.J.S.A.* 18A:12-24.1(j). These actions included not advising the chief school administrator of her intent to visit the schools because of complaints of less than sanitary conditions in the kitchens, not taking her complaints to the chief school administrator after she visited the kitchens, taking pictures and by taking her complaints to a local television station and giving an interview to the local newspaper. By so doing, the board member failed to give the chief school administrator an opportunity to solve the problem before making it public.

The SEC recommended the penalty of censure. The Commissioner agreed.

COMPLAINTS DISMISSED

1. ***Manning, Gist, Salahuddin, Hill and Bryant v. Graves*, Docket No. C23-02 (January 28, 2003).** The SEC dismissed a complaint, filed against a board member, charging that the board member violated the School Ethics Act, particularly *N.J.S.A.* 18A:12-24.1(e), (g), and (i) of the Code of Ethics for School Board Members, when she disclosed information discussed in a closed, executive session of the board of education to local government officials and other members of the community.

   The SEC found no probable cause to credit the allegations that the board member's disclosure constituted private action that could compromise the board in violation of *N.J.S.A.* 18A:12-24.1(e). The board's action, placing the superintendent on administrative leave, necessitating the appointment of an interim superintendent, warranted public disclosure. Action of such magnitude affects not only the superintendent personally but impacts upon the administration of the entire school district. In addition, the superintendent's attorney requested that the final decision of the board be reported in public session and, as such, the board member's disclosure was consistent with the legislative intent of the Open Public Meetings Act.

   The SEC found no probable cause to credit the allegation that the board member violated *N.J.S.A.* 18A:12-24.1(g) by failing to hold confidential all matters pertaining to the schools, which, if disclosed, would needlessly injure individuals or failed to provide accurate information. The board member's disclosure was consistent with the underlying intent of the OPMA and related case law. It was consistent with the superintendent's request, did not present an injury to him and was not inaccurate.

   The SEC found no probable cause to credit the allegation that the board member violated *N.J.S.A.* 18A:12-24.1(i) by failing to support and protect school personnel in the proper performance of their duties. No evidence was presented to show that the board member failed to support and protect the superintendent. In fact, the superintendent testified on behalf of the board member.

2. ***Doty v. Friedberger, Puzio, Hodes and Giarrantano*, Docket No. C34-02 (January 28, 2003).** The SEC dismissed a complaint filed against four board members, charging that the board members violated the School Ethics Act, particularly *N.J.S.A.* 18A:12-24(e) of the Code of Conduct when, after having been endorsed by the local education association, they voted to ratify the collective bargaining agreement, to give monetary stipends to the co-presidents of the local education association and to approve payment of summer compensation to one of the co-presidents.

   The SEC found no probable cause to credit the allegations that one board member accepted a campaign contribution that he knew or had reason to know was given with the intent to influence him in the discharge of his official duties, in violation of *N.J.S.A.* 18A:12-24(e). The board member had previously sought an advisory opinion from the SEC, which advised him that his participation in local association matters after receiving the local association endorsement would not violate the Act. The board member took every action to reject the in-kind contribution of support. The board member did not attend the local association PAC meeting where candidates were endorsed. When he discovered he had been endorsed, he sent a letter to the local association advising that he did not want the endorsement. He attempted to take down the local association signs on his behalf, when the local association did not do so.

   The SEC found no probable cause to credit the allegations that another board member accepted a campaign contribution knowing or having reason to know that the contribution was given with the intent to influence him in the discharge of his official duties, in violation of *N.J.S.A.* 18A:12-24(e). The board member declined financial support from the local association but did receive signs and mailings in support of his candidacy.

He neither requested nor solicited the local association's support and had no input into the signs or flyers.

The SEC found no probable cause to credit the allegations that two other board members accepted a campaign contribution that they knew or had reason to know was given with the intent to influence them in the discharge of their official duties, in violation of *N.J.S.A.* 18A:12-24(e). For the other two board members, who were only candidates at the time of the endorsement, no evidence was found to connect the endorsement with the aforementioned votes.

The respondents asked that the complaint be found to be frivolous and that sanctions be imposed upon the complainant. The SEC did not find the complaint to be frivolous and declined to impose sanctions.

3. ***Doty v. Friedberger, Giarratano and Salny*, Docket No. C38-02 (January 28, 2003).** The SEC dismissed a complaint filed against three board members and the board of education charging that the board members violated the School Ethics Act, particularly *N.J.S.A.* 18A:12-24.1(d) of the Code of Ethics for School Board Members, when, as members of the board's curriculum committee, they recommended that teacher staff, middle school administrators and maintenance personnel review the final plans for the eighth grade science laboratory prior to construction and that other students be displaced in the event the laboratory was not completed as scheduled.

   The SEC found no probable cause to credit the allegations that the board members acted to administer the schools rather than to see that they were well run, in violation of *N.J.S.A.* 18A: 12-24.1(d). The superintendent's affidavit demonstrated that the board members, members of the Curriculum Committee, were acting pursuant to the superintendent's suggestion, based on his concern that the project not interfere with the education of students. The SEC could not conclude that the board members overstepped their bounds as a committee and usurped the authority of the administration.

   The respondents asked that the complaint be found to be frivolous and that sanctions be imposed upon the complainant. The SEC did not find the complaint to be frivolous and declined to impose sanctions.

4. ***Doty v. Friedberger, Puzio, Hodes and Giarratano*, Docket No. C40-02 (January 28, 2003).** The SEC dismissed a complaint filed against four board members charging that the board members violated the School Ethics Act, particularly *N.J.S.A.* 18A:12-24(d) and (g) of the Code of Conduct when they accepted the board member candidacy endorsement of the local education association and voted in favor of the collective bargaining agreement with the association.

   The SEC found no probable cause to credit the allegations that the board members violated *N.J.S.A.*18A:12-24(d) by the undertaking of any employment or service that might be reasonably expected to prejudice their independence of judgment in the exercise of official duties. The SEC could find no employment or service in which the board members engaged set forth in the allegations of the complaint. The board members received an endorsement of the political action committee of the local association. The board members were neither employed by the local association nor undertook any service on behalf of the local association.

   The SEC found no probable cause to credit the allegation that the board members violated *N.J.S.A.* 18A:12-24(g) by representing another person or party other than the school board in connection with a matter involving the school district.

   The SEC was unable to discern any instance of the board members representing any person or party other than the school district. While it was alleged that the board members were representing the interests of the local association, the board members were representing the school district at all times. There was no showing that the board members ever appeared before the board to represent the interests of the local association.

   The respondents asked that the complaint be found frivolous and that sanctions be imposed upon the complainant. The SEC did not find the complaint to be frivolous and declined to impose sanctions. However, the SEC cautioned the complainant that, given the SEC's decisions on his previously filed complaints, the next complaint filed by complainant might meet the frivolous standard.

5. ***Williams v. Lawrence*, Docket No. C32-02 (February 25, 2003).** The SEC dismissed a complaint filed against a board member, charging that the board member violated the School Ethics Act, particularly *N.J.S.A.* 18A: 12-24.1(a), (e), (g) and (i) of the Code of Ethics for School Board members when he allegedly threatened the school business administrator/board secretary regarding her position, disclosed information the supervisor of special education services that was discussed in a personnel committee meeting and disclosed executive session information to a newspaper reporter.

   The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(a). The SEC did not discern any law, rule or regulation alleged to be violated by the board member. While the board member's objection to the election process might have been more appropriately expressed at the time of the vote and at a meeting of the board, the exchange, whether perceived as confrontational or not, did not violate any laws, rules or regulations of the State Board or court orders relating to the schools. The board member did not attempt to bring about a desired change through any illegal or unethical procedures.

   The SEC found no probable cause to credit the allegation that the board member failed to support and protect school personnel in the proper performance of their duties in violation of *N.J.S.A.* 18A:12-24.1(i). The SEC found the exchange between the board member and school business administrator/board secretary to be a matter of perception. The board member's words were not particularly threatening, although his conduct may have been perceived as such.

   The SEC found no probable cause to credit the allegation that the board member failed to recognize the authority of the board and took private action by disclosing information that could have compromised the board in violation of *N.J.S.A.* 18A: 12-24.1(e). The board member's comment that the supervisor was "out of a job" was too

vague. The SEC could not infer that the comment referred to the personnel committee discussion rather then the supervisor's impending retirement.

The SEC found no probable cause to credit the allegations that the board member disclosed confidential information in violation of *N.J.S.A.* 18A:12-24.1(g). There was insufficient evidence to demonstrate that the board member revealed closed session information to the newspaper reporter. The SEC was not convinced that revealing that some of the board members were not present at the board's closed session interviews would needlessly injure individuals or the schools.

6. ***Fitzpatrick v. Central Regional Board of Education, Amato, Mackenzie, Keiser, Kimmel, Pavone-Wilson and Tsucalas,*** **Docket No. C35-02 (February 25, 2003).** The SEC dismissed a complaint filed against the board of education and several board members, individually, charging that the board of education and individual board members violated the School Ethics Act in several areas when they failed to renew the employment contract of a non-tenured teacher.

The SEC found no probable cause to credit the allegation that the board violated *N.J.S.A.* 18A:12-24.1(a) by failing to uphold the laws, rules and regulations of the State Board or court orders pertaining to the schools. The board reconsidered the CSA's recommendation to reappoint the teacher in closed session and in public session voted not to reappoint her, based on the information in her file and letters from parents and students. The SEC was not the appropriate forum to address alleged defects in "Rice notice" procedures. No laws, rules, regulations or orders were violated.

The SEC found no probable cause to credit the allegations that the board violated *N.J.S.A.* 18A:12-24.1(h) by failing to appoint the best qualified personnel available after consideration of the recommendation of the chief school administrator. Boards are not required to accept all recommendations from the chief school administrator, but must consider them as part of the decision-making process. That was precisely what the board did when it went into closed session for discussion, reconsidered the superintendent's recommendation and voted not to renew the teacher's contract.

The SEC found no probable cause to credit the allegations that the board violated *N.J.S.A.* 18A:12-24.1(d) by administering the schools or failing to work with one another to ensure that the schools are well run. The board's decision to non-renew was based on a review of the teacher's record, including information from her personnel file and reports from students and parents.

The SEC found no probable cause to credit the allegations that a board member violated *N.J.S.A.* 18A:12-24.1(g) by failing to hold confidential certain parent letters that would cause the teacher needless injury. The board member testified that all letters he received were forwarded to the superintendent. The SEC could not find that the board member disclosed the letters as other school personnel were in possession of the letters and there was no evidence as to who had disseminated them.

The SEC found no probable cause to credit the allegations that two board members violated *N.J.S.A.* 18A:12-24.1(j) by failing to refer all complaints to the chief school administrator and only acting on the complaints at a public meeting after failure of an administrative solution. The board member testified that all complaints and letters that he received were forwarded to the superintendent's office. The board's decision to non-renew the teacher was not an action in response to a complaint but a decision made in the board's process of determining which teaching staff contracts would not be renewed.

The SEC found no probable cause to credit the allegations that a board member violated *N.J.S.A.* 18A:12-24.1(c) and (f). The SEC has never held that friendship alone would create a personal involvement that would create a benefit to a school official. No personal involvement that created a benefit to the board member was found. In addition, no evidence was presented to demonstrate that the board member had a personal relationship with any of the parents who complained about the teacher's conduct or that she used the schools for the gain of a friend.

7. ***Szilagyi v. Maiello,*** **Docket No. C37-02 (March 23, 2003).** The SEC dismissed a complaint alleging that a board member violated several sections of the School Ethics Act when, while serving as a member of the board of education, she applied to the Historical Preservation Office to have a board-owned building classified as an historic landmark.

The SEC found no probable cause to credit the allegations the board member violated *N.J.S.A.* 18A:12-24.1(e) by taking private action that could compromise the board when she made the final application and supplemented the application as a private citizen while serving as a board member. Based on the fact that the designation of a building as an historical landmark could result in state and federal assistance to improve the property and that the ultimate decision for the use of the property would be made by the board, the SEC concluded that the board was not compromised by the board member's action.

The SEC found no probable cause to credit the allegations the board member violated *N.J.S.A.* 18A:12-24.1(f) by using the schools for personal gain by having the building designated as an historical site. The arguments that the board member's commercial properties in the area would rise in value were speculative at best.

The SEC found no probable cause to credit the allegations the board member violated *N.J.S.A.* 18A:12-24(d) by undertaking a service that might be reasonably expected to prejudice her independence of judgment in the exercise of her official duties. The board member's action in applying for a building's historical preservation did not constitute an uncompensated service.

The SEC found no probable cause to credit the allegations the board member violated *N.J.S.A.* 18A:12-24(c) by acting in an official capacity in a matter in which she had a personal or financial involvement. The SEC found that the initial premise, that the value of her properties would increase if the building were designated an historical site, was too speculative to create the necessary personal or financial involvement. While the board member voted against the sale of the building in 2002, no financial involvement could be seen from the vote since the board, not the

board member, would receive the profits from the sale. Any benefit to the board member would be covered under *N.J.S.A.* 18A:12-24(h) as the board member could not gain from her application to any greater extent than any other business owner in the town.

The SEC found no probable cause to credit the allegations the board member violated *N.J.S.A.* 18A:12-24.1(c) and (d) by acting outside of her policy making role and administering the schools when she entered the building in question. She was in the process of seeking historical landmark status for the building before she became a board member. While she was a board member when she entered the building, she was acting as a private citizen when she sought information to supplement her application.

The SEC found no probable cause to credit the allegations the board member violated *N.J.S.A.* 18A:12-24.1(e) by taking private action that could compromise the board. The board had ultimate authority to determine what would happen to the building and the board member's actions did not affect that outcome.

The SEC found no probable cause to credit the allegations the board member violated *N.J.S.A.* 18A:12-24.1(f) by using the schools for personal gain. While a personal gain need not be monetary, the SEC did not find that the seeking of historical landmark status was an action that would yield a personal gain for the board member.

The SEC found no probable cause to credit the allegations the board member violated *N.J.S.A.* 18A:12-24(b) by using her official position to secure unwarranted privileges or advantages. The request for access to the building to take pictures that supported her private application would have been granted to any member of the public, not just board members. She did not use her influence as a board member to obtain a list of names of those who inquired about the administration building.

The SEC found no probable cause to credit the allegations the board member violated *N.J.S.A.* 18A:12-24(f) by using her public office to gain access to the building.

The board member asked that the complaint be found to be frivolous and that sanctions be imposed upon the complainant. The SEC did not find the complaint to be frivolous and declined to impose sanctions.

8. ***Chappel v. Bryant*, Docket No. C45-02 (March 25, 2003).** The SEC dismissed a complaint filed against a board member alleging that the board member violated the School Ethics Act, particularly *N.J.S.A.* 18A:12-24(c) of the Code of Conduct and *N.J.S.A.* 18A: 12-25(c), when he questioned individuals who requested the job description of the person with whom he cohabitated, (an employee in the school district), when he served as chairperson of the board's Community Engagement and Involvement Committee and when he failed to disclose the name of his cohabitant on his personal and financial disclosure forms.

   The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24(c) by acting in his official capacity in a matter in which he or his immediate family member had a direct or indirect financial or personal involvement. When the board member questioned individuals who requested the job description of his cohabitant, he was not acting in his official capacity as a board member as the questioning took place outside of the board meeting. While the board member's cohabitant sat on the committee that he chaired, the committee had no operational budget and functioned to enhance community and parental involvement in the school district. The nature of the committee did not lend itself to any financial involvement that would impair the board member's objectivity. Additionally, the SEC could discern no personal benefit that the board member could achieve from his chairing of the committee on which his cohabitant sat.

   The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-25(c) by failing to disclose the name of his cohabitant on his personal/relative and/or financial disclosure forms. The cohabitant was not an immediate family member or related to the board member directly or by marriage and was not required to be disclosed.

9. ***Maney v. Thornton*, Docket No. C46-02 (March 25, 2003).** The SEC dismissed a complaint alleging that a board member violated the School Ethics Act, particularly *N.J.S.A.* 18A: 12-24.1(a), (e) and (g) of the Code of Ethics for School Board Members, when she advised other board members that the complainant had committed a violation of the School Ethics Act. The complainant, a fellow board member, had voted on an insurance resolution when his employer was a reinsurer for the company in question.

   The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A: 12-24.1(a) by failing to uphold a law, rule or regulation of the State Board. No evidence existed that the board member tried to bring about a change illegally or unethically. The board member was copied on a memorandum from the board attorney, which stated that the complainant violated the School Ethics Act.

   The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(e) by making personal promises or taking private action that could compromise the board. The SEC saw no promise that the board member made or action that she took that would be applicable to this section.

   The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(g) by misrepresenting or omitting facts from the attorney's opinion. Any misrepresentation or omission could not be attributable to the board member. She was copied on the memoranda from the board secretary and the attorney and contributed neither to the drafting of the memoranda nor to its distribution.

   The board member asked that the complaint be found to be frivolous and that sanctions be imposed upon the complainant. The SEC did not find the complaint to be frivolous and declined to impose sanctions.

10. ***Montgomery v. Palmer*, Docket No. C51-02 (March 25, 2003).** The SEC dismissed a complaint alleging that a board member violated the School Ethics Act, particularly *N.J.S.A.* 18A: 12-24(b) and (c) of the Code of Conduct and *N.J.S.A.* 18A:12-24.1(a), (e) and (i) of the Code of Ethics for School Board Members, when he communicated to

two female district employees that he would vote against the salary increase of one and the transfer requests of another, should either employee, respectively, not smile at him.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(a) by attempting to bring about a desired change through non-legal or unethical means. There was no evidence to demonstrate that such a change was attempted or achieved since the board member did not vote against the salary increase for the first employee and did not take action against the transfer of the second employee.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(e) by making personal promises or taking private action that could compromise the board when he made the comments to the two female employees. He testified that the comments were made in jest. He did not vote "no" against the salary increase or fail to approve the transfer. There was no information to show that the employees changed their behavior in any way based on the board member's actions.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(i) by failing to protect the employees in the proper performance of their duties. The SEC found the board member's actions to be consistent with the intent of this section as he did not disparage the women or take any action against them.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24(b) by attempting to use his official position to secure unwarranted privileges or advantages. The SEC could not discern any privilege or advantage to be gained by the board member's comments. Given the nature of the board member's comments and his actions in favor of the two employees, the SEC believed that the comments were made in jest and contradicted the allegations that he attempted to secure unwarranted privileges or advantages for himself.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(e) by soliciting a favor that would influence him in the discharge of his official duties. Since the SEC established that the board member's actions were done in jest, it had no basis from which to conclude that he solicited a favor, the denial of which would influence him in the discharge of his official duties.

11. ***Goode v. Hazeldine*, Docket No. C41-02 (May 1, 2003).** The SEC dismissed a complaint alleging that a board member violated the School Ethics Act, particularly *N.J.S.A.* 18A:12-22(a), *N.J.S.A.* 12-24(b), (c) and (f) of the Code of Conduct and *N.J.S.A.* 18A: 12-24.1(f) of the Code of Ethics for School Board Members, when he made derogatory comments about the mayor and council while in the school gymnasium, when he served as campaign manager for certain candidates running for the board, when he made comments to complainant's son regarding the mayor and a councilperson and when he asked the business administrator to do what was necessary regarding the vacancy created by the death of a board member.

    The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24(b) by using his official position to obtain unwarranted privileges, advantages or employment. The SEC could discern no privilege, advantage or employment that the board member could obtain by commenting about the Mayor and Council to students.

    The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24(f) by using or allowing his office to be used for the purpose of securing financial gain for himself. The SEC could find no financial benefit to be gained by the board member serving as campaign manager for candidates running for the board.

    The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(b) by failing to make decisions in terms of the educational welfare of children or failing to develop and maintain the public schools. While the board member admitted having a conversation with complainant's son regarding the Mayor and Councilperson, there was no evidence that the remarks constituted a failure to make decisions in terms of the educational welfare of the children or a failure to develop and maintain the schools.

    The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24(c) by voting on a matter that affected his wife where he had a direct or indirect financial involvement that might be reasonably expected to impair his objectivity or independence of judgment or had a personal involvement that was or created some benefit to him or his immediate family. The SEC had no minutes of any meeting that demonstrated that the board member voted on a matter concerning his wife.

    The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A: 12-22(a) when he allegedly told the school business administrator to place an ad to fill the unexpired term of a deceased board member on the day of her wake. The SEC could not find that this conduct rose to the level of a violation of the Act.

12. ***Alston v. Duda, Sharp and Each Member of the Delran Board of Education*, Docket No. C42-02 (May 1, 2003).** The SEC dismissed a complaint alleging that two administrators and each member of the board of education violated the School Ethics Act, particularly *N.J.S.A.* 18A:12-24(b) and (f) of the Code of Conduct and *N.J.S.A.* 18A: 12-24.1(a), (b) and (g) of the Code of Ethics for School Board Members in connection with the handling of a civil rights complaint.

    The SEC found no probable cause to credit the allegations that the middle school principal violated *N.J.S.A.* 18A: 12-24(b) by using his position to gain unwarranted privileges or advantages for himself or others when he allowed access to pupil records to USDOE representatives in connection with the complaint.

    The SEC found no probable cause to credit the allegations that the middle school principal violated *N.J.S.A.* 18A: 12-24(c) by acting in his official capacity in a matter in which he had a financial or personal interest. The SEC was unable to find any conflict of interest between the duties of the middle school principal and the principal's duties as the custodian of pupil records for his school.

The SEC found no probable cause to credit the allegations that the superintendent violated *N.J.S.A.* 18A:12-24(f) by using his position to secure financial gain for the school board attorney by allowing the board attorney access to the pupil records in question. The attorney was an employee of the district and was paid on a fixed annual salary for providing legal advice to the board of education. The attorney received no extra fees as an employee of the school district.

The SEC found no probable cause to credit the allegations that the nine members of the board of education violated *N.J.S.A.* 18A:12-24(b) or (f) by using their positions to secure unwarranted privileges or using their positions for the financial gain of the board attorney in connection with the letter the board attorney sent to middle school parents seeking permission to have students interviewed by the USDOE investigator.

The SEC found no probable cause to credit the allegations that the nine members of the board of education violated several sections of the Code of Ethics for School Board members, *N.J.S.A.* 18A: 12-24.1(a), (b) and (g). All conduct in question concerned the board attorney's actions for which the board members were not held liable.

The SEC was without information to conclude that the board members were required to take any action to uphold or enforce a State Board law, rule or regulation as a result of the board member's letter to the parents. No facts were set forth that would indicate that the board members failed to abide by *N.J.S.A.* 18A: 12-24.1(b). The SEC would not hold the board members vicariously liable for the action of the board attorney. No facts were set forth that indicated that the board members revealed confidential information or provided inaccurate information.

13. ***DiColo v. Dodson*, Docket No. C05-03 (May 27, 2003).** The SEC dismissed a complaint alleging that a board member of violated the School Ethics Act, particularly *N.J.S.A.* 18A:12-24(c) and (e) of the Code of Conduct and *N.J.S.A.* 18A: 12-24.1(c), (e), (g), (i) and (j) of the Code of Ethics for School Board Members and *N.J.S.A.* 18A:12-25, in conjunction with her role as moderator of a web site that discussed teachers, staff, curriculum, school programs and policies.

The SEC found no probable cause to credit the allegation that the board member violated *N.J.S.A.* 18A:12-25 by failure to disclose her moderator duties on her financial and personal/relative disclosure forms. There was no evidence that the board member failed to disclose any employment or financial information to the SEC.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24(e) by soliciting or accepting a gift or other thing of value based upon an understanding that the gift or other thing of value was given for the purpose of influencing her in the discharge of her official duties. No solicitation was made or gift received by the board member in connection with her providing of information to concerned parents regarding the self-medication policy or teaching scheduling on the web site.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(c) by failing to confine her actions to board policy making, planning and appraisal. No personal comments were made regarding the issues of substandard classrooms and a joint retreat for board members and teacher association members. Hence, no board action was taken outside the board member's usual duties of policy-making, planning and appraisal.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(e) by making personal promises or taking private action that could compromise the board. Comments made regarding the self-medication policy, gifted and talented program and teacher schedule changes were procedural in nature and were neither personal promises nor private action that could compromise the board.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A: 12-24.1(g) by disclosing confidential information. The board member's participation in the discussion was to provide procedural information only; information that may be disclosed to the public. No confidential information was disclosed that could injure certain individuals or the schools.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(i) by failing to support and protect school personnel in the proper performance of their duties. The board member's encouragement for teacher participation in a board survey did not constitute a failure to support and protect the teachers.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(j) by failing to refer all complaints to the chief administrative officer and acting on complaints at pubic meetings only after failure of an administrative solution. The comments regarding classroom standards, physical education class requirements and health class discussions were made by other parents and only posted by the board member. No action on the complaints occurred.

14. ***Ingemi and Councilpersons of the Town of Hammonton v. Cuneo*, Docket No. C47-02 (May 27, 2003).** The SEC dismissed a complaint alleging that the school business administrator violated the School Ethics Act, particularly *N.J.S.A.* 18A:12-24(a) and (c) of the Code of Conduct when he signed a contract with the board president for extra compensation for duties related to the board's construction contract and when he executed over a million dollars in change orders without board approval. It was alleged that the contract did not come to the board's attention until a year after the agreement was executed.

The SEC found no probable cause to credit the allegations that the school business administrator violated *N.J.S.A.* 18A:12-24(a) by entering into a transaction that was in substantial conflict with his duties in the public interest, notwithstanding the board's lack of formal approval. The school business administrator performed duties in addition to his regular duties, entitling him to additional compensation pursuant to the agreement.

The SEC found no probable cause to credit the allegations that the school business administrator violated *N.J.S.A.* 18A:12-24(c) by acting in a matter in which he had a personal or financial

involvement when he approved change orders without board approval. The SEC could not conclude that the school business administrator's authorization of the change orders constituted acting in his official capacity in a matter in which he had a personal or financial interest. While one million dollars in change orders was significant, it was within the 20% allowable under state law.

Concerned with the lack of board approval of the change orders, the SEC referred the matter to the Office of Compliance Investigation to determine whether retroactive approval was sufficient. The SEC had no jurisdiction over the change order approval question.

The SEC found curious the fact that a complaint was neither filed against the superintendent, who had a similar agreement nor against the board president who was the manager of the project.

15 ***Morrell v. Macgillis*, Docket No. C09-03 (May 27, 2003).** The SEC dismissed a complaint alleging that a charter school trustee violated the School Ethics Act, particularly *N.J.S.A.* 18A:12-24(c) of the Code of Conduct by virtue of the fact that she was a Dominican Sister in the Roman Catholic church and a founder and member of Genesis Farm, an ecological organization, while serving as a charter school trustee. Specifically, it was alleged that the Act was violated where a member of a Catholic religious order was involved with a publicly funded school and provided the school with a three-year interest free loan.

The SEC found no probable cause to credit the allegations that the charter school trustee violated *N.J.S.A.* 18A: 12-24(c) by acting in a matter in which she had a personal or financial involvement. Her service in and of itself was not a conflict. No showing was made that the trustee used her position to advance religion in the charter school. Any alleged violation of church and state would be a constitutional matter under the Establishment Clause of the First Amendment of the United States Constitution and would not be reviewable by the School Ethics Commission. As for the loan, Genesis Farm, not the trustee, provided the loan. There was no showing of financial or personal benefit to either the trustee or Genesis Farm.

16. ***Phillips v. Streckenbein and Members of the Edgewater Park Board of Education*, Docket No. C19-03 (June 24, 2003).** The SEC dismissed a complaint alleging that the superintendent of schools and members of the board of education violated the School Ethics Act, particularly *N.J.S.A.* 18A:12-24, the Code of Conduct, by creating and approving an administrative position, Coordinator of Educational Technology, for the superintendent's spouse.

The SEC dismissed the complaint because it was filed outside the one-year statute of limitations set forth at *N.J.A.C.* 6A:28-1.8(a). The merits of the matter were not considered.

The SEC noted that the situation created by the employment of the superintendent's spouse does require that the superintendent be mindful of the SEC rulings regarding the employment of a spouse in the school district. The SEC interpreted the Act to prohibit a superintendent from making recommendations regarding his spouse's promotion, tenure or other employment matter in order to avoid a violation of the Act.

17. ***Hanlon v. Gross*, Docket No. C14-03 (July 22, 2003).** The SEC dismissed a complaint alleging that a board member violated the School Ethics Act, particularly *N.J.S.A.* 18A:12-24.1(a), (d), (e) and (i) of the Code of Ethics for School Board Members, by bypassing the board's regular grievance process when he met with two employees to personally address their employment problems. The board member participated in a lengthy email discussion with fellow board members and school administrators prior to meeting with the employees at a diner and accompanying them to a meeting with school administrators.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(a) by failing to uphold all laws, rules and regulations of the State Board and court orders pertaining to the schools. No laws, rules or regulations of the State Board or court orders were violated.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(d) by failing to carry out his responsibility, not to administer the schools, but together with his fellow board members, to see that they are well run. The board member did not administer the schools. Although it was done through an email exchange, the board member acted together with his fellow board members and the chief school administrator in reaching a consensus regarding the course of action to be taken.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(e) by making personal promises or taking private action that could compromise the board. The board member did not act alone. He conferred with other board members by email, regarding the course of action to be taken and acted in cooperation with the chief school administrator.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(i) by failing to protect and support school personnel in the proper performance of their duties. No evidence of a violation of this section was presented.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(j) by failing to refer all complaints to the chief school administrator. The chief school administrator was involved in the decision by virtue of his inclusion in the initial email and allowance of the board member in the meetings between the administrators and the grieving parties.

The SEC found troubling the large amount of email correspondence among board members in this matter. The SEC reminded the parties that board business must be conducted in accordance with the Open Public Meetings Act (OPMA). While the SEC lacked jurisdiction over OPMA issues, it admonished the board members to be mindful of their legal obligations.

18. ***Long Branch School Employees Association v. Grant*, Docket No. C15-03 (July 22, 2003).** The SEC dismissed a complaint that charged a board member with violating the School Ethics Act, particularly *N.J.S.A.* 18A:12-24.1(c), (d), (e), (f) and (g) of the Code of Ethics for School Board Members, when he individually, and without the approval of the board, held a public meeting regarding the boys' varsity basketball team and coach, protested a closed board meeting on the subject and issued a press release

regarding the matter.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(c) by exceeding his duties of policy-making, planning or appraisal. He met with the superintendent prior to the meeting to discuss the problem and did not independently attempt to resolve the matter. His protest, meeting and press release were individual and private actions that did not constitute board action.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(d) by administering the schools when he picketed the closed meeting. His protest did not constitute board action. No evidence was presented that he failed to work together with his fellow board members.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(e) by taking private action that could compromise the board. While his protest of the meeting was private action, there was no showing that the board was, in any way, compromised by his conduct.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(f) by surrendering his independent judgment to special interest groups or partisan political groups or used the schools for personal gain or for the gain of friends. He attempted to gather information regarding the public's concern for the district's student athletes, after consulting with the superintendent.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(g) by disclosing confidential matters pertaining to the schools or failing to provide accurate information. No evidence of a violation of this section of the Act was presented.

19. ***Morrell v. McNulty*, Docket No. C08-03 (July 22, 2003).** The SEC dismissed a complaint alleging that a charter school trustee violated the School Ethics Act, particularly *N.J.S.A.* 18A:12-24(a) and (c) of the Code of Conduct, when he sold a property that he and his spouse owned to the charter school board of trustees.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24(a) by engaging in a transaction that would be in substantial conflict with the proper discharge of his duties in the public interest. Since the charter school was still in the planning and organizational stage and had not yet received Department of Education approval, no substantial conflict with the trustee's duties existed. However, the SEC stated that if a financial relationship continued, once the school's charter was issued, such as payments through promissory notes or a mortgage, the trustee's status would be problematic as recusal might not be enough to obviate the substantial conflict that would exist. No continuing financial relationship existed.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24(c) by acting in his official capacity with regard to the sale of the property. No official action as a board trustee was alleged.

20. ***Barry v. Gannon, Lindert, Norman, Lenihan, and Dawidowicz*, Docket No. C16-03 (August 26, 2003).** The SEC dismissed a complaint that charged the board, in general, and several board members individually with violating the School Ethics Act, particularly *N.J.S.A.* 18A:12-24.1(b), (c), (d), (g), (h) and (i) of the Code of Ethics for School Board Members.

The allegation that the board violated board policy by avoiding public discussion of the class size policy was not within the jurisdiction of the SEC.

The SEC found no probable cause to credit the allegations that the board member violated any provision of the School Ethics Act by allegedly intimidating and discouraging the public from expressing its concerns during the board's public sessions. Insufficient evidence was presented to show that the board intimidated or discouraged the public. If any first amendment issue existed, it was not within the purview of the SEC.

The SEC found no probable cause to credit the allegations that the board violated *N.J.S.A.* 18A:12-24.1(b) by failing to make a decision in terms of the educational welfare of children or by failing to develop public schools to meet the needs of all children. The board president's removal of a teacher from the agenda and the board's rejection of the superintendent's recommendation of a teacher did not violate the Act. The board is not bound by the recommendation of the superintendent.

The SEC found no probable cause to credit the allegations that the board violated *N.J.S.A.* 18A:12-24.1(c) by failing to confine their board action to policy making, planning and appraisal. The board president was not prevented from removing the superintendent's recommendation from the board's agenda.

The SEC found no probable cause to credit the allegations that the board violated *N.J.S.A.* 18A:12-24.1(h) by not appointing the best-qualified personnel available after consideration of the recommendation of the chief school administrator. There was no showing that the board failed to appoint the best-qualified person available. When the teacher was removed from the agenda, the board re-advertised the position and conducted another round of interviews. The board made an attempt to carefully select a teacher for the position.

The SEC found no probable cause to credit the allegations that the board violated *N.J.S.A.* 18A:12-24.1(i) by failing to support and protect school personnel in the proper performance of their duties. No evidence was presented to show a violation of this section.

The SEC found no probable cause to credit the allegations that the board violated *N.J.S.A.* 18A:12-24.1(d) by administering the school when it overruled the recommendation of the CSA and principal to reinstate a fourth section of a second grade class. The board simply followed its own pre-existing policy on class size.

The SEC found no probable cause to credit the allegations that the board violated *N.J.S.A.* 18A:12-24.1(g) by failing to interpret to staff the aspirations of the community for its schools. Nothing in the Act requires board decisions to be consistent with community sentiment. The fact that the board resolved the issues regarding class size, albeit with

intense community opposition, did not violate the Act.

The SEC found no probable cause to credit the allegations that the board violated *N.J.S.A.* 18A:12-24.1(b) by failing to consider the educational welfare of children or failing to develop and maintain schools that meet the individual needs of all children. No evidence was presented that the board ignored the individual needs of students regarding its decision on class size.

The SEC found no probable cause to credit the allegations that the board violated *N.J.S.A.* 18A:12-24.1(c) by exceeding its authority of planning, policy making and appraisal. The board's decision to provide only one day's notice to the administration, staff and parents before deciding to reorganize the aforementioned class was a question of board policy and should be addressed within the school district.

The SEC found no probable cause to credit the allegations that the board violated *N.J.S.A.* 18A:12-24.1(i) by failing to support ant protect school personnel in the proper performance of their duties. No evidence was presented that the board instructed the superintendent to direct her administrators, teachers and staff not to attend board meetings.

21. ***Vickner v. Dunham, Keel, Kramli, Mueller, Pieslak, Savage, and Schroeder*, Docket No. C18-03 (August 26, 2003).** The SEC dismissed a complaint that charged the board, in general, and several board members, individually, with violating the School Ethics Act, particularly *N.J.S.A.* 18A:12-24(d) of the Code of Conduct and *N.J.S.A.* 18A: 12-24.1(f) of the Code of Ethics for School Board Members, by voting to permit a former board member, who had been removed from the board by the School Ethics Commission for ethical violations, to run for election in the April 2003 elections when they had signed a nominating petition in support of his candidacy.

The SEC found no probable cause to credit the allegations that the board violated *N.J.S.A.* 18A:12-24(d) by undertaking a service that might reasonably be expected to prejudice their independence of judgment. There was no language in the Commissioner's decision to indicate that the former board member could not run in subsequent board elections. There was no evidence to show that the board candidate failed to meet the statutory requirements for candidacy. It was not reasonable to expect that the board members would be prejudiced in their independence of judgment by approving the former board member's candidacy when there was no basis to prohibit him from running.

The SEC found no probable cause to credit the allegations that the board violated *N.J.S.A.* 18A:12-24.1(f) by surrendering their independence of judgment or used the schools for the gain of friends. No evidence was presented that the board members supported the former board member in any other way beyond signing his nominating petition. The board based its decision on the recommendation of the board attorney, who advised that there was no legal basis to deny the former board member the opportunity to run in the election.

One responding board member asked that the complaint be found to be frivolous and that sanctions be imposed upon the complainant. The SEC did not find the complaint to be frivolous and declined to impose sanctions.

22. ***Doty v. Friedberger, Puzio, Hodes, Giarratano, Smith, Salny and Parciak*, Docket No. C22-03 (June 24, 2003)**. The SEC dismissed a complaint that charged the superintendent and six board members with violating the School Ethics Act, particularly *N.J.S.A.* 18A:12-24(b) and (g) of the Code of Conduct, by allowing the local education association to post campaign lawn signs endorsing board candidates on school-owned properties and for failing to have the lawn signs removed. It was determined that neither the board members nor the superintendent granted permission for the lawn signs to be posted on school property. In fact, once it was discovered that the campaign signs were on board property, the board secretary was immediately directed to remove them.

The SEC found no probable cause to credit the allegations that the board members or superintendent violated *N.J.S.A.* 18A:12-24(b) by using their official positions to secure unwarranted privileges or advantages for themselves or others. There was no evidence that the local education association posted the signs with board permission. Several board members did not even know that the signs were on board property. No evidence was presented that the superintendent authorized the posting of the signs.

The SEC found no probable cause to credit the allegations that the board members or superintendent violated *N.J.S.A.* 18A:12-24(g). The record was devoid of any evidence that any of the respondents violated the Act in any manner.

The SEC, in only the second time in its history, found the complaint to be frivolous and fined the complainant $250.

23. ***In the Matter of William Patterson*, Docket No. C11-03 (September 23, 2003).** The SEC dismissed a complaint that charged a board member with violating the School Ethics Act, particularly *N.J.S.A.* 18A:12-24(c) of the Code of Conduct and *N.J.S.A.* 18A:12-24.1(d) and (e) of the Code of Ethics for School Board Members, when he directed the board solicitor to subpoena bank records to conduct an investigation regarding improper use of a school district debit card and with respect to his vote on a matter involving the board solicitor. The SEC initially found probable cause to credit the allegations but, after additional submissions and testimony, reversed its finding and dismissed the complaint.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(d) by acting independently of the board and administering the schools. The SEC determined that a majority of the board supported the issuance of the subpoena and that the board member's intent was to protect district funds. He did not attempt to administer the schools or fail to work together with his fellow board members.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1(e) by taking independent action that could compromise the integrity of the school board. Given the support of four board members, who represented the majority of the school board, the SEC found that the board member's conduct did not constitute private action that could compromise the board.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24(c) by acting in his official capacity in a matter in which he had a personal involvement, the vote on the solicitor. The SEC initially found probable cause when the board member voted to appoint the board solicitor when his wife had received legal representation from another member in the firm. The board member argued that he had recused himself on the vote but the minutes from the meeting reflected a "yes" vote. Two board members provided affidavits that indicated that the board member had recused himself, causing the SEC to reverse its previous finding. The SEC noted the uniqueness of the situation as the board secretary who was present at the meeting was no longer working in the district.

24. ***Doty v. Giarratano, Smith and Salny*, Docket No. C25-03 (August 26, 2003).** The SEC dismissed a complaint that charged three board members with violating the School Ethics Act, particularly *N.J.S.A.* 18A:12-24(a) of the Code of Conduct and *N.J.S.A.* 18A:12-24.1(d) of the Code of Ethics for School Board Members, when they voted against the superintendent's recommendation to renew a principal and when they attended an Articulation Meeting held by the teachers in the district.

The SEC found no probable cause to credit the allegations that the board members violated *N.J.S.A.* 18A:12-24(a) by engaging in a business, transaction or professional activity when they attended the Articulation Meeting. Even if one were to stretch the definition of "professional activity" to include attendance at an articulation meeting, there is no indication that their attendance at the meeting was in substantial conflict with the proper discharge of their duties as board members.

The SEC found no probable cause to credit the allegations that the board members violated *N.J.S.A.* 18A:12-24.1(d) by attempting to administer the schools through their attendance at the Articulation Meeting. Articulation Meetings are held at all of the district's schools and were developed by the board in conjunction with, and with the approval and consent of, the administration. Board members are invited to attend these meetings and the superintendent did not view the board members' attendance as an attempt to administer the schools.

As to the failure to approve the superintendent's recommendation to renew the principal, there was no assertion or facts presented that would indicate that the board members withheld their approval on the principal's renewal for arbitrary or capricious reasons. Absent such facts, the SEC could not find that the board members administered the schools when they voted against the superintendent's recommendation.

For only the third time in its history, the SEC found the complaint to be frivolous and fined the complainant $250. The complainant had filed seven complaints with the SEC and was familiar with the School Ethics Act and its procedures. He had been fined previously for filing a frivolous complaint and had been warned in two prior decisions that if he were to continue to file complaints with no merit, that he would be sanctioned by the SEC.

25. ***Venice Park Civic Association v. Herzog, Small, Gallagher, Davis, Imfeld, Jr., and Salway*, Docket No. C26-03 (November 25, 2003).** The SEC dismissed a complaint that charged six board members with violating the School Ethics Act, particularly *N.J.S.A.* 18A:12-24(a) of the Code of Conduct and *N.J.S.A.* 18A:12-24.1(f) and (h) of the Code of Ethics for School Board Members, when they invoked the Doctrine of Necessity to hire a city councilman as a long-term substitute teacher. Two board members were police officers employed by the city and two other board members were employed as the city's demolition officer and social services aide.

The SEC found no probable cause to credit the allegations that the board members violated *N.J.S.A.* 18A:12-24(a) by having employment that would be in substantial conflict with the proper discharge of their duties in the public interest. It is not a substantial conflict for a board member to be employed by the city council so long as he does not vote on matters that cause him to choose between his employer and board member duties. The two positions are not inherently in conflict.

The SEC found no probable cause to credit the allegations that the board members violated *N.J.S.A.* 18A:12-24.1(f) by surrendering their independence of judgment to a special interest or partisan political group when they hired a city councilman as a long term substitute teacher. The school district routinely hires teachers via the alternate route program.

The SEC found no probable cause to credit the allegations that the board members violated *N.J.S.A.* 18A:12-24.1(h) by failing to appoint the best-qualified personnel after consideration of the recommendation of the chief administrative officer. The superintendent recommended the candidate, has had positive experiences with alternate route candidates and noted that the candidate was also qualified to coach wrestling.

SEC cautioned the board that it should follow the SEC Resolution on Invoking the Doctrine of Necessity, adopted February 25, 2003, in the future.

26. ***Solar-Snyder v. Rose, Gardner, Boyle, Higgins and Dispenziere*, Docket No. C32-03 (December 16, 2003).** The SEC dismissed a complaint that charged several board members with violating the School Ethics Act, particularly *N.J.S.A.* 18A:12-24.1(d), (g), (h) and (i) of the Code of Ethics for School Board Members when they directed the superintendent to limit to her job responsibilities, causing harm to her and the school district.

The SEC found no probable cause to credit the allegations that the board members violated *N.J.S.A.* 18A:12-24.1(d) by administering the school district. Because the superintendent of schools handled the matter concerning the staff member's employment, this provision would not apply.

The SEC found no probable cause to credit the allegations that the board members violated *N.J.S.A.* 18A:12-24.1(g) by revealing personal information outside of board meetings. There were no allegations that any confidential information was disclosed outside of board meetings or that they failed to provide accurate information.

The SEC found no probable cause

to credit the allegations that the board members violated *N.J.S.A.* 18A:12-24.1(h) and (i). These provisions do not empower the School Ethics Commission to supplant the decisions of duly elected or appointed board members when they are acting in concert with the district superintendent to make recommendations regarding staff of a local school district. The staff member's duties were issues of terms and conditions of employment , more properly the subject of a grievance and not within the jurisdiction of the SEC. The complaint failed to state a cause of action under the School Ethics Act.

TRAINING DECISIONS

The SEC and Commissioner of Education issued rulings on twenty board of education members who failed to attend board member training during the first year of their first term of office. The decisions of the SEC and Commissioner varied depending on the facts of the case and whether the board member had provided good and sufficient reasons for not attending training.

- In five of the cases, the SEC recommended the suspension of a board member who had failed to attend board member training with automatic removal if the board member failed to attend training by October 2003. In each of these five cases, the Commissioner agreed and so ordered. Reasons given for failure to attend training included:

  Family obligations;

  Business and family obligations;

  Board member attended training in 1987, but not between 1992-2003;

  Health reasons and family obligations;

  Illness.

- In six cases decided later in the year, the SEC recommended the suspension of a board member who had failed to attend board member training with automatic removal if the board member failed to attend training by January 2004. In each of these six cases, the Commissioner agreed and so ordered.

In one of the cases, the SEC recommended an additional reprimand for failure to abide by the board member training requirements of the School Ethics Act, causing administrative and adjudicative time to be wasted by local, county and state education officials.

- In five cases, the board member did not respond to either the SEC or the Commissioner. In each of these five cases the SEC recommended that the board member be removed from office. The Commissioner agreed and ordered the board member removed from office.
- In one case, the Commissioner ordered the matter dismissed as the board member resigned, making the matter moot.
- In one case, the SEC recommended the suspension of a board member who had failed to attend board member training with automatic removal if the board member failed to attend training by October 2003. The Commissioner disagreed, finding the recommended suspension to be unduly harsh. The board member asserted that he was unable to attend weekend training due to religious reasons. No suspension was ordered.

FILING DECISIONS

During 2003, the SEC and Commissioner issued sixteen decisions regarding school officials who failed to properly file their Financial and/or Personal/Relative Disclosure Statements. Decisions were of two types; cases where the school official had not submitted disclosure forms and cases where school officials had submitted disclosure forms but not in a timely manner.

In twelve decisions where disclosure forms had not been filed, the SEC recommended that the board member be suspended from office for a period of 30 days with the understanding that he would be automatically removed from office if, within the 30 days, he were to fail to file the properly completed disclosure forms. The Commissioner adopted the SEC recommendations, ordered the school official suspended and further ordered that even if the school official were to file the necessary statements prior to the filing date of the decision, the school official would nonetheless be reprimanded for his failure to abide by the requirements of the School Ethics Act despite many opportunities for compliance, which failure caused an inordinate amount of administrative and adjudicative time to be wasted by local, county, and state educational officials.

In four decisions where disclosure forms had been filed only after the SEC had issued Orders to Show Cause, the SEC recommended that the school official be reprimanded for failure to file disclosure statements in a timely manner. The Commissioner adopted the SEC recommendations and further admonished the school official for his failure to file the requisite statements, in that such inactivity caused an inordinate amount of administrative and adjudicative time to be wasted by local, county, and state educational officials.

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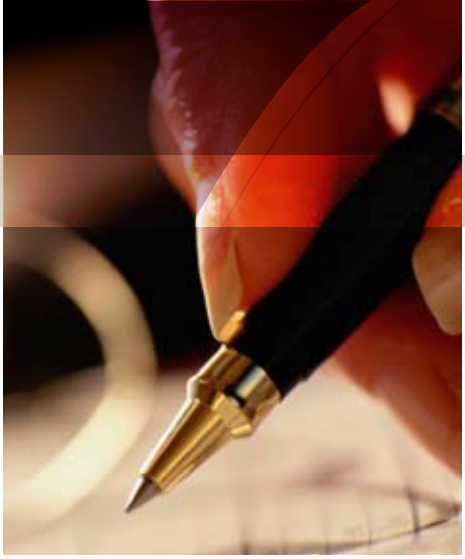

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SCHOOL ETHICS reporter

This is the fifth issue of School Ethics Reporter, a publication of the New Jersey School Boards Association Legal Department. The publication is an upgrade of the School Ethics Commission Update memorandum periodically issued to NJSBA's AMPSA membership. The fresh and improved look is courtesy of the fine creative efforts of Adriana DiGiacomantonio and Melissa Antler of NJSBA's Publications Department. The format will continue to include a summary of School Ethics Commission decisions and public Advisory Opinions and Commissioner of Education decisions interpreting the School Ethics Act during the relevant time period. Each opinion or decision is directly linked to the actual decision found on the Department of Education website. For those decisions in which a violation of the School Ethics Act was found, separate links are listed for the School Ethics Commission (SEC) and the Commissioner (CMR) decisions. Each issue will generally contain an article analyzing a particular area of School Ethics Act law. This issue features the first in a series of articles by Senior Counsel Donna Kaye that will examine decisions by the School Ethics Commission interpreting the Code of Ethic for School Board Members. This issue examines the first five sections of the Code of Ethics, N.J.S.A. 18A:12-24.1(a-e).

The following is a summary of School Ethics Commission (SEC) public Advisory Opinions and decisions and Commissioner of Education decisions regarding interpretations of the School Ethics Act issued during the time period January 1, 2004 through December 31, 2004. A brief summary of each of these Advisory Opinions and decisions follows. Copies of the full Advisory Opinions and/or decisions may be obtained through the direct links provided for each opinion or decision. Copies may also be obtained by contacting the NJSBA Legal Department, the SEC or through the Department of Education's Web site, accessible via link from the Legal section of NJSBA's Web site at www.njsba.org. The updated School Ethics Commission decision list now contains a direct link to the relevant Commissioner decision where appropriate.

ADVISORY OPINIONS

1. **A17-04 - July 2004** - The School Ethics Commission (SEC) advised that a board member, who was an architect employed by an architectural firm that currently, has previously been, and is expected in the future to be engaged in business with the board, would violate *N.J.S.A.* 18A:12-24(c) of the School Ethics Act (Act) if he were to participate in his official board member capacity in any matter having to do with architecture or even the discussion of matters relating to architecture. Recusal would include leaving the room during a closed session discussion on an architecture-related topic. The SEC found that, as an employee of the architectural firm, he had an indirect financial involvement that might be expected to impair his objectivity or independence of judgment.

   The employment relationship did not rise to the level of being incompatible with board membership. The board member did not have an ownership interest (10% of the profit, assets, or stock) in the architectural firm. Simple employment in a firm that is currently, has previously and is expected in the future to be engaged in business with the board of education did not rise to the level of a "substantial conflict" with his duties as a board member. No violation of *N.J.S.A.* 18A:12-24(a) was found.

   Similarly, no conflict of interest under *N.J.S.A.* 18A:12-24 (d) existed as, under the facts set forth, the SEC could not find that the board member's employment in the architectural firm was inherently in conflict such that his duties as an employee of the firm would impair his independence of judgment in the exercise of his official board member duties.

2. **A16-04 – July 2004** – The School Ethics Commission (SEC) advised an entire board of education and an individual board member as to whether the individual board member could continue in her role as co-facilitator of the Special Education Parent Discussion Group (SPED) during her term of service as a board member. SPED provided support to special education parents, helped disseminate relevant information regarding special education, facilitated training and workshops, provided information regarding other district activities and met on a monthly basis. The school district provided space for SPED to meet and refreshments for each meeting, similar to the PTA. The SEC determined that there was no conflict of interest under the School Ethics

Act (Act) for the board member to serve as co-facilitator of SPED while serving as a board member.

The SEC found no conflict of interest under *N.J.S.A.* 18A:12-24(a) between the board member's duties as a board member and her role as a co-facilitator of SPED. Service as a co-facilitator in SPED would not create a "substantial conflict" with the proper discharge of the board member's duties in the public interest.

The SEC found no conflict of interest under *N.J.S.A.* 18A:12-24(d). Board members may permissibly have specific interests or concerns, such as an interest in special education services provided by the district or services provided by SPED. These interests should not impair or prejudice a board member's independence of judgment. The board member's role as a co-facilitator of SPED would not reasonably be expected to prejudice her independence of judgment in the exercise of her official duties as a board member.

The board member was cautioned that she should remain mindful of her duty to maintain the confidentiality of any information, not generally available to members of the public, which she would acquire by reason of her board member office. As a board member, she will have access to confidential information regarding board business related to special education that she will obtain from executive sessions of the board. This information could be used for the benefit of SPED or its members. The SEC advised the board member that she would violate *N.J.S.A.* 18A:12-24(f) and *N.J.S.A.* 18A:12-24.1 (g) of the Act if she were to use or allow to be used, confidential information obtained in her capacity as a board member to the benefit of SPED or its members.

3. **A23-04 – August 2004** – The School Ethics Commission (SEC) advised a superintendent of schools, who was asking on behalf of the district board of education, that board members who were retired members of the New Jersey Education Association (NJEA) could serve as members of the board's negotiations committee without violating the School Ethics Act (Act), provided they were not actively participating in the NJEA.

N.J.S.A. 18A: 12-24(c) was relevant to the inquiry. Board members who are retired members of the NJEA do not have a financial involvement that might reasonably be expected to impair their objectivity or a personal involvement that would create a benefit to them. Citing Advisory Opinion A10-93, the SEC advised that the indirect financial involvement that exists when a school official is a currently employed NJEA member dissipates when one is a retired NJEA member, so long as that person is no longer actively participating in the NJEA. Retired members of a union have an extremely limited financial and personal involvement in the outcome of negotiations.

The SEC declined to answer the questions of whether the retired members should serve on the negotiations committee in light of the public perception and whether the board should exclude them from negotiations anyway. These were questions unrelated to an individual's actions under the Act.

4. **A28-04 – September 2004** – The School Ethics Commission (SEC) advised a board member, whose spouse was employed as a teacher in the school district, that the fact that the board member received medical benefits provided by the school district through his spouse did not create a substantial conflict of interest under the School Ethics Act (Act) that would require the board member to relinquish his position. The SEC further advised that the board member must abstain from all matters involving the local education association to which his spouse belonged and must abstain from all matters relating to his spouse's employment.

The board member would not violate *N.J.S.A.* 18A:12-24 (a) by receiving medical benefits provided by the school district through his spouse. The SEC did not find that such a transaction would be in substantial conflict with the discharge of board member duties in the public interest; the conflict could be cured by abstaining on all matters involving the health benefits of teachers.

The board member would violate *N.J.S.A.* 18A:12-24(c) if the board member were to participate in discussions and vote on matters involving the local teachers' association and all employment issues related to the spouse. Since the spouse was employed in the school district in which the board member served, the immediate family member would have a direct financial interest in the contract that might reasonably be expected to impair the board member's objectivity and independence of judgment.

5. **A30-04 – December 2004** – The School Ethics Commission (SEC) advised a board member, who was the parent of a child in the school district, that the board member would not violate the School Ethics Act (Act) by appealing a Section 504 determination regarding her child, including seeking tuition and attorney's fees and costs if the child prevailed. Specifically, no substantial conflict of interest existed that would violate *N.J.S.A.* 18A: 12-24 (a) or (g), as *N.J.S.A.* 18A:12-24(j) provided an exception. The SEC further advised that the board member must abstain from all board discussions and decisions regarding the Section 504 determination or the board member would violate *N.J.S.A.* 18A:12-24(c).

While the appeal of a Section 504 determination regarding one's own child and pursuing tuition and attorney's fees appears, on its face, to be in substantial conflict with a board member's duties, and violative of *N.J.S.A.* 18A:12-24 (a) and (g), *N.J.S.A.* 18A:12-24 (j) provides an exception, namely, "Nothing shall prohibit any school official, or members of his immediate family, from representing himself, or themselves, in negotiations or proceedings concerning his or their own interests."

Participation in discussions and voting on matters regarding the 504 issue is another matter, and would violate *N.J.S.A.* 18A:12-24 (c). By seeking legal fees and costs, the board member clearly has a direct financial involvement in the 504 determination so that he could not be objective when discussing it. Because the determination involves the board member's child, the board member has a personal involvement that creates a benefit to the board member and his immediate family members. The board member must not act in his official capacity with any matter coming before the board concerning the 504

determination, including participation in discussions and voting. Specifically, the board member couldn't be present when the board discusses the matter in executive session.

COMPLAINTS – VIOLATIONS FOUND

1. ***In the Matter of Charles Fischer*, 2004 *S.L.D.* April 12**. SEC • CMR At its February 4, 2004 meeting, the School Ethics Commission (SEC) found that a board member violated the School Ethics Act (Act), specifically *N.J.S.A.* 18A:12-24.1(e) and (i) of the Code of Ethics for School Board Members, by calling an employee at home and becoming angry when the employee advised that she did not send the board member the reports that he had requested.

   The board member's conduct, including directing the employee to return to the office and obtain the information for him, constituted private action that could compromise the board in violation of *N.J.S.A.* 18A:12-24.1 (e). If the board member were dissatisfied with the employee's response, he should have ended the call and contacted the superintendent. The board member should not have raised his voice to an employee of the board.

   Given the board member's awareness that the employee was properly doing her job and was told not to provide him with certain reports, his continued insistence that she provide the reports and that she return to work to provide them was not supportive of board personnel in the proper performance of their duties in violation of *N.J.S.A.* 18A: 12-24.1 (i).

   The SEC, believing that the board member simply went too far in his pursuit for information and that the superintendent hopefully would put an end to the policy of allowing board members to contact employees directly for information, believed that the situation was not likely to reoccur.

   The SEC recommended the penalty of reprimand. The Commissioner agreed.

2. ***In the Matter of Dino Pettinelli*, 2004 *S.L.D.* September 8** SEC • CMR. At its July 27, 2004 meeting, the School Ethics Commission (SEC) found that a board member violated the School Ethics Act (Act), specifically *N.J.S.A.* 18A: 12-24(c) of the Code of Conduct, when he was present for an executive session meeting where the hiring of his brother as a technology coordinator/instrumental music teacher was discussed and when he was present for and twice participated in another executive session meeting regarding the hiring of his brother.

   The SEC noted that there was a personal involvement related to the hiring of his brother that could create a benefit to the board member in the personal satisfaction of ensuring that a sibling obtains employment. Being present for two executive session discussions and participating in those discussions created a justifiable impression among the public that its trust was being violated as set forth in *N.J.S.A.* 18A:12-22 (a).

   Citing to Advisory Opinion A16-00, the SEC held that it considered an involvement to be personal whenever a school official had a relationship that the public may perceive as being predominant to the best interests of the school district. A benefit may be something of intrinsic value, but no monetary worth. The personal satisfaction that a board member receives in ensuring that a sibling obtains employment is a benefit of intrinsic value. When a board member sits in on a closed executive session related to the hiring of a relative, his brother, and then makes comments directly related to the hiring, it creates a justifiable impression that the public trust is being violated. While the superintendent advised the board member that he could be present in executive session, that did not excuse the board member from his responsibilities under the Act.

   The SEC recommended the penalty of censure. The Commissioner disagreed, finding the penalty to be disproportionately severe. After an extensive review of SEC matters provided by the board member where the penalty of reprimand was imposed and an independent review of instances wherein the penalty of censure had been imposed by the SEC, the Commissioner concluded that reprimand was the appropriate remedy.

3. ***In the Matter of Alphonse A. DeMeo*, 2004 *S.L.D.* November 17.** SEC • CMR At its September 30, 2004 meeting, the School Ethics Commission (SEC) found that a board member violated the School Ethics Act (Act), specifically *N.J.S.A.* 18A: 12-24(b) of the Code of Conduct, when he endorsed a candidate for the Belleville Municipal Council. The endorsement took place through a mailing of letters to members of the Belleville community where the letterhead, envelope and contents of the letter could have mislead recipients to believe that the endorsement was made in the board member's official capacity as board president. By so doing, the board member attempted to use his position as board president to secure an unwarranted privilege or advantage for the Council candidate in violation of the Act.

   The format of the letterhead, which emphasized the board member's official title of board president, could reasonably lead a member of the public to believe that the board member was acting in his official capacity as board president when he endorsed the Council candidate in the body of the letter, especially given the nature of the endorsement and the return address on the envelope. The return address on the letter contained the words "President, Board of Education" under the board member's name.

   The totality of the endorsement including the design on the letterhead, the content of the letter and the nature of the return address on the envelope, could lead someone reading the letter to reasonably assume that the endorsement was made by the board member in his official capacity as board president.

   The SEC recommended the penalty of reprimand. The Commissioner agreed.

4. ***In the Matter of Remond Palmer*, 2004 *S.L.D.* November 12**. SEC • CMR At its September 30, 2004 meeting the School Ethics Commission (SEC) found that a board member violated the School Ethics Act (Act), specifically *N.J.S.A.* 18A:12-24.1(a) and (e) of the Code of Ethics for School Board Members, by asking an administrative staff member to remove the names of persons recommended for certain personnel positions from the agenda, and, after they were not removed and the board approved the

appointments, told a newly appointed employee that she did not have a job and that her appointment was void.

The SEC found that the board member failed to uphold and enforce all laws and tried to bring about a change through illegal and unethical procedures in violation of *N.J.S.A.* 18A: 12-24.1 (a). The conversation with the appointee, indicating that her appointment was void, was an attempt to bring about a change through illegal and unethical procedures. The superintendent recommended the appointment, the board approved it, and therefore, she was hired, despite whether the board member intended to make the motion to approve her appointment. The attempt to pull the item from the agenda behind closed doors, rather than state to the public that the item was going to be held for consideration at a later date, was an attempt to circumvent the Open Public Meetings Act, as was the discussion with the just-appointed employee.

The board member's action, telling administrative staff to remove personnel items from the agenda, constituted private action that could compromise the board in violation of *N.J.S.A.* 18A: 12-24.1 (e). The post-appointment discussion with the employee failed to recognize that authority rested with the board as the board member's statement was in direct conflict with the action of the board. It further violated *N.J.S.A.* 18A:12-24.1 (e) as it left the board open for a lawsuit if the employee did not receive the job that the board had voted for her to have.

Given the charges and the fact that the board member ignored every pleading and item of correspondence sent to him by the SEC, the SEC recommended that the board member be removed from office. The Commissioner agreed.

5. ***In the Matter of Anne Pirillo*, 2004 *S.L.D.* October 29.** SEC • CMR At its September 30, 2004 meeting, the School Ethics Commission (SEC) found that a board member violated the School Ethics Act (Act), specifically *N.J.S.A.* 18A:12-24(c) of the Code of Conduct, when, she was present at and participated in discussions at a Business Affairs Committee meeting when bids for the purchase of new copiers were discussed and one of the bidders was a company in which her husband possessed a financial interest. The board member resigned from the board prior to the SEC considering the complaint.

The direct financial interest that the board member's spouse had in the company could reasonably be expected to impair her objectivity and independence of judgment as the award of the contract to his company could result in increased income to the spouse and thus to the board member's household. The board member commented on the bad reputation of one of the four companies that had submitted bids and an aspect of one of the contract offers that could have thrown off the figures in comparison to the other companies. By commenting on one of the other companies in comparison to her spouse's company and by commenting on the bad reputation of one of the other companies, the board member made statements in violation of *N.J.S.A.* 18A:12-24(c) that could have had a beneficial impact on the bid from her husband's company.

While it is true that the board could have accepted a bid from the spouse's company and entered into a contract with the spouse's company, the board member had an obligation under *N.J.S.A.* 18A:12-24 (c) not to act in her official capacity in any matter involving her spouse's company, including being present during discussions related to her husband's company and participating in those discussions. While the board member may have thought that her presence at the Business Affairs Committee would be helpful in the decision-making process, she still had the duty to comply with the Act.

The SEC recommended the penalty of censure, the highest sanction that could be imposed upon a former board member. The Commissioner agreed.

COMPLAINTS DISMISSED

1. ***Jones v. Schaeder, Walston, Kassan, Flores and Fuentes*, Docket No. C28-03 (February 3, 2004).** The School Ethics Commission (SEC) dismissed a complaint, filed against five charter school board of trustees, charging that the trustees violated the School Ethics Act (Act), particularly *N.J.S.A.* 18A:12-24(a) of the Code of Conduct and *N.J.S.A.* 18A:12-24.1(a), (d), (f) and (g) of the Code of Ethics for School Board Members, when they allegedly failed to provide to fellow board of trustees, and later the public, information contained in a report from the Department of Education's Office of Compliance Investigation (OCI), as required by the Department of Education.

The SEC dismissed the charges related to *N.J.S.A.* 18A:12-24(a), as the statute does not apply to allegations that a board member committed an assault or engaged in other improper conduct. *N.J.S.A.* 18A:12-24 (a) addresses situations where a board member has a conflict of interest.

The SEC found no probable cause to credit the allegations that the trustees violated *N.J.S.A.* 18A:12-24.1(a) when they failed to read the OCI Report publicly or distribute it to other board members. The SEC could not find any law, rule or regulation of the State Board or court order that an OCI Report be read publicly or distributed to board members. While it is the Office of Compliance's policy that reports be read and discussed with board members and the public, dissemination of the OCI Report is not required by law. Additionally, since the chairperson did not share the report with the other respondents, those respondents could not be held responsible for withholding the information, even if it were legally required.

The SEC found no probable cause to credit the allegations that the trustees violated *N.J.S.A.* 18A:12-24.1 (d) when they had certain items placed on the agenda and did not provide the complainant with board minutes. The chairperson's failure to share the OCI Report or his failure to provide all board members with board minutes did not overstep his role as a board member. While the SEC did not condone the alleged conduct, it was not an impermissible attempt to administer the schools.

The SEC found no probable cause to credit the allegations that the trustees violated *N.J.S.A.* 18A:12-24.1 (f) when they followed the chairperson's recommendation and removed the complainant from the board of trustees. The removal was recommended by the chairperson and freely voted on by the trustees. Testimony was provided as to

the individual reasons for each vote, which affirmed the fact that the votes were taken independently. In fact, the board members rejected another proposal by the chairperson to remove another trustee.

The SEC found that the allegations failed to set forth a claim that the trustees violated *N.J.S.A.* 18A:12-24.1 (g) by failing to provide accurate information or by disclosing confidential information. The chairperson provided incomplete information, not inaccurate information.

While dismissing the complaint, the SEC expressed concern that the chairperson did not follow a Department of Education directive and policy. The SEC further reminded the parties that board of trustees business must be conducted in accordance with the Open Public Meetings Act.

2. ***Loutfy, Delgado, Mangieri and Mancuso v. Setar*, Docket No. C33-03 (February 24, 2004).** The School Ethics Commission (SEC) dismissed a complaint filed against a board member, charging that the board member violated the School Ethics Act (Act), particularly *N.J.S.A.* 18A:12-24.1(e) of the Code of Ethics for School Board Members when he allegedly directed that a check be released to an electrical contractor after the board of education voted not to pay the contractor.

   The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1 (e) when he directed that a check be released to an electrical contractor. The board voted to approve a bill list that included payment to the contractor. The board subsequently approved the meeting minutes that included approval of the bill list and contractor payment. The SEC further noted that an Office of Compliance Invetigation (OCI) report confirmed that payment to the contractor was "authorized and legal". Insufficient information was presented to the SEC to show that the board member made personal promises or took private action that compromised the board.

   The respondent asked that the complaint be found to be frivolous and that sanctions be imposed upon the complainant. The SEC did not find the complaint to be frivolous and declined to impose sanctions.

3. ***Atallo v. Johnson, Docket No. C34-03* (February 24, 2004).** The School Ethics Commission (SEC) dismissed a complaint filed against a special counsel to the board of education charging that the special counsel violated the School Ethics Act (Act), *N.J.S.A.* 18A:12-21 et. seq., and the confidentiality of SEC proceedings, as set forth at N.J.A.C. 6A:28-1.8, when he sent a memorandum to the State District superintendent and all board members, except the complainant, regarding the status of a case filed against the complainant by the board president.

   The SEC found that at the time of the sending of the memorandum, the special counsel was a private attorney serving as special counsel to the school district. He did not fall under the definition of an "administrator", which first requires that he be an employee of the school district. The special counsel did not become a school district employee until six months after the memorandum was sent. The special counsel, not being an administrator, board member or officer or employee of the NJSBA, was not a "school official" under the Act. As such, the SEC had no jurisdiction over the special counsel at the time he sent the memorandum. The complaint was dismissed.

   The respondent asked that the complaint be found to be frivolous and that sanctions be imposed upon the complainant. The SEC found that the complainant knew or should have known that the complaint was without any reasonable basis in law and could not be supported buy a good faith argument for extension of existing law. At the time of filing, complainant was told that board attorneys are generally not school officials and was asked to justify why the SEC should exercise jurisdiction. The complaintant proceeded to file a complaint with the District VII Ethics Committee, recognizing that ethical conduct of attorneys is governed by the Supreme Court of New Jersey, but never advised the SEC that he had filed such a complaint. He had certified to the SEC that he would inform the SEC if any other action were pending and failed to do so. He further never set forth a particular provision of the Act that was violated by the special counsel's conduct.

   The SEC found the complaint to be frivolous and fined the complainant $250.

4. ***Maskaly v. Cherepski, Amistad, Avita, Gerstler and Setar*, Docket No. C38-03 (February 24, 2004).** The School Ethics Commission (SEC) dismissed a complaint filed against five board members charging that the board members violated the School Ethics Act (Act), particularly *N.J.S.A.* 18A:12-24(b) of the Code of Conduct and *N.J.S.A.* 18A:12-24.1 (f) of the Code of Ethics for School Board Members when they appointed the board attorney as the lone negotiator for the teachers' contract, to the exclusion of the non-conflicted board members and when they voted to adopt the teachers' contract when they were in conflict, since there were a sufficient number on non-conflicted board members to vote.

   The SEC found no probable cause to credit the allegations that the board president violated *N.J.S.A.* 18 A:12-24(b) by using or attempting to use his official position to secure unwarranted privileges for the board attorney. The SEC acknowledged the authority of the board president to appoint a negotiating committee. Here he chose not to appoint a committee, leaving the attorney to negotiate on his own, with the board passing a resolution appointing the attorney as the "lone" negotiations committee. No evidence was presented to suggest that the appointment was unwarranted.

   The SEC found no probable cause to credit the allegations that two other board members violated *N.J.S.A.* 18 A:12-24(b) by using or attempting to use their official positions to secure unwarranted privileges for the board attorney. No evidence was presented to support the allegation.

   The SEC found no probable cause to credit the allegations that the board members violated *N.J.S.A.* 18 A:12-24.1 (f). There was no evidence to show that the board members surrendered their independent judgment to special interest or partisan political groups or that they used the school for personal gain or the gain of friends. The board had nine members, five of whom had conflicts which prohibited them from voting or negotiating the teachers' contract.

Invoking the doctrine of necessity was proper since there were an insufficient number of eligible voters.

While the SEC dismissed the complaint, it noted that there were board members who were not in conflict who could have negotiated the teachers' contract. The SEC specifically encouraged the use of non-conflicted school board members to negotiate in such circumstances.

5. ***Meadows v. Atallo*, Docket No. C37-03 (May 25, 2004).** The School Ethics Commission (SEC) dismissed a complaint filed against a board member, charging that the board member violated the School Ethics Act (Act), particularly *N.J.S.A.* 18A:12-24 (b) and (e) of the Code of Conduct when he allegedly approached the board's architect and solicited a contribution for a candidate for mayor. When the architect declined to make a contribution, the board member allegedly retaliated over 12 months later by challenging the architect's bills and trying to influence the board of education to not rehire him.

   The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24(b) by using his position to secure unwarranted privileges or advantages for himself or others. The solicitation of the contribution would qualify as such a privilege; however the solicitation was made beyond the one-year limitation period for filing a complaint as set forth in SEC regulations, *N.J.A.C.* 6A:28-1.8(a). As to the statements made by the board member regarding the architect's billings and subsequent reappointment, the SEC lacked sufficient information to link the billing and reappointment concerns to the refusal to make a campaign contribution 16 months earlier.

   The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24 (e) by improperly soliciting a campaign contribution. The allegation went to the actual solicitation which is beyond the one-year limitation period for filing complaints. It did not go to the subsequent statements regarding the bills or appointment as principal architect, which are properly cognizable by the SEC.

6. ***Ferrante v. White*, Docket No. C36-03 (May 5, 2004).** The School Ethics Commission (SEC) dismissed a complaint filed against the a board member, charging that the board member violated the School Ethics Act (Act), particularly *N.J.S.A.* 18A:12-24(b) of the Code of Conduct and *N.J.S.A.* 18A:12-24.1 (f) of the Code of Ethics for School Board Members when he voted to renew a bus service contract.

   The SEC found no probable cause to credit the allegation that the board member violated *N.J.S.A.* 18A:12-24 (b) by using his official position to secure unwarranted privileges, advantages or employment for himself or others. It was alleged that the board member had previously recused himself in discussions regarding the bus contract. None of the allegations were proven and the facts showed that the only time the board member recused himself was regarding general bus issues related to negotiations with the local education association. No demonstration of a personal relationship between the family which owned the bus company and the board member was shown.

   The SEC found no probable cause to credit the allegations that the board violated *N.J.S.A.* 18A:12-24.1(f) by surrendering his independence of judgment to special interest groups or partisan political groups or for the gain of friends. No facts were presented that would establish a violation of this section.

7. ***Atallo v. Santiago*, Docket No. C35-03 (June 22, 2004).** The School Ethics Commission (SEC) dismissed a complaint alleging that a board member violated the School Ethics Act (Act), particularly *N.J.S.A.* 18A:12-24 (c) of the Code of Conduct when he voted to approve an increase in the maximum allowable payment to the special legal counsel after the special legal counsel represented him before the SEC.

   The SEC noted that the superintendent directed the special legal counsel to file an ethics complaint against the complainant in this case as a result of a school district investigation. The superintendent asked the board president, the recipient of this complaint, to sign the complaint against the complainant. The complaint was filed for the benefit of the school district and not for the personal gain of the board president. Special legal counsel represented the interests of the school district before the SEC, not that of the board president. Accordingly, the board president did not have a personal involvement that created a benefit to him, in violation of *N.J.S.A.* 18A: 12-24 (c), when he voted to approve the resolution that increased the pay of the special legal counsel.

8. ***Sanders v. Smith*, Docket No. C03-04 (July 27, 2004).** The School Ethics Commission (SEC) dismissed a complaint filed against a board member alleging that the board member violated the School Ethics Act (Act), particularly *N.J.S.A.* 18A:12-24.1 (d) and (e) of the Code of Ethics for School Board Members, by allegedly interfering in the daily operations of the school district and by making comments about the security in the middle school.

   The SEC found no probable cause to credit the allegations that the board member administered the schools in violation of *N.J.S.A.* 18A:12-24.1 (d) or made personal promises or took private action that could compromise the board in violation of *N.J.S.A.* 18A:12-24.1 (e). The fact that the board member went into the schools to make determinations as to what the school district needed and at one time made a statement regarding security at the middle school, did not violate either *N.J.S.A.* 18A:12-24.1 (d) or (e). The actions of a board member going into the schools to see what the district needed did not rise to the level of administering the schools. The board member's statement regarding security in the middle school when his spouse was a security guard in the middle school did not constitute a private action that could compromise the board.

9. ***Carey v. McDevitt*, Docket No. C14-04 (September 30, 2004).** The School Ethics Commission (SEC) dismissed a complaint alleging that a board member violated the School Ethics Act (Act), particularly *N.J.S.A.* 18A: 12-24.1 (e) and (f) of the Code of Ethics for School Board Members, when he allegedly signed a contract with the board counsel without the approval or knowledge of the board.

   The SEC found no probable cause to credit the allegation that the board member violated *N.J.S.A.* 18A: 12-24.1

(e). There was no evidence that the board member made any personal promises or took any private action that would compromise the board. The board member's action in signing the contract as board president was done only after the board had approved the appointment and the increase in hourly fee. No compromise to the board occurred as the contract was a renewal of an existing contract that the board had reviewed when it approved the reappointment and the fee increase.

The SEC found no probable cause to credit the allegation that the board member violated *N.J.S.A.* 18A: 12-24.1 (f). No special interest groups or partisan political groups were involved. The board member received no personal gain when he signed the contract on behalf of the board. There was no evidence that the board counsel was a friend of the board member or that the board member used the schools for the gain of the board counsel. The board member did not surrender his independent judgment to special interest or partisan political groups or use the schools for personal gain or the gain of friends.

Given the fact that the complainant board member was unaware of the existence of the past two professional services contracts for board counsel and the fact that while such contracts were available at the business administrator's office they were not available at the board meeting, the SEC encouraged the board to provide full public disclosure of the terms of contracts at board meetings in the future.

The board member asked that the complaint be found to be frivolous and that sanctions be imposed upon the complainant. The SEC did not find the complaint to be frivolous and declined to impose sanctions.

10. ***Vogel v. Magistro*, Docket No. C20-04 (September 30, 2004).** The School Ethics Commission (SEC) dismissed a complaint alleging that a superintendent of schools violated the School Ethics Act (Act), particularly *N.J.S.A.* 18A:12-24(g) of the Code of Conduct, when she allegedly coached a witness, a building principal, at a board level due process hearing regarding the suspension of a student who was arrested and charged with possession of a controlled dangerous substance with intent to distribute.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24 (g). The respondent attended the due process meeting in her role as the superintendent of schools representing the interests of the school district to protect the health and safety of the school district's students. She did not represent herself personally or some other person or party other than the school district. The SEC found that *N.J.S.A.* 18A: 12-24 (g) was not applicable to the facts of the case.

The board member asked that the complaint be found to be frivolous and that sanctions be imposed upon the complainant. The SEC did not find the complaint to be frivolous and declined to impose sanctions.

11. ***Glass, et. al. v. Burno*, Docket No. C34-04 (September 30, 2004).** The School Ethics Commission (SEC) dismissed a complaint alleging that a charter school board of trustees member violated the School Ethics Act (Act), particularly *N.J.S.A.* 18A:12-33, *N.J.S.A.* 12-24 (b) of the Code of Conduct and *N.J.S.A.* 18A: 12-24.1(d) of the Code of Ethics for School Board Members, when she allegedly appointed an acting chief school administrator (CSA) at an emergency meeting that was not publicized.

The SEC found no probable cause to credit the allegations that the trustee violated *N.J.S.A.* 18A:12-33 by failing to attend new board member training. Respondent attended training in January 2002.

The SEC found no probable cause to credit the allegations that the trustee violated *N.J.S.A.* 18A:12-24(b) by using her official position to secure unwarranted employment for others. There was no emergency meeting held. There was no evidence presented to show that the appointment was unwarranted. The acting CSA was certified as a principal and was qualified to serve as an acting CSA. The appointment was made due to a family emergency of the CSA made known by the CSA to the trustee on a Sunday night.

The SEC found no probable cause to credit the allegations that the trustee violated *N.J.S.A.* 18A:12-24.1 (d) by administering the schools. When the trustee asked the acting CSA to serve, she was not administering the schools, but was fulfilling her responsibilities as a member of the board of trustees to ensure that the school was properly supervised. The action was ratified by the board of trustees at a subsequent meeting. There was no obligation to appoint an acting CSA from the list of teachers prepared by the CSA since the list was never adopted by the board of trustees.

12. ***Glass, et. al. v. Polite-Calallero*, Docket No. C36-04 (September 30, 2004).** The School Ethics Commission (SEC) dismissed a complaint alleging that a charter school board of trustees member violated the School Ethics Act (Act), particularly *N.J.S.A.* 18A:12-33, *N.J.S.A.* 12-24 (b) of the Code of Conduct and *N.J.S.A.* 18A: 12-24.1(d) of the Code of Ethics for School Board Members, when she allegedly appointed an acting chief school administrator (CSA) at an emergency meeting that was not publicized.

The SEC found no probable cause to credit the allegations that the trustee violated *N.J.S.A.* 18A:12-33 by failing to attend new board member training. Respondent attended training in January 2002.

The SEC found no probable cause to credit the allegations that the trustee violated *N.J.S.A.* 18A:12-24(b) by using her official position to secure unwarranted employment for others. There was no emergency meeting held. There was no evidence presented to show that the appointment was unwarranted. The acting CSA was certified as a principal and was qualified to serve as an acting CSA. The appointment was made due to a family emergency of the CSA made known by the CSA to the board president on a Sunday night.

The SEC found no probable cause to credit the allegations that the trustee violated *N.J.S.A.* 18A:12-24.1 (d) by administering the schools. When the board president asked the acting CSA to serve, she was not administering the schools, but was fulfilling her responsibilities as a member of the board of trustees to ensure that the school was properly supervised. The action was

ratified by the board of trustees at a subsequent meeting. There was no obligation to appoint an acting CSA from the list of teachers prepared by the CSA since the list was never adopted by the board of trustees.

13. ***Glass, et. al. v. Fowlkes*, Docket No. C37-04 (September 30, 2004).** The School Ethics Commission (SEC) dismissed a complaint alleging that a charter school board of trustees member violated the School Ethics Act (Act), particularly *N.J.S.A.* 18A:12-33, *N.J.S.A.* 12-24 (b), (c) and (k) of the Code of Conduct and *N.J.S.A.* 18A: 12-24.1(d) of the Code of Ethics for School Board Members, when she allegedly appointed an acting chief school administrator (CSA) at an emergency meeting that was not publicized and allegedly voted on the salary approval of her daughter.

The SEC found no probable cause to credit the allegations that the trustee violated *N.J.S.A.* 18A:12-33 by failing to attend new board member training. Respondent was scheduled to attend board member training in October 2004 pursuant to an extension given to all similarly situated charter school trustees.

The SEC found no probable cause to credit the allegations that the trustee violated *N.J.S.A.* 18A:12-24(b) by using her official position to secure unwarranted employment for others. There was no emergency meeting held. There was no evidence presented to show that the appointment was unwarranted. The acting CSA was certified as a principal and was qualified to serve as an acting CSA. The appointment was made due to a family emergency of the CSA made known by the CSA to the board president on a Sunday night.

The SEC found no probable cause to credit the allegations that the trustee violated *N.J.S.A.* 18A:12-24.1 (d) by administering the schools. When the board president asked the acting CSA to serve, she was not administering the schools, but was fulfilling her responsibilities as a member of the board of trustees to ensure that the school was properly supervised. The action was ratified by the board of trustees at a subsequent meeting. There was no obligation to appoint an acting CSA from the list of teachers prepared by the CSA since the list was never adopted by the board of trustees.

The SEC found no probable cause to credit the allegations that the trustee violated *N.J.S.A.* 18A:12-24 (b) when her daughter was hired. No evidence was presented that the hiring of the board of trustees member's daughter was unwarranted.

The SEC found no probable cause to credit the allegations that the trustee violated *N.J.S.A.* 18A:12-24 (k). This section concerns school officials who are employees of the New Jersey School Boards Association and is an exception to the prohibited conduct for school officials set forth in *N.J.S.A.* 18A:12-24 (a) – (g). The section is inapplicable to the board of trustees' member.

The SEC found no probable cause to credit the allegation that the trustee violated *N.J.S.A.* 18A:12-24 (c) by acting in her official capacity in a matter in which she had a personal involvement that created a benefit for her. The trustee testified that she abstained from the vote on her daughter's hiring and salary. The minutes from the meeting in question were unclear due to a lack of a signature and date and a failure to record the vote on the space provided. While it appeared that the trustee voted on her daughter's hiring and salary, the SEC could not be so certain as to disregard the trustee's testimony that she abstained.

14. ***Glass et. al. v. White*, Docket No. C38-04 (September 30, 2004).** The School Ethics Commission (SEC) dismissed a complaint alleging that a charter school board of trustees member violated the School Ethics Act (Act), particularly *N.J.S.A.* 18A:12-33, *N.J.S.A.* 12-24 (b), (c) and (k) of the Code of Conduct and *N.J.S.A.* 18A: 12-24.1(d) of the Code of Ethics for School Board Members, when he allegedly appointed an acting chief school administrator (CSA) at an emergency meeting that was not publicized and allegedly voted on the salary approval of his wife.

The SEC found no probable cause to credit the allegations that the trustee violated *N.J.S.A.* 18A:12-33 by failing to attend new board member training. Respondent attended new board member training in January 2002.

The SEC found no probable cause to credit the allegations that the trustee violated *N.J.S.A.* 18A:12-24(b) by using her official position to secure unwarranted employment for others. There was no emergency meeting held. There was no evidence presented to show that the appointment was unwarranted. The acting CSA was certified as a principal and was qualified to serve as an acting CSA. The appointment was made due to a family emergency of the CSA made known by the CSA to the board president on a Sunday night.

The SEC found no probable cause to credit the allegations that the trustee violated *N.J.S.A.* 18A:12-24.1 (d) by administering the schools. When the board president asked the acting CSA to serve, she was not administering the schools, but was fulfilling her responsibilities as a member of the board of trustees to ensure that the school was properly supervised. The action was ratified by the board of trustees at a subsequent meeting. There was no evidence that the trustee engaged in any activity that could be considered administering the schools. There was no obligation to appoint an acting CSA from the list of teachers prepared by the CSA since the list was never adopted by the board of trustees.

The SEC found no probable cause to credit the allegations that the trustee violated *N.J.S.A.* 18A:12-24 (b) and (c) when his spouse's salary was approved in October 2003. No information was presented to indicate that the respondent voted on his spouse's salary at the October 2003 board of trustees' meeting. Minutes of an October 2001 board of trustees' meeting indicated that the board member did vote on the salary of his spouse at that time. However, the complaint was filed outside the one year regulatory limitation on the filing of complaints with the SEC, N.J.A.C. 6A:28-1.8 (a).

The SEC found no probable cause to credit the allegations that the trustee violated *N.J.S.A.* 18A:12-24 (k). This section concerns school officials who are employees of the New Jersey School Boards Association and is an exception to the prohibited conduct for school officials set forth in *N.J.S.A.* 18A:12-24 (a) – (g). The section is inapplicable to the board of trustees' member.

15. ***Esposito v. Grimsley*, Docket No. C29-04 (October 26, 2004).** The School Ethics Commission (SEC) dismissed a complaint alleging that a board member violated the School Ethics Act (Act), particularly *N.J.S.A.* 18A:12-24.1 (f) of the Code of Ethics for School Board Members when she allegedly, on two occasions, received cash advances for out-of-state travel related to board member duties and failed to reimburse the school district for cash advances not used.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24.1 (f). There was no evidence that the board member surrendered her independent judgment to any special interest or partisan political groups. As to the issue of using the schools for personal gain, while it took approximately seven months, respondent reimbursed the school district the equivalent of the first $900 cash advance, according to the school business administrator. While the respondent had not yet reimbursed the school district for two days of non-attendance at the 2004 Orlando conference, no district request for reimbursement had yet occurred. Further, the school district had no policy regarding the reimbursement of unused cash advances. There was no evidence that the respondent accepted the cash advances with the intention of keeping the unused portion for her personal gain.

The SEC was troubled by the lack of board policy regarding reimbursement by board members of unused cash advances and the total lack of board member accountability. The SEC recommended that the board review and update its policy, practices and procedures on board member travel and cash advances to ensure sound budgetary practices. The SEC further recommended that the board develop fiscal policy regarding cash advances for board members that will provide for tracking and accountability and require reimbursement to the district when funds are not used.

16. ***In the Matter of Dr. James Dwyer*, Docket No. C24-03 (October 26, 2004). SEC • ALJ** The School Ethics Commission (SEC) dismissed a complaint alleging that a superintendent of schools violated the School Ethics Act (Act), particularly *N.J.S.A.* 18A:12-24 (b) of the Code of Conduct, by using his official position to secure an unwarranted privilege or advantage for a child of a board member by directing a teacher to change a child's grade. The SEC initially found probable cause to credit the allegation and transferred the matter to the Office of Administrative Law for a hearing as a contested case.

The administrative law judge (ALJ) found that the teacher in question failed to comply with board policy regarding incomplete work. After the superintendent's intervention, the student was given two weeks to make up the missing work, a greater period of time than the five days authorized by board policy. The ALJ determined that the extra time was an unwarranted privilege or advantage for the student. However, given the facts of the case, the ALJ determined that the superintendent of schools did not use his official position to secure an unwarranted privilege or advantage for the child of a board member, but only attempted to find an equitable way to handle a situation in which a student had not been provided with an opportunity to make up missed work in accordance with school policy. It was actually the teacher, rather than the superintendent, who afforded the student an unwarranted privilege and advantage by providing the two week make up period.

The ALJ ordered that the finding of probable cause to credit the allegation that the superintendent violated *N.J.S.A.* 18A:12-24 (b) by directing a grade change for the child of a board member be dismissed. The SEC adopted the initial decision of the ALJ, as it was supported by sufficient, competent and credible evidence in the record, and dismissed the complaint.

17. ***Klein v. Hogate*, Docket No. C33-04 (December 21, 2004).** The School Ethics Commission (SEC) dismissed a complaint alleging that a board member violated the School Ethics Act (Act), particularly, *N.J.S.A.* 18A:12-24.1 (g) of the Code of Ethics for School Board Members, by allegedly discussing, with the complainant, details regarding the non-renewal of the chief school administrator's contract and specifics regarding the cost of living arrangements for a multiply handicapped child. The complaint also alleged that the board member used her position as a board member to have certain infractions taken off of her child's record.

The SEC found no probable cause to credit the allegations that the board member violated *N.J.S.A.* 18A:12-24 (g). While the complainant testified that the board member personally discussed with him the non-renewal of the chief school administrator's contract and the living arrangements of the multiply handicapped child, the board member absolutely denied that the conversations ever took place. No other evidence existed to support the allegations including a specific date at which the conversations took place. Based on the limited information, the SEC could not find evidence that the board member failed to hold confidential all matters pertaining to the schools which, if disclosed, would needlessly injure individuals or the schools.

The SEC found no probable cause to support the allegation that the board member violated *N.J.S.A.* 18A:12-24.1 (g) by having her son's record expunged of certain conduct at a board meeting. No evidence was presented as to the board meeting at which the alleged conduct took place and no other evidence was provided to prove the allegation. The SEC did not see how this provision was applicable to the allegation.

The board member asked that the complaint be found to be frivolous and that sanctions be imposed upon the complainant. The SEC did not find the complaint to be frivolous and declined to impose sanctions.

TRAINING DECISIONS

During 2004 the SEC and Commissioner of Education issued rulings on one board of education member and five charter school trustees who failed to attend board member training during the first year of their first term of office. The decisions of the SEC and Commissioner varied depending on the facts of the case and whether the board member had provided good and sufficient reasons for not attending training.

- In five of the cases, the SEC recommended the suspension of the charter

school trustee who had failed to attend board member training until such time as the trustee attended training. In each of these five cases, the Commissioner disagreed with the SEC recommendation as it was inconsistent with previous SEC decisions with similar facts. In the previous matters, the SEC had recommended, and the Commissioner had concurred, that the trustees be suspended until such time as they attended training and if they did not complete training in January of the next year, be summarily removed from office. In these five cases no reasons were given by the SEC for not recommending removal by a date certain. The Commissioner ordered that the trustees be suspended until such time as they attended training and if they did not attend training in January, they would be summarily removed from office as of January 30, 2005. Four of the trustees never responded as to why they missed training. The one trustee who responded indicated that she missed training due to personal family matters.

- In the one 2004 case involving a board of education member, the SEC recommended that the board member, who had not attended training due to child-care issues and nursing problems with her son, be given an extension to attend training until October 2004, but if she failed to attend training in October the SEC would recommend to the Commissioner that she be removed from office. The board member did not attend training in October 2004 and the SEC recommended that she be removed. The Commissioner agreed.

FILING DECISIONS

During 2004, the SEC and Commissioner issued twelve decisions regarding school officials who failed to properly file their Financial and/or Personal/Relative Disclosure Statements. Decisions were of two types; cases where the school officials had submitted disclosure forms, but not in a timely manner, and the SEC recommended that the school officials be reprimanded and cases where the school officials had submitted disclosure forms, but not in a timely manner, and the SEC recommended censure.

In six decisions where disclosure forms had been filed only after the SEC had issued Orders to Show Cause, the SEC recommended that the school official be reprimanded for failure to file disclosure statements in a timely manner. The Commissioner adopted the SEC recommendations in each decision and further admonished the school official for his failure to file the requisite statements in a timely manner, in that such inactivity caused an inordinate amount of administrative and adjudicative time to be wasted by local, county, and state educational officials.

In six other decisions where disclosure forms had been filed only after the SEC had issued Orders to Show Cause, the SEC recommended that the school official be censured for failure to file disclosure statements in a timely manner. In each of these cases the school official failed to respond to the SEC. In light of that fact, the SEC recommended the penalty of censure. The Commissioner disagreed with the SEC recommendation in all six instances. The Commissioner found that the SEC recommendation was inconsistent with prior SEC recommendations of reprimand in similar situations with no reason articulated by the SEC for the more severe penalty. The Commissioner ordered the penalty of reprimand and further admonished the school official for his failure to file the requisite statements, in that such inactivity caused an inordinate amount of administrative and adjudicative time to be wasted by local, county, and state educational officials.

OVERVIEW OF CASES DECIDED UNDER *N.J.S.A.* 18A:12-24.1 (L.2001,c.178, s.5.) THE CODE OF ETHICS FOR SCHOOL BOARD MEMBERS

The Code of Ethics for School Board Members (Code of Ethics) was adopted in 2001, to govern a range of ethical behaviors that were not addressed under the existing School Ethics Act (SEA). The Code of Ethics is nearly identical to language that for many years had been part of NJSBA's Manual of Positions and Policies on Education, and had already been adopted as policy by many boards across the state prior to its becoming law. The legislative establishment of the Code of Ethics had been a legislative goal of NJSBA because the absence of a statutory enforcement mechanism rendered the boards' ethics policies "toothless;" boards were frustrated that there were no ramifications for the unethical behaviors of fellow board members other than a board reprimand or censure.

When the Code of Ethics first became law and came within the enforcement jurisdiction of the School Ethics Commission (SEC), school board members could only speculate on how the SEC would interpret each of its provisions (a) through (j). We now have significant direction through the many cases that have been decided since the law's inception. This overview examines how provisions (a) through (e) have been applied by the SEC, up through May 30, 2005. The second part of the overview, sections (f) through (j), will appear in a subsequent edition of School Ethics Reporter.

In many of the complaints described below, the complainants alleged that the school official violated two or more of the code provisions; however, this overview will treat each provision (a) through (j) of *N.J.S.A.* 18A:12-24.1 separately to provide the reader with a better idea of what will constitute a violation of that specific provision.

(a) I will uphold and enforce all laws, rules and regulations of the State Board of Education, and court orders pertaining to schools. Desired changes shall be brought about only through legal and ethical procedures.

In one case the SEC has found a violation of this provision. Eight rulings have addressed the application of *N.J.S.A.* 18A:12-24.1(a), but in only one did the SEC find that the board member had violated the provision. In that matter of ***Udy, Ewart and Frazier/Woodstown-Pilesgrove*, C20-03/C21-03; SEC 9/23/03; Comm'r 11/10/03; reversed and remanded State Board 4/7/04,** the SEC's finding of a violation was later reversed by the State Board on procedural,

due process grounds.

Even though the SEC's finding of violation was reversed and remanded on procedural grounds by the State Board, it remains instructive with regard to the type of behavior that will constitute a violation of this section. In this matter, three board members overruled the recommendation of the CSA and voted in favor of retaining a supervisor of guidance who lacked proper certification. On the motion of one of these board members, the board also then voted in favor of creating a new position for the supervisor without the CSA's recommendation, although they were advised by the board solicitor of the certification requirements, and they knew the supervisor didn't possess the appropriate certification. The SEC rejected their argument that their decision to vote in favor of retaining the supervisor was in the best interests of the district.

Ultimately, the State Board reversed the SEC's ruling because the accused board members had not been provided appropriate due process before the SEC. The respondent board members had been erroneously notified that the proceedings at a meeting before the SEC were only to determine the existence of probable cause, and the board members proceeded on that basis. In fact, at that meeting the SEC determined that the respondents had violated the School Ethics Act, which procedurally violated the applicable regulations and deprived the board members of a meaningful opportunity to be heard with regard to the allegations against them.

In seven rulings, the SEC found no violation of N.J.S.A. 18A:12-24.1(a). In general, in the seven other rulings the complainants either failed to identify the breach of a specific legal obligation, citing no rules or regulations of the State Board of Education or court orders pertaining to the schools, or the complainants failed to provide adequate proof that the allegations were true. In the matters of ***Lawrence/Pinelands, Axelrod/Union Township, Hankerson/Woodbine, Schaeder, Walston, Kassan, et.al./ Golden Door Charter, and Thornton/Bridgewater-Raritan,*** board members were exonerated of a charge that *N.J.S.A.* 18A:12-24.1(a) was violated, where the complainant failed to identify specific legal obligations that were breached by the acts alleged. In ***Central Regional, Hankerson/Woodbine*** and ***Palmer/Asbury Park,*** proof problems lead to the dismissal of charges.

A board member will be exonerated where the allegations do not set forth a specific legal obligation that was violated. In ***Lawrence/Pinelands*, C32-02, SEC 2/25/03,** a board member did not violate *N.J.S.A.* 18A:12-24.1(a) when he allegedly threatened the board's Business Administrator/Board Secretary (BA/BS) regarding her position. He asserted that he had a meeting with the BA/BS wherein he questioned the manner in which the BA/BS conducted the board's vote for its president, but denied that he threatened her at any time. It was alleged that the board member should have objected to the election process at the time of the vote, rather than discuss the matter in private. The SEC noted that while the board member's objection to the election process may have been more appropriately voiced at the time of the vote, there was insufficient information to show that his exchange with the BA/BS constituted a violation of school laws, rules or regulations. Nor did the SEC discern that the board member tried to bring about a desired change through an illegal and or unethical procedure. He simply wanted to know why the voting procedure was changed.

In ***Axelrod/Union Township*. C40-04, C41-04 and C42-04; SEC 2/7/05,** the SEC addressed complaints against three board members alleging a number of violations of the Code of Ethics, including *N.J.S.A.* 18A:12-24.1(a). It was alleged that the board member appointed a former board member to fill a vacancy on the board without sufficient notice to other board members or the public. Notices of board vacancy were posted on the board's website and township cable television station but not in the newspapers. In filling the present vacancy, only three board members, who constituted the Personnel Committee, participated in the interview process and made the recommendation, and the interviews occurred privately. The SEC found that its jurisdiction did not encompass conduct that may be unethical in the sense that it is improper or unscrupulous, but that is not a violation of a legally prohibited act under *N.J.S.A.* 18A:12-24 or the Code of Ethics for School Board Members under *N.J.S.A.* 18A:12-24.1. While the SEC could agree that the board's failure to follow procedures it had used in the past made it appear that the respondents were trying to do a favor for a former member of the board, since there was no law or regulation requiring a board to advertise a vacancy in the local newspapers or hold interviews in public, the SEC could find no violation of *N.J.S.A.* 18A:12-24.1(a).

In ***Hankerson/Woodbine*, C36-02; SEC 6/24/03; Comm'r 8/14/03**, a board member who was brought up on numerous egregious ethics charges, many of which were successful and ultimately resulted in her removal from the board, was found, however, not to have violated *N.J.S.A.* 18A:12-24.1(a). It had been alleged that by acting contrary to the report of the Fiscal and Education Intervention Team (FEIT) when she terminated the position of Supervisor of Students for Discipline and created the position of Behavior Specialist, she had violated *N.J.S.A.* 18A:12-24.1(a). The SEC concluded that because the FEIT report was not a law, rule or regulation of the State Board of Education or a court order, she had not violated this section.

In ***Schaeder, Walston, Kassan, et.al., Golden Door Charter*, C28-03; SEC 2/3/04,** it was alleged that charter school trustees violated *N.J.S.A.* 18A:12-24.1(a) when they failed to read the Office of Compliance Investigation (OCI) report publicly or distribute it to other board members. The SEC was unable to find any law, rule or regulation of the State Board or court order that requires an OCI report to be read publicly or distributed to board members. While recognizing that the Department of Education's (DOE) Office of Compliance has a policy that its reports be read and discussed with board members and members of the public, and that this policy was conveyed to the board of trustee's Chairperson in the correspondence from the Department, the SEC noted that dissemination of the Compliance Report is not required by law. Further, the other trustees named in the complaint were not provided with a copy of the Report and therefore could not be

held responsible for the withholding of information contained therein, even if it were legally required. Although the SEC found no violation of *N.J.S.A.* 18A:12-24.1(a), it expressed concern over the board's failure to follow a DOE directive regarding the OCI report and with alleged violations of the Open Public Meetings Act.

In ***Thornton/Bridgewater-Raritan*, C46-02; SEC 3/25/03** a board member did not violate *N.J.S.A.* 18A:12-24.1(a) where she was merely copied on a memoranda from the board attorney that erroneously advised other board members that a fellow board member had violated the Act when he voted on an insurance resolution of a company for which his employer was a reinsurer. She neither contributed to the drafting of the memoranda nor distributed the memoranda. The SEC was unable to determine a law, rule or regulation of the State Board that the board member was even alleged to have failed to uphold or enforce.

Charges are unlikely to "stick" where there are proof problems. Even where alleged behavior would constitute a violation, the SEC will exonerate a board member where the record does not reveal a factual basis for the allegations. Innuendo and inference alone will not suffice. The following cases should not be interpreted to mean that the behavior as alleged would not violate the Act. Rather, the charges were dismissed because of the failure of the complainants to establish a record supporting a violation.

In ***Central Regional*, C35-02; SEC 2/25/03,** the SEC found that board members did not violate *N.J.S.A.* 18A:12-24.1(a) when they voted against a teacher's reappointment, notwithstanding the CSA's recommendation. The complainant alleged that the board members voted against the teacher's reappointment despite recommendations in favor of her reappointment by the superintendent of schools, assistant superintendent, building principal and subject area supervisors. The complainant accused the board members of being arbitrary when they voted, but this charge was not proven. The SEC noted that the teacher had been associated with three incidents where students and parents reported that she behaved inappropriately and the board made its decision based on the information in her file and letters from parents and students. The fact that the superintendent recommended her reappointment despite these incidents, did not prevent the board from voting against the reappointment, and provided the SEC with no basis from which to conclude that the board was arbitrary in its decision.

In this same case, the complaining teacher attempted to convince the SEC that the alleged failure of the board to not provide her with a "Rice" notice prior to its decision to deny her reappointment, although it had sufficient time to do so, violated *N.J.S.A.* 18A:12-24.1(a). The SEC determined that it was not the appropriate forum to address defects in "Rice" notifications, when the complainant did not give the board any opportunity to correct any defects that may have existed. The board had advised her of its reasons for its vote, and had advised her of her right to a hearing wherein she could have addressed any perceived defects in the process, but she did not respond or request a hearing. Therefore the SEC found no probable cause to credit the allegation that the board failed to uphold the laws, rules and regulation of the State Board of Education or court orders pertaining to the schools, in violation of *N.J.S.A.* 18A:12-24.1(a).

In ***Hankerson/Woodbine*, C36-02; SEC 6/24/03; Comm'r 8/14/03**, a board member who was brought up on numerous egregious ethics charges, many of which were successful (and ultimately resulted in her removal from the board), was found, however, not to have violated *N.J.S.A.* 18A:12-24.1(a) on the allegation that she had scheduled budget meetings in violation of the *N.J.S.A.* 18A:12-24.1(a). The SEC found that there was insufficient evidence that she had done so.

And in ***Palmer/Asbury Park*, C51-02; SEC 3/25/03,** a board member did not violate *N.J.S.A.* 18A:12-24.1(a)when he communicated to two female district employees that he would vote against the salary increase of one and the transfer request of the other if the respective employee did not smile at him. The SEC found that the comments had been made in jest. While questioning the quality of the joke, the SEC nonetheless noted that he did not vote against the salary increase or in fact take action against the transfer of the other. There was insufficient information to demonstrate that he actually attempted to change their behavior, or that in fact they changed their behavior, as a result of his remarks.

Conclusions: As a general observation, a violation of *N.J.S.A.* 18A:12-24.1(a) will not be established by vague allegations that a board member acted unfairly or in an offensive manner. Key to a violation of this section is the citation of the particular legal provision that was violated, and there must be facts on record to support that the violation occurred.

(b) I will make decisions in terms of the educational welfare of children and will seek to develop and maintain public schools that meet the individual needs of all children regardless of their ability, race, creed, sex, or social standing.

Three rulings address the application of N.J.S.A. 18A:12-24.1(b). In none of these cases was the provision violated. It appears that many of the complainants "threw" into their complaints an allegation that *N.J.S.A.* 18A:12-24.1(b) was violated, without actually demonstrating how the provision may have been violated.

In ***Hartsough/Ocean City*, C33-01; SEC 1/22/02**, offensive statements made by a board member to a member of the community did not violate the Code of Ethics. Prior to a board meeting, during an informal, private conversation, the board member referred to a citizen as a "cancer" in the community and stated that he would never allow the person to speak before any board he chaired. While the SEC found the comments to be offensive, it did not find that the conduct qualified as decision-making regarding the educational welfare of children, or action that would undermine the development or maintenance of public schools that meet the individual needs of children.

In ***Hazeldine/Keansburg*, C41-02; SEC 5/1/03,** the SEC found no violation of *N.J.S.A.* 18A:12-24.1(b) or any other section of the School Ethics Act when a board member made derogatory comments about the mayor and council in the school gymnasium while serving as

campaign manager for candidates running for the board. Nor did he violate the Act when he allegedly made disparaging and profane comments to the complainant's son regarding the mayor and a councilperson, or when he asked the business administrator to do what was necessary regarding the vacancy created by the death of a board member. While the board member admitted to having made comments to the complainant's son, he maintained that the comments were in response to her son's questions and that the discussion was not unpleasant or adversarial. The SEC determined that the complainant did not carry her burden of proving a violation, as she did not proffer information to show that the board member's remarks constituted a failure to make decisions in terms of the educational welfare of the children or a failure to develop or maintain the schools in violation of *N.J.S.A.* 18A:12-24.1(b).

***Gannon, et. al./Montville*, C16-03;SEC 8/26/03**, also implicated a violation of *N.J.S.A.* 18A:12-24.1(b). The ethics charges were based on allegations that the board members had overruled the recommendation of the CSA and principal to reinstate a fourth section of a second grade class, that they had not accepted his recommendation for hiring of a gifted and talented teacher, and that the board president had removed the superintendent's recommendation to hire the gifted and talented teacher from the agenda. The SEC found that there was insufficient information presented for the SEC to find a violation of this section. Moreover, the SEC found that although the board may only appoint, transfer and remove officers and employees of the district upon the recommendation of the superintendent, the board is not required to accept the superintendent's recommendation.

Conclusions: We have yet to see what kinds of actions would constitute violations of *N.J.S.A.* 18A:12-24.1(b). Action that favors certain children for discriminatory reasons would appear to violate this provision. Presumably, board members who cast their votes to further their own political agendas, or to appease taxpayers, etc., could violate this provision to the extent that such decisions are not motivated by a desire to improve the educational welfare of students. It is likely only a matter of time before the SEC finds that this provision has been violated. It remains to be seen whether a complainant will need to specifically demonstrate how children could be harmed by the board member's actions, or how a complainant can satisfy the SEC that motives other than the welfare of children prompted a board member's action.

(c) I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only after the board has consulted those who will be affected by them.

The SEC has addressed N.J.S.A. 18A:12-24.1(c) in nine of its rulings. Board members who "micro-manage"—that is, who unilaterally take actions and make decisions that go way beyond policy-making-- have been found to trample over this ethical provision.

Three times the SEC found that N.J.S.A. 18A:12-24.1 (c) was violated. In at least two of these situations, it was clear that the board member acted as a one-person board. In the ***Udy*** matter, however, the violation of (c) seems less obvious, since the board member's actions involved making motions before the board. While the subject of his motion should not have been before the board, it is noteworthy that a violation can occur merely by making an inappropriate motion. Board members should be cautious in light of this application of *N.J.S.A.* 18A:12-24.1(c).

In ***Hankerson/Woodbine*, C36-02; SEC 6/24/03; Comm'r 8/14/03**, a board member was brought up on numerous egregious ethics charges that ultimately resulted in her removal from the board. The SEC found that several of her activities violated *N.J.S.A.* 18A:12-24.1(c). She violated this provision when she ordered a school district employee to perform tasks for her. She violated the section when she had "Rice" notices sent to employees proposing the termination of two employees without consulting the superintendent, and in fact terminated them. She again violated her duty to confine her action to policy making, planning and appraisal when she had the position of Supervisor of Students for Discipline eliminated contrary to the recommendations in the Fiscal and Educational Intervention Team (FEIT) report, and again when she created the position of Behavior Specialist and had a candidate appointed to the position without a recommendation from the superintendent. The SEC found that her interview of a candidate in the presence of the superintendent clearly demonstrated her overstepping her role as a board member.

However, allegations that the board member scheduled and attended meetings with the borough council without the knowledge of the superintendent, resulting in the reduction of the budget tax assessment, were not proven; while these meetings occurred, there was insufficient evidence to sustain a finding that she had played a role in these meetings.

In ***Schaeder/Golden Door Charter*, C03/C04/C06/C07/C12-03;SEC 9/23/03; Comm'r 11/10/03; aff'd State Board except as to penalty, 9/01/04,** a charter school trustee who forced the Chief Academic Officer (CAO) to resign without consulting the board of trustees, violated *N.J.S.A.* 18A:12-24.1(c). The board's approval was sought only after the CAO had been presented with the severance agreement. The trustee admitted that he did not include the other trustee in the decision-making process but claimed that this was justified because he did not feel that he could trust her to keep it confidential. He also claimed that the whole board knew of the CAO's performance problems. The SEC stressed, however, that "knowing that performance issues exist with an administrator is not the same as knowing that the administrator is going to be terminated." The SEC emphasized that one board member does not have the right to determine that another board member will be denied access to the same information given the other board members, and observed that the trustee had acted as a one-member board and in so doing had egregiously violated the standards of conduct expected of board members.

The SEC found that the termination of the CAO was initiated and completed by the trustee and he only sought approval of the full board after the fact. The fact that the CAO resigned after being terminated and all trustees even-

tually ratified the severance agreement was irrelevant to the suspect circumstances surrounding the termination. The SEC stated, "The circumstances defy all notions of fairness and respect owed to the Chief Academic Officer of a school."

The SEC emphasized that the SEA applies, in its entirety, to members of charter school boards of trustees. In light of this charge and other violations of the Act, the SEC recommended the penalty of removal. The Commissioner agreed. The State Board set aside the penalty of removal, which was predicated on the SEC's conclusion that the appellant had violated the Act both with regard to the termination of the CAO but also for a violation of *N.J.S.A.* 18A:12-24(b). Determining that the violation of *N.J.S.A.*18A:12-24(b) had not been established, the State Board directed that the trustee be reinstated to the board and reprimanded for violating *N.J.S.A.* 18A:12-24.1(c) and (d).

In **Udy, *Ewart and Frazier/Woodstown-Pilesgrove*, C20-03/C21-03; SEC 9/23/03; Comm'r 11/10/03; reversed and remanded State Board 4/7/04,** a board member violated, among other provisions, *N.J.S.A.* 18A:12-24.1(c) when he made a motion to retain a supervisor and to create a new position for a supervisor without the CSA's recommendation and when there was no evidence that she held the required certification. The SEC found that this action went beyond his duty of policy making, planning and appraisal.

Even though the SEC's finding of violation was later reversed and remanded by the State Board on procedural due process grounds (2004 *S.L.D.* April 7) it remains instructive with regard to the type of behavior that will constitute a violation of this section.

In six matters, the SEC found no violation of N.J.S.A. 18A:12-24.1(c). In two of these matters (see, ***Maiello/Wanaque and Grant/Long Branch***) the SEC distinguished between action in the role of a board member that would violate the Act, and a board member's private action, which would not violate the Act.

In ***Maiello/Wanaque*, C37-02; SEC 3/25/03,** a board member had applied to have one of the board's buildings, the "Rhinesmith Building," designated as an historical landmark. The complainant alleged among other things, that the board member entered the building on many occasions between December 2001 and January 2002 for the purpose of gathering information to support her application and maintained that she was administering the schools. He also claimed that her inventory lists and the photographs she took were board property. The SEC disagreed, noting that based on the information before it, the board member began the process of seeking the historical landmark status before she became a board member. Although she was a board member when she entered the building, she was still acting as a private citizen when she sought information to supplement her application. Since no allegation was set forth in any matter in which the board member was acting in her official capacity, the SEC found no violation of *N.J.S.A.* 18A:12-24.1(c).

***Grant/Long Branch*, C15-03; SEC 7/22/03,** involved rather detailed facts. At a school board meeting, members of the public raised concerns regarding the high school boys' basketball team and coach; the National Association for the Advancement of Colored People (NAACP) president asked that a meeting be held with concerned members of the public and that one of the board members who belonged to the local chapter of the NAACP attend. The board president responded that the proper protocol was for these citizens to express their concerns to the building principal and then to the superintendent. The board member in question recommended that the matter be referred to the New Jersey State Interscholastic Athletic Association (NJSIAA) and offered to obtain information about the problem by meeting with the citizens at the NAACP headquarters. The board member also met with the superintendent to relay the concerns of the public, and then met with the concerned citizens at the NAACP headquarters.

Subsequently, the board president called a meeting and specifically asked the board member in question not to attend. The board member protested, by carrying a picket sign outside of the building where the meeting was held. The picket sign was addressed to the superintendent, athletic director and the boys' basketball team coach and signed by the board member. The sign read, "Our athletes are students, too--They must learn-Reading-Riting-Rithmetic and to Live." The same day as the meeting, a press release was printed and made available for immediate publication, entitled, *Long Branch Board Member Protests Meeting Exclusion*. In the document, Mr. Grant explained that his picketing was prompted by not being able to attend a meeting of concerned parents, school administrators, athletic staff, and the NAACP president.

In finding that the board member had not violated *N.J.S.A.* 18A:12-24.1(c), the SEC noted that he had offered to meet with members of the public to obtain information regarding their concerns related to student athletes. Then, prior to such meeting with members of the public, he had met with the superintendent regarding the problem. It appeared to the SEC that he consulted with the superintendent before holding a meeting with the public and did not attempt to independently resolve the matter. The SEC further found that his protest of the meeting to which he was excluded was individual and private action that did not constitute board action. The SEC found no evidence that he exceeded his duties of policy making, planning, or appraisal.

In ***Axelrod/Union Township.*, C40-04, C41-04** and **C42-04; SEC 2/7/05**, the SEC determined that three board members did not violate sections of the SEA including *N.J.S.A.* 18A:12-24.1(c), and specifically the latter part of that provision pertaining to consulting with those affected before framing policies and plans. A complaint was filed against three school officials who had appointed a former board member to fill a vacancy on the board without publication of notice to the other board members or the public. The SEC determined that notices of the vacancy were posted on the district website and publicized on the township cable television station, but not published in the newspapers. Only three board members, who constituted the Personnel Committee, participated in the interview process and made the recommendation to fill the vacancy, and the interviews occurred out of the hear-

ing of the public. The SEC found that the board members were not in the process of framing policies and plans, but rather were choosing someone to appoint to a board vacancy in the absence of any laws or rules that govern precisely how to do so. In the absence of any requirement that the entire board participate in interviews to fill a vacancy, the SEC was unable to require that they do so, remarking that past practice does not necessarily create a legally binding obligation. There was no evidence that the board members acted outside of their designated authority.

In ***Gannon, et. al./Montville*, C16-03; SEC 8/26/03,** the SEC determined that the board president's removal from the agenda and the board members' rejection of the CSA's recommendation of a gifted and talented teacher neither violated *N.J.S.A.* 18A:12-24.1(c) nor other provisions of the Code of Ethics for School Board Members. The SEC found that the board made an attempt to carefully select a teacher for the position.The SEC also declined to find that the board violated *N.J.S.A.* 18A:12-24.1(c) when it provided only one day's notice to the administration, staff and parents before deciding to reorganize the aforementioned class. The SEC found the question of the adequacy of notice to be a question of board policy that should be addressed within the district. It was not a question of exceeding the board's authority in planning, policy making or appraisal.

In ***Vickner/Ewing*, C36-01; SEC 5/28/02, Comm'r 7/16/02,** the SEC determined that there was no probable cause to credit the allegations that Dr. Vickner violated *N.J.S.A.* 18A:12-24.1(c) when he disclosed student information, including academic, disciplinary and attendance information, to the board of education after the superintendent advised him that the information was confidential. This did, however, violate other sections of the Code of Ethics, *N.J.S.A.* 18A:12-24.1(e) and (g).

In ***Kroschwitz II and Sturgeon/Hamilton*, C29-03; SEC 11/25/03, Comm'r 12/19/03,** the SEC determined that undertaking an appraisal of the school kitchens in order to inform a vote as to whether to renew the contract with the food management service, did not violate *N.J.S.A.* 18A:12-24.1(c).Under the school district's contract with a food management service, new vacancies for kitchen workers would be filled by the company and thus would no longer be required to be school employee/union members. Union representatives appeared repeatedly at monthly board meetings objecting to the hiring of the company and criticizing its performance. Two board members, who had been endorsed by the union, visited schools without notice to the administration to see the conditions in the kitchen, took photos and went directly to the media about the cleanliness of the kitchens. Although this behavior violated other sections of the code, the SEC found that it was not setting out to formulate a policy.

Conclusions: Generally, violations of *N.J.S.A.* 18A:12-24.1(c) will be found where board members unilaterally make decisions regarding staff that should properly be placed before the entire board, or that should be made only after consultation with the CSA. (See, e.g., ***Hankerson***) However, what may at first blush appear to be a violation must be supported by the facts. A careful examination of the facts by the SEC may reveal that no violation in fact occurred. (See, e.g., ***Grant***) Moreover, members of the public who feel disaffected by decisions made by the board may suggest that the board's action constitutes the framing of policies and plans without consulting with those affected by them. However, they may not fully appreciate what constitutes framing policies under *N.J.S.A.* 18A:12-24.1(c) and may erroneously claim a violation of the "framing policy" aspect of (c). For example, as described above, the SEC found that hiring a board member to fill a vacancy did not constitute framing a policy. (***Axelrod***) Nor did a board member's action in investigating allegations of unsanitary kitchen conditions and reporting such information directly to the press constitute framing policy, although that activity violated other sections of the Act.

(d) I will carry out my responsibility, not to administer the schools, but, together with my fellow board members, to see that they are well run.

This provision will be implicated when board members bypass the authority of the CSA. Often, the same facts that establish a violation of *N.J.S.A.* 18A:12-24.1(c) will also establish a violation of *N.J.S.A.* 18A:12-24.1(d). Of the fourteen rulings addressing *N.J.S.A.* 18A:12-24.1(d), the provision was found to have been violated in only three. In two of these three cases, the board member in question took personnel action that undermined and bypassed the authority of the CSA. In the case of a charter school's action vis-à-vis its chief academic officer, one board member failed to act "together with (his) fellow board members" when he excluded the other trustee from the decision-making process.

Three times the SEC found that N.J.S.A. 18A:12-24.1 (d) was violated. In ***Hankerson/Woodbine*, C36-02; SEC 6/24/03; Comm'r 8/14/03,** the board member engaged in numerous unethical activities that violated the Act, as described in other sections of this article. The specific provision of *N.J.S.A.* 18A:12-24.1(d) was found to be violated when a board member nominated, interviewed and hired a teacher and a nurse without the superintendent's recommendation. She administered the schools in a clear attempt to subvert the superintendent's authority. The SEC also noted that the board member's credibility was undermined by her submission of false revised minutes in order to defend herself in this action.

In ***Schaeder/Golden Door Charter*, C03/C04/C06/C07/C12-03; SEC 9/23/03; Comm'r 11/10/03; aff'd State Board except as to penalty, 9/01/04**, a charter school trustee violated *N.J.S.A.* 18A:12-24.1 (d) (as well as (c)—see above) when he forced the Chief Academic Officer (CAO) to resign without consulting the board of trustees. The board's approval was sought only after the CAO had been presented with the severance agreement. The trustee admitted that he did not include the other trustee in the decision-making process on the matter because he did not feel that he could trust her to keep it confidential. The SEC pointed out that under the Code of Ethics, one board member does not have the right to determine that another board member will be denied access to the same information as the other board members. The SEC also emphasized that SEA applies, in its entirety, to members of charter school boards of trustees. The SEC recommended the penalty of

removal as the trustee had acted as a one-member board and in so doing had egregiously violated the Code of Ethics and the standards of conduct expected of board members in general. The Commissioner agreed that the trustee should be removed. The State Board set aside the penalty of removal, which was predicated on the SEC's conclusion that the appellant had violated the Act both with regard to the termination of the CAO but also for a violation of *N.J.S.A.* 18A:12-24(b). Determining that the violation of *N.J.S.A.* 18A:12-24(b) had not been established, the State Board directed that the trustee be reinstated to the board and reprimanded.

In **U*dy, Ewart and Frazier/Woodstown-Pilesgrove*, C20-03/C21-03, 9/23/03, reversed and remanded by the State Board 4/7/04**, the SEC determined that a board member violated, among other provisions, *N.J.S.A.* 18A:12-24.1(d). This provision was violated when he made motions to retain a supervisor and to create a new position for a supervisor, without the CSA's recommendation and when there was no evidence that she held the required certification. Based upon the board member's extensive experience in the district for 32 years, and having even served as a superintendent of schools, the SEC presumed that he knew the laws pertaining to the schools. The board member's attempt to undermine the authority of the CSA and circumvent the certification requirements when he made the aforementioned motions was administering the schools in violation of *N.J.S.A.* 18A:12-24.1(d) and other sections, and warranted removal from his office. Even though the SEC's finding of violation was reversed and remanded by the State Board on procedural grounds, it remains instructive with regard to the type of behavior that will constitute a violation of this section.

Eleven times the SEC found that N.J.S.A. 18A:12-24.1 (d) was not violated. It is instructive to review the kinds of activities that do not constitute a violation of *N.J.S.A.* 18A:12-24.1(d). The rulings make it clear that while board members may not administer in lieu of the CSA, on the other hand, they are not required to rubber stamp a CSA's recommendation. See, e.g., ***Gannon, Calvo, Central Regional,*** and ***Giarratano.*** Other cases resulting in no violation hinge on a finding that the board member acted in his private, individual capacity, and not in his/her role as board member. See, e.g., ***Maiello*** and ***Grant***. In yet other cases, the board member's activities did not go so far as administering the schools; these cases appear to draw a fine line between what may be an acceptable "investigation" by a concerned board member that falls short of "administering," and what constitutes "administering" the schools. See, e.g., ***Smith*** and ***Kroschwitz***. In yet other cases, the facts simply did not bear out the allegations. See, e.g., ***Friedberger***, where the complainant apparently misunderstood the proper role of committees, and ***Schaeder***, where the complainant underestimated the lawful discretion of a board's chairperson.

In ***Gannon, et. al./Montville*, C16-03;SEC 8/26/03,** the SEC determined that the board was not administering the schools in violation of *N.J.S.A.* 18A:12-24.1(d) when it overruled the recommendation of the CSA and principal to reinstate a fourth section of a second grade class; the board was merely enforcing pre-existing policy on class size.

In ***Calvo/Union City*, C39-04; SEC 2/7/05,** a disgruntled employee could not establish that the board failed to work together to see that the schools are well run. The complainant, an administrative clerk in the Student Relations Office, alleged that the respondents violated *N.J.S.A.* 18A:12-24.1(d) (as well as other sections of the Act) when the seven board members voted 7 to 0 to approve a resolution for her non-renewal. The SEC determined that she had received a notice of non-renewal and the board provided her an opportunity to address them regarding her non-renewal. The board acted together to hear her presentation and then together voted not to renew her employment. She did not allege, nor did the facts establish, that the board acted without a recommendation of the superintendent. The SEC noted that it is well within the board's discretion not to renew the contract of a non-tenured employee, and that it could not find that the board has failed to see that the schools are well run merely because it voted not to renew the contract of one of its employees, recognizing that if that were the case, then the board would be required to renew the contract of every employee that came before it.

In **Central Regional, C35-02; SEC 2/25/03,** the SEC found that board members did not violate *N.J.S.A.* 18A:12-24.1 (d) or any other part of the Board Member Code of Ethics when they voted against a teacher's reappointment, despite the CSA's recommendation. The complainant included numerous allegations surrounding the non-renewal, but none were proven. No probable cause was found. The complainant alleged that the board voted against her reappointment without reviewing the evaluation materials in her file, in violation of *N.J.S.A.* 18A:12-24.1(d). The SEC found no information to show that the board failed to review complainant's file. The SEC could not credit the allegations that the board members administered the schools or failed to work with one another to see that the schools were well run.

In ***Giarratano, Smith and Salny/Rockaway*, C25-03; SEC 9/23/03**, the three board members named in the complaint did not violate *N.J.S.A.* 18A:12-24.1(d) when they voted against the CSA's recommendation to renew a principal or when they attended an articulation meeting held by the teachers in the district. The board members were invited to attend the articulation meetings and the CSA did not view their attendance as an impermissible attempt to administer the schools. There were no assertions or facts presented that would indicate that the board members withheld their approval on the principal's renewal for arbitrary or capricious reasons. The SEC found the complaint to be frivolous and fined the complainant $250, noting that he was familiar with the School Ethics Act, that he had filed seven complaints with the SEC in the past and had been previously fined for filing a frivolous complaint, and should have known that this complaint was filed without any reasonable basis in law.

In ***Maiello/Wanaque*, C37-02; SEC 3/25/03**, a board member had applied to have one of the board's buildings, the "Rhinesmith Building," designated as an historical landmark. The complainants alleged, among other things, that the board member entered the building

on many occasions between December 2001 and January 2002 for the purpose of gathering information to support her application, and they maintained that she was administering the schools. It was also claimed that her inventory lists and the photographs she took were board property. Based on the information before it, the SEC could not find that she entered the Rhinesmith Building as a board member and therefore could not find that she acted to administer the schools, and outside of her authority to confine her actions to policy making. Similar to its analysis under *N.J.S.A.* 18A:12-24.1(c), the SEC noted thatMrs. Maiello began the process of seeking the historical landmark status before she became a board member. Although she was a board member when she entered the building, she was still acting as a private citizen when she sought information to supplement her application. Therefore, the SEC found no probable cause to credit the allegations that Mrs. Maiello violated *N.J.S.A.* 18A:12-24.1(d).

In ***Grant/Long Branch*, C15-03; SEC 7/22/03**, the complaint under *N.J.S.A.* 18A:12-24.1(d) was based on the same set of detailed facts described in this article above under the discussion of *N.J.S.A.* 18A:12-24.1 (c). The SEC found that Mr. Grant had not administered the schools. It determined that he had relayed the concerns of the public to the superintendent, and in fact this consultation with the superintendent is precisely what the above section requires of board members under such circumstances. In addition, the SEC found that Mr. Grant clearly made the board aware of his intention to attend a meeting with the National Association for the Advancement of Colored People (NAACP) president regarding the district's student athletes in response to the NAACP's request for such a meeting.There is no information to show that the board objected to his answer to the NAACP's request.

Nor did Mr. Grant violate this section by his protest of the meeting with a sign that read, "Our athletes are students too- they must learn Reading-Riting-Rithmatic and to Live." The SEC found that Mr. Grant's protest did not constitute board action, but was private action. Therefore, Mr. Grant was not administering the schools by picketing the meeting. The SEC found insufficient information to demonstrate that Mr. Grant failed to work together with his four fellow board members or that he administered the schools in violation of*N.J.S.A.* 18A:12-24.1(d).

In ***Smith/Asbury Park*, C03-04 ; SEC 7/27/04,** a board member did not violate *N.J.S.A.* 18A:12-24.1(d) when he visited the middle school to determine district needs and commented on security when his wife was a security guard at the middle school. Even the hearsay evidence presented did not establish a violation. The SEC determined that the actions of a board member going into the schools to determine what the district needs do not rise to the level of administering the schools.

In ***Kroschwitz II and Sturgeon/Hamilton*, C29-03; SEC 11/25/03, Comm'r 12/19/03,** the SEC determined that a board member's actions did not amount to an attempt to administer the schools in violation of *N.J.S.A.* 18A:12-24.1(d) where she undertook an investigation of the conditions of the school kitchen without the knowledge of the other board members. The SEC found that one could argue that she was actually attempting to see that the schools were well run. The factual background for this complaint is described above in this article under the discussion of *N.J.S.A.* 18A:12-24.1 (c). While violations of other sections of the Act were violated, subsection (d) was not. The SEC believed that the other sections were more applicable to the alleged conduct.

In ***Friedberger, et.al./Rockaway Township.*, C38-02; SEC 1/28/03** board members did not violate the Code of Ethics when, serving on the board's curriculum committee, they recommended that certain staff members review the final plans for the eighth grade science lab and that other students be displaced if the lab were not completed as scheduled. Against a factual backdrop where the district's construction project had to be rebid, the CSA had suggested that the administrators meet with the board's curriculum committee to review the proposed project plans to determine what impact, if any, they would have upon the education of students at the middle school. The committee, as charged, made two recommendations, which were presented to and accepted by the board. The committee did not then attempt to implement the recommendations, but presented them to the CSA and other members of the administration for implementation. The CSA testified that the recommendations were proper and within the committee's authority and that he did not view them as an attempt to administer the schools. Noting that pursuant to *N.J.S.A.* 18A:12-29(b) the burden of proof is on the accusing party to establish factually a violation of the code, the SEC concluded that the complainant failed to meet her burden of establishing that the two recommendations made by the respondents in their capacity as the curriculum committee usurped the administration's authority or expanded the committee's role into administration and away from classroom subject matter under *N.J.S.A.* 18A:12-24.1(d).

In ***Schaeder, Walston, Kassan, et.al. Golden Door Charter*, C28-03; SEC 2/3/04**, the complainant alleged that the board chairperson attempted to administer the schools in violation of *N.J.S.A.* 18A:12-24.1(d) when he determined which items to place on the agenda, when he failed to share a Compliance Report with the rest of the board and when he failed to provide all board members with minutes. The SEC found that it is standard practice for the chairperson of a board to determine which items to place on the agenda for a meeting. While warning that it does not condone the chairperson's failure to share the Compliance Report or his failure to provide all board members with minutes, it did not find that he had overstepped his role as a board member nor view these actions as impermissible attempts to administer the schools in violation of *N.J.S.A.* 18A:12-24.1(d).

In *Fischer/Eatontown*, C30-03; SEC 2/24/04; Comm'r 4/12/04, the board member's action in calling a staff member at home for information did not constitute administering the schools in violation of *N.J.S.A.* 18A:12-24.1(d), although other sections of the Code of Ethics for School Board Members were violated by the ensuing events. A board member had asked a financial staff employee for some reports that he needed with respect to a meeting he was hav-

ing with the incoming CSA; the board employee said she would forward the information to his home that day, with her phone number in case he had questions. He didn't get the information so he obtained her home phone number from another employee and left a message at her home. She returned the call later and told him that she had not in fact sent the requested information because she didn't want to get in the middle of it after speaking to the CSA, who had indicated that it could not be released to the public. The board member insisted on obtaining the information, the conversation became angry and he raised his voice to the employee. The SEC accepted the board member's account and found that *N.J.S.A.* 18A:12-24.1(d) was not violated because it was customary practice to call the employee for information and she had invited him to call and in fact returned his call.

Conclusions: The sheer number of complaints filed under *N.J.S.A.* 18A:12-24.1(d) suggests a widely-held suspicion that board members are likely to foray into areas reserved for administrators, and that they are apt to act on their own rather than together with their fellow board members. However, in most of the cases brought no violation was found. While in ***Hankerson, Schaeder*** and **Udy,** board members clearly thumbed their noses at the boundaries of their authority, other types of activity outside the ordinary function of a board member at a meeting, such as conducting an acceptable "investigation" of conditions in the district, will present a closer case. (***Smith, Kroschwitz***) It can also be seen that in order for a board member's actions to violate this section, it must be shown that the board member usurped the authority of an administrator, as opposed to merely expressing disagreement with the recommendation or opinion of an administrator in a legally permissible fashion, such as voting against the administrator's recommendation.(***Calvo***) The SEC has also made it clear that actions taken by a board member in his or her private capacity will not form the basis for a violation of this section. Of course, it may not always be apparent whether a board member's activities taken constitute personal or official conduct, as the personal and official interests of a board member may be so interrelated that the SEC's close scrutiny of the facts will be required.

(e) I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board.

Eighteen rulings addressed N.J.S.A. 18A:12-24.1(e). In somewhat fewer than half (seven) of them, violations of *N.J.S.A.* 18A:12-24.1(e) were found.

Cases where violations of N.J.S.A. 18A:12-24.1(e) were found: In each of the cases, the SEC's ruling seem to hinge upon the SEC's belief that the activity forming the basis of the complaint could really harm the board in some palpable way, including such potential harm as jeopardizing its ability to pass the budget, exposing the board to litigation for breach of confidentiality, eroding its credibility with the public and staff, compromising its relationship with the CSA, damaging the relationship between a sending and receiving board, and revocation of the ability to use a specific school facility.

The types of private activity that were deemed capable of harming the board under (e) included the disclosure of confidential information pertaining to employees or students (***Vickner; Pizzichillo***); circulating malicious documents about fellow board members (***Schmidt***); distributing a flyer containing incomplete information about the proposed school budget (***Quinn***); taking private action regarding the district's teacher orientation program (***Hankerson***); erroneously creating the impression of representing the interests of the full board in a letter copied to the county superintendent and signed by the respondent as "Board President " that accused the board of fire code violations (***Zimmerman***); and persisting in seeking information from a staff employee after being made aware that the employee was reluctant to provide the information in light of counter-instructions she had received from the CSA (***Fischer***).

In ***Vickner/Ewing*, C36-01;SEC 5/28/02, Comm'r 7/16/02**,theSEC foundthat Dr. Vickner violated section *N.J.S.A.* 18A:12-24.1(e) when he disclosed student information, including academic, disciplinary and attendance information, to the Ewing Township Board of Education after the District superintendent advised him that the information was confidential.

The SEC did not believe the board member's actions to be vicious or in bad faith, in that he attempted to resolve a discrepancy where he believed that a board member's son was extended privileges that were not extended to other students. However, the more prudent course of action would have been to discuss this sensitive matter with the superintendent who had provided the information in the first instance. The SEC noted that, although the board reviews attendance and credit data for students, it does not refer to students by name, whereas in the present case, the board member made the complainant's son the sole object of the board's focus. Recognizing that the pupil records law allows a board to discuss information contained in a pupil's record in executive session, the SEC found that the board member went beyond the discussion of the pupil's record to accusations that complainant's son should not have graduated. It concluded that this constituted private action that could compromise the board in violation of *N.J.S.A.* 18A:12-24.1(e). The SEC recommended censure and noted that the board member had already received the ultimate penalty, of not being re-elected. The Commissioner agreed.

In ***Pizzichillo/Fairview*, C17-02; SEC 1/28/03; Comm'r 3/6/03,** the SEC determined that a board member violated section *N.J.S.A.* 18A:12-24.1(e) when he met a friend in a pizza parlor and provided him with confidential employee documents. The information concerned a school administrator's stipend and included correspondence from the school administrator's attorney to the board and the school administrator's payroll records indicating all of the deductions coming out of the school administrator's paycheck each pay period between March and June 2000. The board member claimed that since the employee had waived the right to a private discussion and the matter was discussed at a public meeting, the documents were not confidential. However, the SEC found no authority for the proposition that, because the documents were given to the board at a public meeting, all of the documents, includ-

ing those with an employee's withholding information revealing the extent to which deductions were withdrawn from the employee's paycheck, her salary and her benefits, became public and could be distributed to anyone by any board member. The SEC commented that although the board member testified that he believed that the records were public, the specific personal information in the documents should have convinced him that they were not. If he had been advised by the board secretary that the documents were public, then he should have referred the requestor of the information to the board secretary to let him or her provide the documents.The SEC concluded that the board could be subject to adverse consequences if the employee were to find out that her payroll records were circulated to a member of the public that had no relationship to her dispute with the board. The SEC therefore concluded that along with other violations, the board member failed to recognize that authority rests with the board of education and took private action that could compromise the board in violation of *N.J.S.A.* 18A:12- 24.1(e). The Commissioner agreed with the SEC's recommendation of a reprimand.

In ***Schmidt/Berlin*, C01-02; SEC 2/25/03; Comm'r 4/14/03,** a former board member was found to have violated *N.J.S.A.* 18A:12-24.1(e) when she, while serving as a board member, ultimately paid to have three copies of a letter made using school equipment and distributed them to certain school staff. She had received the malicious letter at home, regarding the complainants, who were four fellow board members. The letter was directed to the residents of Berlin Borough, and had been copied to Mayor and Council, NJSBA and the Camden County superintendent. Although the board member testified that the superintendent had asked her to make copies of the letter, the complainants produced a statement from the superintendent denying the truth of that assertion. The SEC found that the letter was so disparaging of the four board members that to give it to staff members who may not have received it by other means, could compromise the board by decreasing its credibility among the staff and the public that it served. The SEC recommended the penalty of reprimand and the Commissioner agreed.

In ***Quinn/Winfield Bd*, C45-04; SEC 2/7/05,** the SEC found that a board member violated *N.J.S.A.* 18A:12-24.1(e) when she took private action by printing and distributing a flier during her reelection campaign and prior to the public vote on the budget, which flyer provided incomplete information regarding the amount of the tax increase, thereby compromising the board's ability to pass its budget. The board's budget was defeated by 46 votes. The SEC found that her distribution of the flier was a private action since it did not involve her board member duties and occurred during her reelection campaign. The SEC also found that the private action compromised the board's ability to raise the necessary revenue for the school district. The SEC recommended the penalty of censure.

In ***Hankerson/Woodbine*, C36-02; SEC 6/24/03; Comm'r 8/14/03,** a case that involved many violations of the School Ethics Act that ultimately resulted in the board member's removal from the board (as described elsewhere in this article), a violation of *N.J.S.A.* 18A:12-24.1(e) was found where the board member in question removed the CSA from the agenda of a teacher in-service orientation where he was scheduled to give opening remarks, and directed him to conduct interviews. The SEC recognized that the board member demonstrated a clear pattern of attempts to discredit the superintendent at every opportunity. Pulling the superintendent from the teachers' orientation clearly undermined his authority with his staff and thereby compromised his ability to serve as the CSA. The SEC therefore concluded that in setting her own agenda for the teacher's orientation, the board member took private action that could compromise the board. The SEC recommended the penalty of removal. The Commissioner agreed.

In ***Zimmerman/Rocky Hill*, C49-02, SEC 7/22/03; Comm'r 8/21/03,** the SEC found a violation of *N.J.S.A.* 18A:12-24.1(e) where a board member, responding to her neighbor's concerns about unhealthful conditions in her child's classroom, obtained letters from parents and forwarded them to the CSA with her own cover letter, referring to a "substandard kindergarten classroom" with no windows and ventilation and an "obvious fire code violation." The board member signed both letters as Rocky Hill School Board President and, on the parents' letter, copied the school principal, the President of the Montgomery School Board and the Somerset County superintendent. The SEC found that sending letters under her title as Board President and not acting in concert with her fellow board members violated *N.J.S.A.* 18A:12-24.1(e). The SEC found sufficient evidence that she took private action using her position as Board President to create the impression that she was representing the interests of her board. Even if the SEC had discounted the CSA's testimony that she was acting on behalf of the board, there was still sufficient evidence to sustain a finding that (e) was violated. Her writing of such a strongly worded letter and copying the county superintendent could have resulted in the revocation of the use of the room by the county superintendent. The SEC believed that the letter that she provided him, referencing an "obvious fire code violation," surely could have compromised the board and greatly damaged its relationship with the board's receiving district. The SEC recommended the penalty of reprimand and the Commissioner agreed.

In ***Fischer/Eatontown*, C30-03; SEC 2/24/04; Comm'r 4/12/04,** a board member had asked a financial staff employee for some reports that he needed with respect to a meeting he was having with the incoming CSA; the board employee said she would forward them to his home that day, with her phone number in case he had questions. He did not get the information so he obtained her home phone number from another employee and left a message at her home. She returned the call later and told him that she had not in fact sent the requested information because she didn't want to get in the middle of it after speaking to the CSA, who had indicated that it could not be released to the public. The board member insisted on obtaining the information and the conversation became angry and he raised his voice to the employee. The board member claimed that she had started the altercation. The SEC found that regardless of whether the board member raised his

voice first, his conduct constituted taking private action that could compromise the board in violation of *N.J.S.A.* 18A:12-24.1(e) when he requested that the employee return to the office to obtain the information; if he were dissatisfied with the employee's responses, he should have ended the call and contacted the superintendent; he never should have resorted to raising his voice to the employee. The SEC found that the board member simply went too far in his pursuit of information and that the situation was unlikely to recur. As the SEC hoped that the superintendent had put an end to the policy of allowing board members to contact employees directly for information, the SEC recommended a penalty of only reprimand, and the Commissioner agreed.

Cases where no violation of N.J.S.A. 18A:12-24.1(e) was found. Allegations that section *N.J.S.A.* 18A:12-24.1(e) was violated were not sustained in the cases that follow. As a general observation, the SEC will not find a violation where a board member's activities, opinion or comments made in jest, have no actual or likely potential effect on the course of events or on the behavior of others that could compromise the board. It appears that a complaint is unlikely to succeed unless the complainants can demonstrate with some specificity, the way in which a board is actually compromised, or is very likely to be compromised, as a result of the board member's action.

The SEC rulings afford a board member's expression of his personal opinion significant protection. (E.g., ***Hartsough*** and ***Palmer,*** below.) The expression of an opinion, without taking actual steps to act on that opinion, has not constituted a violation. Again, unless an undesirable or offensive comment or threat is accompanied by activity or other indicia that demonstrate that it may be acted upon, the SEC appears unlikely to find a violation of (e).

In ***Graves/Pleasantville*, C23-02, SEC 1/28/03,** the SEC determined that the board member did not violate the Act when she publicly disclosed certain information, because the information in fact warranted public disclosure under the Open Public Meetings Act (OPMA). The complainant alleged that the board member violated *N.J.S.A.* 18A:12-24(e) when she disclosed that the board had voted to place the CSA on administrative leave, which necessitated the appointment of an interim CSA. The CSA's attorney had requested that the suspension be voted upon in executive session (to prevent unnecessary injury to him) and disclosed during the public session. The board voted that the CSA be placed on administrative leave during its executive session but apparently failed to disclose the suspension during public session. Subsequently, a newspaper article quoted the board member stating that the board suspended the CSA because he took too long to prepare some financial reports requested by the board. The board member acknowledged the disclosure, but denied that the information would be considered confidential under the OPMA.

The SEC agreed with the board member that the disclosure was consistent with the legislative intent underlying OPMA and related case law, also noting that a board action of such magnitude affects not only the CSA personally, but impacts upon the administration of the entire school district. The SEC further noted that the CSA's attorney specifically requested that the final decision of the board be reported in public session, which was his right under OPMA, *N.J.S.A.* 10:4-12(b) (8), and demonstrated that the CSA was not injured by the disclosure. The board's action warranted public disclosure. There was no probable cause to credit the allegation that the disclosure constituted private action that could compromise the board.

In ***Maiello/Wanaque*, C37-02; SEC 3/25/03,** as described earlier in this article, a board member had applied to have one of the board's buildings, the "Rhinesmith Building," designated as an historical landmark. The complainants alleged, among other things, that it was a violation of *N.J.S.A.* 18A:12-24.1(e) when she applied for the application while serving as a board member and when she entered the building to gather information to supplement her application. The SEC found that the board member made the final application and supplemented the application as a private citizen while serving as a board member, but that the private action she took did not compromise the board. The SEC believed that her intent was solely to preserve the historical culture of the town. However, the issue of whether her action had the potential to compromise the board was "a question of first interpretation." The board owned the property and was contemplating selling it as of the date of her application. The board member pointed out that the designation of a building as an historical landmark sometimes results in state and federal assistance to improve the property. Based on this and the facts that the ultimate decision for the use of the property would be made by the board and that her actions would not affect that outcome, the SEC ultimately concluded that the board was not compromised by her application and found no probable cause to credit the allegation that she violated *N.J.S.A.* 18A:12-24.1(e).

In ***Palmer/Asbury Park*, C51-02; SEC 3/25/03** no violation of *N.J.S.A.* 18A:12-24.1(e)was found with respect to a board member who communicated to two female district employees that he would vote against the salary increase of one and the transfer request of the other if the respective employee did not smile at him. The SEC found that the comments had been made in jest. While questioning the quality of the joke, the SEC nonetheless noted that he did not vote against the salary increase or in fact take action against the transfer of the other. In addition, there was no information that the women changed their behavior in any way based on the board member's actions. There was insufficient information to show that the board member made personal promises or took private action that could compromise the board.

In ***Thornton/Bridgewater-Raritan*, C46-02; SEC 3/25/03,** it was claimed that the board member erroneously advised other board members that he, a fellow board member, had violated the Act when he voted on an insurance resolution of a company for which his employer was a reinsurer. Factually, the complaint could not be sustained, as the respondent had merely been copied on the memoranda from the board secretary and the board attorney and neither contributed to the drafting of the memoranda nor distributed the memoranda. The SEC failed to

find any promise made or action taken by the board member. The SEC failed to see the applicability of *N.J.S.A.* 18A:12-24.1(e) and therefore could not find that it had been violated.

In fact, the SEC believed that the complaint should have been against the board attorney for not speaking to the board member whose employer was the reinsurer, before concluding that he had a conflict of interest; however the attorney was not a "school official" subject to the Act.

In ***Hartsough/Ocean City*, C33-01; SEC 1/22/02,** no violation of *N.J.S.A.* 18A:12-24.1(e) or any other provision of the School Ethics Act, occurred wherein prior to a board meeting, the board member referred to a citizen as a "cancer" in the community and stated that he would never allow the person to speak before any board he chaired. The SEC recognized that the comments were offensive, but there were insufficient facts to demonstrate that the board member failed to recognize the board's authority or that he made a personal promise or took private action that would compromise the board. While he stated that he would never allow a certain individual to speak before any committee he chaired, there are no facts to show that he actually took any action toward prohibiting this individual from addressing the board or any of its committees. In light of these facts, the SEC found that the board member's comments reflected his personal opinion and did not constitute a promise or action in violation of *N.J.S.A.* 18A:12-24.1(e).

In ***Lawrence/Pinelands*, C32-02; SEC2/25/03,** no violation of *N.J.S.A.* 18A:12-24.1(e) was found on a complaint that a board member had disclosed confidential information to the supervisor of special education services, when following a board meeting, he commented that the supervisor was "out of a job." At a personnel committee meeting preceding the board meeting, the superintendent had discussed the need to transfer the supervisor as a result of the defeat of the budget. However, the board member testified that his statement referred to the supervisor's expected retirement, common knowledge in the district, and not to the matter disclosed in a confidential session. The SEC found the board member's comment to be vague and could not infer that it referred to a topic discussed at the personnel committee meeting rather than the supervisor's impending retirement.

In ***Grant/Long Branch*, C15-03; SEC 7/22/03,** the detailed facts involved are set forth under the discussion of *N.J.S.A.* 18A:12-24.1(c) above. Although the SEC found that the respondent board member took private action when he protested the February 5, 2003 meeting, it found that there was insufficient evidence to show that the board was in any way compromised by his conduct. The SEC found no violation of *N.J.S.A.* 18A:12-24.1(e).

In ***Axelrod/Union Township*, C40-04, C41-04 and C42-04; SEC 2/7/05**, no violation of *N.J.S.A.* 18A:12-24.1(e) or any other provision of the School Ethics Act was found on complaints that that three board members appointed a former board member to fill a vacancy on the board without sufficient notice to other board members or the public. Notices of board vacancy were posted on the website and township cable television station, but not in the newspapers. In filling the present vacancy, only three board members, who constituted the Personnel Committee, participated in the interview process and made the recommendation. The complainants alleged that the board members took private action that could compromise the board in not including the other board members in the interview process which occurred out of the hearing of the public. The SEC found that the board members were meeting as a committee of the board when they interviewed candidates to fill the vacancy, and were therefore not taking private action, but acting as board members, noting that an action is not "private" merely because it was not done in public. Section (e) was therefore not violated by this activity.

In ***Smith/Asbury Park*, C03-04; SEC 7/27/04,** the SEC determined that neither *N.J.S.A.* 18A:12-24.1 (e) nor other sections of the Code of Ethics were violated. The board member, whose wife was a security guard at the district's middle school, had visited the school to determine district needs and commented on security. Even the hearsay evidence presented did not warrant a violation. The SEC stated that a board member's statement regarding the security at a middle school when his wife is a security guard at the middle school did not constitute a private action that would compromise the board. The SEC could not find that there were any personal promises made or private actions taken that could compromise the board or the administration of the schools.

In ***Setar/Carteret*, C33-03; SEC 2/24/04,** a board member did not violate *N.J.S.A.* 18A:12-24.1 (e) when he directed that a check be released to an electrical contractor. The board had previously approved a bill list including payment of the bill and later ratified the minutes from that meeting. Subsequently, the board had concerns about the payment and failed to pass a vote to ratify the payment. An Office of Compliance Investigation report confirmed that the payment was "authorized and legal."

Conclusions: As noted above, when determining whether (e) is violated, the SEC has considered whether the activity complained of has the likely potential to cause actual harm to the district. For example, the disclosure of information was not deemed to be harmful activity where it was not in fact confidential and would be revealed regardless of the board member's disclosure. (***Graves***) Nor did a board member's threat to a citizen that he would never allow him to speak before any board that he chaired, demonstrate any harm to the board where there was nothing in the record to show that he was actually implementing this threat. (***Hartsough***) However, the line is thinly drawn between what will be deemed to have the potential to harm the board, and what will not. The rulings under (e) seem to be particularly fact-specific. It also seems that the SEC may be inclined to take into consideration whether the board member's activity is just as likely to bring good to the district as it would bring harm. (***Maiello***) When the statements of a board member are vague and could be taken in several ways, it appears that the SEC has given the board member the benefit of the doubt. (***Palmer*, *Lawrence***) In any event, action that is not private action, but is rather performed as part of the official duties such as committee work, will not fall within the scope of this provision.

A similar review of the decisions applying the remaining five sections (f) through (j) of *N.J.S.A.* 18A:12-24.1 will follow, in a subsequent publication of *School Ethics Reporter*.

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School Law
REPORTER

• FINAL EDITION, SPRING 2002 •

This edition of School Law Reporter *will be the final edition of the* Reporter *in its current format. The Legal Department will, of course, continue to provide timely information and analysis of issues of significance to school board attorneys and the educational/legal community through articles and other publications.*

SUBCONTRACTING FOR EDUCATIONAL SERVICES: AN UPDATE In the Fall/Winter 1999-2000 edition, *School Law Reporter* addressed the issue of subcontracting for educational services generally and, in particular, the subcontracting for child study team (CST) services. The Fall/Winter 1999-2000 edition of *School Law Reporter* can be found at the NJSBA Web Site, *www.njsba.org,* in the *Legal* section, *Publications* subsection. This article will provide an update on the issue of subcontracting for CST services since that time, and will examine the state of the law of subcontracting for non-child study team certificated teaching staff services.

SUBCONTRACTING CHILD STUDY TEAM SERVICES: AN UPDATE

When School Law Reporter last addressed this issue, the state of the case law on subcontracting of certified CST services was as follows:

- Boards of education may establish a core CST (school psychologist, learning disability teaching consultant and social worker) with employees of the district or may subcontract for the entire CST with one or more boards of education or state agencies which are authorized to provide such core CST services.
- If a board elects to maintain its own core CST, each core team member (school psychologist, learning disability teaching consultant and social worker) must be an employee of the district board of education. Boards may not abolish an individual position within the core CST team and subcontract for the individual service, even for reasons of economy.
- When a board of education establishes a core CST with district employees, special education services that are not part of the core team (school psychologist, learning disability teaching consultant and social worker), such as speech correctional services, may be individually subcontracted.
- Any subcontracting for core CST services must be with public entities authorized to provide those services, such as special services school districts, educational services commissions, jointure commissions or other school districts.
- Boards of education may subcontract for CST services to supplement existing local CST services.
- Boards of education may not contract for services of individual CST members to fill temporary openings such as a one-year sabbatical leave.

The following case law updates have occurred in the area of subcontracting of CST services since the Fall/Winter 1999-2000 *School Law Reporter:*

- The New Jersey Supreme Court denied certification in the case of *Vicenzino v. Bedminister Bd. Of Ed.*, 156 *N.J.* 408 (1998). The denial of certification left standing the Appellate Division decision that held that where a district board of education establishes a CST with employees of the district, the board may not eliminate one of those positions and contract out for the individual service. A board may eliminate the entire CST for good faith reasons of economy and join with one or more boards of education or state agencies to provide for core CST services. In addition, boards of education can use approved agencies and clinics to supplement existing services in defined areas.
- The State Board of Education affirmed the Commissioner's decision in *O'Neal v. Bd. of Ed. of the City of Salem*, 2000 *S.L.D.* (June 7). The Commissioner, pursuant to the equivalency and waiver process and

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with the approval of the State Board of Education, had granted the Salem Board waivers from several administrative regulations. The waivers allowed the board to contract out for the services of its school social worker, a member of its core CST, and to determine which assessments were appropriate for initial evaluations. The State Board affirmed, concurring with Ms. O'Neal that the statutory framework precluded the contracting of school social worker services to a private vendor. However, that was not what happened in this case. The board of education contracted with the Salem County Special Services School District, a public entity authorized by statute to provide such services. The State Board noted that pursuant to *N.J.A.C.* 6A:14-4.10 (f) the waiver at issue expired effective July 6, 1998.

- In *Anders v. Bd. of Ed. of the Twp. of Lakewood* and *Anders v. Monmouth-Ocean Ed. Services Commission*, 2001 *S.L.D.* (January 2), settlement approved State Board 2002 *S.L.D.* (January 2), the Commissioner examined a situation where the Lakewood Board of Education eliminated all four full-time CSTs within the district and entered into a contract with the Monmouth-Ocean Educational Services Commission (MOESC) to provide the services of three full-time CSTs that would perform the duties and functions previously performed by the four in-district CSTs. In dismissing the petition, the Commissioner relied on *Vicenzino* and held that when a local board of education acts in good faith to eliminate its CSTs for reason of economy, it may join with one or more boards of education or State agencies including an educational services commission (ESC) to provide core CST services. The Commissioner, citing *Miller v. Burlington Co. Ed. Services Unit*, 1999 *S.L.D.* (January 19), affirmed State Board, 2001 *S.L.D.* (November 7), rejected the contention that pursuant to *N.J.S.A.* 18A:28-16 the petitioners were entitled to continued employment in the MOESC. The elimination of a district's CST by a board of education and the contracting out for core CST services with an ESC did not constitute a takeover by, or a transfer of an educational program to, an ESC. The Lakewood Board did not cease or discontinue its responsibility for, or governance over, the provisions of CST services to its students. The board remained legally responsible for the CST services provided to its students and those services remained part of Lakewood's overall special education program.

In addition to the subcontracting of core CST services, a significant body of case law exists regarding the subcontracting of other certified teaching staff positions.

AUTHORITY TO SUBCONTRACT WITH PRIVATE VENDORS/ CERTIFICATION WAIVERS

In a case similar to that of *O'Neal v. Bd. of Ed. of the City of Salem*, the State Board further clarified the issue of equivalency and waiver as it pertained to members of the core CST. In *Miller v. Klagholz and the Bd. of Ed. of the Twp. of New Hanover*, 2000 *S.L.D.* (May 3), the State Board, citing *Impey* and *Vicenzino*, held that, where core CST services are involved, those services must be provided through the board's own employees, in combination with another board of education or by another public entity empowered to provide those services. Since the Legislature did not authorize the provision of core CST services through a contract with a private vendor, the State Board refused to provide that authority through the equivalency and waiver process. The Commissioner's waiver, 1996 *S.L.D.* (November 25), allowing all core CST services to be provided by a private vendor, was declared invalid. The State Board held that an administrative waiver could not legitimize an outcome that was not authorized by statute.

The issue of equivalency and waiver once again was addressed by the State Board in *In the Matter of Guttenberg Ed. Association v. Leo Klagholz and Bd. of Ed. of the Boro of Guttenberg*, 1999 *S.L.D.* (March 3). In *Guttenberg* the State Board invalidated the Commissioner's waiver of the certification requirements of a world language teacher, 1998 *S.L.D.* (January 9). The Commissioner had approved the Guttenberg Board's application for an equivalency to permit persons with a county substitute certificate and subject matter expertise to provide world language instruction. The board had approved Berlitz International Inc. as its "world language teacher" and was seeking an equivalency "because the Berlitz teacher program was not certified." The Commissioner granted the equivalency on January 9, 1998 for a three-year period, indicating that Guttenberg could submit a request for continuation of the equivalency at the end of that period. In its appeal, the Guttenberg Education Association challenged the legality of the board's proposal to assign individuals possessing only county substitute certification to deliver world language instruction and to subcontract with Berlitz to engage the services of those individuals.

The State Board invalidated the Commissioner's equivalency, finding that it effectively set aside the certification requirements for services of foreign language teachers specified by *N.J.A.C.* 6:11-6.3(a)(9). The State Board found that Guttenberg's need to develop a world language program could not justify using the equivalency and waiver process to set aside certification requirements. The emergency certification mechanism set forth in *N.J.A.C.* 6:11-4.3 was available in the event that teacher shortages develop in a particular subject area.

The fundamental question of whether the Guttenberg Board could in fact subcontract with a private vendor for instructional services was not directly addressed in this appeal. A separate petition filed by Guttenberg with the Commissioner on November 13, 1997, did address the specific issue of whether a board could provide foreign language instruction by subcontracting with a private vendor. At the time of the State Board's decision, this separate petition was still pending in the Office of Administrative Law. It was subsequently withdrawn, leaving the question unresolved.

The State Board decision in *Guttenberg* was relied upon in the case of *Neptune Twp. Ed. Association v. Neptune Twp. Bd. of Ed.*, 2000 *S.L.D.* (May 22). With the approval of the Monmouth County Superintendent of Schools, the Neptune Township Board of Education had entered into a contract with a private vendor, Limited Star Distance Learning Consortium ("STARNET"), to provide distance learning credit courses in Latin I, II, and III at the Neptune Township Senior High School. The Association

sought to invalidate the contract on the grounds that it was *ultra vires*, that the instructor used by STARNET did not possess New Jersey certification, that the Neptune department chairpersons assigned to monitor the classes did not possess foreign language certification, that a properly certificated foreign language teacher was available to the district and that the STARNET program did not incorporate either the board's curriculum or the core curriculum content standards.

The Commissioner held that the certification issue controlled. Citing the State Board decision in *Guttenberg*, the Commissioner held that the board could not properly provide Latin instruction for academic credit through a distance-learning program where the instruction was delivered by a person who did not possess appropriate New Jersey certification. Neither the Commissioner, nor the Administrative Law Judge (ALJ) below, resolved the other issues in the case, including the basic question of whether the board could contract with a private vendor for distance-learning instruction.

While not part of the Commissioner's decision, several of ALJ Bruce Campbell's comments are worthy of note, particularly for what he did not order in the case. They are:

- Judge Campbell refused to order the board to use its own employees to provide Latin instruction. The relationship between the board and the person providing Latin instruction was secondary to appropriate certification.
- Judge Campbell refused to order the termination of all subcontracting arrangements between the board and STARNET. There may have been lawful and appropriate arrangements between STARNET and the board that would not violate either statute or code.
- Judge Campbell refused to order that the board be prohibited from procuring Latin instruction from private vendors, corporations, persons or entities. It was not the character of the provider that controlled; it was the possession of appropriate certification.

The question of subcontracting certificated services with a private vendor remains one of great interest but is still unanswered except in these limited circumstances:

- Boards are specifically empowered to contract with licensed commercial drivers' schools for the purpose of providing behind the wheel instruction as part of a regular curriculum drivers' education course, provided that the classroom instruction in drivers' education is provided by a certified teaching staff member. *N.J.S.A.* 18A:26-2.
- Abbott districts may cooperate with or utilize a Department of Human Services (DHS) licensed child-care provider whenever practical to implement required early childhood education programs. Certification requirements exist for the DHS providers including the grandfathering of existing non-certificated teachers, provided they make annual progress toward obtaining a bachelors degree and Preschool through Grade 3 certification by September 2004. Newly hired teachers in DHS provider programs must possess proper certification. *N.J.A.C.* 6A: 24-3.3

Certainly, Judge Campbell's comments in *Neptune* have left the door open for private vendor subcontracting. However, given the uncertain state of the law, boards of education should venture into the private vendor subcontracting area with caution and are encouraged to fully discuss the matter with their board attorney before moving forward.

SUBCONTRACTING FOR TEACHING STAFF MEMBER SERVICES (OTHER THAN CORE CST)

In addition to the speech therapist position discussed in *Impey*, case law has evolved concerning subcontracting for other certified teaching staff member services.

Crisis Intervention therapists: *Edison Twp. Ed. Association v. Edison Twp. Bd. of Ed.*, 94 *N.J.A.R.* 2d (EDU) 301, dismissed on other grounds 94 *N.J.A.R.* 2d (EDU) 592 State Board, aff'd App. Div. 96 *N.J.A.R.* 2d (EDU) 463 addressed the issue of a contract entered into by the Edison Board of Education with the University of Medicine and Dentistry of New Jersey (UMDNJ) for crisis intervention therapists (CITs). The Edison Education Association alleged that the board unlawfully supplanted the guidance counselors and CST members with UMDNJ employees performing counseling functions of crisis intervention. The Association maintained that the services being provided by the CITs had to be provided by certified teaching staff members directly employed by the district board of education.

The Commissioner, State Board and Appellate Division all found that the contract was legal, finding no evidence on the record that any staff members employed by the board had been supplanted as a result of the board's contract with the UMDNJ. Much of the intervention work in more serious situations arising in the district had been referred to outside agencies even prior to the time when the district entered into the UMDNJ contract. No indication or evidence was shown that the workloads of staff members in the district had been reduced or even significantly altered as a result of the contract. Significantly, none of the functions performed by the CITs were of an educational character so as to require that they be performed by certified teaching staff members directly employed by the district board. Finally, no provision in the education laws was produced that would preclude the board from contracting out for these services regardless of certification requirements.

School Psychologist/Bumping Rights in RIF: In *Miller v. Burlington Co. Ed. Services Unit*, 1999 *S.L.D.* (January 19), affirmed State Board, 2001 *S.L.D.* (November 7), a RIFd school psychologist alleged that the "Burlington County Educational Services Unit" (ESU) violated her tenure rights when it failed to employ her. Ms. Miller had been laid off from her position with the New Hanover school district as a result of a reduction in force. After she was laid off, the New Hanover district first contracted for certain school psychological services with Therapeutic Alternatives, a private agency. At the termination of that contract the district entered into an agreement with the ESU for the provision of those CST services. Ms. Miller contended that she was entitled to employment with the ESU because it had undertaken the operation of the

New Hanover CST program, citing *N.J.S.A.* 18A:28-16, which provides:

> "Whenever an Educational Services Commission . . . under his, its or their authority shall undertake the operation of any school previously operated by a school district in this State, all accumulated sick leave, tenure and pension rights of all teaching staff members in said school shall be recognized and preserved by the agency assuming operational control of the school, . . ."

Ms. Miller relied on the decisions of *Stuermer v. Bergen Co. Special Services School District*, 1978 *S.L.D.* 628 and *Shelko v. Mercer Co. Special Services District*, 97 *N.J.* 414 (1984). *Stuermer* and *Shelko* dealt with situations where the respective boards of education decided to terminate their programs for deaf students and handicapped students respectively, with the programs being taken over in their entirety by the Bergen County Special Services School District and Mercer County Special Services School District. However, the situation in New Hanover was distinguishable. The agreement between the New Hanover Board and the Burlington County ESU only dealt with supplying CST evaluations to the New Hanover school district on a case-by-case basis whereas in *Stuermer* and *Shelko* the educational programs under dispute were taken over in their entirety by the county special services school district. The statute applied in *Stuermer* and *Shelko* because the boards of education that operated the educational programs in those matters ceased to operate or have any continuing responsibility for, or governance over, those particular programs. In this case, however, the New Hanover Board of Education retained its legal responsibility to provide CST services; no takeover or assumption of operation of a school or educational program took place. The Commissioner dismissed Ms. Miller's claim that she had bumping rights to a position in the ESU.

The State Board affirmed, 2001 *S.L.D.* (November 7). The State Board initially concluded that the proper respondent was not the ESU, but the Burlington County Special Services School District. The ESU was simply a subgroup of the Burlington County Special Services School District and lacked the authority to enter into the agreements involved in the case. Under the circumstances presented in the case, the Burlington County Special Services School District had no obligation under *N.J.S.A.* 18A:6-31.3 or *N.J.S.A.* 18A:28-16 to recognize the tenure rights acquired by Ms. Miller by virtue of her service in the New Hanover School District. When the Special Services School District undertook to provide the special education services previously provided by the New Hanover School District, a "new school district" was not created. The employment rights set forth in *N.J.S.A.* 18A:6-31.3 through 31.6 were not triggered. Because the special education services previously provided by the New Hanover School District were not "a school," *N.J.S.A.* 18A:28-16 did not apply.

Guidance Services for Non-Disabled Students: On the same day that it decided *Guttenberg*, the State Board also issued a decision in *Colantoni v. Bd. of Ed. of the Twp. of Long Hill*, 1999 *S.L.D.* (March 3). Reversing an earlier Commissioner's decision, 1999 *S.L.D.* (January 6), the State Board held that the Long Hill Twp. Board could not contract with a jointure commission for the provision of guidance services to non-disabled students. The matter was initiated when Ms. Colantoni filed a petition alleging that the board had violated her tenure and seniority rights when, after eliminating her position as a guidance counselor, it subcontracted with the Morris-Union Jointure Commission to provide guidance services to its students, including non-disabled students.

Although the ALJ concluded that the board could not properly subcontract with the jointure commission to provide guidance services to non-handicapped students, the Commissioner disagreed. He concluded:

> While the primary purposes of a jointure commission is to assist boards of education in carrying out their common duties with respect to the education and training of handicapped pupils, nothing in this statute would act to preclude such commission from expanding the scope of its services to include non-handicapped pupils where the contracting districts find such expansion to be in the best interest of efficient delivery of services.

The State Board reversed the Commissioner after it reviewed the statutory authority by which jointure commissions are created and granted their powers, *N.J.S.A.* 18A:46-24 *et seq.* The State Board determined that jointure commissions were created only for the purpose of educating and training handicapped students. Finding that the statutory language provided no authority for the provision of services by a jointure commission to non-handicapped students, the State Board held that the board was precluded from providing guidance services to its non-handicapped students by contracting with the Morris-Union Jointure Commission for those services.

The Appellate Division affirmed, agreeing with the State Board that *N.J.S.A.* 18A:46-25 and 26 did not authorize jointure commissions to contract with participating boards of education for guidance services to non-handicapped students. The Court noted that the Legislature has created other avenues for boards of education to provide pooled services, facilities and programs that do not distinguish between handicapped and non-handicapped students. One such avenue is through a county educational services commission. *N.J.S.A.* 18A:46-14. These commissions are empowered to provide a broad range of administrative and educational services, including guidance services, to handicapped and non-handicapped students. 329 *N.J. Super.* 345 (App. Div. 2000)

In response to *Colantoni*, the Legislature enacted and the Governor signed *P.L.* 2001 c.150. Approved July 13, 2001, Chapter 150 amended *N.J.S.A.* 18A:46-25 and authorized jointure commissions to provide services to non-disabled students in certain circumstances. Specifically, counseling services provided by a jointure commission to a non-disabled pupil are limited to preventive counseling services.

Nursing services: A review of the law of subcontracting of nursing services by boards of education must begin with the case of *Old Bridge Twp. Ed. Association v. Bd. of Ed. of the Twp. of Old Bridge*, 1997 *S.L.D.* (November 26),

aff'd St. Bd. 1998 *S.L.D.* (April 1).

In *Old Bridge*, the board of education created the position of "registered nurse." That position required a nursing license but no educational certification. The Commissioner found that the *Old Bridge* Board's creation of this job description was within the scope of its authority and was accomplished for reasons of economy and efficiency. County superintendent approval for the position was unnecessary and the position did not impermissibly require the holder to perform duties reserved to the school nurse.

Duties expressly reserved to school nurses, recognized as "school nursing services" pursuant to *N.J.S.A.* 18A:40-3.1 were set forth on pages 13-14 of the Commissioner's decision. These services can only be performed by certificated school nurses and each board of education must employ a sufficient number of such nurses to ensure adequate provision. However, where education law is silent on the provision of specific nursing services and support functions related to them, and such services do not otherwise require educational certification, there is nothing to prevent a board of education from determining, for reasons of economy or efficiency, that these nursing services will be provided by other health professionals. These health professionals must hold the requisite license from, and be supervised in accordance with requirements of, the State Board of Nursing, pursuant to *N.J.S.A.* 45:11-23 *et seq.*, and need not be additionally certified by the State Board of Examiners. *Communication Workers of America, Local 1033 v. New Jersey Dept. of Ed., Marie H. Katzenback School for the Deaf*, 91 *N.J.A.R.* 2d (EDU) 326.

The Commissioner further commented that while a registered nurse may be assigned to a particular school, work alone for most of the time, report to school administrators rather than the school nurse, have contact with pupils, parents and other medical professionals, and fulfill many of the functions performed by school nurses in the buildings to which they are assigned, these facts do not by themselves create a violation of education law. Rather, this demonstrates that school nurses can and do perform a variety of services in their positions that do not necessarily require educational certification or direct reporting to a senior medical professional. On the other hand, a board is not permitted to have its non-certificated nurses independently perform functions reserved for the school nurse and then simply have the school nurse review and approve the results. The role of the non-certificated nurse in such functions must clearly be limited to the provision of assistance.

The State Board affirmed, stressing that the duties that may be performed only by a staff member possessing certification as a school nurse may not be delegated to an individual who does not possess such certification.

Dover Ed. Association v. Bd. of Ed. of the Town of Dover, and Northwest Covenant Medical Center/Dover General Hospital, 1997 *S.L.D.* (December 13), became the first case to address subcontracting for nursing services in the public school setting. The central issue in Dover was whether a school board could subcontract for non-certificated nursing services with a private agency, the Northwest Covenant Medical Center. The Commissioner held that while it was clear that school nurses must be employees of the district, nothing in the controlling statute, *N.J.S.A.* 18A:40-1, would act to preclude a board from contracting for the services of non-certificated nurses performing duties consistent with the dictates of *Old Bridge*.

Citing *Impey*, V*icenzino*, *Colantoni*, and *Edison Twp.*, the Commissioner stated that generally, boards of education may subcontract positions and services which would otherwise be assumed or performed by board employees. Such cases are based on the recognition that the decision to contract for services is generally a matter of managerial prerogative and is only limited where such action conflicts with specific rights established under school law. Because subcontracting for nursing services other than school nursing services, as set forth in *Old Bridge*, does not violate the applicable statutes and regulations, the Dover Board acted within the scope of its authority. The contract between the board and the Northwest Covenant Medical Center whereby the Center would provide the services of two full-time registered nurses was upheld.

The Commissioner's reliance on *Edison Township* was particularly appropriate as it involved the subcontracting of non-certificated services designed to supplement, but not supplant, the duties of certified professionals. The registered nurses contracted for in *Dover* were not unlike the crisis intervention therapists contracted for in *Edison*.

The State Board dismissed the matter as moot, 2000 *S.L.D.* (July 5). It agreed with the Dover Board that the contracts for registered nurses expired on July 1, 1999 and the board had not entered into any additional contracts for such services. Further, the Dover Board pointed out that newly adopted *N.J.S.A.* 18A:40-3.3 precluded it from placing any uncertified nurse in a school building without the immediate physical supervision of a certified school nurse.

Montclair Ed. Association and the Montclair Bd. of Ed., 1999 *S.L.D.* (September 30), was the next case in the line of school nurse subcontracting cases. The Montclair board, for reasons of economy, abolished two certified school nurse positions and entered into a contract with the Department of Health of the Township of Montclair to provide registered nurses at five of its schools. The teachers' union and nurses whose positions were eliminated challenged this action. Citing *Old Bridge* and *Dover* as authority, the Commissioner reiterated that each school district must employ at least one school nurse who must be appropriately certified by the State Board of Examiners to perform duties expressly reserved to school nurses and must employ a sufficient number of school nurses to ensure the adequate provision of duties specifically reserved for certified school nurses. While services expressly reserved to certified school nurses must be provided by certified school nurses, other nursing services in the school setting may be provided by any qualified person, licensed and supervised, where the duties so require, in accordance with nursing law. While school nurses must be employees of the district, there is nothing that would preclude a board from contracting for the services of non-certificated nurses to perform other health-related services consistent with the dictates of *Old Bridge*.

The Montclair Board of Education's contract with the Department of Health was one such contract. All of

the contracted nurses could perform services other than school nursing services and, as long as they were duly licensed professionals who were supervised in accordance with any conditions specified by the terms of that license, these contracted nurses could assist certificated school nurses in the performance of the duties reserved to them by law. As per *Old Bridge* and *Dover*, the Montclair Board could not have contracted nurses independently performing functions reserved for the school nurse and then simply have the school nurse review and approve the results. The role of non-certificated and contract nurses in such functions must be clearly limited to the provision of assistance.

This was particularly pertinent in *Montclair* as two of the nurses employed by the Department of Health held a standard educational services certificate with a school nurse endorsement. The Commissioner held that while those contracted nurses held educational services certificates with endorsements as school nurses, they could not perform the specifically enumerated school nurse services, as the contracted nurses were not employed by the board of education. Similarly, contract nurses holding county substitute certificates could not substitute for certified school nurses. Any such substitutes must also be employed by the school district.

Boards of education that are considering subcontracting for nursing services should review *P.L.* 1999 c.153, a July 1999 enactment adopted in response to *Old Bridge* and *Dover* and codified at *N.J.S.A.* 18A:40-3.3. This statute requires that certain school nursing services be provided only by a certified school nurse. It permits a school district to supplement the services of a certified school nurse with non-certified nurses provided that the non-certified nurse is assigned to the same school building or school complex as the certified school nurse. While c. 153 was expressly alluded to in *Montclair*, it had no effect on the outcome in that case because its applicability is limited to persons who were initially employed to provide nursing services after its effective date of July 13, 1999. For a comprehensive review and analysis of school nursing services under chapter 153, see the Winter 2001 edition of School Law Reporter, located on the NJSBA Web Site, *www.njsba.org* in the *Legal* section, *Publications* subsection.

In *Ramsey Teachers Association v. Bd. of Ed. of the Borough of Ramsey*, 2001 *S.L.D.* (June 7), the Commissioner had his first opportunity to interpret *N.J.S.A.* 18A:40-3.3. In *Ramsey*, the local education association challenged the board's use of uncertified school nurses serving as school health aides when certified school nurses were not present in the school building. The certified school nurse was present in the building in question between 8:45 a.m. and 12:15 p.m. The school health aide, who was also a licensed registered nurse, staffed the nurse's office from 12:00 noon until 3:00 p.m. As such, the school health aide was the only person physically staffing the nurse's office in the afternoon, Monday through Friday.

The Commissioner agreed with the ALJ that *N.J.S.A.* 18A:40-3.3 does not expressly require that a certified school nurse be physically present whenever a non-certified registered nurse performs duties supplementing the services provided by the certified school nurse. The certified school nurse is permitted to circulate among school buildings, working part-time in each one. There was no evidence that the registered school nurse serving as a school health aide was not functioning in a manner compliant with the applicable regulations, *N.J.A.C.* 6A:16-2.1 (e) and (f). The *Ramsey* Board's division of duties between the certified school nurse and the school health aide did not violate the statute or code.

The Commissioner specifically found unpersuasive the association's argument that such a holding simply maintained the *status quo* prior to the enactment of *P.L.* 1999 c.153. To the contrary, the Commissioner opined, prior to chapter 153 there was no requirement that non-certificated nurses be assigned to a school building or school complex where a certified school nurse was also assigned. The petition was dismissed. The matter is currently awaiting a decision on appeal by the State Board.

The following summarizes the state of case law for subcontracting non-CST educational services:

- Boards may properly subcontract with private providers such as hospitals, for non-certificated services such as crisis intervention therapists, so long as their functions are not of a character requiring educational certification.
- RIF'd teaching staff members have no entitlement to employment with a subcontractor such as a Special Services School District or Educational Services Commission unless the subcontractor has completely taken over the educational program in question.
- The Commissioner may not grant equivalencies or waivers of the certification requirement for employees of the subcontractor. Whether a board may subcontract with a private provider for certificated services remains an open question (except in certain limited circumstances explicitly set forth in statute or code). Recent decisions provide guidance in this area but the question has not been answered definitively.
- Under current statute, a jointure commission may provide services to non-disabled students under certain circumstances. Counseling services provided by a jointure commission to non-disabled pupils are limited to preventive counseling services.
- Boards may subcontract with private providers such as hospitals, and with public providers such as local departments of health, for the provision of non-certificated nursing services for their students.
- A contracted nurse who possesses school nurse certification may not perform school nursing services expressly reserved to certified school nurses, because a contracted nurse is not "employed" by the school board.
- A contracted nurse may provide nursing services not expressly reserved to certified school nurses so long as the contracted nurse is a duly licensed professional supervised in accordance with his/her license. A contracted nurse may assist school nurses in the performance of school nursing services.
- A contracted nurse who possesses a county substitute certificate may not substitute for a certified school nurse. A substitute for a certificated school nurse must also be "employed" by the district.
- A certified school nurse need not be present in the building when a contracted nurse or a licensed nurse

serving as a school health aide is providing services in the building.

Notwithstanding the subcontracting case law evolution, there are no certain answers to many questions arising in the area of contracting for educational services. Presumably, some of the following questions will be resolved through future litigation:

- ***Can any school district contract with a private company such as Sylvan Learning Center for basic skills or other instructional services?*** Since 1997 the State-Operated School District of Newark has been party to a contract with Sylvan Learning Centers to provide basic skills instruction. Sylvan requires its Newark teachers to have New Jersey certification, classroom experience and a belief in the philosophy that all children can learn. Published reports set the cost of the contract at $2 million with a performance guarantee of increased test scores. If a state-operated district can enter into such a contract with a private educational provider of services, can any district? Is the key, as Judge Campbell suggested in *Neptune*, not the nature of the provider but whether the persons providing services have the appropriate certification?
- ***Can a public school district contract with a private company such as Berlitz for world language instruction?*** The Guttenberg Board of Education proposed to have Berlitz International, Inc. provide world language instruction for its students. The State Board invalidated the Commissioner's waiver of certification requirements. If the Berlitz employees possessed proper certification, would the contract have been valid? The matter was before the Office of Administrative law but was withdrawn. Once again, Judge Campbell's comments are applicable.
- ***Can a public school district contract with a private corporation for interim teaching staff member services?*** Districts throughout the state have entered into employment agreements with private corporations that provide interim superintendent, business administrator, principal and other supervisory services. The contract relationship is typically between the board and the company, with the interim worker receiving a salary from the company, not the board. If these relationships are valid exercises of the board's authority, could other similar relationships be developed for other teaching staff positions akin to CST subcontracting?
- ***Can a public school district subcontract with an entity like Kaplan Test Centers or Princeton Review to provide an SAT Review course for its high school students, provided that the instructors possess proper New Jersey certification?***
- ***Can a public school district privatize its entire operation, including certificated staff?*** Eight of the 59 approved charter schools in New Jersey currently have ties to private school management companies. These private companies, Edison Project, Mosaica/Advantage, Kids One, KIPP and The Learning Project, essentially operate the school for the charter board of trustees. If charter schools are public schools and the privatization of charter schools has been given state approval, can a public school similarly privatize its operation including certificated staff? Does the fact that an existing public school can become a charter school make a difference?
- ***Can a public school district subcontract with a private company for substitute teachers?*** A fairly recent phenomenon has been the emergence of private substitute teaching services firms, i.e., firms that hire and assign substitute teachers for the board of education pursuant to a contract with the board. Assuming that all assigned substitute teachers possess proper certification and pass criminal background checks, is the subcontracting of these services a valid exercise of the board's authority?
- ***Must a public school district engage in bidding in order to procure a contract to subcontract employee services?*** Anecdotal reports indicate that most subcontracting contracts are not bid. The underlying legal basis for that action is not entirely clear. Do these services fall under the "library and educational goods and services" exception to the Public Schools Contracts law? Are they, as Judge Campbell suggested in *Neptune*, "professional services," falling under that exception, complete with its additional procedural requirements?

These and other subcontracting questions can be synthesized into one simple question for which there is no definitive answer—how far can you go?

Part of the answer may rest in two bills pending in the Legislature that would effectively preclude subcontracting, blocking a school district's use of what is often a viable cost-savings option. S-591 (Ciesla, Cafiero) and A-877 (Asselta, Weinberg, Geist, Barnes, Gusciora and Greenstein) were pre-filed for introduction in the 2002 legislative session. These identical bills provide that during the term of an existing collective bargaining agreement covering its employees, an employer is prohibited from entering into a subcontracting agreement that affects the employment of those employees. "Employer" is defined as any local or regional school district, educational services commission, jointure commission, county special services school district, or board or commission under the authority of the Commissioner of Education or the State Board of Education. The bills would also require a school board to give 90 days' notice to the union and PERC before it could seek bids from subcontractors and would allow the majority representative to meet and discuss the decision to subcontract and negotiate over its impact. With certain exceptions, all actions of an employer concerning subcontracting would be mandatory subjects of negotiations. Will it become law? Another open question. Stay tuned.

EMPLOYEE COMPENSATION DURING MILITARY LEAVES OF ABSENCE School attorneys are receiving many inquiries from school boards about the boards' obligations to employees who have recently been called to military service. This article contains a brief discussion of the relevant laws regarding payment of school employees on military leave of absence. A more detailed memorandum can be found

on NJSBA's website, *www.njsba.org,* under "Action Alert." That document addresses the compensation of employees on military leave, as well as a number of additional areas, including prohibited discrimination, use of paid leave, health benefits, pension benefits, accrual of benefits during leave including seniority, salary increments and tenure, reemployment rights and obligations, enforcement and liability.

The Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 *U.S.C.* § 4301 *et seq.*, enacted in October 1994, prohibits discrimination or adverse action against an employee if a motivating factor is the employee's service in the uniformed services. It also provides employees in the uniformed services who are called to duty with rights of reinstatement and other protections. USERRA does not require that military leave be paid. There are also a number of provisions under State law which are more generous than the federal protections and therefore create additional rights in employees. The area of compensation is one example of more generous provisions.

Number of days of compensation: The entitlement is different depending on whether the employee is a member of the military forces of New Jersey, or is a member of the organized reserves of the United States. See, *P.L.* 2001 c. 351 (amending *N.J.S.A.* 38:23-1; *N.J.S.A.* 38A:1-1; *N.J.S.A.* 38A:4-4 and repealing *N.J.S.A.* 38:23-1.1 *et seq.*)

Military forces of New Jersey: N.J.S.A. 38A:4-4a. provides:

> A permanent or full-time temporary officer or employee of the State or of a board, commission, authority or other instrumentality of the State or of a county, school district or municipality who is a member of the organized militia shall be entitled, in addition to pay received, if any, as a member of the organized militia, to leave of absence from his or her respective duties without loss of pay or time on all days during which he or she shall be engaged in any period of State or Federal active duty; provided, however, that the leaves of absence for Federal active duty or active duty for training shall not exceed 90 work days in the aggregate in any calendar year. Any leave of absence for such duty in excess of 90 work days shall be without pay but without loss of time.

A "full-time temporary officer or employee who has served under such temporary appointment for less than one year" is not entitled to pay during leave. Although the statutory language is somewhat awkward as school employees are not commonly referred to as "temporary," presumably any employee who has worked in the district (in that job?) for less than one year has no entitlement to pay during his/her military leave.

United States Reserve: A 30-day, rather than a 90-day, obligation to pay applies to Reservists in other branches of the military, such as the United States Army, Navy, Marine, Air Force, or Coast Guard. Therefore, it is important to determine whether the employee is in the state militia, the federal Reserves, or the National Guard of another state.

N.J.S.A. 38:23-1a provides:

> A permanent or full-time temporary officer or employee of the State or of a board, commission, authority or other instrumentality of the State, or of a county, school district or municipality, who is a member of the organized reserve of the Army of the United States, United States Naval Reserve, United States Air Force Reserve or United States Marine Corps Reserve, or other organization affiliated therewith, including the National Guard of other states, shall be entitled, in addition to pay received, if any, as a member of a reserve component of the Armed Forces of the United States, to leave of absence from his or her respective duty without loss of pay or time on all work days on which he or she shall be engaged in any period of Federal active duty, provided, however, that such leaves of absence shall not exceed 30 work days in any calendar year. Such leave of absence shall be in addition to the regular vacation or other accrued leave allowed such officer or employee. Any leave of absence for such duty in excess of 30 work days shall be without pay but without loss of time.

Full/differential pay: As far as whether the employee is entitled to full pay or only differential pay during the paid leave, there is no statutory language that explicitly addresses the question. However, Attorney General Opinion #88-80115, in reliance on several judicial decisions including *Parks v. Union County Parks Commission, 7 N.J. Super.* 5 (App. Div. 1950), indicated that full pay is required under *N.J.S.A.* 38:23-1 and *N.J.S.A.* 38A:4-4, regardless of the military income the employee may also receive during that 90-day period. Note that while this AG opinion was based on those statutes prior to the 2001 amendments, there is nothing in the amended language that would indicate an intention to require only differential pay.

Discretionary pay: *N.J.S.A.* 38:23-3 authorizes a school board (as a subdivision of the State) in its discretion, to pay employees "the whole or a part" of their salaries during the time they are engaged in a branch of the military or naval service of the national government or of this state. This would appear to give the authority and discretion to boards of education to pay employees any part of their salary for a period beyond the board's statutory obligation. It would thus appear that school districts could extend similar benefits to those mandated for State employees pursuant to Executive Order 133 (September 26, 2001, Acting Governor DiFrancesco) (differential pay for the duration of activation beyond statutory entitlement for full pay, as well as health benefits, life insurance and pension coverage during active duty service). http://www.state.nj.us/infobank/circular/eoindex.htm

On the other hand, it could be argued that the more recently adopted language "(a)ny leave of absence for such duty in excess of 90 work days shall be without pay but without loss of time" contained in *N.J.S.A.* 38A:4-4a., and the similar language in *N.J.S.A.* 38:23-1a, restrict a board's discretionary authority to pay any part of the salary of an employee on military leave, beyond the statutorily

required 90 or 30 days. The definition of "shall" now contained in *N.J.S.A.* 38A:1-1(p) bolsters that approach: "'Shall' is used in an imperative sense." Nonetheless, the interpretation of these statutes remains an open question as there may be strong public policy reasons against precluding an employer from offering discretionary pay to recognize the sacrifices of employees who risk their lives to serve our country.

Conclusion: In assessing the obligations of school districts to employees called to duty, school attorneys must review a patchwork of statutes, against the backdrop of USERRA. The enactment of *P.L.* 2001 c. 351 on January 6, 2002, greatly clarified the obligation of public employers to their employees on military leave of absence. In so doing, c. 351 repealed *N.J.S.* 38:23-1 *et seq.*, and eliminated archaic references from *N.J.S.* 38:23-1, *N.J.S.* 38A:1-1 and *N.J.S.* 38A:4-4. Nonetheless, a number of older state statutes relating to employees on military leave still remain "on the books." Reconciling these statutes with one another presents a challenge, as does determining which of these provisions apply to Operations Noble Eagle and Enduring Freedom. Beyond federal and state law, counsel may wish to check collective bargaining agreements, individual staff contracts, and district policy to determine whether additional protections may have been promised.

TO GIVE, OR NOT TO GIVE? THAT IS THE QUESTION: *Assessing a School Board's Obligations under the 2002 Right to Know Law*

Announcing the long awaited, much debated, often touted but will it be lauded? Five times amended but can it be defended? The new and improved *Right To Know Law*!!

Acting Governor Donald DiFrancesco signed *P.L.* 2001, c.404 on January 8, 2002, as one of his last official actions before leaving office. The law becomes effective on July 8, 2002—six months from its enactment, so boards of education have some time to get a handle on what the new law means and to do some of the procedural legwork it requires.

What is most significant about the law is that it amends existing law to express a clear legislative public policy that presumes the public's right to access governmental records. *N.J.S.A.*47:1A-1. So, wherever the law does not provide a specific exemption and there is a question as to accessibility, both at the local level and before the courts if a records request is challenged, that question is to be resolved in favor of access.

From a board of education perspective, this is quite a change because boards have typically taken the opposite approach and erred on the side of caution. After all, once a document is disclosed, it can't be taken back—the horse is already out of the paddock, so to speak. The new law is going to ask boards of education, and their legal advisors, to change that way of thinking and change is often difficult.

The next significant piece of the law is that it gives a detailed definition of what a "government record" is and some pretty clear statements on what is exempt. A "government record" includes anything that has been made, maintained or kept on file in the course of an agency's official business (*N.J.S.A.* 47:1A-1.1) in place of the old language that "all records which are required by law to be made, maintained or kept on file by any public agency," (*N.J.S.A.* 47:1A-2, repealed) including boards of education. And when the law says anything, it means anything because the law reads that "any paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording" that is made in the course of one's official duties is a government record. *N.J.S.A.* 47:1A-1.1.

A government record is not, however, inter- and intra-agency material that is "advisory, consultative or deliberative" in nature. Are interoffice memoranda covered by this intra-agency consultative material exception? What about budget workbooks, exempt for the current budget year under the existing Right to Know Law? Will they remain exempt next year as "advisory, consultative or deliberative material?"

Based on these rather broad definitions, one is left to ponder whether board member doodles or notes passed to a fellow board member during a board meeting are "government records." What about e-mails between board members or between the administration and the board? What about tape recordings of closed session meetings that are exempt under current law if used solely as aids in developing minutes?[1] They are sound recordings and, therefore, specifically included as government records. Must they be disclosed to the public effective July 8, 2002? For those districts that have voice-mail telephone systems at their schools, are voice-mail messages left on those systems, as sound recordings, accessible government records going forward? It appears that they could be considered government records and, perhaps boards now need to be advised that they have to develop a system of archiving their voice-mail messages in case a request is made for them.

The law casts a wide net in favor of something being an accessible government record but certain things are exempt. Here is a sample of some other records expressly deemed confidential pursuant to *N.J.S.A.*47:1A-1.1.

While an opinion letter to your board/client could be considered "advisory" and, therefore, not a government record in the first instance, even if found to be such a record it would be protected from disclosure by the attorney-client privilege exemption. *N.J.S.A.*47:1A-1.1. This exemption specifically does not include attorneys' invoices or bills, however. There has been some litigation over this issue, even very recently, where boards have refused the press' requests for copies of their attorneys' invoices and bills.[2] Now we know that the Legislature considers these to be statutory public records and requires that they be disclosed, although any information contained in the invoice or bill that is protected by attorney-client privilege can be redacted. *Id.*

Security or surveillance measures are also deemed confidential, especially if their disclosure would jeopardize the safety of staff or students. *Id.* After all, disclosing this information could be tantamount to giving a recipe to a gun or bomb-toting student on how to defeat the district's security measures. In addition, any communications

between the board and its insurance carrier are exempt as is information uncovered in connection with a sexual harassment complaint or a grievance filed pursuant to the collective bargaining agreement. *Id.*

Interestingly, the law specifically preserves the personnel records language from Executive Orders 9 and 11; namely that personnel and pension records are NOT considered governments records, except to the extent that the name, title, position, salary, payroll record, length of service, date of and reason for separation and amount and type of any pension received is a government record and must be disclosed upon request. *N.J.S.A.* 47:1A-10. The Right to Know Law remains unchanged in this particular regard.

Finally, the public does not have a statutory right to know a person's social security, drivers license, credit card or unlisted telephone numbers. *Id.*

Ultimately, it is the duty of the "custodian of government records," who your board must appoint by official action (*N.J.S.A.* 47:1A-1.1), to field records requests and to decide whether to allow a record to be inspected, examined and copied during the board's regular business hours. *N.J.S.A.* 47:1A-5a. and i. In the case of small districts, those with 500 or fewer students, access need only be permitted for a minimum of six regular business hours over a minimum of three business days per week. *N.J.S.A.* 47:1A-5a.

Boards of education have had valid concerns about the cost and administrative difficulty in responding to records requests over the years. The law appears to offer an accommodation between the public's access rights and these cost and administrative concerns wherein the law allows boards to charge the public more than the statutory fee to have certain records reproduced. *N.J.S.A.* 47:1A-5b. and c.

In order to avail itself of the provision, the board must show that its actual costs of reproducing the requested documents will cost more than that allowed by law or that an extraordinary amount of time and effort is involved in processing the request. *Id.* Perhaps the records are part of a large, spiral-bound document and it will take a lot of effort to get at the part requested. Or, maybe the records are stored somewhere off-site and considerable effort will be involved in just getting them physically into the custodian's possession. Perhaps under these conditions, the board can charge more than the current going rate.

Another interesting piece of the legislation provides that "the custodian shall permit access to a government record and provide a copy thereof in the medium requested if the public agency maintains the record in that medium." *N.J.S.A.* 47:1A-5d. Does this mean that the public can ask that electronically available documents be downloaded to a disk or e-mailed? If so, do the same reproduction rates apply given that the rates are based on a per-page calculation and that less effort is involved in downloading or e-mailing a document? What if the district is concerned that someone might provide a disk that contains a virus that could infect the district's whole computer network and, in order to avoid that potential problem, the district would rather give a hard copy of the record instead of an electronic version? Would the district be violating the Act? Does the district have to provide its own disks and, if so, is the cost of the disks covered by the statutory reproduction fee schedule? These are perplexing questions posed by the electronic age.

The law requires districts to develop a form for the public to use to request a specific document and that the custodian can return to the requestor with his or her decision on whether the request is granted or denied and, if denied, indicating why. *N.J.S.A.* 47:1A-5f. Once the custodian receives a request, he or she has seven business days to respond, unless a shorter period is otherwise provided by law. *N.J.S.A.* 47:1A-5i. If the request is granted, the record is to be provided within those same seven business days unless it is archived or stored away some place and cannot be accessed within that time. *Id.* The requestor must be informed of this within those same seven business days. *Id.* A failure to respond within seven business days is deemed a denial of the request. *Id.*

However, "immediate" access is required to budgets, bills, vouchers, contracts, including collective bargaining agreements and individual employment contracts, and salary and overtime information on employees. *N.J.S.A.* 47:1A-5e. What does "immediate" mean? Does it mean as soon as the form is completed and reviewed by the custodian and a decision made? Or, is it more of an on the spot, that very minute—"STOP THE PRESSES" on everything else kind of "immediate?" Again, the statute is not clear. Come July, will it be enough for custodians of government records to accommodate requests to the best of their ability?

If a request is denied or a timely response not provided, the requestor has the right to appeal the denial to either a Superior Court judge or to the Government Records Council. *N.J.S.A.* 47:1A-6. The Government Records Council is created by the Legislature in the Department of Community Affairs to do a number of things including serve as a clearinghouse of information, issue advisory opinions on whether something is a government record or not, offer to mediate disputes over records requests as well as adjudicate complaints as an alternative to Superior Court. *N.J.S.A.* 47:1A-7a, b and e. Only the requestor can initiate a proceeding and only the requestor is entitled to recover reasonable attorneys fees if he or she prevails. *N.J.S.A.* 47:1A-6. This is a departure from other types of law that allow the "prevailing party" to recover attorneys fees. So, even if the board wins and does not have to provide the requested document, it is not entitled to recover any of the costs incurred in vindicating itself. This is very "requestor friendly" legislation.

Further proof of this is the rather stiff civil penalty structure. Any public officer, employee or custodian who knowingly and willfully violates the law and who unreasonably denies access to a government record can be fined $1,000 for the first offense, $2,500 for a second offense committed within 10 years of the first and $5,000 for a third offense committed within 10 years of the first offense. *N.J.S.A.* 47:1A-11.

These fines would not appear to apply to a situation where someone reasonably believed that a record was exempt from disclosure. Rather, they appear to be intended to punish intentional withholdings of government records.

But it is possible that the board *could* be obligated to indemnify its administration, employees, custodian or

fellow board members for even intentional denials. The indemnification statutes, *N.J.S.A.*18A:16-6, 18A:16-6.1 and 18A:12-20 as amended in July 2001, require boards to cover the costs incurred by officers, employees and board members in defending civil, administrative, criminal, quasi-criminal or "other" legal proceedings arising out of and in the course of their employment or service with the board. Only in criminal and quasi-criminal cases does the officer, employee or member have to receive a favorable ruling to be entitled to indemnification. Therefore, the board could arguably have to reimburse the legal fees, including any fine imposed, incurred by its government records custodian in a civil proceeding before a Superior Court judge or in an action before the Government Records Council (one of those "other legal proceedings" under the amended indemnification laws) even if the custodian were found to have a personal vendetta against a certain member of the community and to have deliberately refused to make requested records available

To summarize, the new law appears intended to give clearer direction as to what is and what is not an accessible government record. Whether it accomplishes that objective, only time will tell. The law also appears to lean in favor of disclosure if there is any doubt.

Finally, it is important to bear in mind that, just because something is not a statutory Right to Know record, the public may still have a right to access the record under the common law. The government records law specifically provides that "nothing contained [in the law as supplemented and amended] shall be construed as affecting in any way the common law right of access to any record, including but not limited to criminal investigatory records of a law enforcement agency." *N.J.S.A.* 47:1A-1. Therefore, access can still be gained to materials that are not statutory Right to Know documents if the requester can prove that his or her right to examine the record outweighs the confidentiality of the record.

The amended Right to Know Law raises many questions. This article is intended to highlight a few interesting and significant parts of the law and it in no way should serve as a substitute for your own thorough reading and critical analysis of the amended law. The full text of the law is available on the New Jersey Legislature web page at www.njleg.state.nj.us by accessing the pamphlet law version of Assembly Bill No. 1309 in the 2000-2001 legislative session.

ENDNOTES

1 *Convention Center v. South Jersey Pub.*, 135 *N.J.* 53 (1994)—Executive Session audiotapes are not Right to Know records as they are merely convenience aids for preparation of official minutes but are common law records subject to balancing test

2 *Courier-Post v. Lenape Regional High School District*, Docket No. Burl-L-2949-01(Law Div. October 25, 2001) Attorneys bills are statutory public records under *N.J.S.A.*47:1A-1 *et seq.* appeal pending before Appellate Division, Docket No. A-1721-01T2); See, also, *Keddie v. Rutgers State University*, 148 *N.J.* 36 (1997) rev'g and remanding 286 *N.J. Super.* 285 (App. Div. 1996) Billing documents for attorney fees and accounts payable regarding matters of labor/employment were not public records under Right to Know Law. Bills, billing documents and legal submissions to courts, agencies and arbitral forums were all "public records" at common law. Professor's interest in disclosure of legal submissions outweighed university's interest in refusing disclosure.

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SCHOOL LAW REPORTER
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School Law
REPORTER

• WINTER 2001 •

SCHOOL LAW UPDATE: Thirtieth Annual School Law Forum Workshop 2000—Due to time constraints at the School Law Forum held on October 26, 2000 in Atlantic City, the NJSBA Legal Department's School Law Update was omitted from the program. That presentation would have highlighted selected rulings affecting the public schools over the past year. The outline was provided as part of the materials and disseminated to attendees; it is also posted on the legal department's area of NJSBA's website at www.njsba.org. The following informal narrative is an approximation of the oral remarks that would have been made to accompany the outline, had time permitted. This narrative is most useful if read together with the outline; page references throughout correspond to the pages of the outline.

RELIGION

In June 2000, in Santa Fe v. Doe (p. 2 of outline), the Supreme Court ruled that a school district's policy of permitting student-led, student-initiated prayer at football games violated the Establishment Clause. This case is significant because the last big school prayer case, Lee v. Weisman (1992), which ruled out clergy-led prayer at graduation, did not address the question of student-initiated prayer at graduation, nor had it addressed the question of prayer at school-sponsored extracurricular activities. The high court applied the reasoning in Lee and found that as there was immense social pressure and desire to attend football games, the board's policy had the effect of coercing pupils to participate in an act of religious worship.

While the U.S. Supreme Court has never ruled on student-initiated prayer at graduation, New Jersey has had the benefit of the Third Circuit 1996 case involving the Black Horse Pike Regional school district, wherein a policy permitting seniors to decide whether and what prayer would be included at graduation was found to be unconstitutional. And just a few weeks ago in Adler v. Duval, (p.1) the U.S. Supreme Court set aside a policy from Florida that would permit a class member to give a prayer at graduation, and remanded for consideration in light of Santa Fe.

Another important religion case of the past year was Mitchell v. Helms (p.2) which concerned federal funding to private sectarian schools. The Supreme Court upheld the constitutionality of Chapter 2 of the Education Consolidation and Improvement Act of 1981, which provides federal aid to private and public schools to buy instructional and educational materials, and computer software and hardware for instructional use. The fact that the materials could be diverted to religious use did not concern the Court. It rejected the "no divertibility" rule and instead stated that the aid was okay so long as the aid itself did not have an impermissible religious content. Just as a government interpreter is not inherently religious, even when she is conveying a religious message—it's the same with a government computer or overhead projector.

The last religion case (p.3) is C.H. v. Oliva, from the Medford school district. This case concerned a first grader, Zachary H., who, given the opportunity to read the story of his choice to his class, chose to read a bible story. His teacher was concerned that there could be an Establishment Clause problem so she had him read the story privately to her rather than to the class. His mother sued on First Amendment grounds. The Third Circuit affirmed the District Court's ruling that there was no violation. Taking great pains to emphasize that students can express their religious views in assignments, the Court nonetheless found that this was different and raised concerns of excessive entanglement. It viewed the reading activity as

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actually part of the curriculum, and found that there was a danger that Zachary's classmates might believe that the school endorsed Zachary's religious views.[1]

FREE SPEECH

As far as constitutional questions, besides religion, I've noted a few important cases involving free speech or free association issues.

There's the button case from the Appellate Division. In Green Twp. v. Rowe, (p.8.), the Board adopted a conflict of interest policy that prohibited all employees from campaigning on school property, and barred the teachers from promoting a position on a voting or collective bargaining issue in front of students. When the negotiated agreement between the teachers and the district expired, school employees began wearing "NJEA Settle Now" buttons. The Board attempted to enforce its policy. The Association sought an injunction.

The portion of the policy barring the teachers from promoting a position on collective bargaining in front of students was found to pass muster under the Constitution. The Board was found to be within its rights to prohibit teachers from wearing the buttons. The Court emphasized, "a classroom is not a place for proselytizing students to advance a teacher's financial interests. Nor should a classroom be transmogrified into a teacher's soapbox."

With respect to other provisions of the Board's policy, the appellate panel found that if read in a hypertechnical way, the provisions could be construed as barring employees from campaigning outside of the presence of the students. In other words, the policy could be read to prohibit teachers from using their lunch breaks or free periods to express their opinions to other willing adults, even where no students were present, or even from speaking at board of education meetings at the school. This was an overly broad prohibition that violated the First Amendment.

Another case involving teachers and free speech is the cell phone case from North Bergen, (p. 18). This is a Commissioner decision involving the novel question of whether there is a constitutional right to cellular phones and pagers. The teachers objected to the Board's policy which, among other limitations, precluded them from possessing cell phones and pagers during prep class, and required that they deposit these in a mutually agreed upon location like the office, to use during lunch. Finding that there is no constitutional right, the ALJ and Commissioner determined that the Board could prohibit the use of the pagers or cell phones during prep periods as a reasonable exercise of the need to control the schools.

Another case raising constitutional issues (not on your outlines) is Gruenke v. Seip. (225 F. 3d 290 (C.A. 3, 2000)). This was a Section 1983 action by a pupil against her swim coach for forcing her to take a pregnancy test. The District Court for the Eastern District of Pennsylvania granted summary judgment in favor of the coach on the grounds of his qualified immunity for all of the alleged violations— free speech, privacy, familial privacy, right to be free from unreasonable searches.

The Third Circuit reversed the District Court's grant of summary judgment on the 4th amendment claims, stating it had misapplied the framework for analyzing qualified immunity. Under the standard, there is no qualified immunity for violating a clearly established right about which a reasonable person would know. The Third Circuit found that, just because the question of whether a student could be forced to take a pregnancy test was one of first impression, didn't necessarily mean that her right to be free of it was not clearly established, especially where the coach's conduct was objectively unreasonable. "Although student athletes have a very limited expectation of privacy, a school cannot compel a student to take a pregnancy test absent a legitimate health concern about a possible pregnancy and the exercise of some discretion." There's a lot of very interesting discussion in this case about pupil rights in the area of search and seizure, disclosure of health records, family privacy and intrusions by school officials.

Another case that raises a free speech issue (p. 16) is J.F. v. Pemberton. Today's chutzpah award goes to the pro se parents in this case who challenged their daughter's one-day suspension. They claimed, among other things, that their daughter's note to her math teacher on the last day was protected speech: "Have a nice summer. I hope you die(,)" and then the poem, "Roses are red, violets are black, why is your chest as flat as your back?" Predictably, and of course correctly, the Commissioner ruled that this was not protected speech.

In Boy Scouts v. Dale (p.1), the Supreme Court found that N.J.'s Law Against Discrimination intruded on the Boy Scouts' right to freedom of association, and therefore could not be applied to require the Scouts to permit a gay scoutmaster to serve. Many school boards are concerned about the implications of the ruling for the continued practice of allowing the Scouts to meet in school buildings. I know the Division on Civil Rights was considering seeking an AG opinion.[2] Gay rights advocacy groups are lobbying school districts across the country to shift support from the Boy Scouts to other groups; districts are talking of adopting or enforcing policies that prohibit any group that discriminates from using district space.

DRUG AND ALCOHOL POLICIES

There were a few important cases involving drug and alcohol policies. We have one case where it was alleged that drug testing occurred when it shouldn't have, and another where it was alleged that testing didn't occur when it should have.

In Hedges v. Musco, (p.3) the Third Circuit ruled on a case from Northern Highlands Regional regarding reasonable suspicion for drug testing. It held that the math teacher's suspicion that a high school girl was "high" was reasonable even though tests results turned out to be negative. Although the student's speech was not slurred, and the nurse did not smell anything on her breath, those facts didn't undermine the reasonableness of the teacher's suspicion that the girl otherwise looked "high." She may not have possessed every characteristic that may be exhibited by a person who has consumed alcohol or other drugs, but the symptoms she did manifest created a reasonable suspicion that she had consumed some quantity of alcohol or other drugs. The fact that some students overheard the nurse discussing the results didn't undermine the reasonableness of the search. In addition, the Court found that the search was reasonable in scope and not excessively

intrusive. The ruling provides a good discussion of the intrusiveness of the urinalysis and blood tests.

The next case alleges that there should have been a drug test when there wasn't. (p. 13). This case clarifies a district's legal obligation once a staff member reports that, based on observation, he/she believes a pupil is under the influence. The matter arose in the context of a tenure proceeding, In the Matter of the Tenure Hearing of Graceffo. The vice principal was brought up on tenure charges after a pupil overdosed and died. This was one of several situations over the years where the vice principal had declined to have a pupil tested for drugs after a teacher had reported that the student appeared to be under the influence, and requested that the child be tested. The Commissioner found the vice principal guilty of unbecoming conduct, but didn't remove the vice principal, and ordered financial sanctions instead, citing the employee's long positive record in the district. The penalty was also mitigated by the fact that the district's policies did not clearly explain district personnel's responsibilities under the relevant statutes and code. The Commissioner emphasized several important principles and suggested that boards of education ensure that district personnel appreciate their responsibilities:

1. When a district employee reports to an administrator that he/she believes that a pupil is under the influence, and articulates the reasons for the belief, the administrator must immediately notify the parents and superintendent and must arrange for an immediate examination by a doctor or medical inspector. N.J.S.A. 18A:40A-12 does not authorize the administrator to second-guess or seek corroboration of an employee's observations, nor to judge whether the belief is reasonable.
2. While a nurse may also examine the student, it is a medical examination that is required.
3. A drug test does not equate to a medical examination.
4. The board is responsible to train all teaching staff members and other educational personnel so they are thoroughly familiar with the symptoms and indicators of substance abuse. Those are the folks in the position of observing pupils directly. Any staff member who refers a student in good faith, exercising ordinary care, is held harmless. N.J.S.A. 40A:13, 14.

As far as drug testing policies, I just want to mention ongoing litigation involving random drug testing from Hunterdon Central. The ACLU is challenging the Board's random drug testing policy, which permits the district to test pupils involved in extracurricular activities beyond the testing of athletes that was permitted in the Supreme Court's decision in Vernonia. Students in all extracurricular activities are tested, as are students who drive to school. I am told that the ACLU views this as a test case and will probably pursue it, and I understand that the Board's insurance carrier is covering the Board's costs, so we may eventually see this before the Supreme Court. Right now it's in Superior Court before Judge Guterl. I understand his opinion will be posted on the state judiciary's Web site.[3]

SENDING RECEIVING

A few cases are of special interest to counsel who represent districts in sending-receiving relationships.

For example, Branchburg v. Somerville (p. 3) is a matter on cross-motions for summary judgment before the U.S. District Court of N.J. challenging N.J.S.A. 18A:38-8.2, the statute that determines the sending district's representation on the receiving district's board. The statute essentially allows no more than one representative from a sending district, regardless of how many of the district's students attend the schools. Branchburg, the sending district, claimed that because its pupils account for 55% of the pupils in the Somerville High School, and because it only has one representative on the 10-member Somerville Board, the statute is unconstitutional under the Equal Protection clauses of the State and Federal Constitutions. You may recall that there were similar constitutional challenges a few years ago involving Upper Freehold Regional, relating to voting representation on a regional school district's board of education. In that matter, the applicable statute was found to be unconstitutional as applied, and the parties entered into a consent agreement for weighted voting that was upheld by the court.

In Branchburg, the Court agreed with Branchburg that the statute is unconstitutional as applied as it denies Branchburg citizens the right to elect representatives to oversee the high school education of their children in contravention of the "one person, one vote" principle. As far as remedies, the Court recognized Somerville's concern that giving Branchburg a controlling majority on the Board would impact the franchise of Somerville's voters, noting, however, that this is an issue to be addressed by the Legislature and the Commissioner of Education. The Court asked the Commissioner to recommend a solution in 60 days (first week of November) until the Legislature acts, and asked the parties to draft a standstill agreement as to operations of the Somerville Board, that won't delay the ongoing education program.[4]

There are also a few cases concerning issues of severance of the sending/receiving relationship. In Winfield (p. 19), the Commissioner granted the petition for severance, finding that the 1.9% decrease in the proportion of white students did not have a significant impact on racial balance so as to prevent severance.

The courts handed down yet another ruling in the continuing litigation between Englewood and Englewood Cliffs. Englewood Cliffs' petition for severance had been denied because of its effect on racial balance in Englewood's high school. This latest ruling affirmed the State Board's denial of Englewood's request to compel regionalization to address the problem of racial imbalance. While "assuming, without deciding" that the State Board has the authority to mandate the establishment of a regional school district, the Appellate Division nonetheless found that the State Board's conclusion that mandatory regionalization should not be required was adequately supported by the record. It affirmed the State Board's determination that the two districts develop a voluntary plan for magnet and specialty schools, to encourage students from Englewood Cliffs to attend Englewood's High School.

PUPIL EXPULSION

There are a couple of cases on the issue of pupil expulsion, including the question of whether the State has a

constitutional obligation to provide a pupil with continuing education after his or her expulsion. It seems to me that there has never really been a thorough clarification of what expulsion means as far as a district's continuing obligation to a pupil, and when, if ever, a district can completely wipe its hands, so to speak, of a pupil who's been expelled. These cases address the issue in the context of a pupil who has also been adjudicated delinquent in the court system. It's to be seen whether they will be read more broadly to apply to all pupils who have been expelled, regardless of juvenile proceedings.

The first case is a Chancery Division case, State In re G.S. (p. 7). A student was found delinquent by the trial court for making a bomb threat in school. He was placed on probation, which included the requirement that he attend school regularly, maintain his attendance and passing grades and obtain a high school diploma. Meanwhile, the Lower Camden County Regional High School District Board expelled him pursuant to its zero tolerance policy, and terminated educational services. The student challenged the termination of services. He pointed to the court order requiring him to attend school and claimed that the New Jersey Constitution requires the State to provide him education in an alternative setting.

After resolving the jurisdictional issue and finding that the Chancery Division had subject matter jurisdiction, the court agreed with the pupil, relying on language in the Zero Tolerance for Guns Act and in the New Jersey Code of Juvenile Justice. The Court stressed the importance of continuing education in the rehabilitative process and noted,

> "…(T)he Legislature recognizes that expulsion of an adjudicated juvenile by his local school board does not sound the death knell for his constitutional right to receive alternative education in another setting, and further that the Family Part is empowered to order that such alternative education be provided for him."

Accordingly, the Court directed the State to provide an alternative school program for the pupil, to effectuate its constitutional obligation to furnish him a free public education until he attains his high school diploma or reaches his 19th birthday, whichever occurs first. (DYFS had placed G.S. in the Atlantic County Transitional School in Egg Harbor Township, with bus transportation.) As far as footing the bill, I understand the actual court order required DYFS to pay, but the Court also stated that: "Any dispute as to whether the tuition for that program should be funded by the State or by Lower Camden County Regional High School District Number One is for the Commissioner of Education to decide."

Another related case, a request for emergency relief before the Commissioner, is not included on your outlines. The case is P.H. v. Bergenfield BOE, 9/15/2000. This is a case that you may wish to monitor to see how broadly the Commissioner will construe the obligation to provide alternative education. While on school property, a 15-year old sophomore slashed another student with a boxcutter, causing a gash in his coat. It turns out he had 3 box cutters, a razor scraper and a Swiss army knife in his pocket. The police were called, he was charged with criminal offenses, and he ultimately pled guilty to 2 disorderly persons offenses and was placed on probation. The district expelled him, and took the position that it was no longer responsible for his education. The pupil sought emergency relief in the form of an order that the district provide him with alternative education.

On the issue of likelihood of success on the merits, the ALJ said that the logic of State in re G.S would apply with even greater force to students who have been expelled from their local school district without being adjudicated as delinquents. He found that the student was likely to prevail on the merits. The Commissioner did not totally agree. He noted that the question of the right to a free public education in an alternative setting after a student's lawful expulsion from the regular education program could not be considered a matter of settled law. He noted that N.J.S.A. 18A:37-2.2 directs a board to seek an alternative placement when a student has committed an assault with a weapon on school grounds, but pointed out that the statute goes on to clarify that this obligation in no way prohibits expulsion. Ultimately the Commissioner granted the pupil interim relief, but ordered home instruction rather than placement in an alternative school as requested, pending plenary proceedings on the merits of whether the pupil was entitled to alternative education.

If you are looking at this issue, I recommend that you also read a related case from the Somerset County Educational Services Commission, 9/7/99.

PUPIL RESIDENCY ISSUES AND TUITION ISSUES

In the area of pupil residency, there is an important case (p. 7) involving the determination of a district's obligation where the child was in a shared custody arrangement. The matter involves the Somerville and Manville Boards of Education.

This case carves out an exception to the long-accepted principle that a pupil may have more than one residence but only one domicile, as relates to a school district's obligation to pay for pupil's education. Here, the divorced parents of a special education child lived in different school districts. They had joint legal custody and joint physical custody. The child attended the Somerville schools until the child study team determined that the child required a special education placement in a private school. The two districts entered into an oral agreement that they would alternate years in which they would pay for the child's special education. After over a year of operating under the agreement, Manville (the mother's district) determined it would no longer contribute since it wasn't the district of residence.

Somerville brought this suit to have the child declared as having a dual domicile and to have the districts' oral agreement to share the payment of the child's tuition declared valid and enforceable. The trial court granted summary judgment to Manville, reasoning that a child can only have one domicile. Somerville appealed, and the Department of Education (DOE) joined in support of the "only one domicile" principle, claiming that this principle fostered educational continuity.

The Appellate Division reversed and remanded, stating that where the divorced parents share equal parenting time under a joint custody arrangement, "the traditional single-domicile rule requires reexamination." The Court also stated that the DOE ought to provide regulatory

guidance for the various custodial arrangements that exist for children of divorced or separated parents.[5]

Another interesting case is Forstrom v. Byrne (p. 9). This is an unpublished Law Division opinion rendered by Judge Stark, involving the Fair Lawn district. It addressed the novel issue of whether a home-schooled pupil with a disability, is eligible to equitably share in the IDEA funding that is allotted to non-public school students. The case involved a pre-school pupil with a speech and language disability, whose parents were home schooling him. They asked the local school district to allow their son to attend remediation classes in the public school. Consistent with information that it had received from the DOE Handbook, Home Schooling in New Jersey, the district maintained that homeschooling is not a "nonpublic school" for which special education pupils are entitled to an apportionment of IDEA funds. The Court found that the DOE's Handbook amounted to rulemaking without following appropriate procedures under the Administrative Procedures Act, and also found that the DOE's position to treat home-schooled pupils differently than private-school pupils in this respect was irrational and unreasonable. The Judge found a violation of IDEA and equal access to education under the N.J. Constitution, and ordered the district to use IDEA funds on the child for evaluation and remediation.

There's a State Board decision addressing a district's obligation to home-schooled pupils, which, like the other case, also refutes certain statements made in the DOE handbook on home schooling. That's Jacobs v. Northern Valley Regional (last case on p. 12). This one examines a district's obligation to provide a pupil with transportation to a vocational technical school. The student, who was home-schooled but attended the Bergen County Vocational Technical School in the afternoon, sought transportation costs. The school district argued that a public school had no obligation to provide services to a home-schooled pupil; the district also argued that the transportation statutes did not create such an obligation.

After reviewing all the related statutes that establish the framework under which transportation is provided, the State Board concluded that, although not explicit in statute, there was an obligation to provide the transportation. The State Board held that the obligation to pay tuition is set forth in the statute governing county vocational schools. The statute requires a district to send each student who resides in the district to the county vocational school in that county and to pay tuition. The statute doesn't limit the obligation to pupils who are enrolled in the public schools. The State Board emphasized that no publication by the DOE could alter the statutory requirement. It directed DOE to undertake a comprehensive review of the regulations providing for the distribution of State aid for transportation, to ensure that they are consistent with the options currently afforded by the State's educational delivery system, including home schooling combined with a shared-time vocational program.

There is also an instructive Commissioner decision regarding the procedures for enrolling or registering pupils. That's M.G.L. v. West Orange (top of p. 16). Counsel may want to review their districts' enrollment policies and procedures in light of this decision. The Commissioner found that the enrollment of pupils who had arrived from Haiti was improperly delayed by about a month where the Board had conditioned enrollment on the receipt of certain documents. It was illegal for the district to require a certificate of inhabitancy as a condition of enrollment; the landlord's letter of verification should have sufficed. The Commissioner reiterated the established principle that in determining a pupil's eligibility for enrollment, a school district cannot consider whether the pupil may be living in violation of local housing ordinances. Nor can the board delay enrollment on the basis of incomplete transcripts since transcripts go to placement, not eligibility for admission. The absence of immunization records may not interfere with enrollment, although it may delay actual admission to school.

The district was ordered to make its enrollment forms user-friendly and responsive to different types of living arrangements, and advised to let parents promptly know about the Board's decision and the appeals process.

VOCATIONAL TECHNICAL SCHOOLS

There's been significant litigation in recent years over a district's obligation to foot the cost of tuition and transportation for resident pupils who chose to attend county vocational schools under the relevant statutes. Some of the issues involved in the litigation address just what is considered a vocational program—and whether the district offers a comparable program that would eliminate its obligation to pay for the vocational program.

In K.B. v. Rancocas Valley (p. 12) the State Board determined that, contrary to the Commissioner's ruling, the inclusion of a vocational program in the DOE's Directory of Verified Occupational Educational Programs is not conclusive evidence that the program offered by the vocational school is a vocational program. There has to be some legal or factual basis presented.

And Ramapo-Indian Hills is another important Commissioner decision (p. 18). This case addressed a few different issues, including the Commissioner's finding that just because a magnet school offers college preparatory courses does not mean it cannot conform to the state and federal definitions of vocational education.

RESIDENCY/AFFIDAVIT PUPILS

There are a couple of cases concerning pupils who live with relatives in the district and on that basis claim entitlement to free education in the district as "affidavit pupils." The statute requires the district to provide a free education only if the pupil's parents show by affidavit that they are "not capable of supporting or providing care for the pupil due to a family or economic hardship" and where the resident shows by affidavit that the pupil is living in the resident's household for reasons other than to obtain education in the district. Despite the demanding standard established by statute, most of the cases decided under this provision have found that the pupil is entitled to be educated by the district. And it can be strongly argued that the family hardship and incapability standard is being eroded. Not only that, but district residents are able to obtain court orders for custody or guardianship based purely on the pupil's desire to attend the schools, which appears

to undermine the statute.

Let me bring your attention to two cases. P.B.K. v. Tenafly, (p. 12), is currently on appeal before the Appellate Division. It concerns a student who was being educated at an expensive private school in South Korea where he lived with his parents. The father became unemployed for a while, and rather than send him to public school in Korea, where he feared his American-born son would be subjected to harassment, sent him to live with his uncle to continue his education in the United States. The uncle later obtained letters of guardianship. The Appellate Division will grapple with whether the State Board correctly applied the hardship standard when it found the boy was entitled to be educated in the district. The other case relating to affidavit pupils is a Commissioner decision, D.W. (p. 10).

There are also a few cases regarding residence and tuition issues. In Somerville v. New Brunswick (top of p.10), the State Board ruled that a county jail is not a parent's "residence" for the purpose of determining whether the district where the jail is located must pick up the cost of a DYFS placement under the appropriate statute as the "present district of residence." The State Board resorted to statutory construction and reasoned that since "residence" means "domicile" and since "domicile" is defined as the true, fixed, permanent home where one expects to return, a county jail is not a parent's "domicile." A stay in a county jail is brief and statutorily less than for a year so it can't be an individual's domicile.

The Bradley Beach case (p.16) dealt with a DYFS placement in a residential State facility. The Commissioner addressed the burden of proof, noting that the burden is on the board of education, if it contests a district of residence determination made by Division of Finance based on information provided by the Department of Human Services.

West Windsor—Plainsboro v. Delran and Nutley (Sept. 5), is not on your outlines. That Commissioner decision dealt with the financial responsibility for pupil transportation in the context of classified pupils placed by the Division of Developmental Disabilities in a group home. In construing the relevant statutes, the Commissioner held that although the district of residence (district where the child's parent resides) pays tuition to the district where the group home is located, the word "tuition" used in the relevant statute does not include transportation. Instead, the obligation to pay for transportation belongs to the district where the group home sits.

BOARD ACTIONS

There are a few important cases concerning board authority that I'd like to mention. There's the Gonzalez v. Elizabeth Appellate Division decision (p. 9). This case discusses the timing of when a school board can actually hire a new superintendent when the existing superintendent's contract is not being renewed. It rejected the argument that the hiring of the replacement could be done a year in advance by the same board that gives notice of nonrenewal to the outgoing superintendent. The Appellate Division applied the traditional doctrine that since a board is a non-continuous body, it can't bind future boards in ways not explicitly permitted by statute. Based on that, the Court determined that only the board that will be in office at the time the superintendent position actually becomes vacant, can fill the position.

In August the State Board reversed the Commissioner's ruling in the Fairfield v. Ench case (p.10). That case addresses the question of whether a board that is lucky enough to be able to fund the purchase of land through surplus with the idea of building a school, can do that without going to the voters for approval. The Commissioner had ruled that even if the board didn't need to borrow money for the purchase, it had to submit the question by referendum to the voters. The State Board rejected that, after construing the appropriate statutes and looking to legislative history. However, the State Board agreed with both the Commissioner and the ALJ below that when a board makes a purchase of land by using surplus, the transaction should not escape review by the voters. The district must include in its budget a line item reflecting that appropriation of the surplus. The matter was remanded for further proceedings and a determination by the Commissioner as to the impact of the Fairfield Board's failure to include the purchase in its budget.

The Neptune case (p. 18), dealt with whether a board could subcontract with a private company, STARNET, to provide Latin instruction through closed circuit TV. The district actually had a properly certified Latin teacher, but wished instead to subcontract that instruction. However, STARNET's instructor didn't possess the proper certification as a foreign language teacher.

Relying on a prior State Board ruling where a board was not permitted to use a non-certificated teacher to provide foreign language instruction even in an emergency where the district couldn't find a properly certified teacher, the Commissioner held that if a district could not use an individual without proper language certification in an emergency, the district certainly couldn't use one here. While the interesting discussion by the ALJ in Neptune does suggest districts can subcontract Latin instruction with a private company as long as the instructors are properly certificated, the Commissioner declined to reach that issue. The specific question of the legality of providing foreign language instruction by subcontracting with a private vendor is currently pending before the Commissioner in a separate matter involving the Guttenberg Board.

TENURE-RELATED ISSUES

The Appellate Division in Williams (p. 8), ruled that tenure charges filed with the board secretary against the superintendent were public records under the Right-To-Know Law. In this "case of first impression" the Court found that while the eventual provision of the documents in question rendered the case moot, it would nonetheless rule because the issue was important and capable of repetition. The Court held that even though a school board must conduct its tenure proceedings in closed session, the public has the right to access the charges. The Court analogized to grand jury proceedings where the complaint is public although the proceedings are private.

State v. Ercolano involves interpretations of the statute in Title 2C governing the forfeiture of public office, (p. 9). This matter is currently on appeal to the Appellate Division. Arguments took place earlier this month. Hopefully, the ruling will clarify what the proper procedure and standards are when a board of education learns that an employee was

convicted of a crime or offense that would warrant forfeiture of the employment, but where the issue of forfeiture for some reason was not raised by the sentencing court.[6]

Anybody here trying to settle a tenure case? The Allen matter (p. 14), should interest you. The Old Bridge Board is challenging the Commissioner's refusal to accept an agreement between the district's librarian and the district to settle tenure charges. The settlement included the librarian's resignation as well as the employee's acknowledgement of the Commissioner's duty to refer the matter to the State Board of Examiners for possible revocation of the certificate. The Commissioner said he'd reject the settlement and direct a plenary hearing unless the parties modified the agreement to include language indicating the librarian's agreement not to oppose revocaton proceedings before the State Board of Examiners. Old Bridge is arguing that allowing the Commissioner to impose such a condition goes way beyond the Cardonick standard and could affect districts' ability to settle tenure cases.[7]

I'd also like to mention Tave v. Manalapan-Englishtown Regional Bd. of Ed., a case not on the outline. The Commissioner in his letter to counsel, July 13, 2000, explicitly recognizes that the PERC laws carve out a clear and unambiguous exception to the general rule in N.J.S.A. 18A:6-10 that teachers may not be reduced in compensation except where tenure charges are brought, or where the employee is indicted. The PERC statute (N.J.S.A. 34:13A-24c) authorizes a board to suspend teaching staff members without pay for minor discipline if negotiated with the majority representative of the employees in the appropriate bargaining unit.[8]

The last interesting tenure case I'll touch on is Grundfest (p. 14). It concerns a basic skills instructor who allegedly used the school computer to access pornography on the Internet. Ultimately, the Commissioner dismissed the charges. Part of the problem with the Board's case (aside from the fact that the only witness was a student with inconsistent testimony) was that the computer data evidence was contaminated. While looking for evidence, numerous individuals had booted up the computer and back-dated it, and the Board had failed to limit access to the computer both before the incident, and after it. So, while there was evidence that pornographic sites had been accessed, the Commissioner couldn't tell who was responsible. This was fatal to the Board's case. This matter highlights the importance of making sure districts have appropriate procedures and safeguards in place to secure the computer, preserve evidence and establish a chain of custody, in the event that a district suspects one of its employees of accessing pornography.[9]

ENDNOTES

[1] A petition for certiorari to the Supreme Court was filed on November 11, 2000 in C.H. v. Oliva.

[2] The South Florida Council of Boy Scouts has sued the Broward County, Florida school district in U.S. District Court, charging it with violating the organization's freedom of speech and association when the district decided to bar the Scouts from using district facilities. The Boy Scouts had sought an injunction against the school board's December 17 deadline after which it would have barred the Scouts from using the district's classrooms, cafeterias or buses. However, the board agreed to delay its ban until March 30, 2001. The suit remains in pretrial posture.

[3] On January 4, 2001, Judge Guterl granted the plaintiff's motion to preliminarily enjoin adminstration of the district's drug testing program. The Judge found that the program is "incompatible with New Jersey's search and seizure jurisprudence." This case, *Joye v. Hunterdon Central Regional High School Board of Education*, is posted at http://www.judiciary.state.nj.us/guterl/c14031_1018.htm.

[4] On November 27, 2000, Judge Thompson granted Somerville's motion for a stay and certified the initial decision in order to permit an interlocutory appeal to the Third Circuit.

[5] The N.J. Supreme Court has granted certification in this matter.

[6] On November 28, 2000, the Appellate Division entered a ruling favorable to the Branchburg Board of Education. The Appellate Division settled four issues of interpretation under the forfeiture statute. First, the Court ruled that a forfeiture of public employment upon conviction for a qualifying offense is mandatory, regardless of whether the forfeiture is ordered at the time of conviction or at some later date. Second, the Court rejected the teacher's argument that the Commissioner, and not the local board of education, is the entity authorized, along with the county prosecutor and Attorney General, to apply to a Court for forfeiture. Third, the Court ruled that where, as in the present case, the connection between the employee's offense and his duties is obvious, the employee is not entitled to an evidentiary hearing on the question of whether the offense involves or touches on his position. Last, the Court determined that where a forfeiture order is entered to rectify a trial judge's inadvertent failure to order forfeiture at the time of a conviction, forfeiture will become effective as of the date it should have originally been ordered. The teacher has asked the New Jersey Supreme Court to grant certification.

[7] On November 1, the State Board ruled that the parties misinterpreted the Commissioner when they concluded that he intended the teaching staff member to forego defending herself before the State Board of Examiners. The State Board read the Commissioner's statements to mean only that the teacher may not oppose *referral* to the State Board of Examiners, and to the extent that the decision was ambiguous, clarified it as such. Further, and of great interest to boards of education, is the State Board's conclusion that a tenure settlement need not contain such language; an acknowledgement of the Commissioner's duty to make referral to the State Board of Examiners is sufficient to ensure that the public's interest is protected.

[8] *Tave* was affirmed by the State Board, November 1, 2000.

[9] *Grundfest* was affirmed by the State Board, November 1, 2000.

EXAMINING THE SCHOOL NURSE: NURSING SERVICES UNDER c. 153 Over a year has elapsed since the enactment of P.L. 1999, c. 153 (*N.J.S.A.* 18A:40-3.2 *et seq.*), which requires that district boards of education only utilize or employ State Board of Education certified school nurses to provide nursing services. Yet questions continue to abound. It is difficult to ascertain the degree with which the law is really "new," and the extent to which it is merely a legislative reflection of the Commissioner of Education's long-standing pronouncements on the role of nurses in the public schools.

SUMMARY OF THE PROVISIONS OF P.L.1999, C.153 (*N.J.S.A.* 18A:40-3.2 *et seq.*)

Under c.153, only certificated school nurses can provide nursing services in the public schools.[1] However, in the absence of the certified school nurse, a New Jersey registered nurse holding a county substitute certificate or a nurse who possesses an emergency certificate may serve as a substitute for the school nurse. *N.J.S.A.* 18A: 40-3.5. Presumably, this means such a substitute may provide nursing services in the certified school nurse's stead. This is a significant change because previously, unless a board was fortunate enough to locate a certified school nurse substitute or utilize a local hospital, it had few choices. A board that chose to allow someone other than a certified school nurse to perform essential nursing functions in the school nurse's absence, was likely in violation of the law.

The new law also exempts certain persons who are legally authorized to perform specific health-related

services from the certification requirement. It permits special education students and others with specialized medical needs to receive services from an "appropriate provider appointed by the Board of Education." Unfortunately, the law does not specify parameters by which boards should be guided to assess the appropriateness of a given provider.

In addition, c.153 makes clear that boards of education can utilize or employ other personnel to provide supplemental nursing services or to assist in the performance of the certified school nurse's duties through the performance of secretarial or clerical duties. However, the new law does not define the scope of those supplemental services nor the circumstances under which supplemental and secretarial/clerical services may be rendered.

Finally, the new law appears to continue to permit boards of education to continue to utilize non-certified nurses to provide certain statutorily enumerated nursing services to nonpublic school pupils under *N.J.S.A.*18A:40-23 *et seq*. One is left to wonder why the Legislature would require the certification requirement for nurses in the public schools, and not require that same level of education for nurses working with nonpublic school students.

The intent of this article is to suggest a reasonable interpretation of the recent enactment, in light of the questions left unanswered by certain of its provisions. The State Board of Education is considering the adoption of a new chapter, *N.J.A.C.* 6A:16, Programs to Support Student Development. Adoption of these proposed regulations would likely provide needed direction in the area of nursing services. Meanwhile, practitioners may wish to consider this author's analysis.

ANALYSIS

The new law contains three substantive sections, the first of which, *N.J.S.A.*18A:40-3.3 provides:

> A school district shall only utilize or employ for the provision of *nursing services* in the public schools of the district persons holding an educational services certificate with an endorsement as a school nurse issued by the State Board of Examiners, except for those non-nursing personnel who are otherwise authorized by statute or regulation to perform specific health related services. Special education students and those with medical needs requiring specialized care shall have that care rendered by an appropriate provider appointed by the Board of Education. No person shall be issued such certificate unless the person is licensed as a registered nurse pursuant to the provisions of P.L.1947, c. 262 (C.45:11-23 *et seq.*) and meets all of the requirements prescribed by the board for a nursing endorsement. A school district may supplement the services provided by the certified school nurse with non-certified nurses, provided that the non-certified nurse is assigned to the same school building or school complex as the certified school nurse. (Emphasis added).

What services constitute "nursing services?" A definition section is conspicuously absent from this new law when compared with the introductory version of law. Without a definition section, the meaning of certain terms contained in the law remains subject to interpretation. Resort may be made to legislative history and related school law decisions, in order to fathom the Legislature's intent.

Legislative history: Senate Bill No. 168 (Bennett), originally introduced on January 13, 1998 as "An Act concerning the provision of public school health services and supplementing chapter 40 of Title 18A of the New Jersey Statutes" defined the terms "school nurse" and "health services."

"School nurse" was defined as a licensed registered nurse who holds an educational services certificate with a school nurse endorsement and, save the exemptions from the certification requirement carved out by later versions of the bill, is mirrored by c.153.

The bill defined "health services" as including, but not being limited to vision screening; auditory screening, scoliosis testing or screening; taking of heights and weights; administration, taking, and provision of tests, examinations, and diagnostic procedures to obtain health information relating to a pupil or for inclusion in a pupil's or school district's health records; decision-making when involving the exclusion or return of a pupil from school, class, or any school activity due to illness or injury; administration of medication; counseling or advice relating to a pupil's health; administration of medical services; and administration of first aid (taking temperatures, contacting parents of ill pupils, applying band-aids and washing cuts, removing splinters, treating bee stings, treating nose bleeds and applying ointment or creams). By contrast, the Senate Committee Substitute for Senate Bill No. 168 adopted by the Senate Education Committee on June 4, 1998, did not use the term "health services." Rather, it summarily substituted the term "nursing services" for "health services" without offering a definition of that term.

Thus, the Legislative history does not provide clear direction on the question of what services can be provided by a certified school nurse.

School law decisions. Unfortunately, no decisions that directly address the issues raised in this article have been rendered since the effective date of the law. Nor have previous decisions been expressly overturned by this legislation. The most logical source for guidance is therefore, education decisions which predate but are not inconsistent with the law.

In *Old Bridge Township Education Association, et al. v. Board of Education of the Township of Old Bridge*, 1997 *S.L.D.* (November 26), clarified State Board, 1998 *S.L.D. (*April 1), the Old Bridge Education Association petitioned the Commissioner for a determination that the Old Bridge Board of Education was in violation of statute and regulation for its alleged use of non-certified personnel to perform school nursing duties. The Association sought to enjoin the Board from continuing to use such personnel in that capacity.

In affirming the Administrative Law Judge's determination that no violation of the law had occurred, the Commissioner drew the distinction between those duties the performance of which was expressly reserved by statute or regulation to certified school nurses, and such "other nursing services" provided in the public school setting. In creating this distinction, the Commissioner held that only certified school nurses can perform those duties expressly reserved to them by law but that qualified, licensed, non-certified personnel under appropriate supervision could perform the remaining undesignated services, what could

be properly referred to as "supplemental services."

In *Old Bridge*, the Commissioner described the services expressly reserved to certified school nurses under the law and properly considered "nursing services" to include:

- lecturing teachers on the recognition and prevention of communicable disease and other health concerns (*N.J.S.A.*18A:40-3; *N.J.A.C.* 6:29-1.2(b)1vi);
- maintaining pupil health records and assisting the medical inspector with physical examinations, including vision and hearing exams (*N.J.S.A.*18A:40-4; *N.J.A.C.* 6:29-1.2(b)1iv; *N.J.A.C.* 6:29-2.1);
- examining pupils for the presence of scoliosis (*N.J.S.A.*18A:40-4.3; *N.J.A.C.* 6:29-1.2(b)1ii);
- recommending exclusion from school due to illness or exposure to disease (*N.J.S.A.*18A:40-7, 8; *N.J.A.C.* 6:29-1.2(b)1v);
- reporting, receipt of reports and examination in instances of suspected substance abuse (*N.J.S.A.*18A:40A-12; *N.J.A.C.* 6:29-6.5);
- vision screenings, health appraisals and various consultative functions with respect to evaluation for and provision of special education services (formerly *N.J.A.C.* 6:28-3.2 *et seq.*, now *N.J.A.C.* 6A:14-3.4(h));
- audiometric screening (*N.J.S.A.*18A:40-4; *N.J.A.C.* 6:29-1.2(b)iii; *N.J.A.C.* 6:29-5.1);
- maintaining awareness of safe procedures for handling of body fluids (*N.J.A.C.* 6:29-2.5);
- accessing employee health records when permitted by the employee (*N.J.A.C.* 6:29-7.4);
- serving as liaison to the local board of health on issues relating to pregnancy and prenatal health (*N.J.A.C.* 8:52-5.3);
- administration of Snellen vision screenings for special learner's permits for obtaining a driver's license (*N.J.A.C.* 13:21-7.1 *et seq.*);
- testing for tuberculosis infection (*N.J.A.C.* 6:29-2.3); and
- completion or approval, as designated thereon, of health forms required to be submitted to the State and where the school nurse is so assigned, the provision of instruction to students within the limitation of the school nurse endorsement (*N.J.S.A.*18A:26-2; *N.J.A.C.* 6:11-11.7; *N.J.A.C.* 6:29-4.2).[2]

The Commissioner went on to hold that, where the education laws have not specifically reserved certain functions to certified school nurses, these duties and the assistive and support functions related to them may be performed by health care professionals who are properly licensed and supervised according to the requirements of the New Jersey Board of Nursing or by other individuals qualified to perform ministerial duties.

It is reasonable to conclude that the *Old Bridge* definition of "nursing services" is what was contemplated by the Legislature when it enacted P.L.1999, c.153 insofar as the Legislature appears to have provided a blanket prohibition against the performance of "nursing services" except by certified school nurses and then carved out from that prohibition the ability of boards of education to employ supplemental health care and clerical employees. This structure parallels that established in *Old Bridge*. Therefore, the Legislature arguably intended the term "nursing services" to include those services expressly reserved by education statute and regulation to certified school nurses as listed in *Old Bridge*.

What are "supplemental services" for which district boards of education may utilize or employ non-certified nurses to provide? And, under what conditions may these services be provided? As stated above, c.153 permits district boards of education to supplement the services of the certified school nurse with non-certified nurses. The inclusion of the supplemental service language came at the behest of the Governor in her Conditional Veto of May 20, 1999. The Governor recommended this amendment to the bill in order to assure that boards of education retain a "certain degree of flexibility when hiring health care professionals to provide nursing services." However, the Governor's recommended action gave no further instruction on the scope of these supplemental services nor the conditions under which they may be provided.

Thankfully, *Old Bridge* is again instructive on this point. Under *Old Bridge*, "supplemental services" which may be provided by non-certified nurses appear to include any health related service rendered in the public school setting which is not expressly reserved by law or regulation to certified school nurses. In addition, under *Old Bridge* supplemental services could include assisting the certified school nurse in the performance of those services expressly reserved to the school nurse provided that the non-certified nurse does not actually perform the reserved function and provided that the non-certified nurse is supervised in accordance with Board of Nursing regulations.

What level of supervision of non-certified nursing personnel is required to be provided by the certified school nurse? The Board of Nursing regulations, which the Commissioner incorporates by reference in *Old Bridge*, permit a registered professional nurse to delegate selected nursing tasks to licensed practical nurses and ancillary nursing personnel (including aides, assistants, attendants and technicians) with the proviso that the registered nurse is responsible for the "proper supervision of the licensed practical nurses and ancillary nursing personnel to whom such delegation is made." *N.J.A.C.* 13:37-6.2(c). The nursing regulations contemplate that there are various levels of supervision, including "supervision that requires the direct and continuing presence or the intermittent observation, direction and occasional physical presence of the registered professional nurse." *N.J.A.C.* 13:37-6.2(c)4. However, the regulations require that, in all cases the registered nurse shall be available for on-site supervision. *N.J.A.C.* 13:37-6.2(c)4.

Read in conjunction with the c. 153, these regulations appear to authorize the certified school nurse to engage in differential levels of supervision of non-certified nursing personnel who provide supplemental services depending upon the school nurse's individual assessment of the level of supervision warranted by the care being provided.

What does it mean to be "assigned to the same school building or complex as the certified school nurse?" The law is silent on the definition of the word "complex." However, several districts throughout the State have what could be characterized as a campus configuration with multiple buildings housing different grade levels on the same parcel of land. This may be considered a "complex." Additionally,

many districts have had to expand their existing structures to include separate trailers for instructional purposes. It is reasonable to consider that either of these configurations could qualify as a "complex" under the statute.

In determining whether the non-certified nurse is assigned to the same building or complex as the certified school nurse, the certified school nurse's assignment must first be ascertained. The education regulations are clear that district boards of education are only mandated to appoint one school nurse for their district. *N.J.A.C.* 6:29-1.2(b). Therefore, it is reasonable to conclude that, although a certified school nurse may have a single designated office in the district, he/she is actually assigned to provide nursing services to every school in the district. In this sense, the certified school nurse is deemed "assigned" to every school building or school complex in the district. Therefore, the non-certified, supplemental nurses, regardless of their building or complex assignment, would be deemed to be assigned to the same building or complex as the certified school nurse.

The nursing regulations offer support for this conclusion. Reading the law in conjunction with the nursing regulations referenced above, it is reasonable to conclude that the level of supervision of supplemental nursing services personnel will depend upon the certified school nurse's assessment of what is proper under the circumstances of the delegation. This level of supervision may range from direct and continuing to occasional physical presence. However, in all cases, through the certified school nurse's "assignment" to every building and complex in the district, the certified school nurse would be available for on-site supervision. Therefore, the law does not appear to require that the school nurse be physically present whenever and wherever supplemental nursing services personnel are providing care.

Notwithstanding the above analysis, the absence of case law interpreting the provision invites litigation. In fact, there is at least one pending matter where a teachers' union asserts that a district may not supplement the services provided by the certified school nurse unless the certified school nurse is actually present in the building when the supplemented services are performed by the non-certified nurse. *Ramsey Teachers Ass'n v. Ramsey Bd. of Ed.*, Agency Docket No. 12-1/00. A hearing is scheduled for January 2001. The resolution of this matter promises to provide needed direction to boards of education.

What "non-nursing personnel" or other "appropriate providers" are exempt from the certification requirement? The statute provides that "except for those non-nursing personnel who are otherwise authorized by statute or regulation to perform specific health related services," certification as a school nurse is required. This exemption was crafted into the law as a Senate Floor Amendment of September 28, 1998 with no explanation beyond its own terms. At a minimum, it appears that the personnel authorized by law to perform the following nursing services need not be certified under *N.J.S.A.* 18A:40-3.3:

- licensed optometrists who are authorized to perform vision screenings by *N.J.S.A.*18A:40-1;
- licensed medical and health care personnel under the immediate direction of the district medical examiner who are authorized to examine pupils for the detection of any physical defect, including audiometric screenings of students, by *N.J.S.A.*18A:40-4 and *N.J.A.C.* 6:29-5.2;
- physical education instructors or other properly trained school personnel who are authorized to perform scoliosis screenings by *N.J.S.A.*18A:40-4.3; and
- a properly trained employee of the school district, besides the school nurse, who, with parental approval, is authorized to administer epinephrine via epi-pen by *N.J.S.A.*18A:40-12.6.

Similarly, the new law provides that special education students and students with specialized medical needs shall have care rendered to them by an "appropriate provider as appointed by the Board of Education." While the law does not expressly exempt "appropriate providers" from the certification requirement, such an exemption is implicit both from the enacted language and the commentary of the Governor, whose Conditional Veto grafted this language into the law.

The Governor stated that:

> [R]equiring that certified school nurses provide nursing services in all cases is problematic. For instance, the bill makes no distinction between nursing services provided to the general school population and nursing services provided to a student with special needs or with medical needs requiring specialized care. This lack of a clear distinction will in effect require that school districts hire certified school nurses to provide individualized nursing services to students…. Consequently, I recommend that the bill specify that nursing services for special education students and those with special medical needs be rendered by an appropriate provider as appointed by the Board of Education to ensure that the appropriate specialized care is given to students.

Neither the Governor's Conditional Veto nor the legislation itself suggests parameters which district boards of education must follow to make determinations as to the appropriate provider. It is this author's opinion that, in the special education or Section 504 context, the appropriate provider(s) will be the individual or individuals included as part of the student's Individualized Education or Section 504 Plan. And, as regards other students with specialized medical needs, the appropriate provider would appear to be the student's physician or specialist or someone, perhaps even the school nurse, designated by the physician or specialist to administer specialized health care services in the school setting.

When utilizing or employing personnel to perform secretarial or clerical duties that assist in providing nursing services, what does it mean to be "under the supervision of the certified school nurse?" The other substantive section of the new law to be dealt with by this article, *N.J.S.A.* 18A:40-3.4, provides that:

> A school district may utilize or employ a person to perform secretarial or clerical duties that assist in providing nursing services only under the supervision of a certified school nurse. Secretarial or clerical duties may include, but not be limited to, recording information on a pupil or school record, making

telephone calls, and preparing correspondence.

Life would have been so much simpler for district boards of education and board attorneys if the introductory version of S-168 had been enacted, if only for its artful definition of key terms. The original bill stated that secretarial or clerical personnel utilized or employed to assist in providing school health services must be under the "actual presence and direct supervision of a school nurse." The original bill went on to define "actual presence and direct supervision" to mean "that a school nurse shall be in the same office or room at the same time that the secretarial or clerical duties are performed, except in circumstances when the school nurse is at lunch or is required to be away from the office due to a medical emergency."

The enacted version of the law simply provides that such personnel must be under the supervision of the school nurse. Shouldn't the fact that less exacting language became the law be read to evince the intent of the Legislature that a less demanding level of supervision is required over secretarial or clerical personnel? This appears to be a reasonable interpretation. However, it could also be argued that the Legislature's failure to adopt the original version with its exclusion for lunch and emergencies, means that the certified school nurse must be in the same room, even during lunch and emergencies, to directly supervise secretarial and clerical staff.

The *Old Bridge* approach to the supervision required of non-certified supplemental nursing services would seem to provide direction here, as well. There should be a similar spectrum of supervision options available to the school nurse over secretarial or clerical personnel (a.k.a. ancillary personnel) that ranges from direct and continuing to merely being available for on-site supervision if called upon. It would appear that, because secretarial or clerical personnel are not performing functions reserved to the school nurse, are not supplementing those services but are rather serving in an assistant capacity, the standard articulated at *N.J.A.C.* 13:37-6.2(c)4 of "intermittent observation, direction and occasional physical presence" of the certified school nurse would satisfy the legislative scheme. This conclusion seems to comport with the Commissioner's reasoning in *Old Bridge*, wherein he concluded that non-certified nurses who are not independently performing functions expressly reserved to the certified school nurse may simply have the certified school nurse review and approve the results since, in such contexts, the non-certified nurses are merely assisting in providing nursing services. Insofar as secretarial and clerical employees are performing ministerial functions to assist the school nurse in providing nursing services, the same minimal level of supervision of these employees would appear warranted.

To what extent are secretarial or clerical personnel permitted to assist in the performance of nursing services? The most likely reading of *N.J.S.A.* 18A: 40-3.4 is that "secretarial or clerical duties that assist in providing nursing services" cannot include nursing services themselves, e.g., assistance in examining for scoliosis. Rather, it is only the ministerial duties that may be permitted. However, the legislative history of the provision nonetheless raises the possibility that the Legislature intended "secretarial or clerical" duties to include duties less ministerial than simply recording information, making phone calls and preparing correspondence. In fact, the law as finally enacted does not contain explicit language contained in the bill as originally introduced, that secretarial or clerical duties "shall not include the provision of health services [specifically enumerated in the bill]." One could reason that the removal of this restriction in the enacted law could reflect an intent by the Legislature to expand the duties performed by secretarial or clerical personnel beyond the mere ministerial and into the realm of nursing services. In *Old Bridge*, the Commissioner stated that "there is nothing to prevent…other qualified persons (e.g., clerical aids) from assisting certificated school nurses in the performance of duties reserved by law to such nurses, so long as they do not actually *perform* the function at issue… ." (Emphasis in original).

On the other hand, the Legislature's decision not to include in the final version of the bill the explicit prohibition against providing "health services" could simply be based on its belief that such language was redundant in light of the list of clearly ministerial duties already set forth as examples. To the extent that *Old Bridge* said otherwise, the more recently enacted law would govern.

Accordingly, it would be prudent for district boards of education to presume that the Legislature created a three-tiered structure for the provision of nursing services with meaningful demarcations between the roles of various personnel with respect to nursing services: i.e., Tier 1—the certified school nurse whose duty it is to perform specific functions reserved by statute; Tier 2—non-certified, supplemental nursing personnel who, with proper supervision, may perform non-reserved nursing functions, or duties which assist in the provision of reserved functions; and Tier 3 - secretarial or clerical staff who, with proper supervision, may assist the certified school nurse by performing all other services of a ministerial nature which are not provided by Tier 1 and Tier 2 personnel.

CONCLUSION

Depending on how they are interpreted, the recent amendments to *N.J.S.A.* 18A:40-3.2 *et seq*. could afford school districts with flexibility in providing nursing services in the public schools, as follows:

- It appears that where the regular school nurse is absent, the district has more leeway in finding a substitute to fill in.
- While the nursing services that are described in the *Old Bridge* matter and set forth throughout statute and code are probably still reserved to the certified school nurse, the district may use non-certified nurses to assist the school nurse with those services, and to provide supplemental services. The law could justifiably be interpreted to mean that the school nurse need not be physically present whenever and wherever supplemental nursing services personnel are providing care. Read in conjunction with the Board of Nursing regulations, the certified school nurse arguably has the authority to assess the level of supervision warranted by him/her over other nursing personnel for particular tasks, from direct and continuing, to merely being available for on-site supervision if called upon.
- As to the question of whether the school nurse must be physically present in the same school building or complex as the certified school nurse, the issue is presently

in litigation. A persuasive argument can be made that the school nurse is assigned to provide nursing services to every school in the district, and that therefore the assignment of the supplemental nurse would necessarily coincide with that of the regular school nurse, regardless of the building of that assignment.

- Read in conjunction with the Board of Nursing regulations, the certified school nurse arguably has the authority to assess the level of supervision warranted over personnel who perform secretarial or clerical duties, from direct and continuing, to merely being available for on-site supervision if called upon.

ENDNOTES

[1] A school nurse must be licensed by the New Jersey Board of Nursing as a registered nurse and must possess an educational services certificate with an endorsement as a school nurse issued by the State Board of Examiners.

[2] In addition to the above listed services, the education laws provide that the school nurse shall examine pupils for physical defects (*N.J.S.A.*18A:40-4) and administer epinephrine via epi-pen (*N.J.S.A.*18A:40-12.6).

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School Law REPORTER

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TPAF CLARIFIES PERMITTED USE OF RETIRED ADMINISTRATORS IN INTERIM OR TEMPORARY POSITIONS Many New Jersey school districts are currently using the services of retired school administrators to fill "interim" administrative positions while the board of education proceeds through the process of filling the vacated position permanently. As this practice has become more widespread and as the amount of time retirees have held interim positions has increased, the Board of Trustees of Teachers' Pension and Annuity Fund (TPAF) and the Board of Trustees of Public Employment Retirement System (PERS) have defined and clarified the parameters of this practice. A new TPAF regulation is of particular importance to boards of education as it allows boards to hire retirees for up to six months without requiring the retiree to stop receiving his/her pension. This article will explore both case law and regulation in order to assist boards of education with compliance.

BACKGROUND

N.J.S.A. 18A:66-53.2 currently provides that a retiree who has begun receiving a pension may not continue receiving benefits if he/she becomes re-employed in a position covered by the same pension system. The relevant section states:

> If a former member of the retirement system who has been granted a retirement allowance for any cause other than disability[1], *becomes employed again in a position which makes him eligible to be a member of the retirement system,* his retirement allowance and the right to any death benefit as a result of his former membership, shall be canceled until he again retires. Such person shall be re-enrolled in the retirement system.... (emphasis supplied)

Pursuant to this section, if a retired individual becomes employed in one of the pension eligible positions listed in *N.J.A.C.* 17:3-2.1, he/she is required to stop receiving any pension benefits and must re-enroll in the system. *N.J.A.C.* 17:3-2.1 provides:

> With the exception of the public institutions and the Department of Higher Education, any person who is appointed by the State or local board of education in the State, as a regular full-time employee to one of the following teaching or professional staff positions shall be required to become a member of the Fund effective as of the date of their employment:
>
> 16. Superintendent; ...
>
> 23. School administrator;
>
> 43. School business administrator; ...

As the above sections indicate, there is no *per se* prohibition against employment after retirement. Rather, the prohibition is that a retiree may not continue to receive a pension after being re-employed in a position designated as eligible for enrollment in the pension system. The purpose of this prohibition is to prevent professionals from manipulating the pension system by working for public employers while receiving a public pension—colloquially called "double-dipping."

Although the sections cited above appear clear that individuals serving in any of the listed positions are required to re-enroll, questions did arise as to whether temporary positions were considered pension eligible pursuant to these sections. Many retired public employees serv-

[1] *N.J.S.A.* 18A:66-40(b) governs reemployment of retirees receiving a disability pension.

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This publication is not to be considered a legal opinion. It is for informational purposes only.

ing in interim positions believed that if they served in such positions temporarily as "independent contractors/consultants," they would be exempt from re-enrollment in the pension system. However, as the practice of using retired administrators to fill positions became more widespread, the issue of what would constitute independent contracting or consulting and what would constitute reemployment required clarification.

CASE LAW DEFINING MEANING OF "EMPLOYED AGAIN"

The Board of Trustees of PERS first addressed what constitutes re-employment in the municipal context when a retired municipal tax collector came back to work for the same municipality as an "independent contractor" to assist the newly hired tax collector. *Norman Stevens v. Board of Trustees of the Public Employees' Retirement System*, 309 *N.J. Super.* 300 (App.Div.1998); *see also* 294 *N.J. Super.* 652 (App. Div. 1996).

In *Stevens*, the Appellate Division ultimately affirmed a PERS ruling that held that the retired "consultant" was an employee and not an independent contractor. Being thus "employed again," Mr. Stevens was required to re-enroll in the pension system and ordered to reimburse PERS for pension monies received while he was re-employed. In addition, both Mr. Stevens and the municipality were ordered to pay into the pension system the requisite percentage contributions based upon the salary received during this reemployment.

In reaching this conclusion, the court looked to *N.J.S.A.* 43:15A-57.2, the statute governing re-employment of retirees receiving a PERS pension. (This provision is identical to the TPAF statute governing re-employment of retirees cited above.) The pertinent section then provided:

> If a member of the State Employees' Retirement System or the retirement system, who has been granted a retirement allowance for any cause other than disability, becomes employed again in a position which makes him eligible to be a member of the retirement system, his retirement allowance and the right to any death benefit as a result of his former membership, shall be canceled until he again retires. Such person shall be re-enrolled in the retirement system...

As this statute did not define "employed again" the *Stevens* case ultimately turned upon the test to be applied in determining employment status. The Board of Trustees of PERS favored a "control test" that had been used by the Internal Revenue Service since 1987 in determining whether an individual should be classified as an employee or an independent contractor for income tax purposes. This test is incorporated in Revenue Ruling 87-41, 1987-1 C.B. 296, and provides detailed guidance concerning the factors that are used to determine if an employment relationship exists or whether an individual is more properly considered an independent contractor/consultant. The ruling, which has been used by other divisions of pensions, emphasizes that:

> [I]f the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such a relationship exists, it is of no consequence that the employee is designated as a partner, co-adventurer, agent, independent contractor, or the like.

Accordingly, 20 factors are used to closely examine the relationship between the parties to determine whether the relationship is one of employer-employee. Essential in this analysis is the degree of "control" the individual for whom the service is being rendered exercises over the individual performing the service. The factors to be considered include:

1. **Instructions.** This control factor is present if the individual for whom services are rendered has the right to require compliance.
2. **Training.** Requiring the worker to work with an experienced worker or requiring the worker to attend meetings will indicate that the individual for whom services are performed wants the service performed in a particular manner.
3. **Integration.** Integration of the worker's services into the regular business operations generally shows that the worker is subject to direction and control.
4. **Services Rendered Personally.** If the services must be rendered personally, presumably the person for whom the services are performed is interested in the methods used to accomplish the work as well as the results. This is indicative of an employer-employee relationship.
5. **Hiring, Supervising, and Paying Assistants.** If an individual worker hires, supervises and pays other assistants pursuant to a contract under which the individual worker agrees to provide materials and labor and under which the individual worker is responsible only for the attainment of a result, this factor indicates an independent contractor status.
6. **Continuing Relationship.** A continuing relationship between the worker and the person for whom the services are performed indicates that an employer-employee relationship exists.
7. **Set Hours of Work.** The establishment of set hours of work by the person for whom services are performed is a factor indicating control.
8. **Full-Time Required.** If a worker must devote substantially full time to the business of the person for whom services are performed, such person has control over the amount of time the worker spends working and can impliedly restrict the worker from other employment. An independent contractor, on the other hand, is free to work when and for whom he/she chooses.
9. **Doing Work on Employer's Premises.** If the work is performed on the premises of the individual for whom the services are rendered, that factor implies control over the worker, especially if the work could be done elsewhere.
10. **Order or Sequence Set.** If the worker must follow established routines and schedules of the person for whom services are rendered, that factor indicates control.
11. **Oral or Written Reports.** A requirement that the

worker submit regular or written reports indicates a degree of control.

12. **Payment by Hour, Week, or Month.** Payment by the hour, week or month generally points to an employer-employee relationship. Payment made by the job or on commission generally indicates that the worker is an independent contractor.

13. **Payment of Business and/or Traveling Expenses.** If the person for whom services are rendered ordinarily pays the business expenses of the worker, the worker is usually an employee.

14. **Furnishing of Tools and Materials.** If the individual for whom services are rendered supplies significant tools, materials and other equipment, this tends to show an employer-employee relationship.

15. **Significant Investment.** If the worker invests in facilities that are used by the worker to perform service, that factor generally indicates that the worker is an independent contractor. Conversely, lack of investment in facilities indicates dependence on the person for whom services are performed, which is indicative of an employer-employee relationship.

16. **Realization of Profit or Loss.** A worker who can realize a profit or suffer a loss as a result of the worker's services, that worker is generally an independent contractor. The worker who cannot is generally an employee.

17. **Working for More Than One Firm at a Time.** If a worker performs more than *de minimus* services for a multiple of unrelated persons or firms at the same time, that factor usually indicates that the worker is an independent contractor. However, a worker who performs services for more than one individual may be an employee of each of the persons, especially where such persons are part of the same service arrangement.

18. **Making Services Available to the General Public.** The fact that a worker makes his or her services available to the general public on a regular and consistent basis indicates that he/she is an independent contractor.

19. **Right to Discharge.** The right to discharge a worker is a factor indicating that the worker is an employee. An independent contractor on the other hand cannot be fired as long as he/she produces a result that meets the contract specifications.

20. **Right to Terminate.** If the worker has the right to end his/her relationship with the individual for whom services are rendered without incurring any liability, that factor indicates an employer-employee relationship.

PERS preferred this test. However, the Administrative Law Judge (ALJ) first assigned to the case rejected this preference and opined that allowing PERS to utilize this structured test would violate the rulemaking provision of the New Jersey Administrative Procedure Act that prohibits an agency from endorsing a standard of general applicability without notice and adoption in the New Jersey Register.[3] The ALJ then relied upon *Smith v. ETL Enterprises*, 155 *N.J. Super.* 343 (App. Div. 1978) to conclude that Mr. Stevens was an independent contractor because "he had the right to exercise control over his consulting." *Stevens*, 294 *N.J. Super.* at 650.

The Appellate Division subsequently reversed and remanded for additional findings. Specifically, the court indicated that the absence of detailed findings of fact and conclusions of law frustrated the court's ability to reach the merits of the case. Therefore, PERS was ordered to place on the record its rationale for concluding that Mr. Stevens was an employee. 294 *N.J. Super.* at 655.

On remand, PERS made substantial findings of fact, applied the IRS 20-factor control test, and once again concluded that Mr. Stevens was an employee. The Appellate Division affirmed, holding that PERS could rely upon the control test to determine if an individual was properly classified as either an employee or an independent contractor. *Stevens*, 309 *N.J. Super.* at 304. In addition, the court disposed of the ALJ's concern regarding the use of this test to adjudicate the legal rights of one person. The court indicated that use of a particular test to determine whether one individual is an employee does not become a standard of general application in violation of the rulemaking provision of the Administrative Procedure Act. In fact, the court noted, "administrative rule" as defined by the Act specifically excludes agency decisions and findings in contested cases. *Id.*

TPAF ADOPTS RULE

Cognizant of case law and undoubtedly concerned about similar hiring of retirees in administrative positions in school districts, the Board of Trustees of TPAF has approved regulations that would in essence codify the above analysis as a rule to be applied to members of the Teachers' Pension and Annuity Fund. The new rule also provides an exception for members who hold such positions for six months or less.

The summary supporting the regulations indicates as follows:

> The Teachers' Pension and Annuity Fund Board of Trustees recently requested advice from the Attorney General's Office as to whether a consultant or independent contractor can fill a certificated interim position with a board of education under the pension statute. Their memorandum employed a detailed analysis using 20 factors set forth in IRS Revenue Ruling 87-41, C.B. 296. These factors can be used as an aid to determine whether an individual is an employee under the "control test" which has been regularly used by the division of Pensions and Benefits since 1993 to determine whether an individual meets its criteria for employee.
>
> After applying these factors to the certificated interim position, the memorandum concluded that the interim position was not that of consultant, but that of employee. It added that public employers should not be permitted to skirt the statutes governing the retirement system by classifying their workers as independent contractors or consultants.
>
> The Board of Trustees, in conjunction with the above-mentioned memorandum, determined that a new rule is necessary to clarify when a certificated employee in an interim or temporary position with a board of education is ineligible for

enrollment into the retirement system, and when enrollment is required.

The Board of Trustees of TPAF also appeared to recognize the need of boards of education to employ experienced individuals for "interim" positions while going through the process of searching for a permanent replacement. As a result, the regulation would allow a retiree to be hired for a six-month period without having to stop receiving his/her pension and without having to re-enroll in the pension system. The new section also makes clear that all temporary appointments, no matter how the district or the interim labels the relationship, are covered by the new regulation. This regulation, *N.J.A.C.* 17:3-2.6., states:

> Any person retired from the Teachers' Pension and Annuity Fund who is temporarily appointed to any position listed in *N.J.A.C.* 17:3-2.1 *or the functional equivalent thereof,* shall be ineligible for enrollment in the retirement system if the total time in all interim appointments with the board of education does not exceed six months. If the total time for all the interim appointments with one board of education exceeds six months the individual shall be declared an employee for pension purposes and shall be enrolled in the Fund effective the first day of the seventh month of service.[2]

CONCLUSION

Although the above regulation is effective immediately upon publication in the New Jersey Register, there remains a question as to how retired individuals currently serving in interim positions will be treated under the new regulations. The two most likely possibilities are: 1) all retired individuals currently serving in interim positions will be given six months from the December 20th date of the publication of the regulation to comply, or 2) all retired individuals currently serving in interim positions will be required to re-enroll in the pension system immediately upon reaching the first day of the seventh month of employment if that date begins at any point after the December 20th date. Of course, the first possibility provides for ease of administration, without districts being required to calculate dates of re-employment. However, it is not clear that the Board of Trustees of TPAF will apply the regulation in that manner. Therefore, board counsel may wish to contact TPAF regarding the best way to proceed.

Currently pending before the state legislature are two bills, Senate Bill 1593 and Assembly Bill 2947, which would extend the period of time retirees would be permitted to enter into employment contracts with boards of education to one year. If this legislation is passed, it would of course supercede the six-month provision in TPAF's regulations. Please contact NJSBA's Governmental Relations Department to inquire about the status of this legislation.

SUBCONTRACTING OF EDUCATIONAL SERVICES: AN UPDATE

Pursuant to New Jersey law, boards of education are authorized to subcontract for educational and non-educational services without the obligation to negotiate that decision with the majority representative of the affected employees. *In Re IFPTE Local 195 v. State*, 88 *N.J.* 393 (1982). Though non-negotiable, the decision to subcontract or privatize is not without limits. Boards of education may not subcontract to retaliate against employees' exercise of their protected rights, they may not subcontract to avoid collective bargaining with the union and they may not subcontract in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers. The board's action must be rationally related to a legitimate governmental purpose. Procedural aspects of the decision to subcontract are negotiable, such as procedures for laying off employees, notice of subcontracting and consultation with the union over the decision to subcontract when that decision is based solely on fiscal considerations. *Id.*

Over the years school districts have regularly subcontracted for various support services including custodial and maintenance work, bus transportation and cafeteria services. It is only within the last five years that school districts have ventured into the realm of subcontracting of educational services provided by certificated staff members such as child study team (CST) members, guidance counselors and teachers. This *School Law Reporter* article will summarize recent case law concerning the subcontracting of child study team services. A future article will consider the subcontracting of other educational staff members including teachers and nurses.

A review of educational services subcontracting begins with an examination of *N.J.S.A.* 18A:28-9, which authorizes boards to abolish teaching staff positions for reasons including economy. *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 reduction in the number of pupils or a change in the administrative or supervisory organization of the district, or for other good cause upon compliance with the provisions of this article.

Reduction in force (RIF) decisions made pursuant to *N.J.S.A.* 18A:28-9 are entirely within the authority of the local board. *In Re Maywood Bd. of Ed.*, 168 *N.J. Super.* 45 (App. Div. 1978) certif. den. 81 *N.J.* 292 (1979). RIF decisions have, however, been reviewed to determine whether the position abolished has not in fact been abolished but merely transferred to another in violation of the incumbent's tenure and seniority rights, *Viemeister v. Prospect Bd. of Ed.*, 5 *N.J. Super.* 215 (App. Div. 1947), or whether the reduction in force decision has been made arbitrarily when legitimate economic and educational objectives could have been served with less erosion to the rights of tenured employees. In either circumstance, the entire course of events must be examined.

SUBCONTRACTING CHILD STUDY TEAM SERVICES

The majority of litigation regarding subcontracting of educational services has been in the area of subcontracting of CST services.

[2] This regulation was approved by the Board of Trustees on November 4, 1999. It is due to be published in the New Jersey Register on December 20, 1999, and will apply after that date.

One of the first administrative decisions relating to a local board of education's efforts to reduce force and replace educational services personnel through subcontracting arrangements with third parties was the Commissioner's decision in *Cochran et al., v. Watchung Hills Regional H.S. Bd. of Ed.*, 1983 *S.L.D.* 953, aff'd St. Bd., 1985 *S.L.D.* 1878, aff'd App. Div., unreported decision Dkt. No. A-2327-85T7 (Dec. 22, 1986).

In *Cochran* the local board of education reduced its only CST to half-time and contracted out the balance of team services to the Somerset County Education Services Commission. Finding that the board's intention was not an actual abolishment of position, but a mere reorganization and transfer of duties to a less expensive provider, the State Board of Education upheld the ALJ and Commissioner decisions below voiding the RIFs in question as being a violation of petitioners' tenure rights. The State Board ordered the Watchung Hills Board of Education to reinstate the CST members with full back pay less mitigation for other employment.

Key to the State Board's decision was administrative regulation *N.J.A.C.* 6:28-1.3(a) which established that the basic CST consisted of a school psychologist, learning disabilities teaching consultant and a social worker, all of whom were required to be employees of the local board of education. Outside contracting was authorized only in limited circumstances with the approval of the county superintendent and only for the purpose of supplementing existing team members. *N.J.A.C.* 6:28-1.3(f) When the board in *Cochran* abolished the full-time CST and replaced it with a half-time CST, it fully recognized that more general CST contracting would be necessary because of anticipated case load. The services of the CST were supplanted, not supplemented. The Appellate Division agreed with the State Board's determination and affirmed.

The "supplement not supplant" philosophy of *Cochran* became firmly entrenched in New Jersey school law, at least as far as tenured CST members were concerned. It was reaffirmed in the 1994 Commissioner decision of *Mullin v. Boonton Town Bd. of Ed.*, 94 *N.J.A.R.* 2d (EDU) 583. In *Mullin*, the Boonton Board abolished the positions of one of its two basic CSTs. The team members were terminated and placed on preferred recall eligibility lists for their respective positions. Subsequent to the RIF, the board contracted out for CST services, first on an as-needed basis and then for four days per month to handle overflow or excess work that the remaining CST could not handle. Six months later the board approved the hiring of a part-time one-day per week CST. The substantive issue in the case was whether the board supplanted the RIF'd CST by retaining non-district individuals to prepare IEP's, by hiring a psychology extern to do testing and by hiring non-tenured guidance counselors to counsel classified students.

In reaching his decision, the ALJ acknowledged that the determination of whether the utilization of outside contracted services amounted to a supplanting of existing CST members or a supplementing of such members involved a review of all surrounding facts and circumstances. The board's modest use of outside services and the retention of a full-time CST were significant factors in the decision. Relying heavily on the analysis in *Cochran*, the ALJ found that the Boonton Board's actions did not amount to a supplanting of the RIF'd CST staff but merely supplemented the work of the remaining full-time CST. The board's action was upheld. The Commissioner concurred with the findings and conclusions of the ALJ and adopted his decision in its entirety.

The *Cochran* "supplement not supplant" analysis was again upheld by the Commissioner in *Elson v. Hudson Co. Area Voc. Tech. Schools*, 96 *N.J.A.R.* 2d (EDU) 229. The Commissioner reaffirmed that a board of education could contract for CST evaluation and diagnostic services to supplement existing local district services but not to supplant them. It could not, however, subcontract the services of a single member of the team.

In *Elson*, one member of the CST, the school psychologist, had his position eliminated through a reduction in force. The board subsequently contracted out certain services, including those of the school psychologist to a private company named Independent CSTs, Inc. (ICST). The 116 annual evaluations done by ICST and the lack of express authority to subcontract for singular CST members were significant factors in the case. Using *Cochran* and *Mullin* and the Appellate Division decision in *Impey* (discussed later in this article) as the basis for his analysis the ALJ found that the level of services provided by ICST was more than supplemental and in fact supplanted the services of the dismissed school psychologist. The Commissioner concurred with the findings and conclusions of the ALJ and adopted the recommended decision as his own.

Less than one month after the Commissioner's decision in *Elson* the Supreme Court of New Jersey issued its decision in *Impey v. Bd. of Ed. of the Borough of Shrewsbury*, 142 *N.J.* 388 (1995). In *Impey*, the Shrewsbury Board, for reasons of economy, entered into a contract with the Monmouth County Educational Services Commission to provide speech correction services for its pupils. Concomitantly, the board abolished Ms. Impey's permanent part-time tenured speech correctionist position and terminated her employment. The central issues in this case were whether the board had the authority to subcontract with the County Educational Services Commission to provide speech correction services and in doing so whether the board could abolish the position and terminate the employment of its tenured speech correctionist without violating her statutory tenure rights.

The Court answered both questions in the affirmative. Local boards of education were found to have the statutory authority to contract with County Educational Services Commissions to provide speech correction services for their pupils. *N.J.S.A.* 18A:6-1; 18A:6-63; 18A:46-19.7. Significant to the decision was the fact that the core CST does not include a speech correctionist or speech language therapist. Therefor, *N.J.A.C.* 6:28-3.1, which requires members of the CST to be employed directly by the school district, did not apply. Reviewing the statutes and the regulations in their entirety, the Court held that boards of education were authorized to enter into a contract with an educational services commission to obtain speech correction services for its eligible pupils.

The Court then addressed the issue of whether a board of education could subcontract the services of a tenured certified staff member. Ms. Impey's argued, as did the CST members in *Cochran*, that the board's intention was not an actual abolition of her position but rather a reorganization and transfer of her duties to a less expensive provider thereby violating her tenure rights under *N.J.S.A.* 18A:28-10.

The Court disagreed, recognizing that teaching positions may be abolished for reasons of economy. It held that a lawful RIF need not eliminate the services that may be related to those positions. However, whether those services are eliminated, reduced, or modified may be a relevant factor in determining whether the abolition of position genuinely advances the goals of economy and efficiency and was undertaken in good faith. In this case the subcontracting agreement with the Monmouth County ESC had no adverse impact on the program needs of the school district and resulted in a more economical delivery of those services. Ms. Impey's replacement involved a statutorily authorized administrative change in the method of providing an educational service for the sole purpose of saving money. Her statutory tenure rights were not violated.

The *Impey* decision raised many question regarding the scope of the Court's holding. Could boards of education subcontract other professional services positions? Was the "supplement not supplant" analysis still viable? Could an entire CST be subcontracted out? Should the decision be read narrowly to permit subcontracting only those services that are statutorily authorized with a statutorily authorized provider, i.e., speech correction services to an educational services commission? Could private entities provide professional certificated services? These and other questions had yet to be decided.

The first Commissioner decision in the post-*Impey* era was *Auerbach v. Bd. of Ed. of the Boro of Morris Plains*, 1997 *S.L.D.* (August 20). In *Auerbach* the Morris Plains Board of Education abolished Ms. Auerbach's school social worker position and contracted for those services with the Morris County Educational Services Commission (MCESC). MCESC provided all CST social worker services to the district while Ms. Auerbach, a tenured social worker, remained on the preferred eligibility seniority recall list. The ALJ held that terminating Ms. Auerbach and subcontracting her social worker services to the MCESC violated *N.J.A.C.* 6:28-3.1(b), the regulation that requires all members of the core CST to be employees of a district board of education. In so holding, the ALJ found the district could either employ *all* members of the CST or contract with an ESC for *all* members of the CST. *N.J.A.C.* 6:28-3.1(b) defined an overall policy which addressed legitimate concerns engendered by a "split" CST. While boards had the authority to enter into joint agreements to provide educational services, where the CST is concerned, the subcontracting is all or none. Once the Morris Plains Board determined to maintain its own CST, it was prohibited from contracting for the services of a single team member. Hence, Ms. Auerbach's rights were violated.

The Commissioner agreed with the ALJ's analysis adding one significant point. Contracts and joint agreements through which a local board of education may provide CST services must be with public entities such as ESCs, jointure commissions or other school districts. The *Auerbach* decision appears to qualify the "supplement but not supplant" analysis, at least as to the entire CST. Supplanting an entire CST by subcontracting those services for valid reasons of economy was no longer viewed as violating the tenure rights of the RIF'd employees. The State Board affirmed, 1998 *S.L.D.* (February 4).

In *O'Neal v. Bd. of Ed. of the City of Salem*, 1997 *S.L.D.* (November 17) the Salem City Board abolished the position of a tenured school social worker and subcontracted her duties to the Salem County Special Services School District. The record demonstrated that the Commissioner, pursuant to the equivalency and waiver process, *N.J.A.C.* 6:3A-1 *et seq.*, and with the approval of the State Board, granted the board waivers from several administrative regulations. These waivers allowed the board to contract for the services of its school social worker and to determine which assessments were appropriate for initial evaluations. The Commissioner acknowledged that *N.J.A.C.* 6:28-1.1(f), 6:28-3.4(d), and 6:28-5.1(c), as well as *Impey* and its progeny, required a social worker to be a member of the core CST and an employee of the district if the district employed its own CST2. In this case, however, the Commissioner granted a waiver of the aforementioned regulations allowing the school district to contract out for core CST services. Subcontracting of an individual CST member was permitted. (Author's Note: Recent settlement of litigation between the Department of Education and the Education Law Center regarding the use of equivalency and waiver in the special education process makes it unlikely that similar waivers will be granted in the future.)

While the *O'Neal* and *Auerbach* cases were being decided, the case of *Vicenzino v. Bedminister Bd. of Ed.*, 312 *N.J. Super.* 243 (App. Div. 1998) was making its way through the administrative pipeline. The facts in *Vicenzino* were strikingly similar to *O'Neal* with the exception of the waiver. The Bedminister Board eliminated Ms. Vicenzino's tenured part-time school social worker position and contracted with the Hunterdon County Educational Services Commission (HCESC) to provide social case histories for its students. The ALJ ruled in favor of Ms. Vicenzino, concluding that when a district chooses to maintain its own core CST, all core members must be employees of the district; their services cannot be subcontracted to outside vendors. The board's action violated regulations and petitioner was ordered reinstated. The Commissioner and State Board affirmed.

The Appellate Division also affirmed, holding, consistent with *Auerbach*, that where a district board of education establishes a CST with employees of the district the board may not eliminate one of those positions and contract out for those services. However, the board may in good faith eliminate the entire CST for reasons of economy and join with one or more boards of education or state agencies to provide for basic CST services. *N.J.S.A.* 18A:28-9; 18A:46-5.1; *N.J.A.C.* 6:28-3.1(b). Accordingly, the Bedminister board could not abolish Ms. Vicenzino's social worker position while maintaining its own CST and contract with HCESC to replace her position. While approved clinics and agencies could be used by the board of education to supplement existing services in defined areas, *N.J.A.C.* 6:28-5.1(c), the board could not contract out entirely for a singular CST position.

The most recently issued decision in the CST subcontracting parade is the case of *South Amboy Ed. Assoc. v. Bd. of Ed. of the City of South Amboy*, 1998 *S.L.D.* (October 5). In *South Amboy* the ALJ found that the board's action to contract out services of its LDTC to the Middlesex County Educational Services Commission (MCESC) during the LDTC's sabbatical leave was proper, likening the use of the MCESC to a substitute teacher. The Commissioner disagreed, finding the practice to be violative of *N.J.A.C.* 6:28-3.1(b). Citing *Vicenzino*, *Elson*, and *Mullin* as authority, the Commis-

sioner found that as the district's LDTC was unavailable to render services for the 1997-98 school year, those services provided by MCESC could not be considered supplemental, but rather must be viewed as supplanting those of the LDTC, albeit it on a temporary basis. As long as the board elected to maintain its own CST, each basic member needed to be an employee of the district. The board's action was deemed violative of *N.J.A.C.* 6:28-3.1(b) and the board was ordered to cease its practice.

CONCLUSION

To summarize, the state of case law for subcontracting certified CST services is as follows:

- Boards of education may establish a basic, or core, CST (school psychologist, learning disability teaching consultant and social worker) with employees of the district or may subcontract out the *entire* CST to one or more boards of education or state agencies to provide for such basic CST services.
- If a board elects to maintain its own CST, each core member (school psychologist, learning disability teaching consultant and social worker) must be an employee of the district board of education. Boards may not abolish an individual position within the basic team and subcontract the individual services, even for reasons of economy.
- Even when a board of education establishes a CST with district employees, special education services that are not part of the core team, such as speech correctional services, may be subcontracted.
- Any subcontracting of CST team services must be with public entities such as ESCs, jointure commissions or other school districts.
- Boards of education may subcontract for CST services to supplement existing local CST district services, but may not supplant them.
- Boards may not contract out services of individual CST members to fill temporary openings such as a one-year sabbatical leave.

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• **District's obligation to pupil after expulsion** The Commissioner held that a school board's action to expel a student, even when lawfully taken, did not absolve the board from responsibility for the child's tuition when the school placement was controlled by the statutory provisions of *N.J.S.A.* 18A:47-1 *et. seq.* (Schools for Dependent and Delinquent Children). However, the Commissioner emphasized that, except where a court of appropriate jurisdiction orders a student's school placement or there exists a statutory or regulatory provision mandating a school district to pay for educational services after a pupil is expelled, there is no obligation whatsoever on the part of a board to provide or pay for educational services for a student after it has lawfully expelled the student pursuant to *N.J.S.A.* 18A:37-1 *et seq.* Further, the Commissioner indicated that the fact that an expelled student may be under 16, does not alter this holding.

This case arose when the North Plainfield Board of Education expelled a 15-year-old unclassified ninth grade pupil. He was later adjudicated delinquent by the Superior Court, Family Part. In lieu of incarceration, he was enrolled in the Educational Services Commission's (ESC's) "Alternative to Incarceration Program" pursuant to the order of that Court. The ESC sought $20,000 in tuition costs from the North Plainfield Board of Education. Holding that procedural deficiencies in the ESC's establishment of the program were not a basis for defeating the claim for payment, the Commissioner ordered payment. However, the Commissioner stated,

> In so holding, however, the Commissioner expressly rejects arguments advanced by petitioner or otherwise suggested by the . . . (ALJ) in the initial decision, that there is any *general* obligation on the part of a board of education to provide or pay for educational services for a student after it has lawfully acted to expel the student pursuant to *N.J.S.A.* 18A:37-1 *et seq.*, notwithstanding that the student may be under 16 years of age; the exception occurs *only where*, as here, a court of appropriate jurisdiction has ordered the student's school placement or there exists a statutory or regulatory provision mandating such an obligation. The Commissioner stresses, though, that this holding does not prevent, nor is it in any way intended to dissuade, boards of education from providing continued educational services to a student whom it has expelled, if the board so desires. (italics in original) ***Somerset County Educational Services Commission v. North Plainfield Bd. of Ed.,*** **1999 *S.L.D.* (September 7)**

• **Subscription Busing to Non-public Schools** The Commissioner held that a public school district is not obligated to provide subscription busing under *N.J.S.A.* 18A:39-1.3 to non-public schools even where it provides it to public school pupils. That statute, adopted in 1995, permits district boards of education to enter into contracts and charge parents for the cost of busing pupils who do not live remote from school. The statute

further states that district boards of education "may also" enter into such contracts and charge parents for the cost of providing such transportation to such pupils attending "any not-for-profit non-public school" which satisfies statutory maximum distance requirements. The Commissioner agreed with Judge Campbell, ALJ, that resolution of the issue rested on the clear wording of the statute which permits, but does not require, subscription busing of pupils who are not remote from school. ***M.J.K.D. and A.W.D. o/b/o A.K.D. v. Piscataway Bd. of Ed.*** 1999 ***S.L.D.*** **(September 29)**

• **Subcontracting School Nurses** The Commissioner held that "the board *may not* have noncertificated and/or certificated contracted nurses *independently performing functions reserved to the school nurse* and then simply have the school nurse review and approve the results; the role of noncertificated and contract nurses in such functions must be clearly limited to provision of *assistance.*" (italics in original)

For reasons of economy the school board abolished two school nursing positions and provided health services through a contract with the Montclair Township Department of Health. The Commissioner ruled that *N.J.SA.* 18A:40-3.1 does not mandate that all nurses performing services in the district be employees of the Board. Each district must employ at least one school nurse with appropriate certification, and is "oblige(d).. to employ a sufficient number of school nurses to ensure the adequate provision of the duties specifically reserved for certified school nurses."

The Commissioner noted that nothing in the statute precludes a board from contracting for the services of noncertificated nurses to perform health-related services other than those services that require a standard certificate. However, even contracted nurses with school nurse certification may not perform school nursing services. Nor may contracted nurses holding county substitute certificates substitute for certified school nurses; any such substitutes must be employed by the District. (Commissioner noted that *P.L.* 1999 c. 168 did not control the outcome of this case as that new enactment applied only to persons who were initially employed to provide nursing services on and after July 1, 1999.) ***Montclair Education Association v. Montclair Bd. of Ed.,*** 1999 ***S.L.D.*** **(September 30)**

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ISSUES REGARDING PUBLIC TEACHERS "ON LOAN" TO A CHARTER SCHOOL

Burning the midnight oil looking for answers to the following questions under the charter school law?[1] No, your research skills are not failing! Clear answers simply do not exist.

Q. Under what circumstances may a public school board deny approval for a leave of absence to an employee who requests leave to work in a charter school?

A: The answer to this question was not addressed by the Legislature, nor has the Department of Education spoken. *N.J.S.A.* 18A:36A-14 d. states in relevant part:

> *A public school employee, tenured or non-tenured, may request a leave of absence of up to three years from the local board of education or State district superintendent in order to work in a charter school. Approval for a leave of absence shall not be unreasonably withheld.*

Query whether difficulty in the prospects for finding a replacement would constitute a valid reason to withhold approval.

Q: Does a teacher on such a leave of absence have the right to return to the public school prior to the expiration of the full term of the requested leave?

A: *N.J.S.A.* 18A:36A-14 f., the relevant provision, states,

> *Any public school employee who leaves or is dismissed from employment at a charter school within three years shall have the right to return to the employee's former position in the public school district which granted the leave of absence, provided the employee is otherwise eligible for employment in the public school.*

This provision does not address whether the district must immediately reinstate a teacher who, for example, had requested a three-year leave of absence and departs from the charter school after only two years. Nor does it put to rest the even more disturbing possibility that the district could be required to reinstate a teacher in the middle of a school year if the teacher leaves the charter school (or is dismissed) mid-term. Clearly, requiring a board to reinstate a teacher prior to the expiration of the amount of leave requested would impose a hardship on the board of education. A district would likely find it difficult to obtain the services of a competent substitute teacher, especially in a specialty area, if the district could not represent to applicants that the position would be vacant for a certain amount of time. This is especially true if the district could not even represent that the position would be available for a complete year.

Q: Does a public school employee on a leave to work at a charter school, who decides to return to the public school at the end of the leave, accrue seniority credit for the time served in the charter school?

A: The statutory language addresses the issue of seniority, but is not clear. *N.J.S.A.* 18A:36A-14 e. states,

> Public school employees on a leave shall not accrue tenure in the public school system but shall retain tenure, if so applicable, and shall continue to accrue seniority, if so applicable, in the public school system if they return to their non-charter school when the leave ends.

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The statute does not explicitly state that when the teacher returns the time served is added to the calculation of seniority; it only states that seniority "continues to accrue." This could reasonably be interpreted to mean that the seniority calculation is put on hold during employment in the charter school, picking up when the teacher returns. However, this interpretation could be challenged.

Q. Consider the situation where a district has engaged a long-term substitute teacher to fill the place of the teacher who has taken a three-year leave to work in the charter school. The teacher decides to remain in the charter school rather than return to the public school at the end of the leave. If the district wishes to continue the employment of the substitute teacher, will the time served in the substitute position count toward that employee's tenure acquisition?

A: While the issue has not yet been tried, existing case law would seem to govern.[2] Presumably the substitute teacher will not have earned any credit toward tenure, on the theory that he/she was serving in a position that was not actually vacant. The vacancy only occurred once the teacher decided not to return from leave, and tenure would only begin to accrue from that point. To avoid misunderstanding, a district hiring a teaching staff member to fill in for a teacher on leave of absence should make it clear to the substitute that tenure will not accrue during the period of service coinciding with the leave of absence.

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[1] Charter School Program Act of 1995, *N.J.S.A.* 18A:36A-1 *et. seq.*; implementing regulations found at *N.J.A.C.* 6A:11-1.1 *et. seq.*

[2] See, e.g., *Lammers v. Point Pleasant Bd. of Ed.*, 134 *N.J.* 264 (1993); *Sayreville Ed. Ass'n. v. Bd. of Ed*, 193 *N.J. Super.* 424 (App. Div. 1984); cf. *Panettieri v. Emerson Bd. of Ed.*, unreported App. Div. A-373-89T1 (May 16, 1990)

TENURE DISMISSAL—REASONABLE ACCOMMODATION OF TEACHERS WITH ALCOHOL AND DRUG DEPENDENCY

Districts can successfully bring tenure proceedings against teachers with alcohol and drug dependency problems. However, as alcoholism and drug addiction have been treated as disabilities under New Jersey's Law Against Discrimination (LAD), a district must establish compliance with the protections of that law.[1] This article will describe the handful of school law decisions rendered over the last five years wherein school employees challenged tenure charges on the basis of their drug or alcohol dependency under the LAD.[2] In three of the five decisions, the district successfully removed the teacher. In two of the decisions, both involving teachers with alcohol dependency, the teachers were reinstated.

Some broad principles can be drawn from these cases. First, both drug and alcohol addiction have been treated in tenure matters as handicaps within the protection of the LAD. (*Cahill*, *Yaniello*, appellate decisions *infra*.) If an employee appears to be successfully addressing his or her dependency, the district must provide the employee an opportunity to demonstrate rehabilitation. (*Howard*, *infra*.) However, once a district provides an accommodation such as such as offering EAP assistance or a leave of absence to enter a rehabilitation program, the teacher is given an opportunity to demonstrate rehabilitation, and the teacher relapses, the district probably has no obligation to provide additional chances (see *Yaniello*, *infra*., rejecting the "three strikes and you're out" private-sector approach). Even if a teacher declines to take advantage of the district's offer for accommodation, the board will likely be viewed as having fulfilled its obligation to make the accommodation, especially where the teacher's performance or attendance is obviously affected by the drug or alcohol problem. (*Jones*, *infra*.) Although the LAD protects against dismissal based on the employee's disability without providing an accommodation, there is a distinction between tenure charges that are based on drug or alcohol abuse, and those based on some other drug/alcohol-related incident or criminal activity. Thus the criminal act of growing marijuana plants on a huge scale (over 400 plants) was sufficient to justify dismissal even though the school board provided no accommodation and the individual never requested one. (*Kozik*, *infra*.) Finally, while in none of the cases were pupils actually exposed to a teacher under the influence of the addictive substance, it appears from discussion in these cases that such an occurrence would weigh heavily against reinstating an employee. (*Yaniello*, *Koller, infra*.)

The five school law rulings discussed herein were entered against the backdrop of the Appellate Division's ruling in *Matter of Cahill*, 245 *N.J. Super.* 397 (1991). There, the Appellate Division upheld the dismissal of a firefighter cross-addicted to alcohol and drugs, who was found to be under the influence of drugs while off duty. The firefighter was suspended, and entered and completed a drug rehabilitation program. As a condition of continued employment he was required to submit to random drug testing. One day he tested positive for morphine, although his job performance was unaffected. The Merit System Board sought his dismissal. The Administrative Law Judge (ALJ) ruled that he deserved another chance in light of the LAD's protections.

The Appellate Division found that his handicap could cause injury to himself or others, noting the perils inherent in fighting fires. Further, the court ruled that an employer is not required to assume or hope that an employee will limit drug use to off-duty hours, or that the effects of drugs will be dissipated by the time the work day begins. Recognizing that where feasible, an employer should afford an opportunity for rehabilitation to an employee handicapped by substance abuse, the court pointed out that this employee had had his chance. He had undergone a detoxification program and had entered an inpatient drug rehabilitation program. He had been reemployed on the condition that he remain drug free and failed. Refusal to continue employment of a handicapped person is lawful where the employment in a particular position would be hazardous to that individual or to others. The Merit System Board's decision was upheld, and the firefighter was dismissed.

1995–*Jersey City School District v. Howard*, 95 *N.J.A.R.* 2d. (EDU) 301 (unreported Appellate Division, April 20, 1995). This matter involved a long-term teacher who was a recovering alcoholic. The board filed tenure charges against her for her long pattern of incapacity and absenteeism, dating from 1972. This teacher had been absent

as often as she had been present, although she had received good evaluations until 1983. In February 1991 she placed herself in a residential alcohol abuse program and applied for and was granted a two-month leave of absence from the school district. She returned in April, and became upset by a principal's treatment of her, whereupon her psychologist recommended an additional leave to the end of the school year. She was granted the leave; several weeks into the leave she was advised that tenure charges would be filed and her increment withheld for absenteeism. She returned from her leave in September, whereupon her absenteeism improved. However, she was suspended in January pursuant to tenure charges filed against her.

In her defense, the teacher raised her disability under the LAD. The ALJ found that although she was protected under the LAD and was attending AA meetings, the district had already provided her the required accommodation. In light of the importance of role models and the impact of absenteeism on pupils, especially in a poor urban district such as Jersey City, and in light of the "predictability of relapse" in alcoholics, the judge recommended removal. The Commissioner of Education agreed with the ALJ, opining that "any accommodation would translate into tolerance of substandard classroom performance or higher than normal absenteeism" in an "acutely needy" district.

The State Board reversed, sternly objecting to the stereotypic, archaic assumptions made below about the predictability of relapse. In fact, the teacher was successfully addressing her alcoholism and demonstrating her rehabilitation. Disagreeing with the Commissioner's conclusion that continuation of her employment would be tolerating substandard performance, the State Board found that by demonstrating her rehabilitation Ms. Howard would be providing students with a role model "worthy of respect" that "can only be beneficial to the public school students she teaches during the rest of her career whether or not they are poor, urban, or minority." The Appellate Division, in an unreported *per curium* decision, affirmed the State Board's interpretation of the LAD and regulations within the school context, citing the narrow standard of review that governs its consideration of a final agency decision. The court warned in conclusion:

> "Obviously, nothing in the State Board's decision or in this opinion would prevent the district from refiling tenure charges in the event of a failure of Howard's rehabilitation in the future."

1996–*In the Tenure Hearing of Kozik*, 96 *N.J.A.R.* 2d (EDU) 345, St. Bd. aff'g w/modif. 96 *N.J.A.R.* 2d (EDU) 335. This matter involved an industrial arts teacher in the West Deptford School District who had been an alcoholic for many years. The alcohol caused him painful, severe pancreatic attacks, which resulted in frequent absences. Although he never used alcohol while on school grounds and his performance was unaffected, the district expressed concern over his absences in 1985-86. Rather than take his doctor's suggestion to enter a detoxification program, he secretly began to use marijuana as a substitute for alcohol, growing large quantities (over 400 plants) in a clandestine operation behind a false wall in his apartment. In 1991, the Federal Drug Enforcement Agency arrested him, and shortly thereafter, the board filed tenure charges against him. Following a jury trial, he was found guilty of a lesser offense, and sentenced to one-year's probation with counseling, fines, and a six-month suspension of his driver's license. He did not forfeit his public school employment.

In the tenure proceeding, Mr. Kozik sought a reasonable accommodation under the LAD. The ALJ found that the LAD did not protect persons involved in illegal activity like growing marijuana, and further found that the district had already accommodated the teacher in regard to his alcoholism. The judge found that instead of entering a detoxification program as suggested by his doctor he self-prescribed marijuana and should be dismissed for failure to avail himself of an accommodation. The Commissioner agreed.

The State Board agreed that the teacher should be dismissed, but for different reasons. The State Board noted that the record provided neither indication that the teacher had ever requested, nor that the board of education had ever provided, any accommodations for Mr. Kozik's alcoholism. The State Board stressed, however, that tenure charges should be sustained not based on his claimed addiction, but on his grand-scale cultivation of marijuana. The criminal nature of his conduct and the magnitude of the scale of his criminal activities were clearly inconsistent with the teacher's responsibility to provide a role model for his students. Further, the use of great quantities of marijuana could place at risk students entrusted to his care.

1996–*In the Tenure Hearing of Koller*, 97 *N.J.A.R.* 2d (EDU) 157. Mr. Koller, a gifted English teacher with over 25 years' experience in the Shore Regional High School District, was a longtime alcoholic. His alcoholism was exacerbated in recent years by marital problems and related depression. However, he had no performance problems except for some attendance problems. One day in December, he was found intoxicated during school hours, although not within the view of pupils. School officials had to call an ambulance to transport him to a hospital, and shortly after, they filed tenure charges against him for unbecoming conduct. Mr. Koller entered and successfully completed a partial hospitalization program (PHP) and then enrolled in and completed a ten-week Phase II program. He also joined AA and at the time of the hearing indicated that he intended to continue.

The ALJ found that the teacher was protected by the LAD and that his dismissal would violate that law. The judge rejected the school board's argument that the charges were not based on alcoholism, but upon becoming inebriated during school hours, finding that the underlying cause of Mr. Koller's drunkenness was alcoholism. The judge found that, as in *Howard*, *supra*, Mr. Koller had demonstrated that he was addressing his problem and intended to continue in his successful program of recovery. The judge emphasized the teacher's long record of gifted teaching and was persuaded by the fact that the pupils did not witness the teacher's state.

The Commissioner agreed that under the particular circumstances, after a lengthy and successful career

without discipline as well as in consideration of the LAD, the teacher should not forfeit his position on the basis of the single incident. Instead, he ordered forfeiture of 120 days' pay and the upcoming salary increment. However, the Commissioner cautioned against placing any significance on the fact that students were not exposed to the addictive behavior. Rather, his decision relied upon "the respondent's demonstration that he is currently addressing his alcohol addiction problem and that he intends to continue in his program of recovery." For that reason, the Commissioner directed the teacher, in conjunction with the board's Employee Assistance Program (EAP), to develop a plan for the maintenance of the teacher's recovery efforts with regular monitoring in accordance with district policies.

1998–*In the Tenure Hearing of Yaniello*, 97 *N.J.A.R.* 2d (EDU) 250, St. Bd. aff'g w/mod 95 *N.J.A.R.* 2d (EDU) 262, aff'd App. Div., unreported decision, Docket No. A-3482-96T1 (April 2, 1998)

An excellent Spanish teacher revealed to the Millville Board of Education that she had a drug problem, which evolved from some tragic incidents involving domestic abuse, and her husband's suicide. She requested assistance and drug rehabilitation, and completed a one-month inpatient program. She returned to work, signing a contract requiring that she remain drug-free and permitting random drug testing. The contract indicated that a test positive for drugs would warrant disciplinary action.

For five years, the teacher remained drug-free, and eventually became the district's substance awareness counselor. On the evening of May 20, 1994, she had a "slip" and during a phone call with her supervisor wherein she was disjointed and rambling, she represented that she had taken a drink, and voluntarily admitted herself into a rehabilitation center. There, she tested positive for drugs, and it was established that she had in fact ingested amphetamines. The Board filed tenure charges against her, claiming she had breached her end of the contract, and claiming that it had already fulfilled its obligation to accommodate her under the LAD.

Determining that drug addiction is a handicap under the LAD and New Jersey case law, the ALJ found that a teacher should not be held to the same standard as a firefighter because, unlike a firefighter, a teacher whose sobriety is compromised will not threaten the health and safety of students. On the other hand, unlike a clerical worker or secretary, a teacher as role model has the very real potential to harm students' development during the formative high school years, and should therefore not be afforded endless chances at rehabilitation. Noting that both the LAD and ADA are silent, and looking to the Federal Rehabilitation Act of 1973 for support, the judge then ruled that the "three strikes and you're out rule" followed in private industry was the applicable standard. The judge considered unrefuted testimony about the likelihood that a recovering addict will experience at least one slip. The judge noted in the teacher's favor that she immediately reported her slip to her supervisor, and that the students were not exposed to the non-sober behavior. The judge ordered the teacher returned with loss of 120 days' pay, and conditions including continued treatment and attendance at NA and/or AA meetings and the board's right to random drug testing, and a school contact to assist her.

The Commissioner reversed the ALJ's penalty, and ordered Ms. Yaniello dismissed. Recognizing that teachers hold positions that demand public trust and require a higher standard of conduct, the Commissioner rejected the "three strikes" standard in favor of a "balancing of interests" standard. Mindful of the "paramount role which local districts are assigned in the struggle to prevent substance abuse among students" the Commissioner found that the board had reasonably accommodated the teacher's handicap by supporting her effort to obtain treatment for her chemical addiction to permit her to return thereafter. Moreover, she should have understood that upon signing the contract, disciplinary action such as this could ensue. Further, the Commissioner explicitly rejected the significance placed by the ALJ on the fact that students were not exposed to her addictive behavior, and that she voluntarily reported her actions to the district while seeking treatment. "Such rationale would permit repeated use of an illegal substance, provided the employee did not allow students to be exposed to such use, and provided, following every 'slip,' the employee voluntarily reported the action and sought assistance." The State Board of Education affirmed the school board's dismissal of the teacher (modifying the finding that the teacher voluntarily reported her slip to administrators).

A three-judge Appellate Division panel, in an unreported, *per curium* decision, affirmed the State Board, finding that there was sufficient credible evidence in the record to support the conclusion that the local board afforded the teacher reasonable accommodation for her substance disability required by the LAD. Not disputing that her substance abuse addiction qualifies her as a handicapped person under LAD, the court stated,

> "We must defer to the Board's expertise in balancing the interests of the Millville education system, particularly that for teenagers, with those of petitioner's in the reasonable accommodation context. As the Commissioner highlighted, and the Board accepted, teachers must exhibit 'self-restraint and controlled behavior rarely requisite to other types of employment.' Given their dominant role-model type influence on students, teachers are unique members of our society. The Board's expertise in recognizing how a teacher's role can adversely influence teenagers in today's society with its drug abuse potential cannot be overlooked."

The court found that the State Board could elect to disregard Ms. Yaniello's effort to excuse her return to drug use with the explanation that recidivism is an element of her disability. The court also added some final comments relative to the "three strikes" rule, describing it as "arbitrary" and noting "(t)he Board has chosen to reject a slogan derived from the game of baseball that has no application in instances where case-by-case circumstances govern reso-

lution. We have no authority to countermand that policy decision."

1998 - *In the Tenure Hearing of Jones*, 1998 *S.L.D.* (March 6). The State Operated Board of Newark filed tenure charges of excessive and chronic absenteeism, incapacity and insubordination against an elementary special education teacher for a three-year period from the 1993-94 school year to the 1995-96 school year. She was absent 45 times, 54 times and 48.5 times, respectively, often failing to call in her absences. She was also excessively tardy. The board had noted her absenteeism during multiple evaluations, conferences, and memos. She had been warned often and had her increment withheld in 1995.

Prior to the filing of tenure charges, she never disclosed her substance abuse problem to anyone in the district's administration, attributing her absences and tardiness to depression and transportation problems. Several times over the years she had been advised of the Employee Assistance Program (EAP) provided by the school board to all employees, but she failed to avail herself of the EAP, attending only one meeting. Privately, the teacher had sought substance abuse treatment and attended rehabilitation programs in 1994, 1995, and 1996. She was involuntarily discharged from the rehabilitation program in July 1996 when she admitted using drugs during treatment.

During the tenure proceedings the teacher revealed that her absences and tardiness were caused by substance abuse, and claimed that the board's action violated the LAD. She further claimed to be presently rehabilitated, and asserted an entitlement to reasonable accommodation. The ALJ determined that the board had satisfied its policies and had made a sufficient affirmative effort to aid the teacher by offering voluntary EAP assistance. On the issue of LAD protection, the ALJ found that her claim to be rehabilitated was based on her own feeling and an unreliable doctor's certification. She had thus failed to demonstrate rehabilitation by the required preponderance of credible evidence. As continued absenteeism would constitute an inability to perform the essential duties of a teacher, the ALJ concluded that the teacher was not protected by the LAD by virtue of her inability to adequately perform the essential duties of a teacher. He further concluded that "she is foreclosed from the protections in the workplace afforded by law to individuals with disabilities, based on the hardship devolving on the employer in finding appropriate substitute teachers and the hardship devolving on the students whose instruction is impermissibly interrupted, disjointed and uneven as a result of the absences and tardiness." The Commissioner affirmed the ALJ decision for the reasons expressed therein.

Conclusion: In the five tenure cases discussed, the teacher was reinstated in each case that involved alcohol dependency. None of the teachers was reinstated where addiction to other, illegal substances was involved. The logical implication is that reinstating teachers with drug addiction to the classroom raises the larger concern. Also, there seems to be some equivocation over the question of whether addiction to illegal drugs is, in fact, a protected handicap under the LAD. (Refer to endnote [1]). However, even where teachers battling drug addiction are involved, the district should be able to demonstrate that it made a reasonable accommodation such as a leave of absence or EAP assistance.

A district could probably bolster a case involving an alcohol dependent teacher by demonstrating that after providing a reasonable accommodation, the teacher was given an opportunity to demonstrate rehabilitation, and failed. For example, in *Howard*, the tenure charges were filed against the teacher shortly after she had returned from a leave of absence and during a period where her absenteeism was much improved. If the district had waited and documented any absenteeism or performance problems that persisted after the leave had been provided, it may have improved its chance of success.

Even though it may be more difficult to overcome a teacher's claim to LAD protection in matters involving alcoholism than drug addiction, the decision to reinstate the teacher in *Koller* is surprising, in light of the fact that the teacher consumed alcohol on school premises (albeit out of the view of pupils). By way of comparison, the ADA explicitly states that an employer may require that employees not be under the influence of alcohol at the workplace, and may hold an employee who is an alcoholic to the same qualification standards for behavior that it holds other employees, even if the unsatisfactory performance or behavior is related to the alcoholism. 42 *U.S.C.* 12114. Apparently, the LAD was applied here to provide more protection to the employee than the ADA would presumably require. Key to the Commissioner's decision were the teacher's ongoing steps to address his addiction and his long, successful career. Districts faced with a situation involving a single incident by an otherwise exemplary employee should be mindful of the *Koller* decision.

Where employees with drug dependency are involved, a district may wish to consider entering into a "Health Improvement Program Contract" of the sort used by the district in *Yaniello*, under which the school board, the employee and a representative of the teacher's union, agreed that Ms. Yaniello would remain drug free, would submit to random drug testing upon suspicion of a renewed problem, and would be subject to disciplinary action should testing at any time be clearly positive.

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[1] But cf, *Matter of Jackson*, 294 *N.J. Super.* 233 (App. Div. 1996) certif. den. 149 *N.J.* 141 (court, in a footnote declined to address the question of whether dependency upon CDS must be deemed a handicap under LAD in all cases); Atty. Gen. F.O. No. 1 (1989) (stating that past or present addiction to illegal drugs could not be basis for LAD claim)

[2] The LAD does not explicitly list drug or alcohol dependency as a handicap. *N.J.S.A.* 10:5-4.1 contains a general prohibition against discrimination against handicapped employees unless the handicap reasonably precludes the performance of the particular employment. This provision is implemented by *N.J.A.C.* 13:13-2.1 to -2.8. *N.J.A.C.* 13:13-2.5(b) requires an employer to make a reasonable accommodation to the limitations of a handicapped worker unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the enterprise.

The cases described in this article were not decided under the Americans with Disabilities Act (ADA), presumably for jurisdictional reasons. It should be noted that the ADA explicitly extends protections to individuals with drug and alcohol dependency. See, 42 *U.S.C.* 12114; 29 *CFR* 1630.3, providing that while a person who currently uses drugs is not protected under the ADA from employee action taken on the basis of the drug use, former drug addicts who are participating in a supervised rehabilitation program or who have been rehabilitated, and are no longer engaging in the illegal use of drugs, are protected. See also, EEOC Technical Manual, Section 391.

SCHOOL ETHICS ACT; RULINGS AND ADVISORY OPINIONS The following are brief summaries of recent public advisory opinions and decisions of the School Ethics Commission, and Commissioner of Education decisions concerning the School Ethics Act issued during the time period November 1, 1998 through June 1, 1999. Copies of the full advisory opinions and/or decisions may be obtained by contacting the NJSBA Legal Department or the School Ethics Commission. Decisions are also available through the NJSBA Web site.

ADVISORY OPINIONS

1. ***A05-98- November 1998*—**A school business administrator/board secretary asked whether he could continue to serve as a member of the New Jersey Association of School Business Officials (NJASBO) if his employing board were to participate in an investment program that the NJASBO planned to sponsor. The Commission advised that the inquirer's membership in the NJASBO was consistent with his duties in the public interest. In addition, membership in the NJASBO alone did not constitute the type of personal or financial involvement that would reasonably be expected to impair his independence of judgment. No violation of the Act would occur if the school business administrator/board secretary's employing board participated in the NJASBO investment program.

2. ***A22-98—December 1998*—**A board attorney inquired about the participation of three board members in a grievance hearing. One board member taught in another school district and was an NJEA member in that district. A second board member had a spouse who was a teacher in another district who, although not a member of the union (NJEA), received the benefit of the contract through an agency shop provision. These two board members were deemed able to participate in the grievance hearing, as the matter was not covered by the local collective bargaining agreement and would likely turn on past practice. In the eyes of the Commission, since the matter was not contained in the collective bargaining agreement, the outcome would not likely impact the terms and conditions of employment of the out-of-district employees.

The third board member's daughter worked in the district and was covered by the collective bargaining agreement in question, producing a different result. The Commission found that the daughter and the board member had a personal involvement in the outcome of the grievance. A favorable outcome could result in increased compensation for teachers similarly situated to the grievant and could increase the compensation of the daughter. As such, the public could reasonably expect the board member's objectivity and independence of judgment to be impaired. This board member could not participate in the grievance hearing without violating the Act.

3. ***A05-99—April 1999*—**A charter school board trustee/president asked whether the law firm in which he was a partner could represent the charter school board of trustees. The Commission found that the trustee/president would violate the Act if he were to serve as a trustee while his law firm was of counsel to the charter school board. The Commission found a violation on several levels. First, if the board were to contract with his law firm, a profit to the firm would likely result, placing the trustee in the position of engaging in a business that would be in substantial conflict with the proper discharge of his duties in the public interest. Second, the proposed conflict would be so pervasive that it would reasonably impair his objectivity on so many issues he would be rendered ineffective as a trustee and president to the board. Finally, the Commission believed that a lawyer serving on a charter school board of trustees while his law firm is representing the board would create the justifiable impression of a violation of the public trust.

COMPLAINTS— PROBABLE CAUSE FOUND

1. ***In the Matter of Richard Longo and Frank Sedaghi,*** Docket No. C05-98, C07-98—At its October 26, 1998 meeting, the School Ethics Commission found that two board members violated the Act when they voted to reappoint an auditing firm after a firm employee served as their campaign treasurer and after having used the firm's address as the address of their campaigns. The relationship was more than just casual and collegial and created a personal involvement. The Commission believed that a reasonable member of the public would expect that these board members could not be objective in their decision to appoint the firm. The Commission recommended the penalty of reprimand, considering as mitigating factors the attorney's advice that no conflict of interest existed and the fact that the auditors had served for several years. The Commissioner agreed but stayed implementation of the penalty until such time as the State Board ruled on the appeal. 1999 *S.L.D.* (March 4).

2. ***In the Matter of Katherine Mallette,*** Docket No. C09-98—At its December 15, 1998 meeting, the School Ethics Commission determined that a board member violated the Act when she participated in board discussions where her brother-in-law's property was discussed. By so participating, she acted in an official capacity in a matter in which she had a personal involvement that might reasonably be expected to impair her objectivity or independence of judgment. The Commission recommended the lowest sanction of reprimand. In making the recommendation, the Commission considered the fact that the relationship at question was that of brother-in-law in the loosest definition of the term. In addition, while Ms. Mallette participated in discussions on property, the Commission found no evidence that she attempted to persuade the board to purchase her brother-in-law's property. The Commissioner agreed. 1999 *S.L.D.* (February 9).

3. ***In the Matter of Lawrence James,*** Docket No. C10-98—At its December 15, 1998 meeting, the School Ethics Commission determined that a board member violated the Act when he asked the board's business

administrator to intercede for him in acquiring an unsecured loan from the bank that held the board's accounts. The business administrator in fact wrote a letter to the bank asking them to advance the board member an unsecured line of credit. The Commission determined that the board member was using his position to secure unwarranted privileges for himself.

The Commission recommended the penalty of censure for this gross violation of the Act. It recognized that a harsher penalty would have been more appropriate had the board member clearly asked the business administrator to write the letter in question. The Commissioner agreed. 1999 *S.L.D.* (February 9).

4. ***In the Matter of Raymond Rodney Coleman,*** Docket No. C15-98—At its March 23, 1999 meeting, the School Ethics Commission determined that a board member violated the Act when he participated in discussions and voted on matters concerning the lease that the church, in which he served as a deacon, had with the board of education. The Commission concluded that the board member had a personal involvement with the church that might reasonably be expected to impair his objectivity or independence of judgment.

The Commission recommended the penalty of censure. The fact that board member continued to participate in discussions regarding the lease and to vote on it despite the board solicitor's advice not to do so, was deemed an aggravating factor. Had such advice not been given, a reprimand might have sufficed due to the board member's inexperience. The Commissioner agreed. 1999 *S.L.D.* (May 2).

COMPLAINTS—DISMISSED

1. ***Kelly v. Garfield Board of Education,*** Docket No. C14-98 (11/24/98)—The School Ethics Commission dismissed a complaint filed against the board of education for failure to state a claim upon which relief can be granted. The complaint was dismissed with prejudice until such time as specific school officials and facts were named.

2. ***In the Matter of Abdi Gass,*** Docket No. C13-98 (11/24/98) – The School Ethics Commission found no probable cause to believe that, based on his job responsibilities, a board member also serving as a financial consultant to the borough violated the Act. The Commission required the board member to refrain from participating in matters in which the board and the borough had conflicting or competing interests such as a review of defeated budgets. Failure to adhere to this restriction could result in further proceedings against the board member.

3. ***Giberna v. Doherty,*** Docket No. C20-98 (4/27/99)—The School Ethics Commission found no probable cause to believe that a board member violated the Act when she sat in on an open public session where her husband and son criticized the complainant or when she participated in closed session discussions where the board discussed the complainant's reappointment as baseball coach. She did not use her position to secure unwarranted privileges for herself or her son. She had no personal involvement in the coach's continued employment as her son had graduated. The complaint was alleged to be frivolous by the complainant. The Commission found that it was not.

FORFEITURE OF PUBLIC EMPLOYMENT

School employees who are convicted criminals may forfeit the right to hold public office or employment under *N.J.S.A.* 2C:51-2.[1] The first part of this article will address the narrow issue of jurisdiction over the question of forfeiture under the 1995 amendments to the statute, and how boards of education should proceed when employees have been convicted of criminal charges. The second part of this article will examine decisions by the Commissioner of Education on the question of forfeiture prior to the enactment of the amendments.

JURISDICTION

Background: The question of jurisdiction over the issue of forfeiture has not been explicitly addressed in statute. However, the cumulative effect of several of the new provisions is to suggest that the Legislature intended to vest exclusive jurisdiction over the question of forfeiture in the courts. This is a change from the interpretations given the statute prior to its amendment by both judicial and administrative case law. Under prior case law the Commissioner of Education exercised jurisdiction over the forfeiture issue, often in matters involving tenure charges. Under the current law the Commissioner does not believe that he has jurisdiction to order forfeiture.[2]

Historically, the Commissioner's exercise of jurisdiction of forfeiture was necessary because, given the self-executing nature of the pre-1995 forfeiture statute and its predecessor, school districts were not likely to be presented with a forfeiture order. Rather, forfeiture was intended to take place automatically, and simply by virtue of the fact that the employee had been sentenced for the requisite offense.[3]

Without the tangible assurance of a forfeiture order, school districts were uncertain of their authority to remove an employee upon learning that the employee had been sentenced, and this uncertainty made it desirable for them to seek a declaratory judgment of forfeiture from the Commissioner. Obtaining a declaratory judgment seemed especially prudent where the school district had no indication that the sentencing court had even been aware of the public employment status of such employee so as to raise the issue. Further, often the employee would already have tenure charges pending against him at the time the criminal matter was resolved, and the Commissioner would need to address the forfeiture question before ruling on the tenure matter, as the forfeiture issue could render the tenure matter moot.[4] Typically the Commissioner or ALJ would hold hearings to determine whether the convictions were of a nature that would trigger forfeiture.[5]

In 1990 the Supreme Court of New Jersey confirmed that administrative agencies had jurisdiction over forfeiture issues. *Moore v. Youth Correctional Institute at Annandale*, 119 *N.J.* 256 (1990). In this case involving an employee of the Department of Corrections covered under the Civil Service Act, the Court held that determinations of whether an offense involves or touches on the public office are to be decided in an administrative hearing. In *Moore*, no forfeiture application had been made to the municipal court judge who convicted the employee of harassment, a petty disorderly persons offense. The Department of Corrections sought his removal in a disciplinary matter before the Office of Administrative Law. On appeal, the Merit Board found that his conviction triggered forfeiture, which finding was affirmed by all tribunals of appeal including the state's Supreme Court. Underlying the affirmation was the court's concern that the statute made no provision for communication of employment-related information to the sentencing court, making it impractical and inefficient for the court to exercise jurisdiction over the question of forfeiture. The majority believed that vesting jurisdiction in the administrative agency would address the situation where the sentencing court does not possess the necessary knowledge or information to decide the issue of forfeiture. The dissent, however, asserted that the Department of Corrections lacked jurisdiction to decide the issue of forfeiture because that should be decided only by the sentencing court.

Current Law The 1995 amendments to the forfeiture law appear to vest exclusive jurisdiction over forfeiture issues in the courts. The Commissioner of Education has adopted this interpretation, and believes that he no longer has jurisdiction over the question. See, e.g., *Tenure Hearing of Vitacco*, 97 *N.J.A.R.* 2d (EDU) 449, in which the Commissioner dismissed a tenured superintendent for unbecoming conduct after concluding that he had no jurisdiction to address forfeiture where the federal district court specifically declined to order forfeiture. The superintendent had plead guilty to tax evasion in federal court, but the court had specifically declined to order forfeiture because of the superintendent's indications that he would be retiring from his tenured position.[6]

The Legislature indicated its intent to vest exclusive jurisdiction over forfeiture issues in the courts when it added the language in paragraphs b. and g. of the statute.

Paragraph b. requires a court to enter an order of forfeiture immediately upon a finding of guilt or entry of a guilty plea unless the court orders a stay:

> "b. A court of this State *shall enter an order* of forfeiture pursuant to subsection a.
>
> (1) immediately upon a finding of guilt by the trier of fact or a plea of guilty entered in any court of this State unless the court, for good cause shown, orders a stay of such forfeiture pending a hearing on the merits at the time of sentencing; or…" (emphasis added)

Compare the new paragraph b. above, which requires affirmative action on the part of the court, with the passive language of the prior statute:

> "b. The forfeiture set forth in subsection a. *shall take effect*:
>
> (1) upon finding of guilt by the trier of fact or a plea of guilty, if the court so orders: or
>
> (2) Upon sentencing unless the court for good cause shown, orders a stay of such forfeiture…" (emphasis added)

This requirement that the declaration of forfeiture be embodied in an order suggests that the law is no longer self-executing, but rather that forfeiture must be specifically addressed and ordered by the court. This inference is buttressed by paragraph g., which addresses what happens when the issue of forfeiture is not raised in a court at the time of a finding of guilt, entry of guilty plea or sentencing. Previously the statute was silent on this issue, and the Commissioner of Education would entertain an application for a declaratory ruling, as described previously. Paragraph g. addresses how forfeiture under these circumstances may be resolved:

> "In any case in which the issue of forfeiture is not raised in a court of this State at the time of a finding of guilt, entry of guilty plea or sentencing, a forfeiture of public office, position or employment required by this section may be ordered by a court of this State upon application of the county prosecutor or the Attorney General *or upon application of the public officer or public entity having authority to remove the person convicted from his public office, position or employment.* The fact that a court has declined to order forfeiture shall not preclude the public officer or public entity having authority to remove the person convicted from seeking to remove or suspend the person from his office, position or employment on the ground that the conduct giving rise to the conviction demonstrates that the person is unfit to hold the office, position or employment." (emphasis added)

Further support for the proposition that jurisdiction over forfeiture issues rests with the courts, is the Legislature's direction in paragraph b. (1), that a stay of the order of forfeiture may be ordered by the court for good cause "pending a hearing on the merits at the time of sentencing." Prior to the amendments the statute made no reference to a hearing. An inference can be drawn from the explicit reference to a mechanism for fact-finding, presumably on the issues of "involve and touch" or dishonesty, that the courts should provide such fact-finding.

Conclusion: In light of the above amendments to *N.J.S.A.* 2C:51-2, it is no longer appropriate for a school board to seek a declaratory judgment from the Commissioner of Education on the issue of forfeiture. Where the sentencing court is on notice that the defendant is a public officer, the court has an obligation to determine whether to enter an order; a district in possession of the order need do no more than honor that order. In other cases, a district may learn that the court specifically declined to order forfeiture. In such a case, the Commissioner does not have the ability to address the issue of forfeiture, but may proceed on the tenure charges. If the issue of forfeiture was not raised before the court, the proper procedure now seems to be for a

board of education to either notify the county prosecutor or the Attorney General, or for the board itself to apply to a court to have the employee removed. Presumably, should the court conduct a hearing, the employing school board may be asked to provide whatever job-related information may be necessary to assist the court in rendering a decision on the issue of forfeiture. Also note that where staff members have been accused of crimes or unbecoming conduct that might warrant suspension or revocation of the teaching certificate, the district superintendent has an independent obligation to notify the State Board of Examiners. *N.J.A.C.* 6:11-3.5. Should the State Board of Examiners issue an order to show cause, the district has a responsibility to cooperate in the investigation and may be called upon to provide information.

OFFENSES THAT HAVE WARRANTED FORFEITURE

Although the Commissioner appears to no longer possess jurisdiction over the question of whether an offense involves dishonesty or touches upon the school employee's employment for the purpose of forfeiture, the decisions rendered by the Commissioner of Education thereon may nonetheless be instructive, both to the practitioner and to the courts charged with making that determination.

Offenses that "Involve or Touch" Employment The Commissioner's decisions should be read against the more recent pronouncements in *Moore*. In *Moore,* the Supreme Court articulated several broad principles to be followed when assessing whether a particular offense touches on the employment in such a way as to warrant forfeiture.

> "First, there is a need to assess the gravity of the crime as revealed by its nature, its context and the identity of the victim. Second, there is a need to assess the qualifications required of the employee's public employment." (*supra* at 269)

The court emphasized that it is the substance of the crime, not whether it was committed during work hours or on work premises, that should determine whether it involves or touches employment.

> "When the infraction casts such a shadow over the employee as to make his or her continued service appear incompatible with the traits of trustworthiness, honesty, and obedience to law and order, then forfeiture is appropriate." (*supra* at 270)

• *Drug offenses:* The general position of the Department of Education as espoused in *Arocha and Gonzalez v. Bd. Of Ed. of Hudson Co. Area Vo. Tech.*, St. Bd 1985 *S.L.D.* (April 3), rev'g 84 *S.L.D.* (August 16), is that drug related convictions always touch on employment that involves the care of students. In *Arocha*, the district suspended two janitors who were indicted on drug (marijuana) offenses. Arocha was admitted to PTI and obtained a conditional discharge. Gonzalez plead guilty to a disorderly persons offense. The board terminated their employment, and they filed a challenge.

On appeal of the Commissioner's decision, the State Board held that the forfeiture statute could not be applied to Arocha because a conditional discharge was not a conviction for purposes of the forfeiture statute.

On the question of whether Gonzalez was entitled to a hearing on whether the drug offense touched the employee's position, the State Board reversed its prior ruling of *In the Matter of the Tenure Hearing of Humphreys*, 1979 *S.L.D.* 839, St. Bd. rev'g 1978 *S.L.D.* 689. In *Humphreys,* the State Board had taken the position that a forfeiture determination necessitated a hearing regarding *all* the relevant circumstances surrounding the offenses in order to determine whether the conduct touched the administration of the position or involved moral turpitude. Referencing the state's commitment to solving the widespread drug problem in the schools, the State Board noted in *Arocha*:

> "…where a public school employee has been convicted of an offense involving a controlled substance, it must be shown only that his position charged him with the care of students or involved significant contact with students. Once this is established, forfeiture may be declared so long as the administrative proceedings afforded the employee the opportunity to demonstrate any mitigating circumstances relating to the conviction… In so far as our holding today is inconsistent with the decision in *In re Humphreys*, that decision is modified." (*Arocha*, St. Bd. at 8)

While the extent of Gonzalez's contact with students during his performance of janitorial cleaning duties could not be determined, the State Board found that children were placed in his charge for approximately three hours and forty five minutes each work day in his capacity as bus driver, which constituted significant student contact to require forfeiture.

Although the State Board has taken the position that any CDS related offense requires forfeiture of the position of an employee whose job places the employee in contact with children, the municipal courts have not necessarily taken the same position. In *Willingboro Bd. of Ed. v. Lott*, 93 *N.J.A.R.* 2d (EDU) 516, aff'd St. Bd. 94 *N.J.A.R.* 2d (EDU) 35, a teacher pled guilty to growing 64 marijuana plants in her back yard, constituting a fourth degree crime. After her plea, tenure charges were filed. In a ruling on cross-motions for summary judgment, the ALJ concluded that since the sentencing judge had ruled at the time of her sentencing that her conduct did not touch upon her employment, the issue of whether she had forfeited her position as art teacher was foreclosed and could not be litigated in that administrative proceeding.

Moreover, the State Board may have moved from its position, at least where anabolic steroids were concerned. In the State Board ruling on remand in *Tenure Hearing of Olek*, 94 *S.L.D.* (March 2) the State Board required a specific factual demonstration of a nexus between the infraction and the employment. There, a science teacher/wrestling coach was arrested for possession of anabolic steroids and drug paraphernalia in his home. The board filed tenure charges and ulti-

mately he pled guilty to possession of a hypodermic needle and a legend drug and use of the drug, all disorderly persons offenses. The board moved for summary judgment on the issue of forfeiture.

The ALJ concluded that based on *Arocha* and *Moore*, the offenses involved or touched his employment. The Commissioner agreed. The State Board reversed, noting that careful examination of the facts, including the teacher's employment (there was some confusion re: his employment status) and the qualifications required thereof, is necessary to determine whether the offenses involving the use and possession of steroids touched or involved his employment. Such analysis must also include consideration of all mitigating circumstances. The State Board declined to expand its holding in *Arocha* to encompass the steroids offenses, which drugs were not designated as CDS until after he entered his guilty plea. The State Board reversed the grant of summary judgment and remanded for fact finding.

On remand the ALJ found that there was a nexus between the offenses and his employment. The judge determined that the teacher's involvement with steroids adversely affected his ability to enforce the school's anti-steroid policy and sent a conflicting signal to students and diminished his image as a role model. They also made him more aggressive. The Commissioner agreed.

The State Board reversed, finding that forfeiture was not warranted for lack of sufficient nexus between the use and possession of steroids found in the teacher's home, and his employment. It found that the record did not establish that the teacher was directly responsible for discouraging and monitoring student steroid use, either in his teaching position or during the brief period in which he served as an assistant wrestling coach. Nor had the Board presented evidence of the particular duties and responsibilities specifically required of the teacher as assistant wrestling coach. The testimonial evidence was only stated in generalities, imputing an awareness about steroid misuse to all individuals involved in athletics. Further, the district had no steroid policy. (1994 *S.L.D.* at 5-8.) The matter was remanded to the Commissioner for proceedings on the tenure charges. Ultimately, the matter settled. The terms of the settlement included the employee's departure, and his promise never to seek employment again in the district. 1995 *S.L.D.* (October 24).[7]

• *Sex offenses:* Mitigating circumstances, such as long, unblemished records, have figured in several of these cases. For example, in *West Orange Bd. of Ed. v. Lieb*, 1985 *S.L.D.* 933, an exemplary teacher was convicted of a disorderly persons offense of lewdness (contact with undercover officer's genital area). The board pursued tenure charges, which had previously been lodged against him but held in abeyance pending the outcome in municipal court. The Commissioner accepted the findings of the ALJ, who determined that the offense did not involve dishonesty, a crime of the third degree or above or touch his employment as a teacher as it did not involve pupils and occurred during the summer when school was not in session. Not only did the Commissioner not order forfeiture, but due to the mitigating circumstances he did not order removal, merely suspension without pay through the end of the year. And in *Old Bridge v. Pappa* 1988 *S.L.D.* 542, another exemplary teacher plead guilty to the disorderly persons offense of public lewdness. The Commissioner did not discuss the forfeiture statute, but did look to *Lieb* in determining that, although it was conduct unbecoming, it should not warrant dismissal, but rather an increment withholding, loss of 120 days' pay and reinstatement conditioned on therapy.

In *Bergenfield v. Efferen*, 95 *N.J.AR.* 2d (EDU) 457 (decision on remand), the Commissioner applied the nexus test set forth in *Moore.* He found that forfeiture was not warranted where a custodian had entered a guilty plea to fourth degree criminal sexual contact with his 25-year-old mentally retarded daughter. The Commissioner accepted the ALJ's determination that the offense did not involve and touch his employment as a school custodian. Noting that under *Moore* a crucial factor is the relationship between the offense and the individual's ability to perform satisfactorily in the future, he looked to prior determinations of the Commissioner and State Board where the forfeiture statute was given a narrow interpretation so as to rule against forfeiture where the offenses neither occurred on school property, nor involved students or the employment. The Commissioner did not order forfeiture, but terminated the custodian on charges of conduct unbecoming.

• *Threats, harassment and offenses involving violence:* An art teacher was indicted for making terroristic threats on the phone to several teachers in *In re Fulcoli*, 1985 *S.L.D.* (March 18). Tenure charges were filed, and he subsequently pled guilty to a disorderly persons offense. The Commissioner rejected a proposed settlement, and after the tenure hearing, in a post-hearing brief, the issue of forfeiture was raised. The teacher claimed that the board waived its right to pursue forfeiture since it didn't press the issue prior to tenure hearing, and also claimed forfeiture was precluded since the acts occurred out of the classroom while he was under the influence of drugs and alcohol, and didn't involve students.

The Commissioner rejected his arguments and found both that forfeiture was warranted and that conduct unbecoming had occurred. What may have formed the nexus to employment was the finding that these individuals feared further contact and association with him in the school environment. On the issue of harassment, see also, *In the Matter of the Tenure Hearing of Tanelli*, 194 *N.J. Super.* 492 (App. Div. 1984) (harassing phone calls to the principal had occurred before the effective date of the *N.J.S.A.* 2C:51-2; tenure dismissal warranted).

See also, *In the Matter of the Tenure Hearing of Henderek*, 94 *N.J.A.R.* 2d (EDU) 268, where a teacher plead guilty to a 4th degree crime of assaulting three state troopers while resisting arrest. The Commissioner simply found forfeiture inapplicable as the crime was not of the third degree. For some reason not obvious from the opinion, there was no discussion of whether the offense touched

on employment.

Offenses that Involve Dishonesty A conviction for shoplifting has been automatic grounds for forfeiture. In *Timmons v. Bd. of Ed. of Paramus*, 1986 *S.L.D.* 1945, aff'd St. Bd. 1986 *S.L.D.* 1958, aff'd Appellate Division, unreported decision Docket No. A-2518-86T8 (November 13, 1987) a school custodian was convicted of shoplifting, a petty disorderly persons offense. Thereafter, the board sent him a letter advising him that he automatically forfeited his position. He filed a petition with the Commissioner demanding reinstatement and contending that in his circumstances that penalty was unduly harsh. The ALJ ruled that under the plain meaning of the forfeiture statute, an offense of shoplifting requires automatic forfeiture without the need for a hearing. It is irrelevant whether the conduct constituted a "crime" or whether it involved or touched the public position, as the provision regarding dishonesty is a totally separate basis for forfeiture. See also, *In the Matter of the Tenure Hearing of Peterson*, 1990 *S.L.D.* 500 where a teacher was convicted in federal court of shoplifting. Her attorney unsuccessfully attempted to obtain waivers from the county prosecutor and AG. The ALJ concluded that the tenure case should be dismissed because the forfeiture statute automatically removed her. "In effect, at the time of her conviction the board merely needed to remove her from its employee roles and cease paying her. It did not need to invoke any assistance from the Commissioner to effectuate such removal." *Peterson*, at 502. He found the offense of shoplifting "indisputably one of dishonesty." (relying on *Timmons*, *supra*). *Id.* at 501.

In at least one situation, the Commissioner has ordered the certificate revoked under Title 18A, avoiding consideration of the forfeiture statute. For example, in *Cox v. State Board of Examiners*, unpublished opinion, App. Div. (Docket No. A-3527-81T3) decided Nov. 18, 1983, a tenured school teacher was convicted of conspiracy to defraud. The DAG notified the Commissioner of the conviction, and proceedings were instituted by the State Board of Examiners to revoke his certificate. Finding that his certificate should be revoked under *N.J.S.A.* 18A:6-38 the court found it unnecessary to consider the applicability of the forfeiture statute.

Summary: Board counsel no longer has the ability to seek a forfeiture determination from the Commissioner of Education. Board counsel may wish to communicate with the prosecutor's office regarding the forfeiture issue should the board learn that one of its employees has been charged. Board counsel may be called upon to provide information relating to the issue of forfeiture to the prosecutor, Attorney General's office, or directly to the criminal court. Administrative case law examining whether particular crimes involve or touch on the position, should be instructive to all parties involved.

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[1] The statute provides that:

a. A person holding any public office, position, or employment, elective or appointive, under the government of this State or any agency or political subdivision thereof, who is convicted of an offense shall forfeit such office or position if:(1) He is convicted under the laws of this State of an offense involving dishonesty or of a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or crime; (2)He is convicted of an offense involving or touching such office, position or employment; or (3)The Constitution or a statute other than the code so provides.

[2] See, *Tenure Hearing of Tighe*, 1999 *S.L.D.* (May 3); *Tenure Hearing of Vitacco*, 97 *N.J.A.R.* 2d (EDU) 449.

[3] See, *State v. Musto*, 187 *N.J. Super.* 264 (Law Div. 1982), aff'd o.b. 188 *N.J. Super.* 106 (App. Div. 1983); *Kendall v. Camden Bd. of Ed.*, 1983 *S.L.D.* (March 16) quoting *The New Jersey Penal Code, Volume II: Commentary, Final Report of the New Jersey Criminal Law Revision Commission*, October, 1971. See also, e.g., *McGuire v. Haddonfield*, 1985 *S.L.D.* 1641, aff'd St. Bd. 1986 *S.L.D.* 3086 (ALJ noting that, as there was nothing in the record to show that the court ordered forfeiture upon the teacher's plea to second degree charges of sexual assault, or that the sentencing court ordered a stay, therefore, at the precise moment of sentencing, automatic forfeiture of the teacher's legislative status of tenure and employment by the board was forfeited).

[4] See, e.g., *In the Matter of the Tenure Hearing of Gervasio*, 1988 *S.L.D.* 1433; *Kearny Bd. Of Ed. v. Noll*, 1989 *S.L.D.* (January 5, decision on remand); *In the Matter of the Tenure Hearing of Grover*, 1983 *S.L.D.* (June 1); *North Brunswick Bd. Of Ed. v. Breece*, 1987 *S.L.D.* 2212 (forfeiture not specifically mentioned but, as condition on guilty plea to planting a narcotic in school principal's drink, employee agreed never to seek employment with a board of education, rendering tenure action moot). See also, *In the Matter of the Tenure Hearing of Bracigliano*, 93 *S.L.D.* (June 28) where the Commissioner was, in fact, presented with a forfeiture order stated in the court's oral opinion and memorialized in the judgment of conviction.

[5] See, e.g., *Arocha and Gonzalez v. Bd. Of Ed. of Hudson Co. Area Vo. Tech.*, St. Bd. 1985 *S.L.D.* (April 3), rev'g 1984 *S.L.D.* (August 16); *In the Matter of the Tenure Hearing Gervasio*, 1988 *S.L.D.* 1433. See also, NJSBA's 1983 publication of *Focus On: Tenure Dismissal* (Susan Galante, Esq.).

[6] The Commissioner rejected the ALJ's decision. The ALJ had read the forfeiture statute broadly to permit jurisdiction before the Commissioner, finding that "…the more reasonable reading of subsection (g) is that where, for whatever reason, the issue of forfeiture is not ordered by any court, a school district having authority to initiate the removal of a teaching staff member may litigate the forfeiture issue as part of a pending tenure proceeding." 97 *N.J.A.R.* 2d (EDU) at 453.

[7] While an employee's illegal drug use will usually justify tenure dismissal, dismissal is not guaranteed. See, e.g., *In the Matter of the Tenure Hearing of Valenti*, 90 *S.L.D.* 410, where a 20 year veteran and "Teacher of the Year" was arrested and charged with possession of marijuana in a parking lot of a bar. The Board filed tenure charges. The amount possessed made it a disorderly persons offense, and he was granted a conditional discharge. The Commissioner distinguished *Arocha and Gonzalez*, *supra*, as Gonzalez had narrowly escaped imprisonment whereas Valenti's charge was as a disorderly person, and he had no prior record of drug abuse. The victimless offense was not committed on school property, involved no student, teacher or administrator. The ALJ noted that smoking marijuana was not a heinous offense, and that numerous witnesses attested to Valenti's exemplary record and rapport with students. The Commissioner accepted the ALJ's recommendation that he not be dismissed, noting that the board did not specifically except to that determination, and imposed only a penalty of 180 days loss of pay and loss of increment. (For the Commissioner's rejection of the notion that smoking marijuana is not particularly heinous, see *Tenure Hearing of McIntyre*, 96 *N.J.A.R.* 2d (EDU) 722 at 725, aff'd St. Bd. at 726, aff'd App. Div., unreported *per curiam* opinion at 726.)

COMMISSIONER CORNER

SELECTED RECENT DECISIONS—READ THEM ON DOE WEB PAGE!

• Teacher who did not provide 60 days' notice of resignation was found guilty of unprofessional conduct and had teaching certificate suspended for one year. *In the Matter of the Suspension of the Teaching Certificate of Falco*, 1999 *S.L.D.* (May 24)

• When teacher settled Workers Compensation matter he waived statutory right to benefits under *N.J.S.A.* 18A:30-2.1. *Marino v. Willingboro Bd. of Ed.*, 1999 *S.L.D.* (April 13)

• Law is unsettled regarding interpretation of statute permitting school board to remove board member for missing four consecutive meetings. *Smith v. Hazlet Bd. of Ed.*, 1999 *S.L.D. (*March 8)

• Board violated statute prohibiting board from taking action on tenure charge at a public meeting; however, Commissioner declined to address question of remedy. *Williams v. Atlantic City Bd. of Ed.*, 1999 *S.L.D.* (March 1) (motion)

• Board member seeking indemnification that is discretionary with board was not disqualified from board membership. *Walsh v. Middletown Bd. of Ed.*, 1999 *S.L.D.* (Feb. 16)

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• FALL/WINTER 1998-99 •

SCHOOL ETHICS COMMISSION SUMMARY
You will find in this Fall/Winter 1998 edition of School Law Reporter a summary of the five Advisory Opinions issued and made public by the School Ethics Commission (SEC) between January 1998 and June 1998. This summary supplements the summary of Advisory Opinions set forth in the Spring '98 edition. Also in this edition is a summary of Complaints Dismissed between December 1996 and June 1998. This summary supplements the summary of Complaints Dismissed set forth in the July 1997 edition.

After this edition, School Law Reporter will no longer provide a detailed summary of all SEC action because the full text of all subsequent advisory opinions and decisions is now available on the Internet. To facilitate your research on school ethics issues, NJSBA will continue to provide a quarterly AMPSA publication identifying these rulings and opinions and providing a brief synopsis.

Please check the last page of this edition for information to help you access the full text of SEC and other school law decisions on the DOE Web site. The last page also contains an INDEX to prior editions of School Law Reporter that contain detailed summaries of earlier SEC rulings, many of which have not been posted on the Web site.

ADVISORY OPINIONS

Advisory Opinion A30-97 (February 24, 1998) addressed whether an assistant superintendent of schools who was a 1/3 partner in a private day care/after school center would be in conflict should that private center bid and contract with the board of education to provide services to the school district. The school district in question was an *Abbott* school district which could be required to provide, or could determine to provide, full day programs for three and four year olds and half-day programs for children under the age of three. Although the district was currently constructing a new facility, it did not have adequate facilities to provide the new programs. The board, therefore, could discuss, in the future, the issue of contracting with local day care centers and nursery schools to provide preschool programs. The SEC concluded that it would be a violation of the School Ethics Act for the private day care center, in which the assistant superintendent was a partner, to contract with the board to provide services to district children.

The SEC found that a contract between the assistant superintendent's day care center and the board would be in substantial conflict with the assistant superintendent's duties and would violate N.J.S.A. 18A:12-24a. In his capacity as an assistant superintendent whose responsibility included technology issues for the district, he would likely be called upon to offer guidance on the role of technology for the four and under programs. If his day care center were to have a contract with the district, he would have a substantial conflict in discharging his duties as assistant superintendent. On the one hand, he would have to make decisions and recommendations to the superintendent and/or board on any technologically-related issues affecting the contracted out programs, and on the other hand, he would be a businessman seeking to make a profit on the contract.

The SEC also found that N.J.S.A. 18A:12-24c would be violated. It could reasonably be perceived that any action the assistant superintendent would take regarding the use of private day care centers to provide district programs would be tainted by his business interest. If his center were to bid on the project, the public could reasonably perceive that any decisions or recommendations he made that had any impact on the services to be provided were made not just with the district's interest in mind, but also his own center's interest.

The SEC declined to answer the question of whether his center could contract with the district in the event that other centers located within the district could not provide the necessary services. In order to be able to answer the inquiry the SEC would need to know the circumstances under which the other centers or providers could not deliver the services. That information was not before the SEC.

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Advisory Opinion A01-98 (February 24, 1998) considered whether several board members could participate in a discussion and vote on a proposal to give greater weight to certain courses in which their children were enrolled. The proposal was to increase the numerical value of grades in "academy" program courses by 1/2 of a point in recognition of the academy courses' greater rigor. Anyone receiving a "B" in an academy course would receive a 3.5 grade point transcript credit instead of the usual 3.0. Class ranking would remain unaffected by the modification. Three board members had children who were high school juniors, academy program enrollees, and who would be applying for college in the spring. The SEC advised that these board members could participate in discussions and vote on the general proposal without violating the Act. However, they could not participate in a discussion and vote on whether the weighted grading system should apply retroactively.

N.J.S.A. 18A:12-24c applied to the facts in this request. The SEC found that the board members in question and their children had a personal involvement in the grading proposal. The question was whether that personal involvement might reasonably be expected to impair the board members' objectivity or independence of judgement. The SEC found that the board members in question would reasonably be expected to lack objectivity when it came to a proposal affecting their children. The SEC recognized that the decision on whether to adopt the proposal was one which would affect all students in the district and was similar to a situation when a board member who is a parent of a district student with musical talent has to vote on whether to keep the music program intact. Such a board member would be reasonably expected to consider the ramifications to his or her child, but the decision would be one that would affect every parent of a student in the district. Accordingly, the SEC believed that N.J.S.A. 18A:12-24h provided an exception to allow the board members to vote on whether to weight grades in academy courses without the clause being made retroactive.

The SEC defined the group in subsection h to be the parents of all students, not just the parents of academy students. Academy course enrollment was open to any interested students. Should the board adopt the proposal, academy course students would have two separate grade point averages, one for college transcripts and one for class ranking. These factors indicated that although the board members in question had a personal involvement, they did not stand to gain more than other parents in deciding whether to weight grades. Thus, the decision of whether to weight grades alone was a matter of educational policy, as any other curriculum decision, and the board members in question would not violate the Act by participating in that decision.

The SEC found that the same overall public interest was not present with respect to making the proposal retroactive. By voting in favor of making the policy retroactive, the board members in question would be voting to make their own children's transcripts look better for their college applications. In contrast to the general proposal, it would particularly affect those parents who had children in academy courses who were now college bound. The fact that the junior year is crucial for the college transcript heightened the personal involvement of the board members.

Unlike the general proposal, the SEC advised that subsection h would not apply to the decision of whether to weight the grades retroactively. The circumstances set forth indicated that if the proposal were to apply retroactively, the board members in question would accrue material gain to a greater extent than any gain would reasonably be expected to accrue to any other parent of a student, making subsection h inapplicable.

Advisory Opinion A03-98 (April 28, 1998) tackled the question of which board members could serve on a negotiations team and vote on the collective bargaining agreement when four of the five members who were able to vote had a conflict of interest. The SEC concluded, for the first time, that the doctrine of necessity would apply to the selection of the negotiations team.

This matter involved a county special services school district which was beginning negotiations with its education association, an affiliate of the NJEA. Two vacancies existed on the seven member board. Of the remaining five voting seats, one member of the board was a member of the NJEA and a local affiliate. Three other members of the board had spouses who were members of the NJEA and local affiliates. The one non-conflicted member was a recent appointee to the board and had served on the board for less than two months.

The SEC found that the doctrine of necessity would need to be invoked in this circumstance as the one board member who was not in conflict would not constitute a committee. Clearly, the one board member who was not in conflict should participate in negotiations. The board would then invoke the doctrine of necessity in order to allow the other four board members to participate in negotiations. When they did so, they should state publicly that they were invoking the doctrine of necessity and the reason for invoking it. The board could then determine to act as a negotiations committee of the whole or to chose a committee from among any of its members. The SEC reiterated that only because the circumstances would render the board unable to negotiate a contract if it did not invoke the doctrine of necessity would it be permitted to do so. The SEC also found that the doctrine of necessity would have to be invoked to permit all board members to vote on the collective bargaining agreement.

Advisory Opinion A04-98 (April 28, 1998) took on the question of whether a board president who was seeking a position as an adjunct professor in several local colleges, could properly ask the superintendent of schools for a letter of recommendation. The SEC concluded that the Act would not be violated by requesting such a recommendation. However, for other reasons, the SEC suggested that the board president may wish to reconsider making such a request.

The SEC advised that the board president would not be using his official position to secure unwarranted privileges, advantages or employment for himself by asking the superintendent for a recommendation. No facts were presented which would indicate that the board president pressured the superintendent or in any way used his leverage as a board member to obtain the recommendation. No violation of the Act occurred. The SEC acknowledged, however, that since the board member was in a position of being the superintendent's

employer, the situation was unusual at best. Because of the nature of the employment relationship, the superintendent might not feel free to refuse the request or to be completely candid on the recommendation.

The SEC further noted that it did not encourage board members to ask personal favors of the superintendent or any other employee. Such favors could result in a later finding that the board member could not be expected to be objective if a matter concerning that employee, in this case the superintendent, were to come before the board. If such a finding were made, that board member would have to abstain from issues involving the employee or risk violating N.J.S.A. 18A:12-24c. The SEC declined to express an opinion on whether future actions taken by the board president regarding the superintendent could violate the Act as such facts and circumstances were not before it. The SEC only raised the possibility for consideration.

Advisory Opinion A08-98 (May 26, 1998) considered three specific questions regarding board members who had certain relatives employed in the district and the board members' ability to participate in the negotiations process.

The first question was whether a board member could negotiate and vote on a contract when her mother was a substitute cafeteria worker who was not a member of any negotiations unit nor covered by any negotiated agreement. Cafeteria helpers were included in the collective bargaining unit represented by the teachers association, an NJEA affiliate. The SEC found no linkage between the terms and conditions of the cafeteria helpers and the substitute cafeteria workers. Substitutes' salaries appeared to be determined independently and substitutes did not receive any health benefits or paid holidays that could be affected by the negotiated agreement with the education association. Accordingly, it did not appear that the board member or her mother would receive any financial or personal benefit from the outcome of the negotiations with the local education association. The SEC determined that the board member would not violate the Act if she were to participate in negotiations or vote on the contract with the local education association which represented the cafeteria helpers.

The second question dealt with whether a board member whose sister-in-law was in the local bargaining unit could participate in negotiations and vote on the collective bargaining agreement with that unit. The SEC believed that a board member's relationship with a spouse's sibling was different than that of a relationship with an emancipated child or daughter-in-law. The SEC found that the public would not reasonably expect or perceive that a board member whose spouse's sister was in a local bargaining unit could not be objective in negotiating. Therefore, the SEC advised that the board member whose sister-in-law was in the local bargaining unit could negotiate with that unit without violating the Act.

The third question was a more complicated one as it dealt with whether certain board members with relatives in the teachers', secretaries', and administrators' associations could negotiate and vote on contracts with other bargaining units. The mother of one board member was a teacher, the spouse of another board member was a secretary, and the sister of third board member was a teacher. The Commission was asked to consider the contracts with the teachers' association, secretaries' association, and administrators' association for purposes of determining which board members could negotiate with which units.

In reviewing the three contracts the Commission focused on whether the issue of linkage of contract provisions. It appeared that each unit negotiated its contract separately with no particular connection between or among the contracts. Although the provisions of the teachers' and secretaries' contracts were the same, they were not expressly linked to one another. The SEC advised that the three board members with relatives in the teachers' and secretaries' associations could not negotiate the contracts of the associations representing their respective relatives. However, each board member could negotiate and vote on the other association's contracts so long as the board did not have an understanding that the secretaries' or teachers' association would each get the same level of health benefits as the other.

Author's note: In reaching its determination, the SEC failed to consider the fact that the secretaries' association and teachers' association were each NJEA affiliates. Had the SEC recognized that the associations were both part of the same statewide union, it likely would have determined that a board member whose spouse was in one NJEA affiliate was precluded from negotiating with another NJEA affiliate in the same district. Unfortunately, this issue apparently was not raised before the SEC, and the SEC did not address it within the confines of this opinion. Board members are encouraged to consult their board attorney should they be faced with this situation. School attorneys should be cautious about relying on this opinion as the statewide union affiliation was not addressed.

COMPLAINTS DISMISSED— NO PROBABLE CAUSE

The following represent complaint dismissals by the School Ethics Commission for lack of probable cause. Please note that while complaint dismissals can often be instructive on questions involving school board ethics, in other situations their value may be limited. The reason for dismissal may simply amount to a lack of evidence and not necessarily a finding that the conduct forming the basis of the complaint, if proven, would not violate the School Ethics Act. Moreover, each case is dismissed based on its own merits and on the particular facts presented to the SEC.

***In the Matter of Vincent Lowry, Medford Lakes Bd. of Ed.*, Complaint No. 5-96.**

On December 24, 1996, the SEC dismissed a complaint filed by Ms. Jane Berezow against Mr. Lowry, a member of the Medford Lakes Board of Education. The complaint alleged that Mr. Lowry misused his official position to secure unwarranted privileges and advantages for himself in violation of the School Ethics Act by reading a prepared statement about his accomplishments during a board work session. The SEC found that Mr. Lowry did, in fact, read a prepared statement during the open board discussion portion of the work session. The statement set forth his intention to run for reelection, cited his prior accomplishments and listed his goals were he to be

reelected. The SEC found that this conduct was not an unlawful misuse of his position in violation of the Act. Rather Mr. Lowry used the privilege of board membership to speak freely during the course of a meeting and, in particular, during the open board discussion period. No probable cause was found and the matter was dismissed.

***In the Matter of Hanover Park Regional School District Bd. of Ed.*, Complaint No. 12-96.** On September 24, 1996, the SEC dismissed a complaint filed by Gordon A. Raupp and Louis J. Belle, principal owners of Kinsley Associates. The complaint alleged that Kinsley Associates contracted with the Hanover Park Regional High School District to provide professional services but was not paid. Kinsley's services consisted of the design and supervision of athletic field renovations and water service installation and were billed to the board approximately 15 months prior to the filing of the complaint.

The SEC found that Mr. Raupp and Mr. Belle failed to state a claim upon which relief could be granted under the School Ethics Act. Mr. Raupp and Mr. Belle simply sought the proceeds that they believed they were due under the Kinsley contract. For that relief, they would need to file a complaint in New Jersey Superior Court—Law Division as a contract claim, not a claim with the SEC. The SEC lacked subject matter jurisdiction over the contract claim set forth in the complaint. No probable cause was found and the matter was dismissed.

***In the Matter of David Dickinson, Edison Bd. of Ed.*, Complaint No. 9-96.** On January 28, 1997, the SEC dismissed a complaint filed by Mr. James Kukor against Mr. Dickinson, a member of the Edison Board of Education. The complaint alleged that Mr. Dickinson violated the School Ethics Act when he negotiated a contract with the Edison Township Education Association during the time in which Mr. Dickinson's father was employed as a physical education teacher and was a member of the Education Association. The SEC found significant the fact that Mr. Dickinson's father would be retiring at the end of the 1995-96 school year and would not be covered by the contract being negotiated. Mr. Dickinson's personal involvement in the outcome of negotiations was not such that he would be unable to be objective in serving on the negotiations committee. No probable cause was found and the complaint was dismissed.

The SEC rejected Mr. Dickinson's request for sanctions against Mr. Kukor for filing a frivolous complaint. There was no evidence that Mr. Kukor intended to harass or maliciously injure Mr. Dickinson.

***In the Matter of Melindo Persi, Superintendent; Dr. William Suriano; Bruce Polkowitz, Edison Township Bd. of Ed.*, Complaint No. C29-96.** On April 8, 1997, the SEC dismissed the complaint filed by Mr. James Kukor against Superintendent of Edison Township Schools, Mr. Persi. The complaint alleged that Superintendent Persi attempted to use his position to secure unwarranted privileges for himself in connection with a traffic accident that occurred in December 1995. The initial complaint included allegations against board members Dr. Suriano and Mr. Polkowitz. These were withdrawn by Mr. Kukor in January 1997.

On December 5, 1995, Superintendent Persi was involved in a traffic incident involving a pedestrian. When he spoke to the investigating police officer, Mr. Persi asked for Sergeant Polkowitz, a member of the Edison Township Board of Education, but he was unavailable. Mr. Persi was then approached at the scene by Officer Suriano, the brother of board member Suriano. Officer Suriano took his statement. Mr. Persi did not receive a summons.

The SEC found that Mr. Persi's merely asking for Sergeant Polkowitz at the scene of the accident without any evidence that he did so as an attempt to avoid a summons was insufficient evidence that he attempted to use his official position to secure unwarranted privileges for himself. The record was devoid of any evidence that Mr. Persi ever contacted Mr. Polkowitz or Mr. Suriano with the purpose of exonerating himself from any misconduct. No probable cause was found and the complaint was dismissed.

Superintendent Persi requested that the SEC find Mr. Kukor's complaint to be frivolous and to fine him accordingly. The SEC found, for the first time, that a frivolous complaint had been filed and fined Mr. Kukor $500. Mr. Kukor filed and continued his complaint in bad faith for the purpose of harassing and causing malicious injury to Mr. Persi. Even if Mr. Kukor had a basis to file the complaint initially, it became apparent during its pendency that there was no violation of the Act, yet Mr. Kukor continued against Mr. Persi. He had ample opportunity to withdraw the complaint and chose not to do so. Mr. Kukor's attachment to the complaint of newspaper articles unrelated to the allegations suggested that he may have had an intention other than to determine whether Mr. Persi's actions had violated the School Ethics Act. The SEC found significant that Mr. Kukor was familiar with the provisions of the School Ethics Act and its procedures as this was the fourth complaint he had filed with the SEC. Because of his prior experience with the SEC, the SEC found that he knew or should have known that there was no reasonable basis for this complaint.

***In the Matter of Frank Huber, John Bendokas, James Palmisano, Frank Pannucci, Joseph Sangiovani, Nicholas Eremita and Edward Mercer, Brick Township Board of Education,* Complaint No. C19-96.** On May 27, 1997, the SEC dismissed a complaint filed by Ms. Lauren Kelly against board members Mr. Huber, Mr. Bendokas, Mr. Palmisano, Mr. Pannucci, Mr. Sangiovanni, Mr. Eremita and Mr. Mercer. The complaint alleged that the board members conduct violated N.J.S.A. 18A:12-24 b, c, and d, of the School Ethics Act. Ms. Kelly also named Robert Shea, Esq., then attorney for the Brick Township Board of Education. The SEC advised Ms. Kelly that Mr. Shea was not a school official subject to jurisdiction of the School Ethics Act and that aspect of the complaint was withdrawn.

Ms. Kelly alleged that the firing of the board solicitor and auditor at the May 1996 reorganization meeting and the replacement of those individuals was improper. She alleged that Mr. Sangiovani violated the Act by voting on the board attorney because he used Mr. Shea as an attorney in the past. It was admitted that Mr. Huber hired a uniformed officer to attend the budget meeting without the board's knowledge or approval and that he attempted to remove materials on health and sex education without

consulting with the board's curriculum committee. It was further alleged that Mr. Sangiovani had tried to have Mr. Eremita fired from his position as a teacher in the Lakewood school district for having used a fax machine at the school for Brick Township Board of Education business. Other allegations were raised and ultimately dropped either through lack of understanding of the Act or misunderstanding of the facts.

In reviewing the circumstances surrounding the board's appointment of its professional services individuals, the SEC found insufficient evidence to find probable cause that the respondents used their positions to secure unwarranted privileges, advantages, or employment for others. Mr. Shea's representation of Mr. Sangiovanni in a legal matter eleven years prior to the vote in question was insufficient evidence of financial and personal involvement that might reasonably be expected to impair Mr. Sangiovani's objectivity or independence of judgement. Even if the representation were closer in time to Mr. Shea's hiring, this evidence may not amount to the type of involvement that creates a conflict of interest under the Act.

The fact that Mr. Huber hired a uniformed police officer and tried to remove materials from the curriculum without consulting the curriculum committee did not constitute a violation of the Act. Mr. Huber's religious beliefs and the actions taken in response to those beliefs did not constitute the type of conflict that the Legislature contemplated when it prohibited a school official from acting in his or her official capacity in matters in which the official has a personal involvement.

Last, Mr. Sangiovanni's contact with administrators at Lakewood High School was not found to be an attempt to secure unwarranted privileges for himself or others. No probable cause was found and the complaint was dismissed.

In addition, the SEC rejected the respondents' request for sanctions against Ms. Kelly for filing a frivolous complaint. Ms. Kelly's actions did not rise to that level. She was a parent who was concerned about the conduct of the board, and the SEC found no evidence of bad faith.

***In the Matter of Fred Ferrone, Superintendent, Rita Klimkowski, Jack Crane and Maryanne Core, Board Members, Florham Park Bd. of Ed.*, Complaint No. C20-96.** On April 22, 1997, the SEC dismissed the complaint filed by Mr. Steven Brodsky and Ms. Dale Pardo against Mr. Ferrone, Ms. Klimkowski and Mr. Crane. The complaint alleged that respondents violated the School Ethics Act when they met for dinner without informing other board members and discussed Superintendent Ferrone's contract renewal along with the tenure of a principal with whom they were friends. It was alleged that the meeting resulted in the superintendent dramatically altering his opinion of the principal, allowing her to get tenure when he was clearly against it prior to the meeting.

On April 29, 1996, Dr. Ferrone advised the board by memorandum that he did not intend to recommend the renewal of contract and subsequent tenure for the principal in question. On May 9, 1996, Mr. Crane and Ms. Klimkowski took Dr. Ferrone out to dinner. They discussed Dr. Ferrone's pending five-year contract renewal and discussed the matter of the principal. All three parties at the dinner said that at no time was there discussion linking Dr. Ferrone's pending five-year contract with the renewal of the principal. Dr. Ferrone took no action regarding the principal including failing to notify the principal of the pending non-renewal. As the principal did not receive a non-renewal notice by May 15, 1996, she was effectively granted contract renewal for the 1996-97 school year and tenure in the Florham Park school district, effective on or about August 17, 1996.

The SEC found insufficient evidence that the dinner meeting discussion was aimed at getting the superintendent to change his mind about the renewal of the principal. Each of the individuals present at the dinner meeting testified that there was no discussion linking the superintendent's contract to the principal's tenure. The inference raised from the principal's receipt of tenure subsequent to the dinner meeting was not sufficient to support a finding of probable cause. The only actual evidence present was that the respondents met with the superintendent over dinner.

With regard to the superintendent, the SEC was unable to draw a connection between the superintendent's own contract and the tenure of the principal. The superintendent was never in danger of losing his contract, the only question being whether he would receive a three or five-year agreement. There was insufficient evidence to support a probable cause finding that the superintendent had used his position to secure unwarranted privileges for himself or others.

Ultimately, the SEC found that the sequence of evidence created an unsavory appearance, but that was not sufficient to find probable cause. The record showed instances in which the superintendent and the board did not follow the education statutes. The board was directed to adhere to the May 15 deadline for taking actions on non-renewal and begin the process prior to April 29. Despite the SEC's discomfort with the superintendent's and the board's execution of procedures in this matter, it found no probable cause and the matter was dismissed. The SEC rejected respondent's request that the complainants, Mr. Brodsky and Ms. Pardo, be found to have filed a frivolous complaint and be sanctioned. The complaint in question did not meet the standards set for frivolous complaints set forth in N.J.S.A. 2A:15-59.1.

***In the Matter of Frank Huber, Brick Township Board of Education,* Complaint No. C25-96.** On May 27, 1997, the SEC dismissed the complaint filed by Mr. Edward Mercer against Mr. Frank Huber, a member of the Brick Township Board of Education. The complaint alleged that Mr. Huber violated the Act when he asked for a legal opinion from the board attorney and then threatened to have him removed when the board attorney did not give him the opinion he wanted. It was further alleged that Mr. Huber threatened the board attorney with removal from his position if he provided the board with a legal opinion as to whether the board would have liability under Title 59 if Mr. Huber exhibited behavior with the students and teachers as he was said to have done in an April 1997 police report. It was further alleged that Mr. Huber engaged in unethical behavior with respect to charges paid on a National School Boards trip to Florida and when he attended a $150 per person dinner as a guest of the school architect shortly after voting for him to be the

board's architect for the 1996-97 school year. Finally, it was alleged that Mr. Huber violated the Act when he voted to hire special counsel for the board to investigate Mr. Mercer. The special counsel being considered had been Mr. Huber's own personal counsel in School Ethics Complaint C19-96.

The SEC found insufficient evidence to establish probable cause that Mr. Huber violated the Act when he used his position to have the board attorney removed. No evidence was shown that Mr. Huber's motivation to remove the attorney was related to the board policy or the legal opinion on the police report. The SEC did not feel that disagreeing board members should call upon it to intervene in political disputes of this type and declined to do so in this instance. The SEC found no probable cause to credit the allegations that Mr. Huber's request for reimbursement for a board trip to Orlando violated the Act. No unwarranted privilege was demonstrated.

With respect to the receipt of tickets to attend a boat trip from the board architect, there was no evidence that Mr. Huber solicited the tickets or otherwise used his position to secure the tickets for himself in violation of the Act. There was no evidence that he used his position to secure an unwarranted privilege for the architect since the board had already voted to appoint the architect for that particular year.

Mr. Huber's failure to abstain from the resolution to hire special counsel was also not deemed to violate the Act. There was no dispute that Mr. Huber had initially retained special counsel to represent him in a prior Ethics Commission case. As in a prior Commission decision, No. Hunterdon v. Lentine, Complaint No. C17-96, the Commission held that there was no conflict of interest for a board member to vote for an attorney who had been previously retained by the board member when the only prior representation of the board member was in the context of board membership. No probable cause was found and all matters were dismissed.

***In the Matter of Gina Kolata, Princeton Regional Bd of Ed.*, Complaint No. C34-96.** On June 24, 1997, the SEC dismissed the complaint filed by Mr. Kenneth Raybuck against Ms. Gina Kolata. The complaint alleged that Ms. Kolata violated the Act when she negatively characterized a teacher during an interview by a reporter for the Princeton Packet. Ms. Kolata's comments were with respect to an article in the high school student newspaper, The Tower. Ms. Kolata suggested that The Tower lacked proper journalistic guidance and cited other examples of what she considered to be flawed journalism.

The SEC found that Ms. Kolata's comments were not an attempt to use her position to secure unwarranted privileges for herself or others. Nor did she have a financial or personal involvement in the matter. No probable cause was found and the matter was dismissed.

The SEC rejected Ms. Kolata's request that Mr. Raybuck be sanctioned for filing a frivolous complaint. The SEC found that the standard for frivolous complaints pursuant to N.J.S.A. 2A:15-59.1 was not met and denied the request.

***In the Matter of Theresa E. Nielsen, West Amwell Bd. of Ed.*, Complaint No. C32-93.** On June 24, 1997, the SEC dismissed a complaint filed by Mr. Randolph Bannerman, Ms. Cynthia Magill, Mr. Robert Kascik and Mr. Michael Fleming against Ms. Nielsen, a member of the West Amwell Board of Education. The complaint alleged that Ms. Nielsen's close relationship with the superintendent was a personal involvement that might reasonably be expected to impair her objectivity in matters dealing with the superintendent's salary.

The facts set forth in Ms. Nielsen's answer under oath were undisputed. She and the superintendent were good friends but no more than she considered herself to be a good friend of the school attorney, staff members and several board members. The superintendent and his family have been friends of hers and her family's for several years. She denied that her judgement had ever been colored or impaired regarding his contracts. A closer relationship was alleged in the complaint but no supporting evidence was presented.

The SEC found no probable cause to exist that Ms. Nielsen's personal involvement would require her to abstain from voting on the superintendent's contract and subsequent revisions. The SEC noted that it has never held any relationship other than a marital, familial or business relationship to create a personal involvement that may preclude a school official from acting in her official capacity in a matter. It is difficult to show how an otherwise undefined relationship would reasonably be expected to impair one's objectivity or independence of judgement. The other difficulty would be establishing upon what matters she would be precluded from voting. If the SEC were to find that Ms. Nielsen should not have voted on his contract, the question would become on how many other matters would she be required to abstain because they would involve the superintendent. Essentially every vote that she cast that had anything to do with the superintendent would come under scrutiny. The SEC did not believe that the Legislature intended the School Ethics Act be applied in such a way, and dismissed the complaint.

***In the Matter of James L. Palmisano, Brick Township Bd. of Ed.*, Complaint No. C31-96.** On June 24, 1997, the SEC dismissed the complaint filed by the Brick Township Board of Education against Mr. Palmisano, a member of the board. The complaint further alleged that Mr. Palmisano attempted to use his position as a board member to harass the police officer and to obtain favorable treatment. According to the police report filed by Patrolman David Buckle, Mr. Palmisano asked Officer Buckle whether he had any children and told Officer Buckle to watch out because he had connections.

In reviewing the allegations, the SEC found significant the sworn testimony from the municipal court proceedings, particularly the finding of Judge Apostolou, that Mr. Palmisano never used or attempted to use his position as a school board member to harass Office Buckle. Although the judge's findings pertained to harassment charges, those findings were persuasive on the question of whether the "connections" to which Mr. Palmisano referred included his membership on the Brick Township Board of Education. The Commission found the court's findings to be particularly persuasive and concluded that there was no probable cause to credit the allegations against Mr. Palmisano. The complaint was dismissed.

***In the Matter of Edward Mercer, Brick Twp. Bd. of Ed.*, Complaint No. 33-96.** On October 28, 1997, the SEC dismissed the complaint filed by the Brick Township Board of Education against Mr. Mercer, a board member. The complaint alleged that Mr. Mercer violated the Act when he gave his resume and those of his friends to the account manager for Blue Cross/Blue Shield. Mr. Mercer had served on the board's finance committee which was charged with the responsibility of recommending a health insurance provider and which had recommended Blue Cross/Blue Shield.

In reviewing the charges, the SEC accepted the arguments presented by Mr. Mercer. Mr. Mercer did not ask the Blue Cross/Blue Shield account manager to mention his membership on the board to the person to whom he forwarded the resume. The account manager testified that he did not do for Mr. Mercer anything that he would not do for anyone else. He regularly received resumes from persons he met and generally forwarded them to the human resources persons. He did nothing more than that for Mr. Mercer. The SEC did not dispute that Mr. Mercer possessed the qualifications for the job, but could not conclude for certain that he could have obtained the job without the assistance of the account representative. But for that assistance, Mr. Mercer's resume could have languished for months in a pile full of equally qualified applicants. However, his qualifications made it difficult to conclude that his employment was unwarranted under the School Ethics Act.

Considering all the facts the SEC could not conclude that Mr. Mercer used or attempted to use his position to secure unwarranted privileges or advantages for employment. The SEC did not encourage or condone Mr. Mercer's conduct but found only that he committed an error in judgement that was not likely to recur since he was no longer a board member. In reaching its conclusion that no probable cause existed, the SEC did not intend to imply that it was appropriate for a board member to seek employment through a connection with a vendor. The SEC's rulings were based on the precise facts before it in this particular case. No probable cause was found and the matter was dismissed.

***In the Matter of Mary Ann Bancroft-Piatkowski, Ronald Lawson, Patte Blood, Elizabeth O'Connell, Gene Tanala, Ronald Sanasac and Herbert Massa, Howell Township Bd. of Ed.*, Complaint No. C08-97.** On October 28, 1997 the SEC dismissed the complaint filed by Mr. Martin Blashinsky against board members Bancroft-Piatkowki, Lawson, Blood, O'Connell, Tanala and Sanasac, as well as against Board Secretary/Business Administrator Massa. The complaint alleged that these individuals accepted free tickets for food and drink from various vendors of the board in violation of the N.J.S.A. 18A:12-24e which states that no school official shall accept any gift based upon the understanding that the gift was given for the purpose of influencing him, directly or indirectly, in a discharge of his official duties. Board Secretary/Business Administrator, Herbert Massa, denied that he accepted free tickets and submitted proof that he had purchased his own ticket. The other respondents admitted to receiving free tickets but denied that this violated the Act.

The tickets were in connection with the Howell Chamber of Commerce dinner which honored the Howell Township Superintendent of Schools, Dr. Charles Kuzminski, as Man of the Year. The superintendent's secretary had received 40 tickets purchased by board professionals and vendors at $55 per person for distribution. The superintendent's secretary called board members and other individuals within the district advising them the tickets were available if they wished to attend. Ultimately the tickets were distributed to three vendors (5 seats), six board members (12 seats), one food-service worker (2 seats), four transportation department workers (4 seats), and fourteen secretaries (15 seats). The SEC found that six vendors of the board contributed to the purchase of the 40 tickets and made findings with respect to each of the respondents.

Mr. Massa purchased his own tickets, submitting a copy of his cancelled check as proof that he did so. No probable cause to credit the allegation against him was found and the matter was dismissed.

Ms. Bancroft-Piatkowski certified that she received two complimentary tickets directly from the Chamber of Commerce and not from Ms. Dore. Since she received the tickets from the Chamber as a body and since the Chamber is not a business that would seek contracts with the board, the SEC could not find that she accepted the tickets with the understanding that they were given for the purpose of influencing her directly or indirectly in the discharge of her official duties. No probable cause was found and the matter was dismissed.

The remaining defendants, all of whom had received tickets from the superintendent's secretary, certified having no knowledge that the tickets had been purchased by board vendors. No evidence was presented to contradict that any of them were aware that a specific vendor had purchased tickets. After the vendors bought the tickets at the invitation of the Chamber of Commerce, they did not give those tickets directly to the board members, but instead donated them to the Chamber for general distribution within the school district. As the board members did not know which vendors purchased the tickets, they could not have accepted the tickets with the understanding that they would show favoritism towards those vendors in future votes. No probable cause was found and the matter was dismissed.

The Commissioner rejected respondents' request that sanctions be imposed against Mr. Blashinsky for filing a frivolous complaint. The standard for frivolous complaints set forth in N.J.S.A. 2A:15-59.1 was not met. There was no evidence that Mr. Blashinsky's sole purpose was to harass or maliciously injure the respondents.

***In the Matter of Kabili Tayari, Mariano Vega and Suzanne Mack, Jersey City Bd of Ed.*, Complaint No. C06-97.** On November 25, 1997 the SEC dismissed a complaint filed by Mr. William Connelly, Ms. Camille Coleman, Mr. Joseph Stamm, Ms. Margaret Flint and Ms. Mary Avagliano against Ms. Tayari, Mr. Vega and Ms. Mack, board members. The complaint alleged that respondents violated the School Ethics Act when they voted for the board's purchase of the Caven Point Athletic Complex from the City of Jersey City as the three board members had a conflict of interest due to their ties to the mayor of Jersey City. Ms. Tayari was employed by the City of Jersey City as a Supervising Administrative Analyst, acting as a liaison between the municipal court

and the Administrative Office of the Courts. Ms. Mack was married to Mr. Robert Magro who was employed by the City of Jersey City as a computer analyst. Mr. Vega ran for city council as part of the mayor's political ticket in May 1997. He met with the mayor on several occasions prior to the vote on the purchase of Caven Point to discuss the purchase and other matters.

With respect to Mr. Tayari, the SEC found that there was no connection between the nature of his employment with the City of Jersey City and the matter being voted upon so as to create a prohibited conflict of interest. There was insufficient evidence that the mayor would benefit personally from the sale or that Mr. Tayari would feel that he had to support the sale in order to avoid risking a threat to his employment.

With respect to Ms. Mack, her spouse's employment had no involvement with the sale of Caven Point. Further, he was a civil service employee protected by New Jersey laws against arbitrary actions against his position. The SEC concluded that Ms. Mack's spouse did not have a financial involvement that could reasonably be expected to impair her objectivity or independence of judgement.

The SEC agreed that Mr. Vega had a personal involvement with the mayor having been on the mayor's ticket when he ran for city council. However, it was not the type of involvement that was reasonably expected to impair Mr. Vega's objectivity in voting on whether to purchase the athletic complex. Allegations that the purchase would assist the mayor in balancing the Jersey City budget was a loose connection at best. The Commission found no probable cause to credit the allegations in the complaint against any of the respondents and dismissed the complaint.

***In the Matter of Gerardo Fernandez and Joseph Garcia, Passaic City Bd. of Ed.*, Complaint No. C02-94.** On December 16, 1997, the SEC dismissed the complaint filed by Mr. Italo Ubaldini against Mr. Fernandez and Mr. Garcia, members of the Passaic City Board of Education. The complaint alleged that respondents violated the School Ethics Act when they voted against implementing a time clock system for use by district employees when their spouses were employees of the school district.

Initially, the SEC found probable cause as each board member's respective spouse had a personal involvement that might reasonably be expected to impair the board member's objectivity. However, upon reconsideration and further investigation, the SEC found that N.J.S.A. 18A:12-24h provided an exception which would permit their voting in this instance. Subparagraph h permits voting despite a conflict if no material or monetary gain accrues to the school official as a member of any business, profession, occupation or group to any greater extent than any gain could reasonably be expected to accrue to any other member of the business, profession, occupation or group. The SEC's investigation revealed that the time clocks would not be any more detrimental to the spouses than the use of the sign-in procedure. It also failed to reveal that the spouses would benefit from the defeat of the time clock resolution to any greater extent than would any other district employee. Accordingly, the SEC concluded that N.J.S.A. 18A:12-24h would permit the board members to vote on the resolution to purchase and utilize time clocks. The SEC vacated its May 27, 1994 finding of probable cause and dismissed the complaint.

***In the Matter of Jane Berezow, Medford Lakes Bd. of Ed.*, Complaint No. C19-97.** On January 27, 1998, the SEC dismissed a complaint filed by Ms. Pearl Bohs against Ms. Berezow, a member of the Medford Lakes Board of Education. The complaint alleged that Ms. Berezow used her board member position to gain employment for her daughter in violation of the School Ethics Act. When Ms. Berezow became aware that her daughter might be considered for a position as a school psychologist she informed the board president and superintendent that she would not be attending the executive session where that matter would be discussed. She also sought input from the NJSBA and the School Ethics Commission, which both suggested that she totally recuse herself from the hiring process. Following that information, she did not attend the July 11, 1997 executive session at which the positions were discussed and abstained from voting on the selection of the school psychologist at the July 16, 1997 board meeting. At that meeting the board hired Ms. Berezow's daughter as a full-time psychologist/guidance counsellor, effective July 1, 1997.

In reviewing the matter, the SEC found no information indicating that Ms. Berezow used her position to gain employment for her daughter. She was a member of the personnel committee prior to the hiring of her daughter but the personnel committee's responsibilities did not include screening or interviewing applicants for staff positions. There was no information to indicate that she tried to coax or otherwise influence the superintendent to select her daughter as her choice to fill the psychologist position. Since she abstained from all matters involving the hiring of her daughter, no probable cause was found to credit the allegations that she used her position to secure unwarranted privileges for her daughter. The complaint was dismissed.

***In the Matter of the Howell Twp. Bd. of Ed., Dr. Charles Kuzminski and Herbert C. Massa,* Complaint No. C10-97.** On February 24, 1998 the SEC dismissed a complaint filed by Mr. Morlino against the Howell Twp. Board of Education and administrators Kuzminski and Massa. The complaint alleged that the respondents violated the School Ethics Act when the board approved a tentative school budget and the administration sent a budget with different figures to the Department of Education. Specifically, on February 26, 1997, the board adopted a tentative budget. Thereafter, but prior to the March 4 tentative budget submission, the administration realized it had underbudgeted for courtesy busing by $285,000. The administration added that amount to the budget and forwarded the revised budget to the county office for review and approval. Mr. Morlino alleged, among other things, that the administration circumvented the elected board by submitting a budget $285,000 above the budget approved by formal board vote and by so doing acted in a matter in violation of the public trust.

After a close review of the facts and the law, the SEC found that the complainant had failed to state a claim under the School Ethics Act. No violation of any of the prohibited acts set forth at N.J.S.A. 18A:12-24 was found. The Commission noted that not all conduct of which the public may disapprove falls within its jurisdiction. No

probable cause to credit the allegation set forth in the complaint was found and the charges were dismissed.

In the Matter of Anthony Esgrow, Luis Perez, Clifford Meeks and Frank Speziali, Glassboro Bd. of Ed. **Complaint No. C07-97.** On March 30, 1998, the SEC dismissed a complaint filed by Mr. Mark Williams against board members Esgrow, Perez, Meeks and Speziali. The complaint alleged that these board members violated the School Ethics Act when they attended an American Association of School Administrators (AASA) conference in Orlando, Florida, and stayed at accommodations at a cost above that which was allowed by board policy. The SEC initially found probable cause to believe that a violation of the Act occurred. Upon receipt of additional submissions from the parties, the Commission reconsidered its decision and dismissed the complaint against all respondents. The Commission found that none of the respondents used their positions to secure unwarranted privileges for themselves or others in violation of the Act.

The SEC was concerned with the lack of internal procedures that caused the filing of this complaint. Had the board members made arrangements as a group instead of separately, this matter could have been avoided. The board has modified its travel policy so that the issue is not likely to arise again. The SEC suggested that the board could go further and delineate the number of board members that could go to any given convention. In addition, the board members should have publicly discussed how many board members were going on the trip and how much it was going to cost. It was never demonstrated that the board members' attendance at the convention was discussed and approved by the board. The SEC noted that if the board is paying for its members to attend a conference, it must openly discuss the number of members attending and the cost of the trip. The SEC concluded the respondents had not violated the Act by staying at the Disney Wilderness Lodge during the AASA conference and dismissed the charges against them.

In the Matter of Fred Lester, Hillside Twp. Bd. of Ed. **Complaint No. C17-97.** On March 30, 1998, the SEC dismissed a complaint filed by Mr. Dennis Kobitz against Mr. Lester, a member of the Hillside Board of Education. The complaint alleged that Mr. Lester violated the School Ethics Act when he was sworn in by a friend who was an attorney for the law firm which represented the board, when he voted to put on the agenda a raise for poll workers while his wife was a poll worker and then voted for the raise before changing his mind and abstaining, and when he took contributions from the board attorney and other vendors for his campaign to run for reelection but later returned the money.

The SEC found the following facts to be undisputed. Mr. Lester was sworn in by a friend who was an attorney at the law firm which had been appointed as the board's labor attorney and board solicitor on a 30-day interim basis. Mr. Lester's wife is a poll worker and he initially voted to raise the pay for poll workers but subsequently changed that affirmative vote to an abstention after advice from the board solicitor. Mr. Lester also received contributions from attorneys but then later returned those contributions.

The SEC found no violation of the School Ethics Act when Mr. Lester was sworn into office by a friend who was an attorney with the law firm which represented the board. There was no unwarranted privilege that was secured and no advantage gained by being sworn in by a friend. The fact that respondent originally voted for a pay raise for the poll workers which included his wife, but after advice from the board attorney, abstained from voting did not violate the School Ethics Act. His admitting to having accepted political contributions from attorneys, believing that the contributions were not given with the intent of obtaining employment, and later returning the contributions, did not violate the Act. Having found no violation, however, the Commission cautioned the respondent to take precautions, and expressed hope that in the future the respondent would be more cautious in his acceptance of campaign contributions. No probable cause was found to credit the allegations set forth in the complaint and the charges were dismissed.

In the Matter of Dr. Roy Dawson, Jr., Camden City Bd. of Ed., **Complaint Nos. C22-97 and C25-97, Consolidated.** On March 30, 1998, the SEC dismissed complaints filed by Ms. Barbara Johnson and Ms. Janice Taylor against Superintendent Dawson. The complaint alleged that Dr. Dawson violated the School Ethics Act when he transferred principals and other administrators in connection with a district-wide reorganization.

In reviewing the matter, the SEC noted that all the individuals who were transferred had the qualifications to serve in the positions to which they were assigned. All transfers were properly approved by the board. There was nothing to indicate that any individual received any special favors or treatment. There was no indication that the relationship that Mr. Dawson had with any of the individuals would reasonably be expected to impair his objectivity or independence of judgement. No probable cause was found to credit the allegations in the complaint and the charges were dismissed.

In the Matter of Joanne Carter, Willingboro Bd. of Ed., **Complaint No. C24-97.** On March 30, 1998, the SEC dismissed a complaint filed by Ms. Edith Wright against Ms. Carter, a member of the Willingboro Board of Education. The complaint alleged that Ms. Carter violated the School Ethics Act when she met privately with members of a semi-professional football team and allegedly guaranteed their use of school district facilities. The complaint further alleged that Ms. Carter violated the Act when she hosted a private reception on behalf of the football team. In reviewing the facts of the case, the SEC found that the complaint failed to demonstrate that the respondent had an interest in the organization or had received either an unwarranted privilege or anything of value which would have impaired her objectivity as a board member. Her attendance at the reception was in her capacity as a former founder and president of the Willingboro Basketball Association. All community members were invited to this reception. The Commission noted that its authority was limited to reviewing violations of the School Ethics Act. The Act sets forth minimum ethical standards to which all school officials must abide. The Act does not prohibit all conduct by school officials which might be considered inappropriate or unprofessional. As the conduct of Ms.

Carter did not fall within the purview of the School Ethics Act it was not a violation of the Act. There was no finding of probable cause that she violated the Act and the complaint was dismissed.

***In the Matter of Larry Martin, Roxbury Bd. of Ed.,* Complaint No. C18-97.** On April 28, 1998, the SEC dismissed a complaint filed by Mr. Armond D'Agostino against Mr. Martin, a member of the Roxbury Twp. Board of Education. The complaint alleged that Mr. Martin violated the School Ethics Act when the Roxbury Twp. Board of Education purchased computers from AGO Consultants, a company of which Mr. Martin was president.

At its meeting of February 24, 1998, the SEC determined that there was no probable cause to credit several of the allegations set forth in the complaint. The Commission concluded that Mr. Martin did not use his position to secure unwarranted privileges for himself as he did not benefit from the transaction. Since he did not benefit from the transaction, the Commission could not find any use of position to secure financial gain for himself. Furthermore, he appropriately abstained from voting on the bill when it came before the board. Therefore, he did not act in his official capacity in a matter in which he had personal or financial involvement. The Commission did, however, find probable cause to credit the allegations that he violated N.J.S.A. 18A:12-24a, which prohibits a school official from engaging in a transaction that is in substantial conflict with the proper discharge of his duties in the public interest.

After a review of the written submissions, the SEC found that Mr. Martin offered his services to the PTA to help the PTA and the school secure the best price for computers they intended to purchase. He did not make any profit on the transaction and acted to purchase the computers only when the company would not sell the computers directly to the school and the PTA at the price previously quoted to AGO. The SEC found that this was not a business or transaction that was in conflict with the discharge of his duties as a board member.

The SEC noted that the perceived entanglements set forth in the probable cause determination indicated the reasons that the board's subsequent decision not to make purchases through a board member in the future was sound judgement. There will always be questions about whether a board member gained financially or otherwise from a transaction with the board despite his or her good intentions. In this transaction the SEC found no financial or other gain to Mr. Martin. He was acting as a member of the PTA when he offered to get a bid from Infotel. As a member of the PTA there was nothing wrong with this attempt to secure for the PTA the best price for the computers they wanted to purchase. The difficulty arose when board funds were committed to add to the donation from the PTA. The Commission concluded that the impression that a violation of the public's trust occurred, may have been created by a lack of adequate procedures and policies. The informality and laxity in the conduct of this transaction clearly resulted in the filing of the complaint.

The Commission concluded that Mr. Martin did not violate the School Ethics Act and dismissed the charges against him. Because of its concerns regarding the Roxbury Board of Education's methods of doing business, the Commission referred the matter to the Office of Compliance, Department of Education, for further inquiry.

Author's note: Since the Commission found probable cause prior to dismissing the case, any appeal of this decision would go to the State Board of Education rather than to Superior Court, Appellate Division.

***In the Matter of Wesley Smith, Hazlet Twp. Bd. of Ed.,* Complaint No. C28-97.** On April 28, 1998, the SEC dismissed a complaint filed by Ms. Maureen Mancini against board member Smith. The complaint alleged that Mr. Smith violated the Act when he responded to a student's letter to the editor criticizing the board's handling of an incident, by calling the student at home. The SEC found that even if all the allegations in the complaint were true, no evidence existed that Mr. Smith was trying to secure unwarranted privileges or advantages through his position as a board member. A board member does not give up his right to voice his disagreement to the author of an article or letter he reads in the newspaper, even if the author is a student. While the SEC did not condone Mr. Smith's action, for which he had apologized, it did not find that he secured, or tried to secure, privileges for himself in violation of the Act. The SEC found no probable cause to credit the allegations set forth that Mr. Smith violated the School Ethics Act and dismissed the complaint.

***In the Matter of Patrick Crilley, Carteret Bd. of Ed.* Complaint No. C30-97.** On April 28, 1998, the SEC dismissed a complaint filed by Ms. Michelle Grandell against board member Crilley. The complaint alleged that Mr. Crilley violated the School Ethics Act when the delicatessen he owned provided food for a Carteret Education Association function and was compensated therefore.

Mr. Crilley and his wife have owned and operated the delicatessen and catering business since 1989. Mrs. Crilley is an elementary teacher in Carteret and a member of the CEA and has served in that position prior to Mr. Crilley becoming a member of the board. Mr. Crilley has never voted on any personnel decision involving his wife and has never participated in any aspect of collective negotiations between the Carteret board and the CEA. He also has never voted on, or participated in, open or closed session discussions on any matter involving the Carteret board's collective negotiations and has never voted on the appointment of any elementary school teacher by the Carteret Board.

The SEC found that Mr. Crilley adequately handled his conflict by abstaining on the matters noted above. He was not prohibited from doing business with the union since he was already abstaining from pertinent union issues. The SEC did not agree that his one time business with the CEA colored his decisions with respect to the operation of the entire school system. Thus, this was not a substantial conflict that abstaining from participating in union matters could not cure. There were no facts educed to support that Mr. Crilley used his position as a board member to secure additional business.

While not commenting on the more general question of whether a board member should be in a contractual relationship with the local union, the Commission found that Mr. Crilley had not violated the Act. He catered for the union on this one occasion at a reduced rate, making

little or no profit. He recused himself from all official duties as a board member in matters involving the union. If there were matters that Mr. Crilley discussed which arguably impacted on the terms of employment for CEA members, then the SEC would be more concerned with the fact that his wife was a member of the union than with this one instance for which he catered an event. The Commission specifically did not encourage or condone contractual relationships with the union. It found no probable cause to credit the allegations that Mr. Crilley violated the School Ethics Act and thereby dismissed the complaint.

***In the Matter of Susan Ciallella, Spring Lake Heights Bd. of Ed.* Complaint No. C01-98.** On May 26, 1998, the SEC dismissed the complaint filed by Ms. Theresa Casagrande against Ms. Susan Ciallella, a member of the Spring Lake Heights Board of Education. The complaint alleged that Ms. Ciallella violated the School Ethics Act when she voted on the appointment of the Spring Lake Heights sending representative to the Manasquan Board of Education. Ms. Ciallella was and is a teacher in the Manasquan school district. The complaint also alleged that Ms. Ciallella violated and continues to violate the Act by teaching in the Manasquan school district and serving on the Spring Lake Heights board.

In reviewing the issue, the SEC noted that the representative of the sending district could only vote on issues regarding the pupils of the sending district. Since Ms. Ciallella did not teach any pupils of Spring Lake Heights, which sends to grades nine through twelve, the representative would have no say over issues that affected her employment. Further, even though Manasquan has only one collective bargaining agreement for teachers in grades K-12, the representative for whom she voted on May 19, 1997 will have no opportunity to negotiate an employment contract. The contract is for three years and the representative's term is for one.

Considering these factors, the SEC found that Ms. Ciallella's connection to the appointment of the representative was a remote connection. It did not constitute a matter in which she had a personal or financial involvement that might be reasonably be expected to impair her objectivity or independence of judgement. No violation of the Act was shown.

The SEC also found that Ms. Ciallella's service on the Spring Lake Heights board of education, a sending district to the Manasquan school district where she taught, did not constitute a violation of the Act. The SEC did not believe that in creating the School Ethics Act or N.J.S.A. 18A:38-8.1 the Legislature meant to preclude teachers in receiving districts from serving on the sending district's board of education. Rather, there may be restrictions on the matters in which the teacher may participate as a board member. For example, she may be prohibited from negotiating on behalf of the teacher's union. Such a restriction, however, would not prohibit Ms. Ciallella from serving on the Spring Lake Heights board of education. The SEC found no probable cause to credit the allegation that Ms. Ciallella violated the School Ethics Act and dismissed the charges against her.

***In the Matter of Dr. Collette Hayes, Spring Lake Heights Bd. of Ed.*, Complaint No. C02-98.** At its May 26, 1998 meeting, the SEC dismissed a complaint filed by Ms. Theresa Casagrande against Dr. Hayes, a member of the Spring Lake Heights Board of Education. The complaint alleged that Dr. Hayes violated the Act when she failed to disclose on her financial disclosure statement that, as a chiropractor, she received compensation from a business that was a party to a contract with the board, namely CIGNA and AmeriHealth. The complaint also alleged that Dr. Hayes violated the Act when she served as chair of the negotiations committee and participated in closed-session discussions regarding contract parameters and voted to approve the health insurance carrier for the last two years.

The SEC concluded that any money Dr. Hayes received from either Cigna or AmeriHealth was not compensation required to be reported on her disclosure statement pursuant to N.J.S.A. 18A:12-25. The money paid by the insurer to Dr. Hayes was not something given or received as an equivalent for services, debt or loss. The insurance company was not indemnifying Dr. Hayes. The insurer in a traditional plan simply agreed to pay the patient's debt either to the patient or to Dr. Hayes. The patient must pay Dr. Hayes whether the insurance coverage existed or not.

With respect to the vote on the insurance carrier, the Commission did not find that Dr. Hayes had a personal or financial involvement that might reasonably be expected to impair her objectivity in negotiating the contract or in entering into a contract with a given insurance carrier.

The counterclaim asked the SEC to find the complaint to be frivolous and to impose sanctions pursuant to N.J.S.A. 18A:12-29e. The Commission did not find the complaint to be frivolous as the SEC had never before addressed issues such as those set forth in the complaint, and the complainant appeared to sincerely believe that Dr. Hayes had violated the Act.

YOU CAN ACCESS SCHOOL LAW DECISIONS ON THE DOE WEB SITE!

Visit the Department of Education's Web page at **http://www.state.nj.us/education** for the full text of recent school law decisions. These include decisions of the SEC, Commissioner of Education (some of which are a review of a penalty determination of the SEC), State Board of Education and State Board of Examiners. Currently, the site posts SEC decisions, public advisory opinions of the SEC, and State Board decisions issued from January 1, 1997 to the present, as well as Commissioner decisions issued from July 1, 1997. Decisions of the State Board of Examiners are posted from September 1, 1997. The full text of decisions of the Office of Administrative Law are not provided on the Web site but may be accessed through a link to the Rutgers University Law School-Camden Administrative Law Decisions page.

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(Note that current editions of *School Law Reporter* are designated by season and year.)

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Volume 1 Number 2 (1994)—School Ethics Commission-Contract Voting

Volume II Number 1 (1994) Policy Guidelines, Advisory Opinions, Complaint Dismissals, Decisions on the merits where probable cause was found, and Decisions in filing and training cases. Through September 1994.

December 1995—no ethics summary.

August 1996—no ethics summary.

September 1996—Policy Guidelines, Advisory Opinions, Complaint Dismissals, and Decisions in filing and training cases. Through June 1996.

(The September 1996 edition did not contain Decisions on the merits in matters other than those involving filing and training. The next edition, July 1997, picks up where Volume II Number I left off with other Decisions on the merits)

July 1997—Advisory Opinions, Decisions in filing and training cases and Complaint Dismissals. Through December 1996. Also Decisions on the merits in matters other than those involving filing and training. September 1994 through December 1996.

Spring 1998—Advisory Opinions, and Decisions in filing and training cases. Through December 1997.

(The Spring 1998 edition contained neither Decisions on the merits in matters other than those involving filing and training, nor Complaint Dismissals. The next edition, Summer 1998, picks up on Decisions in matters other than those involving filing and training where the July 1997 edition left off. This current edition, Fall/Winter 1998-99, picks up on Complaint Dismissals where the July 1997 edition left off.)

Summer 1998—Decisions on the merits in matters other than those involving filing and training, and Policy Guidelines. January 1997 through June 1998.

Fall/Winter 1998-99 (this edition)—Advisory Opinions and Complaint Dismissals. Through June 1998.

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• SUMMER 1998 •

SCHOOL ETHICS COMMISSION SUMMARY

During the period January 1997 through June 30, 1998, the School Ethics Commission (SEC) found probable cause to believe that a violation of the School Ethics Act, *N.J.S.A.* 18A:12-21 *et seq.*, had occurred in a number of instances. For the most part, this edition of *School Law Reporter* reports on rulings on complaints where the SEC found probable cause during the January 1997 calendar year through June 30, 1998. As such, it serves as an update of decisions reported in the July 1997 edition of *School Law Reporter*, as well as a vehicle for informing its readers of new decisions in which the SEC has found probable cause, through June 30, 1998. It also reports on the SEC's action to rescind a policy guideline on the issue of board member recusal.

Previous issues of *School Law Reporter* have kept this publication's readers abreast of SEC activity by reporting on advisory opinions, policy guidelines, rulings on financial and personal/relative disclosure statements, rulings on board member training, adjudicated complaints and complaints dismissed for lack of probable cause. The most recent edition (Spring 1998) provided an update of advisory opinions as well as 1997 rulings of the SEC in board member training and filing cases. Subscribers may consult three previous editions of *School Law Reporter* for earlier summaries of School Ethics Commission activity: July 1997; September 1996; and Volume II, No. 1.

HOT NEWS: SCHOOL LAW DECISIONS ON DOE WEB SITE!

Visit the Department of Education's Web page at **http://www.state.nj.us/education** for the full text of recent school law decisions. These include decisions of the SEC, Commissioner of Education (some of which are a review of a penalty determination of the SEC), State Board of Education and State Board of Examiners. Currently, the site posts SEC decisions, public advisory opinions of the SEC, and State Board decisions issued from January 1, 1997 to the present, as well as Commissioner decisions issued from July 1, 1997. Decisions of the State Board of Examiners are posted from September 1, 1997. The full text of decisions of the Office of Administrative Law are not provided on the Web site but may be accessed through a link to the Rutgers University Law School-Camden Administrative Law Decisions page.

SUMMARY OF DECISIONS ON THE MERITS—1/1/97 TO 6/30/98.

In the Matter of Carol Scudillo, Garfield Board of Education, Complaint No. C14-93. On December 9, 1993, the SEC found probable cause to believe that board member Scudillo violated the Act when she voted for the appointment of her son-in-law to the position of superintendent of schools and when she sold gloves manufactured by her employer to employees in the school district. The SEC, after accepting the submission of the parties and finding no facts to be in dispute, determined that no factual hearing was required. On February 3, 1994, the SEC determined that Ms. Scudillo had violated the Act when she voted for her son-in-law and when she sold gloves to district employees. A detailed analysis of the SEC's opinion may be found in the Volume II No.1 edition of *School Law Reporter*. The SEC recommended that Ms. Scudillo be suspended for a period not to exceed three months for her vote for employment of her son-in-law and that she receive a letter of reprimand with respect to the sale of gloves. 95 *N.J.A.R.*2d (EDU) 190.

In reviewing the recommended penalty the Commissioner rejected the SEC's recommendation and instead removed Ms. Scudillo from her seat on the board. The Commissioner found significant that Ms. Scudillo had abstained on the vote relating to her son-in-law's appointment as acting superintendent but voted for his permanent employment at a later date. 95 *N.J.A.R.*2d (EDU) 190, 195.

The State Board reversed the SEC's determination with respect to the alleged violation of the Act and remanded the matter to the SEC with direction to transmit

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the case to the OAL for a hearing. The State Board found that factual disputes existed and that Ms. Scudillo did not receive her necessary due process when the SEC failed to send the matter to the OAL for a hearing. Because the Commissioner's decision of the appropriate sanction was grounded in the SEC's factual findings and determinations with respect to the violations, the State Board set that judgement aside as well. The Commissioner was directed to consider the case anew once the SEC had issued its decision on remand. 95 *S.L.D.*(January 4).

The matter was filed in the OAL in May 1995 with the matter finally being heard December 23, 1996. In an Initial Decision issued March 20, 1997, ALJ Arnold Samuels found that Ms. Scudillo violated the School Ethics Act when she voted with the majority to appoint her son-in-law as permanent superintendent, her vote being necessary to carry the motion (5-4). Her conduct gave rise to the speculation that a conflict of interest existed as Mr. Cangiolosi was married to Ms. Scudillo's daughter and Ms. Scudillo presumably had a personal involvement with both her daughter and son-in-law. This relationship was sufficient to reasonably be expected to impair her objectivity or independence of judgement as well as being conduct which created a justifiable impression among the public that the public trust was being violated. Judge Samuels recommended that public censure was the appropriate sanction. Since Ms. Scudillo was no longer a board member, removal and suspension were not possible sanctions.

The SEC adopted the initial decision with modifications. The Commission agreed that since the penalties of removal and suspension were moot as Ms. Scudillo no longer sat on the board, the highest penalty they could impose was censure. The SEC agreed with the ALJ's assessment of penalty. The Commissioner of Education accepted the SEC's recommendation of censure as the appropriate penalty. 97 *S.L.D.*(June 10).

In the Matter of Edward Gore, Hamilton Township Board of Education, Complaint No. C10-96. In the July 1997 edition of this publication it was reported that board member Gore violated the Act when he used his official position to view the home addresses of district employees to which he would not otherwise be entitled, and used that information for his own personal political purposes. The Commissioner adopted the SEC's recommendation that censure was the appropriate penalty. 97 *S.L.D.* (January 30).

On June 4, 1997 the State Board affirmed the SEC's determination concurring with the SEC that, although it may have been appropriate for Mr. Gore to obtain employees' addresses for purposes related to board business, in this instance Mr. Gore obtained the information solely for his own political purposes. The State Board also affirmed the Commissioner's determination that the appropriate sanction was censure. 97 *S.L.D.*(June 4).

In the Matter of Michael J. Kilmurray, Lacey Township Board of Education, Complaint No. C12-94. At its February 20, 1996 meeting, the SEC found probable cause to believe that board member Kilmurray violated the Act when he failed to completely recuse himself from the hiring of his sister-in-law. He moved for a revote when the motion to hire his sister-in-law failed. He selectively abstained from votes on a prospective employee who was vying for the same position as his sister-in-law until he was satisfied that his sister-in-law's hiring was secured and selectively recused himself from private session discussions concerning his sister-in-law. The matter was referred to the OAL for a hearing.

On October 14, 1996, an order was issued by ALJ Kathleen M. Duncan, designating Mr. James K. Le Tellier as the petitioner in this matter. Judge Duncan found that the SEC had no statutory authority to prosecute complaints once it had found probable cause. The SEC reversed that order November 26, 1996. The State Board of Education, by decision issued February 7, 1997, declined to review the SEC's decision interlocutorily and reinstated the SEC as the main petitioner in these proceedings.

An initial decision was issued by Judge Duncan January 14, 1998. It concluded that the mere presence at a private session when one's personal interests were being discussed, did not in and of itself violate the School Ethics Act. However, by interjecting himself into the deliberation of the superintendent's proposed appointment of his sister-in-law, Mr. Kilmurray violated his ethical obligation to refrain from acting as a board member on matters in which he had a personal interest. When the board returned to public session and the vote on the superintendent's recommendation to support Ms. Kilmurray again failed, Mr. Kilmurray again violated his ethical obligations by making and supporting the motion to revote on the appointments of Ms. Kilmurray and Ms. Hutler. Judge Duncan recommended that Mr. Kilmurray be reprimanded for violating the School Ethics Act.

At its February 24, 1998 meeting the School Ethics Commission agreed with Judge Duncan's conclusion as to Mr. Kilmurray's violation of the School Ethics Act and went one step further. The SEC agreed that Mr. Kilmurray violated the Act by commenting that "both" of the job applicants at the time were good, including his sister-in-law, by not refraining from action for which he had a personal interest during closed session, by interjecting himself in the deliberations of the superintendent's proposed appointment of his sister-in-law and by making a motion and supporting the motion to vote again on the appointment of his sister-in-law. In addition, the Commission found a fourth violation by Mr. Kilmurray when he sat in on private discussions concerning the appointment of his sister-in-law. The SEC concluded that Mr. Kilmurray should have known, even without board member training, that he was violating the Act when he approached the board members going into private session and demanded to know why they were not supporting the superintendent's recommendation.

The Commission also disagreed with Judge Duncan's recommendation of reprimand and recommended to the Commissioner that he be issued a penalty of censure.

In the Matter of Mark Connolly, West Milford Board of Education, Complaint No. C15-96/C26-96. At its April 8, 1997 special meeting, the SEC found probable cause to believe that board member Mark Connolly violated the Act when he failed to remove himself as a member of the personnel committee when his wife was being considered for a teaching position in the West Milford School District, when he solicited the school board attorney's legal opinion as to how to bring the resolution back to the floor for a new vote when the motion for the hiring of his wife failed and

when he called the one school board member who would be able to bring the motion back to the floor for a vote to facilitate that event.

At its May 27, 1997 meeting, the SEC found that Mr. Connolly violated the Act by remaining in the personnel committee meeting when his wife was being discussed. Mr. Connolly was acting in his official capacity in a matter in which he had a financial and personal involvement. His mere presence in that private meeting could be viewed as a hindrance to the critical review of a candidate's credentials by the rest of the committee. It would create a chilling effect on the committee's speech by virtue of the fact that any board member who would speak against the candidate's qualifications would be viewed as personally attacking Mr. Connolly.

The SEC agreed with Mr. Connolly that his inquiry of the board attorney concerning the procedure for bringing a motion to appoint his wife back to the floor did not violate the Act. If he had taken no further action, the SEC would not find that he had violated the Act. However, Mr. Connolly acted on the information, and contacted the one board member who did not cast a vote, to request that he bring the motion back to the floor. In doing so, he fully involved himself in the process of his wife's hiring and took on the role of advocate rather than being the impartial and neutral observer that the Act requires. He was clearly acting in his official capacity in a manner in which he and his spouse had a personal and financial involvement that might reasonably be expected to impair his objectivity and independence of judgement.

The Commission recommended the penalty of censure for Mr. Connolly's two violations. The Commissioner agreed. 97 *S.L.D.*(June 23).

In the Matter of Rodney Bond, Asbury Park Board of Education, Complaint Nos. C21-96, C24-96. At its March 7, 1997 meeting, the SEC found probable cause to believe that Rodney Bond violated the Act when he voted in favor of allowing Solid Gold Productions to use a school district facility to hold a concert. Mr. Bond resided in the same household with the concert promoter and was originally listed as a contact person on the application for use of the public school building.

At its July 22, 1997 meeting, the SEC found Mr. Bond's actions had violated the Act. In its analysis, the Commission addressed two procedural arguments raised by Mr. Bond, dismissing them both. Mr. Bond argued that once the SEC found probable cause it was statutorily required to refer the matter to the OAL for a hearing. The Commission rejected that agreement, taking the position that it was not required to transfer a matter for a hearing if there were no disputed material facts. Mr. Bond had also requested that the SEC allow the board president, the board secretary/business administrator and board vice president to address the Commission. The SEC denied that request as certifications had been filed by the board president and board secretary/business administrator. The SEC found there was no need for the appearance of individuals who had filed their certifications.

The SEC found that Mr. Bond violated the Act for several reasons. He had signed the original application as a sponsor and had appeared before the board at a public meeting as an advocate for the application in March. After his election to the board, despite his involvement with the concert and the application, he voted in favor of the revised May 13 application. This was the same application for the same event, except that Mr. Bond's name had been removed as a sponsor. In these circumstances a justifiable impression existed that Mr. Bond's independence of judgement and objectivity were impaired. He should not have voted. The fact that Mr. Bond had no interest in Solid Gold Productions and would receive no benefit from the concert did not alleviate the problem. It would be reasonable for the public to perceive that his independence of judgement or objectivity might be impaired when the application of his good friend, on which he was initially a sponsor, and in support of which he appeared before the board shortly before his election to the board, came before the board for a vote. Actual conflict is not required as an apparent conflict is prohibited as well, as evidenced by the legislative intent to the School Ethics Act.

The SEC found that reprimand was the appropriate sanction in this case. Prior to his vote, Mr. Bond did disclose to the school board that he was no longer involved with the concert or the application. He sought legal advice from the board attorney to determine whether he could vote on the matter. In recognition of the fact that the board attorney advised Mr. Bond that he could vote on the matter, the SEC recommended to the Commissioner that a reprimand be imposed.

The Commissioner accepted the SEC's recommendation that reprimand was the appropriate penalty in this matter. 97 *S.L.D.*(August 20).

In the Matter of Sheri Scozzaro, Fairfield Board of Education, Complaint No. C09-97. At its September 23, 1997 meeting, the SEC found probable cause to credit the allegation that Ms. Scozzaro violated the Act when she voted for the appointment of her daughter as a substitute teacher in June 1995 and June 1996. At its November 25, 1997 meeting the SEC found that Ms. Scozzaro had a personal involvement with her daughter's employment as a substitute that would reasonably be expected to impair her objectivity and independence of judgement. Ms. Scozzaro had the ultimate responsibility to know and understand upon what she was voting. Since substitute lists are sent to her as part of the superintendent's packet, Ms. Scozzaro had a duty to scrutinize the items carefully prior to the meeting. Failure to abstain from voting on the substitute lists or to have her daughter considered separately so she could vote on the remaining substitute lists violated the Act. A board member's vote in favor of his or her child's employment is the type of vote reasonably expected to impair the board member's objectivity. Even where, as here, the board member did not know her daughter's name was on the list, the Act views conflicts from the perspective of what the public might reasonably expect, not the board member's subjective intent.

The SEC recommended the sanction of reprimand. In making this recommendation the SEC considered the fact that Ms. Scozzaro abstained the first time that her daughter was on the list. This gave credibility to her statement that she would have done so in June 1995 and June 1996 if she had been more diligent.

The Commissioner accepted the SEC's recommendation that reprimand was the appropriate penalty. 98 *S.L.D.* (Jan. 21). (Editor's note: The Scozzaro matter illustrates the effect of the absence of a statutory time bar for filing

ethics complaints. Ms. Scozzaro's votes on the substitute list occurred in June 1995 and June 1996. The complaint against her was not filed until April 22, 1997, after the board member left the board. Also on the issue of a time bar for filing ethics complaints, see *In the Matter of Panucci*, 97 *N.J.A.R.* 2d (EDU) 339, at 341).

In the Matter of Delores Maugeri, Bergenfield Board of Education, Complaint No. C01-97. At its September 23, 1997 meeting the SEC found probable cause to believe that Ms. Maugeri violated the Act by voting on her daughter's appointment to a short-term substitute position. At its October 28, 1997 meeting the SEC found that Ms. Maugeri violated the Act.

Ms. Maugeri properly abstained on a vote to appoint her daughter as a physical education teacher, effective March 1, 1996. Although her daughter was scheduled to begin work March 1, 1996, the teacher occupying the position left before that time, leaving the school administration without a physical education teacher for the period February 21-29, 1996, a period of seven school days. The administration decided that the individual most appropriate to serve as the interim teacher was Ms. Maugeri's daughter. Accordingly, her daughter assumed the post of physical education teacher on February 21, 1996. Since the board had not appointed her daughter for those seven days, they had to ratify her payment of salary. The recommendation was that her daughter be placed on the substitute list retroactively for the period of February 21-29, 1996.

On March 12, 1996 Ms. Maugeri voted on the approval of that substitute list. She indicated that she was unaware that her daughter's name appeared on the list because she knew the board had appointed her daughter to a teaching position, effective March 1. In finding a violation of the Act, the SEC concluded that Ms. Maugeri had the responsibility as a board member to read the agenda and to know that her daughter was on the substitute list. Although her vote on the list was an oversight, she was still acting in her official capacity in a matter in which she had a personal involvement that might reasonably be expected to impair her objectivity. Therefore, she violated the Act.

Because of the circumstances surrounding Ms. Maugeri's vote for her daughter's appointment as a short-term substitute, the SEC recommended the lowest possible sanction, the sanction of reprimand.

The Commissioner accepted the SEC's recommendation that reprimand was the appropriate penalty in this matter. 98 *S.L.D.* (Jan.21).

In the Matter of David W. Fuller, Irvington Board of Education, Complaint No. C32-95. At its September 23, 1997 meeting the SEC found probable cause to credit the allegations that Mr. Fuller violated the School Ethics Act by serving in the dual capacity as board member and township business administrator in the same community, Irvington. The SEC found that *N.J.S.A.* 18A:12-24(d) was the relevant provision to be considered. The issue was whether the public could reasonably perceive that Mr. Fuller's independence of judgement would be prejudiced when the conflicts are so pervasive that he could not hold both positions. Considering the duties and responsibilities of both positions, the SEC concluded that Mr. Fuller could not hold both.

As township business administrator, Mr. Fuller is vitally involved in the preparation and approval of the municipal budget. He has to take into account the needs of the department of administration and the public's concern over municipal services and local property taxes. In his role as township business administrator, Mr. Fuller must balance his interest as department of administration head over all municipal needs, and the taxpayer interests in achieving an acceptable level of property taxes.

As a board member, Mr. Fuller is also involved with the school budget. Each decision he makes as a board member ultimately impacts upon the school budget. Mr. Fuller's situation is one where, being intimately involved in municipal finances and holding employment that may depend upon keeping taxes at a low level, he is also called upon as a board member to make school decisions that will affect taxes and which may have financial implications for municipal residents. Under these circumstances, the public could reasonably perceive that Mr. Fuller could be making decisions as a board member with his employment as township administrator in mind rather than the interests of the district.

Additionally, Irvington being a Type I district, Mr. Fuller was appointed to the board by the mayor and is under the supervision of the mayor as township business administrator. The public could reasonably perceive that Mr. Fuller may act to advance the mayor's interests and policies rather than acting in the interests of the school district. Recusal on matters that may affect taxes is not feasible as such matters would be too far reaching. The conflict of interest is so pervasive that *N.J.S.A.* 18A:12-24(d) would prohibit the holdings of both positions.

The SEC recommended to the Commissioner that Mr. Fuller be removed from the board unless he resigned one of his positions within 13 days.

The Commissioner found that Mr. Fuller's removal from his board position was the appropriate penalty in view of the SEC's determination that Mr. Fuller could not serve simultaneously as a board member and township business administrator. 98 *S.L.D.*(Jan.21).

In the Matter of Barbara Rone, South Amboy Board of Education, Complaint No. C03-97. At the July 23, 1997 meeting the SEC found probable cause that Ms. Rone violated the Act when she voted on a resolution to hire special counsel to investigate the superintendent. At the October 28, 1997 meeting the SEC found that Ms. Rone violated the Act. During the 1996-97 school year, Ms. Rone had filed a criminal complaint against the superintendent. The municipal court judge found the superintendent to be guilty of harassment. The superintendent appealed and the Superior Court of New Jersey, Law Division, vacated the conviction. An order was entered finding the superintendent not guilty of the charges. The superintendent applied to the board for reimbursement of legal fees.

The resolution in question called for the board to hire special counsel to review the conduct of the superintendent. Counsel would report to the board with recommendations as to appropriate disciplinary actions. Counsel would also review and advise the board with regard to the superintendent's claim for reimbursement of attorney's fees resulting from criminal charges filed against him in the municipal court and subsequent appeal, and with regard to the validity of the claims made in the January 17, 1997

letter from superintendent's counsel seeking to restrict the board members' voting rights.

Ms. Rone voted in the affirmative on the above resolution. The SEC found that by so doing she violated the Act. The litigation between Ms. Rone and the superintendent constituted a direct personal involvement that might reasonably be expected to impair her objectivity in voting on the resolution to hire special counsel to investigate the superintendent's conduct and his request for attorney's fees. Her involvement would reasonably be expected to impair her objectivity or independence of judgement. That she was only voting to appoint someone who was neutral to look into the matter was irrelevant. Ms. Rone should have abstained because the matter involved a legal dispute in which she was an adversary of the superintendent.

The SEC recommended censure as a sanction. The Commission considered as a mitigating factor the fact that the board did not need her vote to pass the resolution but rejected as mitigating factors her length of service on the board and her abstention on the direct vote on payment of the superintendent's legal fees.

The Commissioner of Education accepted the SEC's recommendation that censure was the appropriate penalty in this matter. 97 *S.L.D.*(Jan. 21).

In the Matter of James Famularo, Asbury Park Board of Education, Complaint No. C23-96. At its meeting of April 8, 1997, the School Ethics Commission found probable cause to believe that James Famularo, a member of the Asbury Park Board of Education violated the School Ethics Act when he moved for, and voted on, the hiring of Albert Reinoso for the position of principal at Thurgood Marshall Elementary School. Mr. Famularo had previously served as the treasurer of Mr. Reinoso's successful campaign for election to the Asbury Park City Council. The Commission found significant that shortly after the board appointed Mr. Reinoso to the principal's position, Mr. Famularo accepted employment with the City of Asbury Park as assistant city manager. For these reasons, there was probable cause to credit the allegation that Mr. Famularo had a personal or financial involvement with Mr. Reinoso causing the public to reasonably perceive that he could not be objective in making the motion, discussing and voting for Mr. Reinoso. The matter was transmitted to the Office of Administrative Law for a hearing.

In a January 27, 1998 decision, Administrative Law Judge Jeff Masin, found that the limited time between the campaign in which Mr. Famularo served as Mr. Reinoso's campaign treasurer and the time when Mr. Famularo acted in regard to the hiring decision was clearly insufficient to eliminate any reasonable public apprehension. The political scene in the city was then still one of controversy and strife. Under those circumstances, it would have been appropriate for Mr. Famularo to refrain from involvement when Mr. Reinoso was being considered for a job with the board of education. The later hiring of Mr. Famularo for a city job, even if Mr. Reinoso played no official role therein, surely heightened suspicion among members of the public, even if they misapprehended the process by which the assistant city manager was selected. Judge Masin noted that his decision was made independent of the later development of city hiring and was reached only upon the facts of Mr. Famularo's role in the school board action.

Given the nature of the conflict, the lack of clear precedent and the difficulty in defining the exact parameters of such a restriction, Judge Masin concluded that a written reprimand was a sufficient response to Mr. Famularo's inappropriate conduct. Judge Masin further suggested that the Commission advise board members and others covered by the School Ethics Act of the need for caution and the factors to consider when faced with similar "political" relationship questions.

In a February 24, 1998 decision, the School Ethics Commission agreed with Judge Masin's conclusion that Mr. Famularo's position as Mr. Reinoso's campaign treasurer created a personal involvement that might reasonably be expected to impair his objectivity in making and supporting the motion for Mr. Reinoso's appointment to the position of principal. Serving as Mr. Reinoso's campaign treasurer created a justifiable impression among the public that Mr. Famularo's support of Mr. Reinoso to the position of principal was based more on political ties than on Mr. Reinoso's qualifications. The Commission rejected Mr. Famularo's argument that the six-month lapse between Mr. Famularo's service as campaign treasurer and the vote in question was enough time to dilute any reasonable suspicion of favoritism.

The Commission disagreed with Judge Masin that a written reprimand was a sufficient response to Mr. Famularo's conduct as the Legislature had specifically drafted the School Ethics Act to eliminate political cronyism. Mr. Famularo's vote on July 8, 1996 was to hire Mr. Reinoso to one of the highest positions in the district. He participated in the executive and public meeting sessions regarding the hiring decision, giving no consideration to the public's perception of his vote. He did so despite the politically charged atmosphere in which he cast the vote.

The Commission agreed that there was a lack of precedent directly on point with the nature of the conflict. However, there was precedent for the Commission going beyond the familial and financial relationships that would clearly result in a conflict for a board member. Namely, in *In the Matter of Salvatore Buono*, 1996 *S.L.D.* April 9, the Commissioner had ordered a one month suspension for a board member who voted for the reappointment of his business partner and emancipated daughter. The Commission believed that a political association such as this, one that is greater than just a shared political affiliation, constitutes as serious a conflict as a relationship with a business partner. The Commission recognized as mitigating factors that it had not previously ruled that a political association constituted a conflict of interest and that Mr. Famularo was a new board member. Accordingly, the Commission recommended the penalty of censure.

In a March 16, 1998 decision, the Commissioner agreed and ordered that Mr. Famularo be censured as a school official. See, 1998 *S.L.D.* March 16.

In the Matter of James Russo and Thomas Scarano, Woodbridge Twp. Board of Education, Complaint No. C12-97. At its December 16, 1997 meeting, the School Ethics Commission found probable cause to credit the allegations that board members James Russo and Thomas Scarano violated the School Ethics Act by serving on the negotiations committee and voting on the collective bargaining agreement with the Woodbridge Township Education Association (WTEA). The Commission believed

that they had acted in their official capacity in a matter in which they had a direct or indirect personal involvement that would reasonably be expected to impair their objectivity and independence of judgement.

It was undisputed that James Russo and Thomas Scarano were appointed by the board president to serve on the negotiations committee, effective April 21, 1997. They engaged in collective bargaining with the WTEA as the only two members of the negotiations team. Mr. Russo had a sister who worked as a secretarial clerk in the district and who was represented by the WTEA. Mr. Scarano had a brother and a fiancée (now wife) who worked as teachers in the district and who were also represented by the WTEA. Mr. Scarano married his fiancée November 1997.

At the first public meeting following Russo and Scarano's appointment to the negotiations committee, the complainant, Arthur Delaney, called attention to what he perceived to be conflicts of interest. He specifically referenced SEC Advisory Opinion A23-94. He requested an opinion from the board attorney on whether the respondents had a conflict of interest. The board attorney advised that there was no conflict. Mr. Delaney suggested that an advisory opinion be sought from the SEC. No such advisory opinion was sought and the board attorney did not advise the board members to seek such an opinion. Mr. Delaney then requested that the board president, Mr. Robert Mantz, reconsider his selection of members to serve on the negotiations committee. President Mantz refused although there were three board members who did not have any relatives in the WTEA. Mr. Russo and Mr. Scarano met with the WTEA representatives and a mediator on April 30 and May 12, 1997. Upon the completion of negotiations and the WTEA ratification of the contract, the Woodbridge Board of Education voted. Four board members, including Mr. Delaney, abstained from the vote because they or their family members were members of the WTEA or the NJEA. The remaining five, including Mr. Russo and Mr. Scarano, voted to ratify the contract.

Because the material facts were undisputed, the Commission invited Mr. Russo and Mr. Scarano to provide a written statement within thirty days from the finding of probable cause as to why the Commission should not find them in violation of the Act. Written submissions were filed including unsolicited comments from Mr. Delaney. The Commission considered all comments in reaching a decision.

In a January 27, 1998 decision, the SEC concluded that Mr. James Russo and Mr. Thomas Scarano had violated *N.J.S.A.* 18A:12-24c of the School Ethics Act when they negotiated the collective bargaining agreement with the teachers union and voted in favor of it. In reaching this decision, the Commission addressed several issues raised by the respondents, the first being whether this matter needed to be referred to the OAL for a hearing. In responding to this question, the Commission acknowledged that it had previously addressed the issue in *In the Matter of Rodney Bond*, C21/C24-96. In reviewing the use of the word "shall" in a statutory provision relating to transfer of cases to the OAL, the Commission responded that, pursuant to the Administrative Procedure Act (APA), an agency head like the Commission retains full authority to determine whether a case is contested and to make final decisions in contested cases. New Jersey courts have found that an agency head's discretion to determine how to handle a particular case is not circumscribed by the use of the word "shall" in a statutory provision relating to transfer of cases to the OAL. In *Hills Development Co. v. Bernards Twp.*, 229 *N.J. Super.* 318 (App. Div. 1988) and *In Re Twp. of Warren*, 247 *N.J.Super.* 146 (App. Div. 1991) certif. den. 127 *N.J.* 557 (1992), the Appellate Division concluded that the use of the word "shall" in a statutory provision did not automatically require the Council on Affordable Housing to automatically refer objections to a municipality's affordable housing plan to the OAL for a hearing. Although the language of the Fair Housing Act is not identical to that of the School Ethics Act, these cases demonstrate the word "shall" does not abrogate the agency head discretion to decline referral of the case to the OAL when the statutory provision references the APA.

The SEC further responded to Mr. Scarano's argument that the School Ethics Act only prohibits board members from negotiating if their "immediate family member" was a member of the local bargaining unit. The Commission found Mr. Scarano's arguments to be without merit. As previously stated in Advisory Opinion A23-94, the Commission does not limit its view to a board member's immediate family members when investigating conflicts of interest. Rather, it looks to the whole statute which provides that a school official cannot act in a matter in which he has an indirect personal or financial involvement that might reasonably be expected to impair his objectivity. The Commission found that a board member who has a sibling in a local bargaining unit might reasonably be expected to be lacking objectivity when negotiating that sibling's contract. Thus both Mr. Scarano and Mr. Russo had an indirect personal involvement with the salary and benefits of their siblings that prohibited them from negotiating without violating the Act.

The Commission found the issues concerning Mr. Scarano's fiancée even more troubling. The reason for prohibiting a board member from negotiating with a spouse as a member of the collective bargaining unit is that the benefits from that contract will directly enrich the board member's household. When a board member negotiates a fiancée's contract and the term of that contract goes beyond their anticipated date of marriage as it did here, the benefits of the contract enrich the board member. Accordingly, since Mr. Scarano married his fiancée prior to the expiration of the contract, the Commission concluded that he had a financial involvement in the outcome of the negotiations that might reasonably be expected to impair his objectivity.

Respondents also argued that they proceeded to negotiate on the basis of an opinion by the board attorney who said there was no conflict. As previously stated by the Commission in *In the Matter of Rodney Bond*, the Commission may consider a board attorney's advice as a mitigating factor in determining sanctions, but will not consider it in determining whether a violation occurred. Further, the Commission had previously issued public advisory opinion A23-94, indicating its interpretation of the Act. In fact, Mr. Delaney had referenced A23-94 at the board meeting and had brought it

to the board members' and attorney's attention. In that opinion the Commission advised that a board member with an emancipated son or daughter-in-law in a local bargaining unit was prohibited from negotiating. Thus, the Commission had already indicated that the scope of family relationship which would prohibit a board member from negotiating was beyond that of immediate family member.

Having found that Mr. Russo and Mr. Scarano violated the Act, the Commission recommended that Mr. Russo and Mr. Scarano be censured. The Commission considered as a mitigating factor that Mr. Russo and Mr. Scarano sought legal advice from the board attorney who advised that they could serve as the negotiating committee. However, the Commission found it to be a serious violation that these two board members served as the *only* two members of the negotiating team. Thus, a more public statement than a reprimand was necessary to stress that negotiating a contract when the terms of the contract will benefit one's sibling and/or fiancée and ultimately spouse is a violation of the School Ethics Act.

In an April 16, 1998 decision the Commissioner agreed and ordered that James Russo and Thomas Scarano be censured as school officials found to have violated the School Ethics Act. 1998 *S.L.D.* (April 16).

In the Matter of Raymond Bonker, Lenape Valley Regional Board of Education, Complaint No. C11-97. At its meeting of December 16, 1997, the SEC found probable cause to credit the allegation that Mr. Bonker violated *N.J.S.A.* 18A:12-24b of the School Ethics Act by obtaining e-mail addresses of teachers through his membership on the technology committee and using them to secure unwarranted advantages in his school board election campaign. Since the material facts of the case were undisputed the matter was not transferred to the OAL. The Commission requested that Mr. Bonker file a written statement as to why the Commission should not find that he had violated the School Ethics Act. Such a statement was received and was considered by the Commission in reaching its decision at its March 30, 1998 meeting.

In January 1997, board member Bonker served on the Ad Hoc Technology Committee. The Committee consisted of citizens, teachers, students, board members and the chief school administrator. Pursuant to his committee duties, Mr. Bonker received a list of e-mail addresses for teachers just prior to his run for re-election to the school board. Mr. Bonker prepared campaign literature that detailed his accomplishments during his prior term as a board member. Included in those accomplishments was the acknowledgement that Lenape Valley Regional was now on the Internet and that every teacher and administrator had a personal e-mail address which Mr. Bonker listed on the back of his campaign literature. At the time the campaign literature was distributed, neither the technology committee nor the board had authorized the public release or use of the e-mail addresses for any purpose. Subsequent to the election the board voted to publish the e-mail addresses annually in the school handbook calendar, to publish the e-mail addresses on the LVR home page on the worldwide web and to prohibit the change of any e-mail address for any active employee of the school system except by the technology coordinator.

The Commission concluded that the e-mail addresses were not privileged and confidential information. However, just as they were not the Lenape Valley Regional Board of Education's to conceal, they were not Mr. Bonker's to release, especially not in his personal campaign literature to promote himself. In addition, he went to the technology coordinator to get the e-mail addresses because his status as a board member allowed him to do so. The SEC concluded that Mr. Bonker's unilateral dissemination of the addresses was an attempt to secure unwarranted privileges or advantages for himself in violation of *N.J.S.A.* 18A:12-24b.

If such information were going to be released, it should have been released officially by resolution, as it ultimately was, and disseminated as an official board document to parents of students.

In addressing the sanction, the Commission noted Mr. Bonker's sarcastic response when he was asked what would be an appropriate penalty. Mr. Bonker responded:

> While I must admit that such a request seems perverse given my innocence in this matter, I have nonetheless listed below some suggestions:
>
> 1. Write a 500 word essay on the joys of unpaid public service through school board membership.
>
> 2. Conduct a seminar on the difficulties of implementing change in tenured, litigious environment.

The Commission responded:

> The Commission believes that Mr. Bonker's response is an indication that he does not take these proceedings seriously. Since censure is a public sanction, it will underscore for Mr. Bonker the importance of complying with the Act. Therefore, the Commission recommends that the Commissioner of Education impose a sanction of censure.

The Commissioner agreed. 1998 *S.L.D.* (May 28).

BOARD MEMBER RECUSAL— SEC RESCINDS 1993 GUIDELINE

Recognizing that its 1993 Policy Guideline #2 concerning board member recusal was inconsistent with its subsequent rulings on the issue, the SEC formally rescinded Policy Guideline #2. That guideline had stated that:

> "(w)hen one recuses himself he is not required to leave the room because he is still an elected official to a public body, however, he may not participate in any manner whatsoever regarding the matter."

On 3/30/98 the SEC acknowledged the guideline's inconsistency with Advisory Opinion A33-95. That advisory opinion states that board members who must recuse themselves from participating and voting on collective bargaining agreements pursuant to A10-93 and A10-93(b) and A07-94 may not be present during closed sessions to discuss negotiation strategy. The SEC also noted that the guideline was contrary to the SEC's ruling *In the Matter of Michael Kilmurray*, C12-94

(board member discussing employment of sister-in-law should have left room). However, recognizing that there may exist circumstances where a conflicted board member could remain in a closed session during discussion of the matter, the SEC resolved that:

> "the determination of whether a board member must leave a closed session during which the board is discussing a matter in which he or she has a conflict should be determined on a case by case basis and not set forth as a general policy."

CONCLUSION

NJSBA keeps informed about the activities of the SEC by sending a staff member representative to every meeting. NJSBA keeps its members informed of the SEC's activities through *School Board Notes* and *School Law Reporter*, explaining not only the rulings but their general implications for board members and school districts. In addition, NJSBA provides quarterly updates of ethics rulings through its Associate Membership Program of School Attorneys (AMPSA). NJSBA's Legal Department and Labor Relations staff are in regular contact with board attorneys to discuss the specific implications of these decisions for their boards of education. Board members and school administrators are encouraged to contact their board and personal attorneys for advice on the impact of School Ethics Commission rulings and decisions on their individual conduct as school officials

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VOTING RIGHTS OF THE SENDING DISTRICT'S REPRESENTATIVE In a recent trio of rulings, the Commissioner of Education has provided clarification on the role of the board member who is the appointed representative to a receiving district's board of education. The first of the trio, *Lincoln Park Bd. of Ed. v. Boonton Bd. of Ed.*, 97 *N.J.A.R.* 2d (EDU)___(May 30) is a lengthy decision providing guidance on several issues arising under *N.J.S.A.* 18A:38-8.1, including the responsibility of the sending district's representative to maintain the confidentiality of closed session discussions that take place at the receiving board's meetings. The second decision, *Little Ferry Bd. of Ed. v. Ridgefield Park Bd. of Ed.*, 97 *N.J.A.R.* 2d (EDU)___(July 24) eliminates any doubt about the sending district representative's right to vote in the election of board officers and other procedural matters relating to the conduct of the receiving district's board. The last of the threesome, *Green Twp. Bd. of Ed. v. Newton Bd. of Ed.*, 97 *N.J.A.R.* 2d (EDU) ___(August 5) clarifies quorum and voting requirements on the receiving board.

BACKGROUND

First, a little history. Prior to the 1995 annual reorganization meeting, school districts that sent their pupils to a receiving district had no voice on the board of education of the receiving district.[1] That changed with the adoption of L.1995 c. 8, found at *N.J.S.A.* 18A:38-8.1, which requires representation of a sending district on the receiving district's board of education according to a formula based on proportional pupil enrollment.

The statute specifically listed four types of matters arising before the receiving board on which the representative "shall be eligible to vote." Voting was statutorily permitted on:

a. Tuition to be charged the sending district by the receiving district;
b. New capital construction to be utilized by sending district pupils;
c. Appointment, transfer or removal of teaching staff directly providing services to pupils of the sending district; and
d. Addition or deletion of curricular and extracurricular programs involving pupils of the sending district.

The new law generated a great deal of debate and at least one lawsuit.[2] Districts and their counsel could not agree on whether the enumerated areas of voting eligibility were intended to be exclusive, or simply permissive. Also, there were disagreements over how narrowly the four areas were to be read—for example, did superintendents and other central office staff qualify as "teaching staff directly providing services to pupils of the sending district?" What about voting on financial matters that would involve the sending district as substantially as the tuition decision? Some of the most heated discussion involved the role of the sending representative in discussions and deliberations on matters for which the statute did not address the authority to vote.

About one month after the law was passed, the Department of Education issued a letter of guidance.[3] Regarding participation rights of the representative from the sending district, the Assistant Commissioner advised:

• The law identifies the four areas for which a sending district representative may vote; the reference to "appointment, transfer or removal of teaching staff" refers to certificated staff positions.

• The sending district representative may vote on all certificated personnel who have involvement with students from the sending district, including the superintendent and business administrator, but not on personnel decisions regarding certificated staff that have no involvement with those students such as an elementary school teacher or

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principal in a situation where the sending district only sends high school students to the receiving district.

• While the representative has limited voting rights, in all other respects the representative will function as a full member of the board, including participation in closed sessions discussions. Also, the requirements for a quorum, and other voting requirements, must be amended to reflect the new total membership of the board. For example, if the receiving district's board is expanded to twelve members, a quorum for a public session would be seven.

While this memorandum addressed some aspects of the law, it raised additional questions. For example, as representatives were entitled to participate in closed session discussions held by the receiving board, was the sending board then entitled to information concerning those closed session discussions, or was the sending representative who participated in closed session discussions required to keep those matters confidential? If a sending district had a right to be informed of closed session discussions, was that right limited to discussions concerning items on which the sending representative may vote? What if the sending representative was representing two or more boards of education (as is required by the statute in certain circumstances)—was there an obligation to report back to all sending boards, only his own, or none at all?

Among other questions left open was whether the "appointment, transfer or removal of a teaching staff" language allows a sending representative to vote on a negotiated agreement. The memo did not address whether the sending representatives, as members of the board, may serve on the negotiating team or participate in closed session strategy discussions. Nor did it serve to clarify whether, while the quorum to convene a meeting must reflect the new total membership of the board, the quorum required for a vote on any particular question should be determined in accordance with whether the sending representatives are permitted to vote on that issue. It provided no direction on whether the sending district's representative had the right to vote for board officers (president and vice president).

Despite urging, the Department issued no further guidance, indicating that districts in sending-receiving relationships should work together with their attorneys to resolve disagreement through mutual discussions between the affected boards.

In August 1996, school districts obtained some legislative clarification through amendments to *N.J.S.A.* 18A:38-8.1 (L. 1996 c. 100). The sending district's representative's voting rights in subsections a. and c. were thus amended (amendments indicated in *italics;* deletions in brackets [ ]):[4]

a. Tuition to be charged the sending district by the receiving district *and the bill lists or contracts for the purchase, operation or maintenance of facilities, equipment and instructional materials to be used in the education of the pupils of the sending district;*

c. Appointment, transfer or removal of teaching staff *members* [directly] providing services to pupils of the sending district, *including any teaching staff member who is a member of the receiving district's central administrative staff...*

It is against this background that the three recent decisions providing additional guidance by the Commissioner of Education are most welcome.

THE DECISIONS

1.) Lincoln Park Bd. of Ed. v. Boonton Bd. of Ed.

Lincoln Park sent its high school students to Boonton, and had one appointed representative to the Boonton Board. The Lincoln Park Board asserted that it and its appointed representative had the right to receive and discuss among themselves all matters relating to the high school programs prior to the Lincoln Park Board taking action on the information. The Lincoln Park Board further claimed that, in order to effectively participate in the decision-making process at the Boonton board meetings, it was entitled to a copy of all appendices to the board agenda affecting the high school program.[5]

Administrative Law Judge Bari-Brown, in a decision affirmed by the Commissioner for the reasons expressed therein, found that resolution of these issues required an interpretation of both *N.J.S.A.* 18A:38-8.1 and the 1990 sending-receiving agreement between the two boards. The Agreement provided, among other things, that "the Boonton Board will take the concerns of the Lincoln Park and Lincoln Park Boards of Education into account in making all decisions and taking all actions affecting Lincoln and Lincoln Park pupils and the Boards." Another paragraph of the Agreement indicated that the Board would reach mutually acceptable agreements in nine areas, including a catch-all section which required agreement on "(s)uch other areas as any of the participating districts Boards, Superintendents, or Business Administrators shall deem appropriate." The ALJ noted that the Agreement had been strengthened and broadened by the enactment of the statute which gave the Lincoln Park Board a seat on the Boonton Board of Education. (slip op. at 9) Further, she noted that the 1996 amendments clarified and further expanded the voting rights by broadening the areas upon which the appointee could vote.[6]

Held: The appointed representative was entitled to copies of all information, documents and communications when distributed to other Board members, even though the items are not listed within the categories upon which the appointee is statutorily entitled to vote.

The ALJ rejected Boonton's argument that the appointee's right to receive information in advance of public dissemination and the right to discuss or debate any matters, are only triggered when the board addresses those issues listed in the statute. She found such an interpretation to be restrictive and contrary to both the boards' sending-receiving Agreement, and legislative intent. The Judge rejected Boonton's position that the appointee's right on all other matters was no greater than that of any other member of the public. (slip op. at 12)

Looking at the plain meaning of the statute, she wrote:

> The ordinary meaning of the statute is that the appointee has limited rights of voting. The Legislature expresses no intention to limit either the appointee's access to documents/information, or the appointee's level of participation outside of

voting eligibility ... The Board's leap to severely circumscribe the appointee's rights of membership based on limited voting rights is not expressed in the statute or legislative history, nor can it be reasonably inferred from the plain language of the statute. Indeed, the legislative history shows that the Legislature originally intended not to place any limit on the appointee's voting rights.

Moreover, the Board's interpretation of *N.J.S.A.* 18A:38-8.1 does not comport with what the Governor recognized as the purpose of the legislation. Indeed, in her veto message, the Governor concluded that the underlying intent of the legislation is to promote communication between the sending and receiving school districts which will foster an atmosphere of trust and cooperation. (slip op. at 13)

I also reject the Board's argument that by providing the appointee with the disputed information in advance of public dissemination "Boonton's statutory obligation and authority to govern its own school district" will be hindered ... The appointee is a board member and, contrary to the Board's position, nothing in *N.J.S.A.* 18A:38-8.1 expresses or implies that when the subject matter before the Board is outside the voting categories the appointee reverts to a member of the public with no greater rights ... (slip op. at 14)

Although Boonton correctly notes that the appointee is not entitled to vote on "extra-statutory subjects" such as "student discipline, staff leaves of absence, or reduction in force, to name a few," I am persuaded that the receiving district would not be consistently able to determine when matters which are not directly related to the sending district will raise issues that do impact its pupils ... The Board, however, ignores the fact that "student discipline, staff leaves of absence, [and] reduction in force, to name a few," affect all students. Thus, withholding "extra-statutory" information from the appointee until the information is available to the public places the appointee at a severe disadvantage. In contrast, permitting the appointee to review in advance of public dissemination information on "extra-statutory" subjects on which he has no vote merely ensures that the appointee will be a well-informed Board member. The Board's concern that Lincoln Park will control the administration of Boonton High School is unfounded ... (slip op. at 15)

Held: The appointee's deliberative role is not limited to questions arising under the voting categories. The presiding officer controls the procedure of the meeting and may recognize any board member who seeks the floor to discuss, remark or comment on the merits of the pending question.

Judge Bari-Brown noted that the statute does not address an appointee's deliberative role or limit participation to questions arising under voting categories. Although in *Callowhill* the Commissioner would not compel the receiving district to accept and consider the evaluative input of the appointee, the ALJ found that:

(i)n light of the legislative history, and the recognition of the importance that the sending district's voice be heard, the appointee's deliberative role should not be limited unless it is expressed in the statute.

Rather, the extent of an appointee's deliberative participation, like that of any other Board member, should be governed by the Board's parliamentarian procedures ... Permitting the Board to maintain control of the procedure is in accord with *Callowhill*, as it does not compel the appointee's deliberative role in extra-statutory matters; it simply permits the appointee to participate in discussion at the Board's discretion. In the exercise of its discretion, the law presumes that local public bodies will act fairly with proper motives and for valid reasons.

Notwithstanding that differences of opinion between the two school districts may exist, permitting the appointee to debate on extra-statutory subjects does not undermine the receiving board's authority to control the meeting or the conduct of Board members. Moreover, where the subject of debate is a matter outside of the appointee's voting eligibility, it is improbable that the appointee will find need to participate in the discussions. However, where the appointee rises to obtain the floor to participate in the discussion on the merits of the question before the Board, his or her comments may have significant bearing on the subject of debate. Indeed, the appointee's input may expand the knowledge of all members of the Board.

Also, permitting the appointee to voice an opinion on extra-statutory subjects is consistent with the intent of the Agreement ... (slip op. at 17-18)

Held: The appointee may communicate freely with the sending district's superintendent over confidential items.

The ALJ wrote:

I agree that students' records and personnel matters must be kept confidential ... Additionally, matters regarding bargaining units and property acquisition negotiations should maintain a level of confidentiality. However, the appointee's right to consult with the superintendent facilitates the appointee's ability to better represent Lincoln Park and better function as a member of the Boonton Board of Education, and fulfills the intent of the Agreement and *N.J.S.A* 18A:38-8.1. (slip op. at 20)

Based on the above, I CONCLUDE that by virtue of the statutory entitlement to a seat on the receiving board, *N.J.S.A* 18A:38-8.1, a sending district's appointee may freely communicate with its superintendent on matters regarding documents and information received pertaining to the Board meeting. For the reasons discussed here, I further CONCLUDE that the superintendent must be bound to maintain strict confidentiality as to all issues so designated.

Held: The appointee is entitled to receive all documents

and information provided to members of the Board. The appointee may not disclose confidential information to the other members of the sending board. The appointee may only disseminate to the sending board non-confidential communications, and only where the sending district has convened as a full board.

Judge Bari-Brown explained the problem that would occur should the appointee communicate to the sending board confidential information discussed by the receiving board. Although the receiving board would be entitled to invoke the statutory exceptions under the Open Public Meetings Act to permit closed session discussions, the sending district would not be able to satisfy the same statutory requirements under the OPMA.

The ALJ wrote:

> For example, matters involving employment may be discussed in a closed session by the public body which employs or has appointed the employee in question... A closed session, held for this purpose by the Board would be appropriate. However, if the appointee determined that it was necessary to discuss the same issue with Lincoln Park, the sending district could not satisfy the statutory exception because it would not meet the requirements of being "the public body which employs or has appointed the employee." Thus, the only time an appointee may communicate confidential issues to Lincoln Park is in a closed session, which may only be convened where one of the specific exceptions required under (OPMA) exists. It is unlikely that Lincoln Park will ever satisfy this requirement. (slip op. at 22)

Judge Bari-Brown also set limits on the dissemination by the appointee of non-confidential information to the sending district's board. She wrote:

> ... Under general parliamentary procedure, the appointee may not communicate with individual members of the Lincoln Park BOE. If communication with Lincoln Park is necessary, it must convene as a full board. A board can transact business only in a properly called meeting and at which a quorum, unless otherwise properly established, is present. "The personal approval of a proposed action obtained separately by telephone or individual interview, even from every member of the board, is not approval of the board, since the members were not present in one room where they could mutually debate the matter." (citing *Roberts Rules of Order*). Also, if Lincoln Park must call a meeting, it must provide adequate public notice ... and the timing of the meeting could not be used to delay the (receiving) Board's consideration of any matter. (slip op. at 22-23)

2.) Little Ferry Bd. of Ed. v. Ridgefield Pk. Bd. of Ed.

The Little Ferry Board sent its high school pupils to Ridgefield Park, and had one representative on the Ridgefield Park Board. Little Ferry filed a petition of appeal and motion for emergent relief, requesting a ruling that the Ridgefield Park's reorganization was null and void as the sending board had been wrongly precluded from voting on organizational issues including board officers.

Held: The appointee is entitled to vote on procedural matters in addition to the substantive matters listed in the statute.

Relying on *Lincoln Park Bd. of Ed., supra*, the Commissioner concluded that by virtue of her statutorily granted membership on the Ridgefield Park Board, the Little Ferry representative was entitled to vote in the election of Board officers "and other procedural matters attendant to the orderly conduct of Board operations." (slip op. at 7). The Commissioner noted that the statute addresses two distinct subjects: 1) the entitlement to membership on the board as a representative, and 2) matters before the board upon which the representative is eligible to vote. As to the former, the Commissioner found that eligibility for full participation includes voting rights in those procedural and organizational matters necessary to ensure the effective operation of the board itself. He stated, the "statutory restrictions governing the voting rights of the representative *on substantive issues arising before the board* cannot be superimposed on the separately granted membership rights, thereby depriving this individual of full and effective participation as a board member." (slip op. at 8)

Thus the reorganization meeting was held to be void, and the board was required to reorganize again, recognizing the full participatory rights of its members. (The Commissioner declined to nullify subsequent actions of the board and its officers, as the improperly appointed officers had performed within their authority as "de facto" board officers.)

3.) Green Bd. of Ed. v. Newton Bd. of Ed.

The Green Board sent its high school students to Newton and had one representative on the 11 member board. Green sought a declaratory judgment from the Commissioner construing the provisions of the OPMA and *N.J.S.A.* 18A:38-8.1 as they apply to 1) the right of the sending district representative to share executive session discussions of the receiving district's board with the sending district's board and 2) the impact of those statutes on the quorum requirements of the receiving district's board.

Held: A quorum to convene a meeting must reflect the new total membership of the board. Voting requirements will vary, dependent upon whether the appointee may vote on the issue.

First, the Commissioner found that the sharing of executive session discussions had been "squarely addressed and resolved" by *Lincoln Park* and found to be impermissible.

With respect to the quorum and voting requirements, the Commissioner explained that these flow from an understanding of the underlying duality of purpose of *N.J.S.A.* 18A:38-8.1. While the representative of a sending district has limited voting rights in substantive matters before the board, in all other respects the representative functions as a full member of the board. Therefore, requirements for establishing a quorum, and those for voting, must be amended to reflect the new total membership of the board. For Newton, an 11 member board, "the quorum necessary to convene any meeting, pursuant to *N.J.S.A.* 10:4-8b, will at all times be six." (slip op. at 5) The Commissioner further directed,

> Notwithstanding that the quorum requirement to convene meetings remains constant, voting requirements will vary, dependent upon whether the sending district representatives are eligible to vote on the issue at hand. Thus, on all procedural matters as set forth in *Little Ferry, supra,* and on those substantive matters before the Board where the representative members are eligible to vote, the vote required to carry a motion will be based on a total membership of eleven. On those matters where such representatives are not eligible to vote, the vote required to carry the motion will be based on a total membership of nine. (slip op. at 5)[7]

CONCLUSION

These three decisions answer many, but not all, of the questions raised earlier in this article. Predictably, the decisions themselves raise additional questions. For example, do certain circumstances justify limitations on the access to information and the deliberative role of the representative? At least one district is wrestling with the issue of whether, where two districts are involved in litigation against one another, such as severance of the sending-receiving relationship itself, the sending representative must be privy to and permitted to participate in the receiving district's discussions of the litigation. Is there something unsettling about the notion of a board member being privy to the confidential discussions of strategy by each party pitted against the other in litigation? Does the board member's presence compromise the position of the receiving district?

Among other questions raised by these decisions is whether the districts could agree between themselves to either expand (or narrow) the voting rights. That is, may the districts mutually agree that the representative will vote on substantive issues falling outside of the four named categories, or is the statute to be read as restricting the right to vote on substantive areas to those listed? Finally, would the ruling in *Lincoln Park* have been different in any respect if the districts did not have an Agreement that so strongly emphasized the need for inter-district cooperation? NJSBA will keep its membership apprised should the Commissioner address these or other related issues.

FOOTNOTES

[1]School districts' authority to enter into contractual sending-receiving relationships is set forth in *N.J.S.A.* 18A:38-20. These relationships may be terminated upon application to the Commissioner of Education pursuant to *N.J.S.A.* 18A:38-21 and 18A:38-13.

[2]*Callowhill v. Atlantic City Bd. of Ed.*, 96 *N.J.A.R.* 2d (EDU)693 (application for emergent relief). The Commissioner held that, pending appeal on the merits, the receiving board must either allow the sending board's evaluative input on the superintendent and school business administrator, or refrain from the evaluations. The decision was based on an interpretation by the Deputy Commissioner that the sending representative has the right to vote on the superintendent's contract. However, Commissioner declined to issue a directive compelling participation in the evaluation of board solicitor where no entitlement to vote on the underlying contract was shown.

[3]Letter from Peter E. Contini, Assistant Commissioner, dated February 22, 1995, re: Implementation of Chapter 8, P.L. 1995 (Senate Bill 151). The letter also clarified that the representation would begin with the 1995 annual reorganization meeting, and that the appropriate representation would be verified based on October 15, 1994 student enrollment data.

[4]Also, the law was amended to reflect that pupil count would be calculated as of the last school day prior to October 16 of the prebudget year.

[5]Another issue in this case, which will not be addressed in this discussion, concerned whether the Board acted arbitrarily or illegally in conducting a search to fill the position of principal of the Boonton High School.

[6]The ALJ examined at length the legislative history of the 1996 amendments and of the original law adopted in 1995. (slip op. 9-12)

[7]These quorum requirements probably mean that a receiving board could have sufficient members present to vote on an issue involving only the receiving district, but is precluded from doing so where a quorum of the *total* membership of the board (including the sending representatives) is not present to convene the meeting. (Example: 11 member board requires 6 to convene meeting, although only a majority of the 9 receiving district members (i.e.,5) constitutes a voting quorum for an issue on which only members from the receiving district may vote.)

SCHOOL ETHICS COMMISSION SUMMARY

In three previous editions of *School Law Reporter*, this publication provided its readership with an update of School Ethics Commission advisory opinions, policy guidelines, rulings on financial and personal/relative disclosure statements, rulings on board member training, complaint dismissals and decisions regarding complaints where probable cause was found through December 1996. (See Volume II, No. 1, September 1996 and July 1997.) To provide its readers with the most current interpretations of the School Ethics Act, this edition of School Law Reporter will provide an update of School Ethics Commission advisory opinions, rulings on financial and personal/relative disclosure statements and rulings on board member training, through December 1997.

PUBLIC ADVISORY OPINIONS

The School Ethics Commission (SEC) is authorized to provide advisory opinions upon request as to whether any proposed activity or conduct would constitute a violation of the Act. Advisory opinions remain confidential to those who request them unless the SEC, by a vote of at least six members, directs that the opinion be made public. *N.J.S.A.* 18A:12-21. Every public advisory opinion is forwarded to the County Superintendent's office in each county for dissemination to local district superintendents.

Advisory Opinion A 16-96 (January 29, 1997), provides the most comprehensive review to date of the parameters of negotiations participation when a conflict of interest exists. The SEC considered whether a board of education member, whose spouse was a member of the local administrative association, could participate in negotiations and vote on a contract with the teachers' education association when the administrative association contract had provisions linked to the teachers' education association contract. The SEC found a conflict to exist pursuant to *N.J.S.A.* 18A:12-24(c). The linkage of the administrators' contract to the teachers' contract meant that the board member's spouse had an indirect financial involvement in the outcome of the teachers' contract that would reasonably be expected to impair the board member's objectivity when participating in the negotiations

process. If the teacher's contract contained a salary increase or additional benefits, it would openly affect the administrators' contract and thus his spouse. Premised on that conflict, the SEC responded to six specific questions and established the following restrictions on negotiations conduct.

- The board member could not vote on the collective bargaining agreement with the teachers' education association.
- The board member could not participate directly in the negotiations with the teachers' education association.
- The board member could not participate in preliminary closed session discussions for the purpose of establishing the general framework within which negotiations with the teachers' education association would take place.
- The board member could not participate in closed session discussions regarding those areas in the teachers' education association contract which were either linked or not linked to the administrative association contract.
- The board member could not participate in post-settlement preratification discussions with the board's subcommittee when it reviewed those areas which were not specifically linked to the administrative association contract.
- The board member could not participate in post-ratification and post-execution discussions regarding those areas in the teachers' education association contract linked to the administrative association contract. His comments could influence future arguments regarding the interpretation of the contract or the next round of negotiations with either the administrative association or the education association.

Advisory Opinion A22-96 (February 26, 1997), addressed whether a board of education member could serve on the board of trustees of a charter school in the same district. The board member recognized that she had a personal involvement in developing the charter school and would be required to abstain on issues regarding the charter school at the board of education level. She also planned to recuse herself from any closed session discussions regarding the charter school due to her personal involvement.

The SEC concluded that the board member would violate the School Ethics Act if she served on the board of trustees of a charter school in the same district. Such service would be a violation of *N.J.S.A.* 18A:12-24(d) as it would constitute a service which would be reasonably expected to prejudice her independence of judgement in the exercise of her official duties as a board member.

Charter schools were intended by the Legislature to provide a choice to parents seeking a learning experience for their child not offered in the traditional classroom. It is this choice, and the implementation of educational programming that may not be available in the traditional classroom, that would create an appearance of conflict under the Act. The public may perceive that a board member who was also a member of the board of trustees of a charter school would have divided loyalties and might make decisions to benefit the charter school rather than the public school. Recusal would not be enough because virtually any decision a local board may make could have an impact on education generally in the district and could affect the parent's decision on which school to send his or her children.

The SEC found significant the methodology by which per pupil payments are made to charter schools. The school district of residence pays directly to the charter school, for each student enrolled, an amount equal to 90% of the local levy budget per pupil for the specific grade level in the district. To the extent that a board member would contribute to discussions on how much the local budget should be, she might be influenced by the fact that the amount of funds the charter school would receive would rise proportionately to the amount of funds that the board allocates per pupil. Abstention on the budget vote would not remove the taint because of all the other decisions of a local board to determine the amount of the budget for that school year. The same analysis could be applied to decisions regarding the provision of transportation to students attending the charter school.

Here, the board member started the charter school to meet a need in a particular grade level that the district could not fulfill due to a budgetary shortfall. To the extent that the local board may try to emulate the services of the charter school, the public may reasonably expect that the board member's opinions on such issues would be prejudiced by her desire for success of the charter school. Other conflicts may arise in the employment of teachers and staff depending on the school's charter and in matters of curriculum and grants available for new programs in the local school district. For all of these reasons, the SEC concluded that a board member would violate *N.J.S.A.* 18A:12-24(d) by serving as a trustee of a charter school in the same district.

Advisory Opinion A23-97 (October 28, 1997), addressed the ability of a board member in a regional school district to start a personal business privately advising college bound students. The board member did not plan to include in his promotional material the fact that he was a school board member and did not plan to otherwise use his position to gain clients.

The SEC determined that the proposed business would not be in substantial conflict with the board member's duties and would not reasonably be expected to prejudice his independence of judgement as a board member. However, the board member was advised not to use his position to obtain information not generally available to the public in an effort to market his consultant service. For example, he could not obtain the addresses of potential student clients from board records or gather lists of those in college preparatory classes. In addition, the SEC advised that the board member should recuse himself from any matter involving any student who used his consultant services. This would avoid the perception that he was acting in his official capacity in a matter in which he had a financial involvement that could reasonably be expected to impair his objectivity.

Advisory Opinion A26-97 (November 26, 1997), addressed the involvement in the negotiations process of a business administrator/board secretary whose salary agreement provided that he could receive a percentage of the settlement offered to the teachers' association. The business administrator/board secretary asked whether serving as a resource person by calculating the cost of various proposals would present a conflict of interest that violated the School Ethics Act. The SEC concluded that serving as a resource person during negotiations did not violate provisions *N.J.S.A.* 18A:12-24c through 12-24f of the Act.

Because of his contract, the business administrator/

board secretary had a financial involvement in the outcome of negotiations that would bar him from negotiating or otherwise giving his opinion as to how negotiations should proceed. However, his position required that he make himself available to the negotiating committee as a resource person to provide objective facts concerning the budget, past contract settlements and the like. Such participation would not violate the Act.

The SEC further indicated that the business administrator/board secretary would violate the Act if he disclosed confidential negotiations information to members of the association in order to get the association and thus himself a better deal. His presence at negotiations sessions only as a resource person would not constitute using his employment to secure financial gain for himself. However, he must refrain from subjective comments about the proposed settlement.

FINANCIAL AND PERSONAL/RELATIVE DISCLOSURE STATEMENTS

On September 26, 1997, the SEC recommended the removal of a school official who failed to file his 1997 financial and personal/relative disclosure forms in a timely manner. Under the School Ethics Act, financial and personal/relative disclosure statements must be filed on or before April 30 of each year or within 30 days of taking office or hiring. *N.J.S.A.* 18A:12-25, 26; *N.J.A.C.* 6:3-9.3. On November 5, 1997, the Commissioner of Education issued the following decision:

In the Matter of Timothy Klein, Salem County Special Services School District, Salem County, 97 *N.J.A.R.*2d (EDU) ___ (November 5). The Commissioner of Education adopted the SEC's recommendation and removed Mr. Klein from his office as a board member. The SEC recommended Mr. Klein's removal as he failed to timely file his financial disclosure statement and failed to respond to the SEC's order to show cause or any other SEC correspondence. Mr. Klein filed no response to the Commissioner regarding the recommended sanction.

BOARD MEMBER TRAINING

The School Ethics Act requires that each newly elected or appointed board member complete, during the first year of that member's first term, a training program prepared and offered by the New Jersey School Boards Association regarding the skills and knowledge necessary to serve as a local school board member. A newly elected or appointed board member is defined as any board member who has never served as a member of either an elected or appointed school board. *N.J.A.C.* 6:3-9.2. The NJSBA is required to present a list to the SEC by March 31 of those board members who have failed to meet the training mandate in their first year. *N.J.A.C.* 6:3-9.4.

On April 22, 1997, the SEC recommended that the Commissioner of Education either suspend or remove three board of education members elected in 1996 who failed to meet the Act's training requirements. The Commissioner rendered the following three decisions regarding the SEC's April 22, 1997 recommendations:

In the Matter of Bettie Jo Ziemer, *Bradley Beach of Education, Monmouth County,* 96 *N.J.A.R.*2d (EDU) ___ (May 19). The Commissioner, based on Ms. Ziemer's assertion that she would be taking the October 1997 training course and that she had provided sufficient reasons for not attending two of the prior training conferences, rejected the SEC's recommended penalty of removal. Finding that some penalty was warranted in that seven courses were offered between April 1996 and April 1997 and Ms. Ziemer only demonstrated why she was unable to attend two, the Commissioner suspended Ms. Ziemer from her office as a board member for a period of three months to commence May 19, 1997 and further subjected her to removal without further proceedings should she fail to attend the October 1997 Orientation Conference.

Ms. Ziemer filed a notice of appeal to the State Board but failed to file the brief necessary in order to perfect her appeal. The State Board dismissed the appeal for failure to perfect. 96 *N.J.A.R.*2d (EDU) ___ (September 3).

In the Matter of Andrew Mc Ilvaine, *Board of Education of the Township of Cherry Hill, Camden County,* 96 *N.J.A.R.*2d (EDU) ___ (May 19); ***In the Matter of Robbin Marvin,*** *Board of Education of the Borough of Lawnside, Camden County,* 96 *N.J.A.R.*2d (EDU) ___ (May 19). In each of these two matters, the Commissioner of Education, having confirmed that the above board members planned to attend the June Orientation, adopted as his own the SEC's recommended penalty of suspension. Mr. Mc Ilvaine and Ms. Marvin were suspended from their respective offices as board members as of May 19, 1997, pending their attendance at the June training session and would be removed from office without further proceedings should they fail to attend the June training session.

On May 27, 1997, the SEC recommended that the Commissioner of Education either reprimand, suspend or remove eight board members elected in 1996 who failed to meet the Act's training requirements. The Commissioner rendered the following eight decisions regarding the SEC's May 27 recommendations:

In five decisions, the Commissioner of Education confirmed that the board members in question had attended a June 1997 training session, but found that some penalty was appropriate for failure to attend training in a timely manner. The Commissioner rejected the SEC's recommendation of a reprimand, and found the appropriate penalty to be suspension of the board members from their respective boards of education for one meeting, effective the next regularly scheduled board meeting. In the Matter of Craig P. Heard, Board of Education of the Township of Roxbury, Morris County, 96 N.J.A.R.2d (EDU) ___ (June 27); In the Matter of Stephan Lynch, Hackensack Board of Education, Bergen County, 96 N.J.A.R.2d (EDU) ___ (July 3); In the Matter of the Reverend John G. Bryant, Pleasantville Board of Education, Atlantic County, 97 N.J.A.R.2d (EDU) ___ (July 3); In the Matter of Frank Kelly, Mullica Township Board of Education, Atlantic County, 97 N.J.A.R.2d (EDU) ___ (July 3); In the Matter of William E. Young, Asbury Park Board of Education, Monmouth County, 97 N.J.A.R.2d (EDU) ___ (July 8).

In the sixth case, the Commissioner of Education, having confirmed that the board member, Mr. Mennen, resigned from his position on the Somerset Hills Board of Education on June 23, 1997, rejected the SEC's recom-

mended penalty of reprimand in view of the resignation. The matter was dismissed as moot. ***In the Matter of William G. Mennen, IV,*** *Somerset Hills Board of Education, Somerset County*, 96 *N.J.A.R.*2d (EDU) ___ (July 3).

In the last two cases noted below, the board members were removed from office:

In the Matter of Barbara DeLuca, *Board of Education of the Borough of Audubon Park, Camden County*, 97 *N.J.A.R.*2d (EDU) ___ (July 2). The Commissioner of Education adopted as his own the SEC's recommended penalty of removal. Ms. DeLuca's response that she did not attend the January session for which she was scheduled because she had to work and that she attended school on Saturdays until November was not deemed sufficient reason for failure to attend board member training.

In the Matter of Debbie A. Phillips, *Board of Education of the Township of Elsinboro, Salem County*, 97 *N.J.A.R.*2d (EDU) ___ (July 8). The Commissioner adopted as his own the SEC's recommended penalty of removal. Ms. Phillips' response that she was unable to attend classes because of her work schedule, did not attend weekend sessions in June and September because she was a single parent and had signed up for the October class was not deemed to be sufficient reason for failure to attend.

In board member training cases through the 1997 calendar year the SEC has issued penalties ranging from removal, to suspension for two months or until training is complete, to a suspension for one board meeting. One may question whether prohibiting attendance at a board meeting during the month of July is an effective penalty, especially as there is no requirement that the reason for the failure to attend be publicly announced at the board meeting. It would not be surprising if the SEC in the future were to require that the reason for non-attendance be read into the record at the board meeting when a board member is suspended for failure to comply with the training requirement of the School Ethics Act.

CONCLUSION

Look for the next edition of *School Law Reporter* for an update of complaint dismissals and decisions regarding complaints where probable cause was found through December 1997.

Board members and school administrators are encouraged to contact their board and personal attorneys for advice on the impact of School Ethics Commission rulings and decisions on their individual conduct as school officials.

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By Carl Tanksley, Esq. Assistant Counsel, Legal

Affirmative Action Programs - Raceless Distinctions?

On December 2, 2002, the United States Supreme Court agreed to hear two related cases that directly address affirmative action policies in law school and undergraduate admissions. Grutter vs. Bollinger, and Gratz vs. Bollinger, respectively challenge the admissions policies of the University of Michigan law school and undergraduate programs.

Continuing Controversy The desirability and implementation of affirmative action programs has long generated controversy among liberals and conservatives alike. While it is generally accepted that certain minorities are disparately underrepresented in both graduate and undergraduate programs, there is no clear consensus on whether to address the issue, let alone how to address it. Certain conservatives have argued that such programs punish blameless applicants by denying an otherwise qualified non-minority applicant admission to the program of their choice, based simply on race. Others point to individuals such as Secretary of State Colin Powell and National Security Adviser, Condoleezza Rice, as shining examples of the success of affirmative action programs. The argument naturally follows that, because individuals have achieved success through affirmative action programs, these types of programs have achieved their goal and have therefore outlived their usefulness.

Many liberals, on the other hand, counter by arguing that minorities historically have and continue to be embarrassingly underrepresented in this nation's institutional infrastructure; without affirmative action programs, the status quo will never provide effective representation of minority viewpoints.

Additionally, liberals point out that the success of a relative few individuals has not transferred to the vast majority of minorities in this country. These minorities arguably, have not received the same opportunities as non-minorities. The argument follows that affirmative action programs continue to be necessary to allow minorities the opportunity to participate in our nation's institutional infrastructure.

Reverse Discrimination In Grutter and Gratz, both petitioners complain that they, otherwise eligible applicants, were denied admission to the law school and undergraduate program, respectively, and were the victims of "reverse discrimination." Grutter and Gratz argued that this denial constituted a violation of their equal protection and civil rights. At issue was the university's admissions policy, which in order to establish "academic diversity," granted "plus factors" to applicants based on characteristics such as race, ethnicity and geographic location. The university argued that its admissions policy was narrowly tailored to achieve a compelling state interest.

On January 15 of this year, President Bush ordered the United States solicitor general to become involved in the case in opposition to the Michigan admissions policy. The solicitor argued that the Michigan policy is unconstitutional because it seeks to employ race-based criteria when racially neutral criteria are available to achieve the university's goal of academic diversity. The solicitor's brief points to geographical origin, a history of overcoming disadvantage, socioeconomic status, challenging living or family situations, and reputation and location of the applicant's high school as examples of race-neutral alternative selection criteria. The solicitor points out that similar race-neutral alternatives have succeeded in Texas, Florida and California. Michigan contradicts the success of the race-neutral programs in both Texas and California.

The question before the Supreme Court turns on whether academic diversity is a compelling state interest, and if so, whether the admissions policy crafted by the University of Michigan is narrowly tailored to meet that interest. In order to sustain a race-based distinction, a state must prove that the racial classification is necessary to achieve a compelling state interest and that the state's use of the race-based distinction is narrowly tailored to achieve the asserted interest.

Racial Diversity If the Supreme Court agrees with the solicitor general, what will the impact be on school districts? In New Jersey, public school students may not be segregated on the basis of race, color, creed, religion, sex, ancestry, national origin or social or economic status.1 Therefore, all local boards of education have a duty to ensure that students enrolled in their districts are not assigned to schools or programs using any of the aforementioned criteria.

In many New Jersey municipalities, certain minority segments of the population, for whatever reason, settled in certain neighborhoods. These residency patterns necessarily result in the children in those neighborhoods being assigned to the neighborhood school and accordingly, the segregation of that minority population. In order to comply with state law, many districts have chosen to assign the children of minority families to various schools within the district. Therefore, all the children of a particular family would be assigned to a particular elementary school, while another family in the same neighborhood might find its children assigned to a different school.

If the Supreme Court holds that race is an impermissible characteristic upon which to base admissions decisions, boards may find themselves in the awkward position of having to ensure that students are not racially segregated without resorting to race in

determining the school to which each student is assigned. In order to ensure that students are not impermissibly segregated, boards of education should consider race-neutral criteria, such as geographic location and socioeconomic status, in assigning students to schools and programs.

The Supreme Court has scheduled oral arguments in these two cases in April. A decision is expected sometime this summer. SL

By Michael Kaelber, Esq. Senior Associate Counsel, Legal

Monitoring Requirements for Community Relations

A successful community relations program encompasses all aspects of the board's relationship with its community and can provide many benefits. It can effectively promote public interest and participation in the school system. It can help to develop and maintain the confidence of the community in the school board and school staff, attract good teachers and encourage the staff to strive for excellence in the educational program. It can provide for an honest, continuous, and comprehensive flow of information about the policies, procedures, programs, problems and progress of the school system to the community and its staff. It can assist the board in developing programs in the school that will integrate home, school and community in meeting the needs of district pupils. Perhaps most importantly, it can anticipate and forestall problems that are brought about by lack of information or understanding.

The Quality Assurance Annual Report The state Board of Education has recognized the importance of community support and has included it as part of the monitoring review process. By October 30 of each year, the chief school administrator must provide to the public, at a regularly scheduled board of education meeting, the Quality Assurance Annual Report (QAAR). By November 15 of each year, the chief school administrator must submit a copy of the QAAR to the county superintendent. Absent approval of the QAAR, a district's budget will not receive Department of Education approval.

The QAAR must include information on implementation of school-level plans; achievement of performance objectives; school report cards; professional development activities; the condition of school facilities; the status of mandated program reviews; the implementation of guidance and counseling services; the identification of eligibility and provision of services to gifted and talented students; and community support data.

The community support element requires that school districts annually document community support through the following monitoring components: a review of demographic data; a community survey regarding school and education issues; identification of available resources and linkages to social service agencies; strategies to overcome any community and environmental conditions that hinder learning; methods to eliminate any barriers to community participation; the planned level of community involvement; and strategies for parental involvement and parent-teacher interaction.

While the school district must report on all seven areas every year, it must implement the demographic data, community survey and social services agencies identification components at least once during the seven-year monitoring cycle. If these three items have not been implemented, plans and appropriate timelines must be reported.

The school report card component requires that by September 30 of each year the school district compile a report card for each school. The school report card must contain statistical information specified by the Department of Education and must be disseminated to all staff and parents and made available to the media.

Community Relations Policies In an effort to assist school districts in complying with the monitoring process, NJSBA's Policy and Library Resources Department has developed several relevant policies in the community relations section of the Critical Policy Reference Manual. These policies are important as they are not only monitored, but statute and code require the district to inform its community of specific proposals, programs, activities and the condition of the district. The policies include, but are not limited to:

- Concepts and Roles in Community Relations; Goals and Objectives (File Code 1000/1010)Directs the establishment of a structured community involvement program.

- Communicating with the Public (File Code 1100)Assigns responsibility for informing the public on topics specified by law as well as matters of general interest.

- District Publications (File Code 1111) Directs the chief school administrator to supervise development and coordination of publications to support the district's efforts to communicate effectively with parents/guardians and the community in general.

- Board of Education Meetings (File Code 1120)Directs the use of the regular board meeting as a primary channel of two-way communication.

- Participation by the Public (File Code 1200)Directs the chief school administrator to develop procedures and programs for enlisting parents and community members in active participation and support of district programs.

These policies may be found in their entirety in NJSBA's Critical Policy Reference Manual, accessible through NJSBA's Web Site at www.njsba.org. SL

By Michael Kaelber

New Jersey School Boards Association

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Sussex County Spring Meeting

When: May 30, 2018

Where:
3 South Sparta Avenue,
Sparta, NJ, 07871

Directions | Register

MAY 31

Bergen County Spring Meeting

When: May 31, 2018

Where:
283 NJ-17,
Hasbrouck Heights, NJ, 07604

Directions | Register

JUN 1

NJSBA's 3rd Annual School Security Conference

When: June 1, 2018

Where:
1200 Old Trenton Road,
West Windsor, NJ, 08550

Directions | Register

JUN 2

County Association Leadership Meeting

When: June 2, 2018

Where:
413 West State Street,
Trenton, NJ, 08618

Directions | Register

JUN 6

Advocating For Your District's Funding

When: June 6, 2018

Where:
800 Ireland Avenue,
Absecon, NJ, 08201-1199

Directions | Register

JUN 8

Urban Boards Meeting

When: June 8, 2018

Where:
413 West State Street,
Trenton, NJ, 08618

Directions | Register

JUN 12

Spring School Law Forum

When: June 12, 2018

Where:
12 Centre Drive,
Monroe Township, NJ, 08831

Directions | Register

JUN 21

Are you I-STEAM Ready - Makerspaces

When: June 21, 2018

Where:
2201 Marconi Raod,

Wall Township, NJ, 07719

Directions | Register

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The Pendulum Swings Again

A new law changes the burden of proof in special education cases

By DONNA M. KAYE. ESQ.

It has been almost dizzying. Over the last few years the educational community has watched the burden of proof in due-process hearings swing back and forth. But with the passage of a State law in mid-January, the burden of proof in a special education due process matter now rests on the board of education in all cases. For many special education practitioners representing boards of education, this development represents a setback that will discourage the settlement of special education matters and will increase the costs of litigation to school districts. At the same time, the practitioners are hopeful that the judges conducting the hearings will implement procedures to lessen any harmful impact of the law.

What is a "burden of proof?"

Even the United States Supreme Court has described the burden of proof as a concept that is slippery and confusing. The term generally refers to the duty of proving one's case in a trial or a hearing. But technically the "burden of proof" encompasses two distinct duties: the "burden of persuasion" and the "burden of production." The party who bears the burden of persuasion is the one who will lose if the evidence is very close or evenly balanced (in judicial poetics, "in equipoise"). The party who bears the burden of production is the one who must first come forward with sufficient evidence to support his position, after which the other party has the opportunity to rebut that evidence. The traditional rule is that the burden of proof falls on the party who initiates a claim.

The courts or Legislature can change the general rule and determine which party should bear the burden of proof in different types of proceedings. The New Jersey Legislature's recent enactment applies only to special education due process hearings:

> Whenever a due process hearing is held pursuant to the provisions of the "Individuals with Disabilities Education Act," …Title 18A... or regulations promulgated thereto… the school district shall have the burden of proof and the burden of production.

What is a "due process" hearing?

A "due process" hearing is a formal proceeding before an impartial administrative law judge to resolve a dispute when a family and school district disagree about a student's special education plan or other issues concerning the student's education. Due process hearings typically involve issues of identification, evaluation, re-evaluation, classification, educational placement, the provision of an appropriate education, or disciplinary action. They are similar to trials as the parties may present evidence, call witnesses and be represented by attorneys.

Not all disagreements are submitted to due process. Cooperation between parent and school sits at the core of special education law. The "Individuals with Disabilities Education Act" (IDEA) promises students a "free appropriate public education" (FAPE) through a collaboration that requires parent participation and communication with the school at every step. The vehicle for this collaboration is the creation of the "individual educational program" (IEP), a written plan which sets forth measurable goals for the student, and the necessary instruction and related services to enable the student to meet those goals. Parents and guardians are members of the IEP team and play a central role in developing or modifying their child's IEP.

In many cases the collaborative model works smoothly. In cases where there is disagreement between the school and the parents, the parties may obtain mediation. If both the district and the parents agree to mediation, an impartial mediator provided by the State Department of Education (DOE) can assist the parties in reaching a binding agreement. Resolving differences without resorting to due process tends to bolster positive relationships and trust between the parties through engagement and discussion on behalf of the student. Collaboration avoids the adversarial model and the expenditure of public funds for litigation expenses that could better be used for educational programming. It also avoids the need to remove special education educators from the classrooms to testify at a hearing.

Due process hearings occur when mediation is refused or fails to produce a settlement. The parties do have the statutorily protected right to seek "due process." DOE data indicates that about 75% of the hearing requests come from parents rather than schools. Prior to the due process hearing, the parties are afforded another opportunity to resolve their differences at a "resolution session."

Why did the burden of proof swing back and forth?

Before the new law, no federal or state statute had addressed which party carried the burden of proof in a special education due process hearing. Prior to 1989, it was left to individual administrative law judges to assign the burden to one of the parties. In 1989 the New Jersey Supreme Court in *Lascari v. Ramapo Indian Hills Regional Bd. of Ed.* settled the question and ruled that under the special education law in effect in 1989, the burden should be placed on the school district. The Court reasoned that the school district had better access to relevant information than the parents and should be able to prove that the IEP was appropriate.

Since *Lascari* was decided, the federal special education law has been amended several times—in 1990, 1997, and in 2004. These amendments established many new safeguards and procedural rights for parents, including provisions for increased access to information, disclosure, notification, and participation.

Recognizing these safeguards for parents under the amended IDEA, the United States Supreme Court in *Schaffer v. Weast* ruled in 2005 that the party initiating the due process proceeding should bear the burden of persuasion. The Court outright rejected the premise that a school district has better access to relevant information than the parents, pointing out that Congress had leveled the playing field for parents. The Court therefore believed that the traditional legal rule, that the party initiating the proceeding should have to prove its case, should apply in due process hearings. According to the Court, to place the burden on

school districts would, in effect, ask courts to assume every IEP is invalid until the school district demonstrates otherwise, contrary to Congress' intent. *Schaffer* was praised by boards of education across the nation as properly mindful of Congress' intent to reduce districts' administrative and litigation-related costs through recent amendments to IDEA.

Even after *Schaffer*, there was lingering uncertainty over whether *Lascari* had been overruled in New Jersey. That is, until the Third Circuit Court of Appeals confirmed in 2006 that *Schaffer* had become the law in New Jersey. The Court of Appeals reasoned that the *Lascari* ruling was no longer valid as the *Lascari* ruling was based not on IDEA, but on its precursor.

What prompted the Legislature to adopt a law returning the burden of proof back to school districts?

For seventeen years following the *Lascari* decision, the burden of proof had been borne by school districts in New Jersey. In the wake of the sudden change after *Schaffer*, parent advocate organizations contacted the New Jersey Office of the Public Advocate (Advocate) with their concerns. The Advocate undertook an investigation and produced a position paper urging the Legislature to pass legislation that would return the burden back to school districts.

Despite the protections for parents now incorporated in the IDEA, the Advocate concluded that there still exist powerful disincentives for parents to bring valid claims forward. The Advocate believed that parents often lack knowledge, access, and understanding of critical information involving their children, as well as tools for effective advocacy including access to attorneys. The Advocate rejected the suggestion that placing the burden on the district could result in the filing of increased numbers of meritless cases and greater costs for school districts. The Advocate cited DOE information indicating that relatively few cases proceed to due process, and that districts tend to be successful in the great majority of the cases. The full report may be found on the Department of the Advocate's Web site at *www.state.nj.us/publicadvocate.com*.

The Legislature acted on the Advocate's recommendation. Senator Sweeney and Assemblyman Cryan introduced bills in each of the houses of the Legislature to restore the burden of proof to school districts. Although NJSBA lobbyists and representatives of the Associate Membership Program of School Attorneys (AMPSA) worked against passage of the bill, the large number of groups and individuals that testified in support of the bill carried great sway. At one legislative hearing, among the 20 individuals and groups that testified, NJSBA's was the lone voice in opposition to the bill.

Do other states have laws allocating the burden of proof to school districts?

Yes. At least 10 other states and the District of Columbia have statutorily allocated the burden of proof in special education cases to school districts. In a number of other states there are parent movements working to pass similar legislation.

What are the implications for boards of education?

Protracted hearings Some school board attorneys suggest that when the district bears the burden of demonstrating the appropriateness of a student's program rather than requiring the parents to first demonstrate a specific problem, the district is placed in the difficult position of disproving a negative that has not been clearly defined. This can increase the length of cases because it requires the district to present additional rebuttal testimony and evidence after the parents present their position. While the number of special education cases reaching due process may not be enormous, school officials know that even one due process matter can take an enormous toll on district resources.

Yet these lawyers remain hopeful that administrative law judges will require parents to be specific about identifying the nature of their problems in advance of the hearing, and assist the parties in identifying and narrowing the issues in dispute during pre-hearing conference calls. Also, the length of proceedings may depend on how much evidence the judges require the school district to provide when the district moves forward before turning the floor over to the parents. Some judges may require the board to present live testimony up-front, but others may ask for the up-front submission of basic evidence concerning the contents of the IEP, saving the testimony of experts for rebuttal after the parents present their case.

Meritless cases Placing the burden on the board may encourage parents to proceed with meritless cases, rather than settle them, as the parents will not need to present evidence until after the board submits its case. It also eliminates the district's ability to have a frivolous or meritless case dismissed early in the proceedings. When parents are required to bear the burden, board counsel has the opportunity to have frivolous cases resolved or dismissed at the close of the parent's case, thereby avoiding the need to remove teachers and child study team members from their school duties to testify.

Pressure to settle Also, many practitioners believe that parents are more likely to insist on services to which they are not entitled when the burden falls on the district. Parents' desires or expectations for the "best for their child" do not always coincide with what is legally appropriate or required under the IDEA. For example, school districts must place students in the "least restrictive environment" (also referred to as "mainstreaming" and "inclusion"), but this may be unsatisfactory to the parent whose heart is set on a particular private out-of-district school. Where the board of education bears the burden of production and proof there may be situations where the district is inclined to yield to the parent's demands rather than involve its staff in lengthy and expensive proceedings.

Conclusion The hope that special education litigation would be less onerous as a result of the ruling in *Schaffer* was short-lived in New Jersey. It is in the interest of the entire educational community that a district's energy and funds be diverted to the provision of special education programs and services, and not to the demands and costs of litigation. All parties must grapple with the reality that providing appropriate special education in the least restrictive environment involves the significant time and dedication of educational professionals, and carries a hefty price tag. Despite the legislation placing the burden on the district, educators, parents, parent advocates, and government representatives must work together to develop strategies to encourage the amicable resolution of special education disputes, to discourage unreasonable positions on the part of either party, and to ensure that precious tax dollars are diverted not to due process proceedings, but to the programs and services that will benefit our students. **sl**

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Critical Juncture in School Funding

The State Board of Education issues a key decision that could have far-reaching effects on how New Jersey finances education.

By Michael F. Kaelber, Esq.

One of the more frustrating events for school board members and administrators occurs when the state Legislature provides school districts with less than their full state aid entitlement. This issue plagued school districts for more than 20 years under Chapter 212, the Quality Education Act of 1990 (QEA) and the Comprehensive Education Improvement and Financing Act (CEIFA). Since 2002-03, failure to comply with CEIFA has become an annual Legislative event, as the Appropriations Act has been the vehicle to fund public education.

What is a school district to do when it does not receive the level of state aid to which it is entitled? Is there a point where the failure to distribute state education aid in accordance with the school funding formula becomes a violation of the Thorough and Efficient (T&E) clause of the New Jersey Constitution? A decision by the State Board of Education might hold the answer to this question and might prompt a new wave of school finance litigation in New Jersey.*

Rural Districts Challenge Funding Law *Bacon, et al. vs. New Jersey Department of Education, et al.* was originally filed in the Superior Court of New Jersey in December 1997. The plaintiffs were 20 rural districts in the southern and central parts of the state, ten students and their guardians. The suit sought to declare CEIFA unconstitutional as applied to the school districts because they did not receive the same funding as the *Abbott* districts, nor did they have the ability to raise the same financing as the District Factor Group I and J districts, the more affluent districts in the state. The suit alleged that, similar to *Abbott* districts, these 20 districts had neither the tax base nor the taxpayers' income to support the cost of state mandated programs.

In a recommendation issued September 26, 2002, the administrative law judge found that 12 of the remaining 17 districts had failed to prove their case and dismissed their complaints. However, the judge found that five of the petitioning districts (Buena Regional, Commercial, Fairfield in Cumberland County, Salem and Woodbine) had proven their claims and should be recommended for "special needs" or *Abbott* status.

In a decision issued February 10, 2003, the commissioner adopted the administrative law judge's conclusions that 12 of the districts failed to prove their claims. But he rejected the initial administrative law judge's conclusions regarding Buena Regional, Commercial, Fairfield and Woodbine, finding instead that they had not proven their claims. The commissioner directed that specific evaluations and interventions be initiated in each of these four districts. The commissioner concurred that Salem City warranted special needs status and would recommend that the Legislature include Salem City in its definition of Abbott districts. On June 30, 2004, the governor signed P.L. 2004 c. 61, which granted Abbott district status to the Salem City school district.

The commissioner of education decision was appealed to the state Board.

Impact on All Districts In June 2005, the state Board received a Legal Committee Report which concluded that, despite gains made under CEIFA, the students in 16 of the rural school districts were not receiving a thorough and efficient education. (Salem City, the 17th plaintiff district, had received Abbott status earlier.) The Legal Committee determined that CEIFA, as applied to the 16 rural districts, failed to meet the constitutional mandate. The fact that CEIFA's funding provisions had not been fully implemented for four years negated the correlation, central to CEIFA, which links educational standards to the actual costs essential to a thorough and efficient education. The report, however, did not recommend that Abbott remedies or special needs status be provided to the rural districts. Instead, the report recommended that the state Board direct the commissioner of education to analyze, and develop changes to, CEIFA as it applies to *all* school districts.

The state Board was expected to address the matter at its January 2006 meeting. If the state board adopts the Legal Committee's report, it would overturn the February 2003 commissioner ruling that upheld CEIFA's constitutionality as applied to the 16 rural districts.

Regardless of the outcome, the state Board's ruling in *Bacon* is likely to be appealed to the Appellate Division of Superior Court. The 16 rural districts will likely appeal anything less than receiving Abbott status, and the Department of Education will likely appeal anything less than a dismissal of the case. Of interest will be the Appellate Division's reaction to any state board response involving the Legislature's failure to fully fund CEIFA, given the court's 2003 decision on a related issue.

In *Hammonton Board of Ed. vs. NJDOE, et al.* the local board of education challenged the state's failure to provide aid to school districts in accordance with the CEIFA formula, instead using the fiscal year 2003 Appropriations Act to allocate state money to school districts. In holding that such a funding scheme was not unconstitutional, the Appellate Division observed that appropriations acts have a life limited to their particular fiscal year.

Therefore, use of the 2002-03 Appropriations Act, and the Legislature's failure to provide funding in accordance with CEIFA, resulted in an implied suspension of CEIFA for the 2002-03 school year, rather than an implied repeal. In essence, the court held that the Appropriations Act trumped CEIFA. Hammonton's suit was dismissed.

State Board Holds the Cards The anticipated state Board decision in *Bacon* raises many questions in the area of school funding.

If the linchpin of the state board's decision is the Legislature's failure to provide aid in accordance with the CEIFA funding formula, which affects *every* school district in the state, will other school districts seek to litigate the matter? Will there be a third group of "special needs" districts? If the *Hammonton* decision stands for the proposition that the Appropriations Act can trump CEIFA on an annual basis, how many years can the Legislature play that same hand before it constitutionally runs out of cards? What approach will our new governor take in addressing CEIFA and school funding?

Stay tuned. The answers may follow the state Board's decision in *Bacon*. **sl**

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School Desegregation Ruling Is on the Horizon

By Carl Tanksley

In December, the United States Supreme Court heard oral argument in a school desegregation matter that will have significant ramifications for every public school district in the country. Some have called it the most important public school decision since *Brown v. Board of Education.* A decision from the Court is expected by the end of the school year.

The matter involves challenges to two voluntary desegregation plans, one in Seattle, Washington, and the other in Jefferson County, Kentucky. In both matters, the local school boards adopted desegregation plans designed to address a long history of racial segregation.

In *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1,* the board sought to eliminate school segregation that originated in segregated housing patterns.

Although approximately 70 percent of Seattle residents were white, only 40 percent of those students attended the public schools, therefore 60 percent of the students attending public schools were minorities. While the main component of the district's student assignment plan was parental choice, the district resorted to racial tiebreakers if the parent's chosen school had reached its enrollment capacity.

In *McFarland v. Jefferson County Bd. of Educ.*, the board also sought to address segregation based on the historical housing patterns of 97,000 students by designing a student assignment plan based on residence, school capacity, program popularity and random draw before resorting to assigning students by race.

Maintaining Racial Balance Seattle offered different programs at each of its 10 high schools in order to respond to continually changing needs of the students. Nevertheless, certain high schools were oversubscribed. When a high school was oversubscribed, students were admitted according to tiebreakers in the following order: students with a sibling attending the oversubscribed school were admitted; if the school was racially imbalanced, a racial tiebreaker was then administered; distance from the school; followed by a lottery if none of the previous tiebreakers resolved the admission issue.

A school was considered racially imbalanced if its student population deviated more than 15 percent from the general city-wide demographic listed above. Therefore, if an oversubscribed high school's minority population exceeded 75 percent, white ninth grade students were assigned to the school to eliminate the disparity. If an oversubscribed high school's nonwhite population was less than 45 percent, nonwhite ninth grade students were assigned to the school to eliminate the imbalance.

In Jefferson County, the District sought to maintain African-American student enrollment in each school between 15 and 50 percent; percentages roughly equal to student enrollment district-wide.

Strict Scrutiny Parents in both Seattle and Jefferson County objected to any use of race in student assignment. Both the 6th Circuit in Jefferson County and the 9th Circuit in Seattle analyzed the districts' respective plans under a strict scrutiny analysis. Under this analysis, the use of race in a state's decision is prohibited unless the state can show that its use of race furthers a compelling state interest, and that use has been narrowly tailored to address that interest. Each Court concluded that the local district had a compelling interest in eliminating segregation and maintaining desegregated public schools and generally concluded that the student assignment policies were narrowly tailored to achieve that interest. The Sixth Circuit struck down that portion of Jefferson County's plan that applied to its traditional schools, approximately 9 percent of the students.

Compelling State Interest In Seattle, the Ninth Circuit found that in racially diverse schools, "both white and minority students experienced improved critical thinking skills—the ability to both understand and challenge views which are different from their own." In addition, the Court found that social science research "clearly and consistently shows that, for both white and minority students, a diverse educational experience results in improvement in race-relations, the reduction of prejudicial attitudes, and the achievement of a more... inclusive experience for all citizens...." In Jefferson County, the Sixth Circuit noted that "the Board has described other compelling interests and benefits of integrated schools, such as improved student education and community support for public schools…." The Court also noted that the benefits of diversity in higher education, cross-racial understanding, racial tolerance, preparation for a diverse workplace, and the relinquishment of racial stereotypes also accrued to students in racially integrated public schools. The Court therefore found that the benefits of racial tolerance and understanding were as important and laudable in public elementary and secondary education as they were in higher education. In the view of each circuit court, such interests were compelling state interests.

A Narrowly Tailored Decision After finding a "compelling state interest" in maintaining integrated public schools, the Sixth Circuit addressed the "narrowly tailored" component of the strict scrutiny test. In determining that Jefferson County's plan was narrowly tailored, the Court found that the plan: (1) did not amount to a racial quota that sought a fixed number of desirable minority students; (2) provided for an individualized holistic review of candidates; (3) did not unduly harm members of any racial group; and (4) gave serious good faith consideration to race-neutral alternatives. However, the Sixth Circuit struck down the county's traditional assignment plan because it placed white and African-American applicants on different tracks and appeared to be completely unnecessary to accomplish the board's integration goals.

The Ninth Circuit concluded that consideration of each student's individual merits was not applicable to public school assignments because the public schools must accept all students. However, the Court noted that the lack of quotas, good faith alternatives, the absence of undue harm, and a termination point for the admissions plan were important elements in a narrowly tailored student admission plan. The Court concluded that Seattle's plan was narrowly tailored to achieve its stated objective of integrated schools.

On appeal to the Supreme Court, it is expected that that Court's recent graduate and post-graduate decisions of *Grutter v. Bollinger* and *Gratz v. Bollinger* will play a significant role in the appeal. In those decisions, the Supreme Court upheld the University of Michigan's use of race in its law school admissions policy, but struck down a different policy used to determine undergraduate admissions.

New Jersey boards of education that currently have race-based student admissions plans should carefully monitor these decisions. While the Supreme Court could uphold each district's plan, it is also possible that the Court could strike down any use of race in public school admissions. The Court could also uphold portions of each district's plan while striking down other portions. In any event, districts should be prepared to ensure that student admissions policies do not rely on race as the primary factor in determining where to place students within the district. **sl**

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Breaking Up is Hard to Do…

…but not impossible. A legal primer on what you must do to terminate a subpar employee.

By CARL TANKSLEY, ESQ.

The decision to terminate an employee is often a difficult one for board members for many reasons. That decision can be made even more difficult by the complex array of statutory and regulatory procedures surrounding the termination of district employees. While New Jersey's non-renewal and tenure dismissal procedures can be cumbersome, the difficult decision to non-renew a non–tenured staff member or to dismiss an employee who has tenure (through a process of certifying tenure charges to the Commissioner of Education) can proceed fairly and efficiently to a successful conclusion with appropriate documentation and detailed attention to procedures. Here's how it works in each case:

Tenure Dismissal A common misconception is that a board conveys tenure on its employees. Actually, tenure rights are acquired through operation of statute. So long as the employee meets all of the statutory qualifications, tenure is conferred upon the employee; via statute, not through board action. Accordingly, tenured employees may only be removed through a similar operation of statute. Once an employee has acquired tenure within the district, the board may not dismiss that employee or reduce their compensation unless tenure charges have been filed with the Commissioner of Education or the employee has been suspended because he or she has been the subject of a criminal indictment.

When the board seeks to dismiss a tenured employee, the charges must conform to the requirements contained in both *N.J.S.A.* 18A:6-10 *et seq.* and *N.J.A.C.* 6A:3-5 *et seq.* Tenure charges must assert inefficiency, incapacity, unbecoming conduct, or other just cause. Incapacity, unbecoming conduct, and other just cause charges may be filed by any person, however, inefficiency charges (which can encompass such problems as repeated bad performance reviews) may only be filed by a school district administrator. Inefficiency charges against the superintendent may only be filed by the board.

Tenure charges must be filed with the board secretary and must include a written statement of evidence. Both the charges and statement of evidence must be executed under oath by the person filing the charges. Once charges are filed, the board must provide the employee with a copy of the charges within three school days. The employee then has 15 calendar days to respond to the charges by filing a sworn statement of position and written statement of evidence with the board secretary. After that, the board has 45 calendar days to determine whether there is probable cause to credit the evidence supporting the tenure charges and if so, whether the conduct, if credited as true, warrants a dismissal or reduction in compensation. The board must make its determination to certify the charges to the Commissioner by a majority vote of its full membership and the board's deliberations and vote may not take place at a public meeting. The board's failure to act within 45 days leads to an automatic dismissal of those charges. Tenure actions are one of the few exceptions to the Open Public Meetings Act. Upon receipt of the board's certification, the Commissioner will schedule a public tenure hearing.

It is important to clearly understand the board's role during a certification determination. When determining to certify charges to the Commissioner, the board does not sit as a jury, seeking to determine guilt or innocence. Rather, its role is more like that of a grand jury, seeking to determine whether there is probable cause to believe that misconduct occurred and if so, whether that misconduct warrants punishment. It should be noted that the standard for the board is merely a probable cause standard. In other words, the board must determine whether, given the evidence that will be presented to the Commissioner during the public tenure hearing, it is more likely than not that the alleged conduct occurred. This is a low standard and very unlike the criminal standard of "beyond a reasonable doubt." The lower standard is due to the fact that the board must protect the best interests of the district and students instead of the employee's interests in maintaining a position with the district.

Non-Renewal The dismissal of non-tenured employees follows a very different path than the dismissal of a tenured employee. The superintendent has unilateral authority to non-renew any non-tenured employee. According to *N.J.S.A.* 18A:27-4.1, once the superintendent determines not to recommend the employee for continued employment, that employee is deemed non-renewed. The superintendent must notify the board of the decision to non-renew the employee and the reasons for that decision before notifying the employee of the non-renewal. Any employee who has been non-renewed by the superintendent has 15 days within which to make a written request for a written statement of reasons for the non-renewal, which must be provided to the employee within 30 days.

The non-renewed employee also has the right to an informal appearance before the board in order to convince the board to offer re-employment despite the superintendent's decision to non-renew. This informal appearance, known as a "Donaldson Hearing," is a right that was established by the New Jersey Supreme Court in *Donaldson v. North Wildwood Bd. of Ed.*, 65 *N.J.* 236 (1974). The employee has 10 days from the receipt of the statement of reasons for non-renewal to request a Donaldson Hearing, which must then be scheduled within 30 days. The employee may be represented by counsel at the hearing and may present witnesses. However, because the Donaldson Hearing is an informal hearing, the witnesses need not be sworn in and the board may not cross-examine any witnesses that appear. While the hearing may be conducted in executive session, the employee also has the right to a public discussion according to *Rice v. Union County Reg. H.S. Bd. of Ed.* 155 *N.J. Super.* 64 (App. Div. 1977), unlike tenure certification determinations, which must not take place during a public meeting. After the Donaldson hearing has been conducted, the board then has three days in which to notify the employee of the board's decision.

Conclusion Boards that are contemplating tenure charges or non-renewal actions are urged to consult with the board attorney in order to ensure compliance with some of the more technical aspects of the law. Additionally, actions to terminate both tenured and non-tenured employees should be supported by the particular facts of the matter and by appropriate documentation. By following these guidelines, boards can take action to terminate an employee whose skills do not meet the needs of the district. **sl**

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Risky Business

Far from innocuous, e-mail threads and attachments among board members can land the board on the wrong side of the Sunshine law.

By Donna Kaye, Esq.

Ten years ago, it seemed a novel idea—almost a stretch—to think that by sending e-mails from your home computer to fellow board members, you may actually be participating in a "virtual" board meeting and be in violation of New Jersey's "sunshine law," the Open Public Meetings Act (*N.J.S.A.* 10:4-6 *et seq*). Today, however, there is a broad understanding and acceptance of how certain e-mail communications may be analogous to public meetings and, therefore, would contradict the spirit of the sunshine law—namely, the public's right "to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision-making of public bodies..."

Holding meetings that violate principles of openness hampers community engagement, a desirable goal advanced in this issue of *School Leader*.

E-mail has a place in the conduct of board business because it is a speedy and cost-efficient way of sending information. Even though the use of e-mail is commonplace, or even indispensable in present-day business, the state courts, administrative agencies and the Legislature have not offered much guidance on its appropriate use. Instead, New Jersey public officials must rely on a somewhat awkward legal analysis that applies the principles of a physical meeting to communicating by e-mail. Additional guidance may also come from other states' courts and administrative agencies that have explicitly addressed a public body's appropriate use of e-mail. The value of such rulings, however, depends on how similar the states' sunshine laws are to those of New Jersey.

Arizona Opinion An Arizona Attorney General's opinion, prompted by an inquiry from an elementary school district, provides excellent guidance on the parameters that open meeting law requirements place on e-mail communication to and from members of a public body. (Ariz. Att'y Gen. Op., No. I05-004[R05-010], July 25, 2005.) Arizona's Sunshine Law (OML), while not identical, is similar in many respects to New Jersey's Open Public Meetings Act (OPMA) as well as to interpretive case law. Provisions of both states' Sunshine laws are broadly construed in favor of open and public meetings, and both define "meeting" similarly. Arizona's Open Meetings Law defines a "meeting" as

> "…the gathering, in person or through technological devices, of a quorum of members of a public body at which they *discuss, propose or take legal action,* including any *deliberations* by a quorum with respect to such action." (emphasis added).

New Jersey's OPMA defines a meeting as

> "…any gathering whether corporeal or by means of communication equipment, which is attended by, or open to, all of the members of a public body, held with the intent, on the part of the members of the body present, to *discuss* or *act as a unit upon* the specific public business of that body…" (emphasis added) unless it is attended by less than an effective majority of the members.

In light of similarities between the laws, New Jersey boards of education, in consultation with their board attorneys, should review the Arizona AG opinion when drafting policies and procedures on the use of e-mail. Boards should be mindful that the Arizona AG opinion is just that—an opinion—and does not carry the weight of a legal ruling. Nonetheless, this Arizona AG opinion provides a well-articulated framework for assessing the use of e-mail by board members.

Serial Communications The AG determined that back-and-forth exchanges among a quorum of board members would violate Arizona's sunshine law, since they would be similar to discussions at a physical meeting. Moreover, the AG concluded that a "meeting" could also occur when electronic communications among a quorum of the board take place over a period of time and concern a matter that is before the public body, or may be presented to it. Such serial communications, the AG noted, would violate Arizona law that precludes circumventing public discussion by splintering the quorum and having separate (or serial) discussions. That provision applies not only to meetings in person, but also by telephone, electronically, or through other means. Thus, even if communications on a particular subject among board members do not take place at the same time or place, it can nonetheless constitute a "meeting."

New Jersey's OPMA statute contains a similar prohibition by stating explicitly that a public body may not fail to invite a portion of its members to a meeting for the purpose of circumventing the sunshine law. The Commissioner of Education has also held that private meetings and phone conversations on a topic, held serially, would violate the OPMA. It is likely, therefore, that serial communications by e-mail on a topic, involving a quorum of board members, would violate New Jersey's open meetings law the same way.

One-way Communications Arizona's AG also observed that, generally, one-way communications sent to a quorum would not constitute a meeting because they do not constitute *"discussions," "legal actions,"* or *"deliberations"*—terms that are found in the Arizona statute. The AG noted that the definitions of the words *"discuss"* and *"deliberate"* suggest collective, as opposed to unilateral, activity. Also, *"taking legal action"* in the context of the Arizona sunshine law requires a collective decision, commitment or promise by a majority of the members of a public body. Thus, a valid use of e-mail would be one-way communication, such as distributing information to board members.

There are risks whenever board members send e-mails to a quorum of other board members, according to the Arizona AG. Even if the first e-mail does not violate the open meeting law, if a quorum of the board responds, there may be a violation of the sunshine law. In addition, a quorum of the members might independently e-mail other board members on the same subject, without knowing that fellow board members are also doing so. This exchange of e-mails might result in discussion or deliberations by a quorum that could violate the law.

Because of these potential problems, the AG strongly recommended that board members communicate with a quorum about board business at open public meetings, and not through e-mails.

Proposals Banned Furthermore, the AG cautioned that even a one-way communication to a quorum of the board members could violate the law, if the correspondence consisted of a *proposal,* i.e., a recommendation for a course of action. The AG's reasoning was based on the specific language of the Arizona law, which defines a "meeting" to include not only *discussion, legal action* and *deliberations* by a quorum, but also *proposals.* While discussion, legal action and deliberations involve an exchange between board members, a *proposal* can describe unilateral activity, said the AG, relying on Webster's definition of "propose" to mean "to put forward for consideration, discussion, or adoption." A single board member "proposing" legal action by recommending a course of action for consideration by a quorum of the board would constitute a meeting, even if it consists only of a one-way communication and no other board members reply to the e-mail. Such one-way communication, therefore, would violate Arizona's sunshine law.

Whether one member's one-way proposal for legal action to a quorum of the board would violate New Jersey's sunshine law is unclear. However, boards developing policy should be mindful of the Arizona AG ruling and the possibility that a court could apply the same reasoning in this state. Although the definition of "meeting" under New Jersey statute does not refer to proposals, but only to discussions and actions, there is language in *N.J.S.A.* 10:4-7 (Legislative findings and declaration) with regard to policy formulation: "The Legislature finds and declares the right of the public to be present at all meetings of public bodies, and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies." This language could open the door to a ruling by a court that proposals potentially affecting the formulation of board policy must not be made by e-mail, but should instead be voiced at a properly advertised public meeting.

Discussion that constitutes a public meeting includes exchanges of both facts and opinions, if it is reasonably foreseeable that the topic may come before the public body for action in the future.

While some states, such as Florida, permit exchanges of factual information (as opposed to opinions) among a quorum of a public body outside of public meetings, the AG determined that an exchange of facts, as well as opinion, may constitute deliberations under Arizona's Open Meetings Law. Arizona's law does not distinguish between communication of facts or opinions. Similarly, New Jersey's sunshine law makes no distinction between communications of fact or opinion, and would appear to prohibit e-mail communication among a quorum of both fact and opinion. Of course, such communications are only prohibited where the topic concerns board business; in New Jersey, the statute refers to *"the specific public business of that body."* Personal and social discussion would not be prohibited. Similarly, in Arizona the Sunshine law applies only to topics that foreseeably may come before the public body for action. The scope of what is foreseeable is determined by the statutes or ordinances that establish the powers and duties of the body.

The AG provided scenarios, presented in the sidebar (page 16), to illustrate how the principles described above would apply to e-mail communications.

Ensure Compliance The AG's caveat resonates all the way from Arizona to New Jersey: E-mail is a useful technological tool, but it must be used in a manner consistent with the spirit of the open public meeting laws. Arizona's AG recommended some measures to help ensure that a public body conducts its business in public. He recommended that any e-mail includes a helpful reminder to board members that they should not respond to the e-mail. For example, on e-mails from the CSA or staff, a board might include language such as:

> To assure compliance with the OML, recipients of this message should not forward it to other members of the public body. Members of the public body may reply to this message, but they should not send a copy of the reply to other members.

Language for e-mails from board members could be the following:

> To ensure compliance with the Open Meeting Law, recipients of this message should not forward it to other board members and board members should not reply to this message.

Records Retention On a final note, the AG stated that e-mail among board members implicates the public records law, as well as the state's sunshine law. E-mails generated by board members or staff pertaining to the business of the public body are public records under New Jersey's public records law as well. (See The Open Public Records Act, *N.J.S.A.* 47:1A-1.1) Therefore, such e-mails must be preserved according to a records retention program and generally be made available for public inspection. (See *N.J.S.A.* 47:3-15, The Destruction of Public Records Law, 1953.) Public bodies might consider maintaining a file that contains any e-mails sent to and from board members and is available for public inspection (if they are not confidential or otherwise privileged). Ready access to this type of information helps ensure compliance with the legislative mandates favoring open government. Finally, the AG encouraged all public bodies to educate board members and staff concerning the parameters of the OML and the public records law to ensure compliance with these laws.

As boards of education in New Jersey work with their counsel in crafting appropriate policies to govern the use of e-mail by board members and staff, they should consider the traditional sunshine law jurisprudence in New Jersey, as well as directions taken by courts and agencies in other states, and the practical needs of the district in disseminating information. The Arizona AG opinion provides a helpful framework for anticipating how New Jersey's courts and administrative tribunals may view the parameters for the valid use of e-mail for school district business. **sl**

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The Sunshine Law Applied to E-mail Under Specific Scenarios

ARIZONA ATTORNEY GENERAL EXAMPLES

These scenarios assume that the e-mails are not sent with the intent of circumventing the sunshine law and that unilateral communications do not propose legal action:

1. E-mail discussions between less than a quorum of the members that are forwarded to a quorum by, or at the direction of, a board member would violate the Open Meetings Law.
2. If a member of the staff or public e-mails a quorum of board members and there are no further e-mails among board members, there is no OML violation.
3. On a five-member board, a member may not e-mail members B and C on board business and include what board members, D and E, have previously communicated to him. Such an e-mail would be part of a chain of improper serial communications among a quorum on a subject for potential legal action.
4. A board member may e-mail a quorum of the board proposing that a matter be placed on a future agenda. Proposing that the board have the opportunity to consider a subject at a future public meeting, and nothing more, does not propose legal action. Therefore, it would not violate the OML.
5. An e-mail from the superintendent to a quorum of the board would not violate the OML. However, if board members reply to the superintendent, they must not send copies to enough of the other members to constitute a quorum. Similarly, the superintendent must not forward replies to the other board members.
6. On a three-member board, a member may e-mail a unilateral communication to another board member concerning facts or opinions relating to board business. However, board members may not respond to the e-mail because an exchange between two members would be a discussion by a quorum.
7. A board member may copy other board members on an e-mailed response to a constituent inquiry without violating the OML, such unilateral communication would not constitute discussions, deliberations or taking legal action by a quorum of the board members.
8. An e-mail request by a board member to staff for specific information does not violate the OML, even if the other board members are copied on the e-mail. The superintendent may reply to all without violating the OML as long as that response does not communicate opinions of other board members. However, if any board member replies to a quorum, it would constitute a discussion or deliberation and therefore violate the OML.
9. A board member may use e-mail to send an article, report or other factual information to the other board members or to the superintendent or staff member with a request to include this type of document in the board’s agenda packet. The agenda packet may be distributed to board members via e-mail. Board members, however, may not discuss the factual information with a quorum of the board through e-mail.

Grading Your Superintendent

One of the most important jobs a board performs is the CSA evaluation. Here's what you need to know.

By ROBERT P. MARTINEZ

Spring brings a period of transition to boards of education. The marathon deliberation sessions on budgets are over; but school board and budget elections loom. The period between March and May tends to fly by in the psychic life of most boards. Yet during this same time period, the law imposes on board members the performance of arguably their most important duty—the annual evaluation of the chief school administrator. It's a good time to review some of the legal imperatives of the process and to plan for some of its complexities, particularly calendar issues.

Every board of education that has a superintendent is required to evaluate performance "at least once a year." The statutes require that the evaluation ultimately be committed to writing, that the superintendent receive a copy, that the board and the superintendent "meet to discuss the findings," and that each superintendent's employment contract contain not only a commitment to the evaluative process but any criteria or procedures, beyond those mandated by the State Board of Education, that the parties have agreed to utilize. The mandate for bilateral agreement about criteria and procedures beyond those legally specified is significant. It precludes a board from employing a surprise evaluation process not acceptable to the superintendent.

The mandate to evaluate applies both to superintendents holding tenured office under "grandfather" provisions and to those tenured by contract term. A superintendent's tenured status or contract terms may "lock in" the terms and condition of future employment so tightly that board members may believe their evaluation is almost irrelevant and therefore they needn't take the evaluation effort seriously. Such a belief would miss the purpose of the evaluation, and would be legally unsound.

The evaluation statute requires, at a minimum, an evaluation based upon the goals and objectives of the community, the superintendent's particular duties, and State Board of Education criteria. The State Board lists the primary three purposes of performing an evaluation: the first is directed towards promoting professional excellence and improving skills, the second requires discussion of improvements in the quality of instruction, and only the last is a review of past performance. The State Board has created a detailed mandate about minimum board policies and procedures for superintendent evaluation. Both the local board and its superintendent are expected to certify compliance, and may experience on-site document audits in connection with NJQSAC district governance reviews.

A well-organized district will have documents available to the board to provide the framework for an evaluation, including those describing goals and program objectives, written policies and instructional priorities to be implemented, new state mandates requiring compliance, a job description for the chief school administrator, and the superintendent's previously defined goals and professional improvement plan for the year now concluding. Those superintendents who are consummate professionals will provide board members (in a timely manner and without being asked or required by contract to do so) with a packet of these documents along with relevant data about pupil progress and district operations, a statement about what this data enables a board member to conclude about the achievement of named objectives and the superintendent's related performance, and finally, a set of proposed district and personal goals and professional development objectives for the coming year. These items form the core of the board's written evaluation and the agenda for the evaluation meeting.

Each board must settle its own internal process for producing a consensus evaluation. Many use standardized evaluation forms that are completed by each board member, and then compiled into a single document that fairly reflects a majority opinion while also reporting significant points of disagreement. The resulting draft becomes the focus of discussion among board members and then between the board and the superintendent. Between these two steps, the legal formalities of the board's corporate status come into play and should be respected. The evaluation is not a free-for-all, but a reflection of the considered judgment of the corporate trustees as a body. The discussion meeting between a majority of the full board and the superintendent is held before the board's written report is "filed" and must be in private session unless the superintendent requests that it be public. This is to assure that the board has heard the superintendent's point of view before the board finalizes its report.

Given the need for an informed and reflective deliberation leading to a well-written report, a properly completed annual evaluation cannot be a last minute project. Interim deadlines should be set to assure both an orderly and timely process. That process (i.e. gathering individual board member inputs, drafting the written report, meeting with the superintendent, and finalizing the report) must be concluded by April 30.

Board elections are usually held on the third Tuesday of April and the "new" board meets to organize and elect officers within two weeks of the election. So, the statutory period within which the evaluation must be completed overlaps the life of the "new" board by nine to sixteen days, depending on the calendar each year and how quickly the new board meets. There is nothing in the statute that would disqualify a "new" board from conducting an annual evaluation, and this may be desirable if for some reason, the "old" board is unable to conclude the evaluation in a timely fashion. However, it makes sense to have the same board that set the goals for the year, and observed their execution first hand, be the board that does the evaluation.

A "new" board should understand both the district's stated goals for the coming year and the superintendent's growth and development plan, since it will be responsible to oversee and eventually evaluate their accomplishment. The best point for the "new" board to take ownership of the plans then in place is at the beginning of its year-long life. Although the State Board code does not specifically address the point, best practice would appear to include some process whereby the "new" board becomes officially apprised of the goals and plans that will govern the chief school administrator's efforts and priorities during the coming year. The formality of this process may depend on the extent of board member turnover in a given year, but at the very least, should result in new board members being fully informed of these local conditions, in addition to receiving the mandatory evaluation training provided by NJSBA. **sl**

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The Next Move to Improve
Five strikes and you're restructured.

Michael F. Kaelber, Esq.

Continuous improvement is something that every school board member, school administrator, parent and student want from their school district. Whether it is at the board of education, central office, school or classroom level, we aspire to be better tomorrow than we are today. In the realm of student achievement, continuous improvement, by school and district, is the hallmark of the federal No Child Left Behind Act (NCLB).

Schools and school districts are required to make adequate yearly progress (AYP) based on state assessments and at least one other academic indicator, specifically defined by each state. What happens when continuous improvement does not occur and efforts to improve student performance fail to meet the demands? Restructuring is the latest NCLB improvement mechanism—developed, approved and soon to be initiated in New Jersey.

In September 2006 New Jersey will have its first set of schools, 67 of the state's 2398, entering NCLB year five restructuring status. While NCLB AYP has only been in effect for three evaluative years, these 67 schools had been previously identified for improvement under NCLB's predecessor, the Improving America's Schools Act of 1994. What is this restructuring and how will it impact these 67 schools in 2006 and potentially the 37 additional schools in year four corrective action status, should they not make adequate yearly progress in the 2006 testing year?

AYP is tracked, by school and district, for students in the aggregate and by state defined subgroups, including students who are economically disadvantaged, racial and ethnic subgroups, students with disabilities and students who are limited English proficient (LEP). Continuous improvement in student achievement is required, as the percentage of state assessment proficient students necessary to achieve AYP in each school and district increases periodically. This process of continuous improvement culminates in the NCLB goal of 100 percent student proficiency on the state assessment by the school year 2013-14.

New Jersey has chosen to raise the student achievement bar every three years. For example, to have met 2005 AYP requirements in fourth grade mathematics, a school and district must have had 62 percent of its fourth grade students, in the aggregate and by subgroups, be proficient or pass the math portion of the NJASK4 test. In 2008, the requirement jumps to 73 percent and in 2011, 85 percent and finally 100 percent must pass in assessment year 2014. Similar benchmarks exist for Language Arts Literacy and Science at all tested grade levels. While the percentages may be different in a given year for a particular subject and grade level, ultimately all students in all subjects at all grade levels must be state assessment proficient by 2014.

Unfortunately, not every New Jersey school and school district has been able to meet its AYP goals on an annual basis. Those schools which do not make AYP move into a "school in need of improvement" category; a category that provides, depending on years in the category, for particular NCLB improvement mechanisms. Schools that fail to make AYP for one year in a given subject area are placed in early warning status; two consecutive years, intra-district school choice must also be offered; three consecutive years, supplemental educational services must also be offered; four consecutive years, a corrective action plan is developed and implemented and after five consecutive years, restructuring.

Under NCLB, local educational agencies (LEAs) which have schools that have been unable to achieve AYP for five years, along with providing parents with the option of intra-district school choice and supplemental educational services, must implement, consistent with state law, one of the following five alternative governance arrangements:

- Reopening the school as a public charter school.
- Replacing all or most of the school staff (which may include the principal) who are relevant to the school's inability to make adequate yearly progress.
- Entering into a contract with an entity, such as a private management company, with a demonstrated record of effectiveness, to operate the school as a public school.
- Turning the operation of the school over to the state educational agency (SEA), if permitted under state law and agreed to by the state.
- Any other major restructuring of the school's governance arrangement that is consistent with the principles of restructuring.

As described in the *United States Department of Education's (USDOE) LEA and School Improvement Non-Regulatory Guidance*, the purpose of restructuring is for the school to improve its ability to teach all children, achieve annual academic performance targets and be removed from restructuring status.

The New Jersey State Department of Education (SDOE) began its development of a School Restructuring Plan in 2004 with an inclusive process involving stakeholders from throughout the New Jersey education community. Most notably involved was the NCLB School Improvement Advisory Committee, a committee comprised of a representational cross section of New Jersey educational interests. The Committee includes SDOE Title I staff; county education specialists; representatives from state education associations such as NJSBA, NJASA, NJPSA and NJEA; representatives from the federal Region III Comprehensive Center; local school district administrators and staff; and local labor union representatives.

After several meetings, discussions, commentary, review, consultation with the Attorney General's office and revisions by senior SDOE staff, the *New Jersey - Title I School Restructuring Plan* was finalized in early 2006. The *School Restructuring Plan* is part of New Jersey's NCLB Accountability System and is subject to federal NCLB Accountability Review, last done in February 2004 and expected to be repeated in February 2007.

Pursuant to the *School Restructuring Plan*, the SDOE requires that school districts select one or more of the following three restructuring options for their schools in need of improvement in year five.

(1) Implement any major school governance restructuring that is consistent with the principles of restructuring set forth under the *No Child Left Behind Act.*

(2) Re-open the school as a public charter school as defined by and consistent with state statute and regulation (*N.J.S.A.* 18A:36A-1 and *N.J.A.C.* 6A)

(3) Replace all or most of the school staff, which may include the principal; who are relevant to the school's inability to make adequate progress (consistent with existing contractual provisions and applicable statutory protections in Title 18A).

Based on the district's analysis and planning process for each school, the district will choose the option or combination of options that best addresses the identified needs of the school and school community. The district will appropriately reallocate resources necessary to support the implementation of the chosen restructuring option. The district will further support the implementation of the school restructuring plan by providing technical assistance and professional development to meet the identified needs of students and staff. To date, all school restructuring plans under discussion have involved the use of Option 1, Option 3 or a combination of Options 1 and 3. No school district has proposed re-opening its restructured school as a public charter school.

The legal and practical concerns inherent in private management operation of individual schools and state takeover of individual schools caused these two options to be removed from New Jersey's final restructuring plan. The lack of express legislative authority for New Jersey boards of education to contract with private management companies to provide certified educational services, combined with the limited record of effectiveness of these private entities nationwide, lead to SDOE's removal of this option. The evolving NJQSAC process, its implications for school districts and the lack of statutory authorization for intervention in individual schools, as opposed to school districts, lead to SDOE's removal of this option.

School districts with schools in year five needs improvement status are currently formulating their school restructuring plans, to be filed with the SDOE by May 15, 2006 and implemented in September 2006. District leadership, school leadership and school improvement committees are working together to develop an implementation plan for each restructured school. The plan must include a timeline for change, identification of who is responsible for each step of the plan and a schedule for review, revision and implementation. It will specify benchmarks and timelines, including what is to be used and when to evaluate the success of the proposed changes.

To be successful, the plan and its implementation must involve all school community stakeholders, including the board of education, school leadership, instructional and non-instructional staff, district and school union representatives, the school improvement committee, parents and community leaders. All must work together towards a common goal of continuous improvement in the school's ability to teach all students, improve student achievement and eventually be removed from NCLB restructuring status.

Regional SDOE technical assistance sessions and on site visits have enabled each school district to discuss its restructuring proposal for each identified school prior to development and submission. The training and face to face visits will provide each school district with the opportunity to discuss its proposed response and to identify additional necessary pieces of the restructuring plan for each identified school.

Some of the year five schools have already implemented governance changes as part of their year four corrective action plans. Emanating from the Collaborative Assessment and Planning for Achievement (CAPA) assessment process, some school districts went beyond corrective action plans that involved instructional, curricular and school culture changes and implemented governance changes such as reassigning principals, transferring staff and restructuring site-based management teams. Some of these schools have seen continuous improvement in student achievement as a result of implementing the CAPA recommendations, some have not. For these schools, year five is an opportunity to refine the process, building on what is working and revamping what is not working. For schools which did not implement governance changes in year four, this will be a new process; one in which they can benefit from the experiences of their year-five brethren and create governance changes that can better serve their students, leading to increased levels of student achievement.

As with any new initiative, NCLB restructuring is exciting and uncertain at the same time. It holds the promise of continuous improvement in schools where student academic performance has been less successful than desired. It is an opportunity to make governance changes that can create a better educational environment in each restructured school; one that is more conducive to learning and increased student achievement. Will it be successful in the 67 schools to be restructured in 2006? How about the potential 37 additional schools in 2007? No one can tell at this time. As districts restructure for better achievement the academic lives of the students in these schools hang in the balance. **sl**

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The Open Public Records Act

What every school board member needs to know.

By John J. Burns, Esq.

Advancing student achievement requires public support. To gain that support, a board of education must have the public's confidence. And to maintain community confidence, a school board should ensure that district operations adhere to two important statutes: the Open Public Meetings Act, enacted in 1975, and the 2002 Open Public Records Act (OPRA).

For the benefit of New Jersey's new school board members, "Legally Speaking" will focus on the more recent statute, which involves public access to government records.

What is OPRA?

The Open Public Records Act defines what is – and what isn't – a government record. It establishes how a public body grants access to a government record. It also gives citizens the right of appeal if a record has been denied by a government agency.

What is the role of the board of education in OPRA?

While its role in implementing OPRA is limited, the school board must take steps to ensure that district personnel comply with the law. First, the board should adopt a records policy, part of which addresses citizen access to records. Second, the board must designate a "records custodian."

Who is the school district's records custodian and what does he or she do?

The records custodian is an administrator designated by the board to handle records requests under OPRA. Very often, the records custodian is the school business administrator, but the role may also be assigned to another staff member, such as a superintendent or assistant superintendent. The records custodian should be able to interact effectively with the public, be familiar with OPRA and know about the records in the district's care.

The custodian of records must develop a form for members of the public to use when requesting government records. After adopting a records request form, many districts make them available not only in the administrative offices but also on their Web sites.

What does a government records request form look like?

OPRA does not specify what the form must look like, but it does mandate the form's content. The form should include a brief description of the government record sought, along with space where the custodian can indicate the record to be made accessible, the date when it will be available, and the fees to be charged. OPRA also requires that the form indicate that the requestor has a right to challenge the school board's decision to deny access, as well as the procedure a citizen can use to file an appeal.

How much can a school district charge for copies of government records?

A public body may charge a reasonable fee per copy for public records. These fees vary according to the type of record and the form of the record. The statutory fee schedule is 75-cents per page for the first ten pages, 50-cents each for the 11th to 20th pages and 25-cents for the 21st page and beyond.

A public body may add a special service fee for the staff time needed to access and duplicate the documents. However, the courts have drawn the line on some types of extraordinary charges.

In a 2002 New Jersey Superior Court case (*Courier Post v. Lenape Regional High School District*), a school district sought to charge a requestor thousands of dollars for copies of attorneys' bills. The board reasoned that it needed to cover the fees paid to its lawyer to redact the documents to remove confidential information. The court, however, determined that the board could not build those costs into the fee.

What are OPRA's timelines for records access?

Ordinarily, immediate access must be granted to budgets, bills, vouchers, contracts (including collective negotiations agreements and individual employment contracts), and public employee salary and overtime information. For all other records, access must ordinarily be granted within seven business days. Some records custodians ensure compliance with the timelines by maintaining an "inventory" consisting of a few copies of the most frequently requested records.

When is a record a "government record"?

OPRA defines a government record as any "paper, written or printed book, document, drawing, map, plan, photograph, microfilm, data processed or image processed document, information stored or maintained electronically or by sound-recording or in a similar device, or any copy thereof, that has been made, maintained or kept on file" or which has been received in the course of official business.

Frequently requested records include budgets, bills and minutes of meetings.

Other public records include:

- Collective bargaining agreements and individual employment contracts.

- Individual employees' names, titles, positions, salaries, payroll records, lengths of service, dates of separation and reasons thereof, and amounts and types of pensions.
- Resumes of successful candidates for district positions.
- Staff member's e-mail messages—depending on the nature and the subject of the correspondence.

This is by no means an exhaustive list of the district records that are accessible by the public.

What records are not covered by OPRA?

While the list of government records is quite expansive, the definition does not apply to every item in a district's filing cabinet. For example, documents may be excluded if they are considered advisory, consultative or deliberative in nature —that is, if they contain advice, opinions or recommendations reflecting the personal thoughts of an author regarding a particular issue. However, factual information contained within such materials may still accessible by the public. In such cases, the parts of the documents that are advisory, consultative or deliberative can be redacted.

This past April, the Appellate Division of New Jersey Superior Court agreed that a board secretary's handwritten notes that were used in preparing the official school board minutes do not constitute a public record. In *O'Shea v. West Milford Board of Education*, the court held that such notes fall within the "advisory-consultative-deliberative" exception.

Exceptions to records disclosure that commonly apply to schools include the following:

- Trade secrets and proprietary commercial or financial information obtained from any source. Trade secrets include data processing software obtained under a licensing agreement which prohibits its disclosure.
- Any record within the attorney-client privilege. This exception, however, does not block access to attorney bills or invoices.
- Records concerning the security of people and buildings.
- Information which, if disclosed, would give an advantage to competitors or bidders. Sealed transportation bids, for instance, do not have to be disclosed prior to the award of the bid since the disclosure would harm the public bidding process.
- Information in a sexual harassment complaint or related investigations.
- Grievances filed by or against an individual.
- Collective negotiations, including documents and statements of strategy or negotiating position.
- Information which is to be kept confidential pursuant to court order, executive order, federal law/regulation or state law/ regulation. Student records are confidential by federal law and also by state law and regulation.

Can a denial of access be reviewed?

A person, who is denied access to a government record by the custodian of the record, may file an action in Superior Court or a complaint with the Government Records Council, the state agency charged with interpreting OPRA.

What are the responsibilities of the Government Records Council?

The Government Records Council's duties include the following: adjudicating complaints concerning denial of access to a government record; issuing advisory opinions as to whether a particular type of record should be accessible to the public; providing training and guidelines for records custodians; and operating an informational Web site and a toll-free helpline.

The five-member council consists of the Commissioner of Community Affairs or designee, the Commissioner of Education or designee, and three public members appointed by the governor, with the advice and consent of the state Senate.

Any party can go before the council free of charge. It is subject to the provisions of the Open Public Meetings Act. A requestor who prevails in any proceeding is entitled to a reasonable attorney's fee. Council decisions may be appealed to the Appellate Division of Superior Court.

What are the penalties for OPRA violations?

A public official, employee or records custodian who violates OPRA is subject to a civil penalty of $1,000 for the first violation. For second and third violations that occur within ten years of the first infraction, fines are $2,500 and $5,000, respectively.

In addition, a school board may initiate disciplinary proceedings against an employee who knowingly and willfully violates OPRA.

What can boards of education do to ensure compliance with OPRA?

Boards can help ensure that their records custodians have a basic understanding of OPRA. Given OPRA's tight timelines for providing government records, school district records custodians should also have access to the board attorney.

For further information, visit the New Jersey School Boards Associations Legal Department Web page at *www.njsba.org/legal* or the Governor Records Council at *www.nj.gov/grc*. Board members may also access NJSBA's sample records policy (File Code 3570) by selecting "Critical Policy Reference Manual" in the Popular Resources section of *www.njsba.org*. **sl**

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Avoiding a Sticky Situation

When nutrition regulations clash with school vendor contracts, the doctrine of impossibility offers a way out.

By John Burns, Esq.

Recent changes in school nutrition regulations at both the federal and state levels will restrict the sale of food and beverages of limited nutritional value in the schools. What is a school district to do about existing vending contracts that allow foods which do not meet the regulatory requirements?

Under the regulations in *N.J.A.C.* 2:36, any item of minimal nutritional value or that contains sugar as the first ingredient may not be sold during the school day. If candy and soda cannot be sold, sales will probably decrease. This is great for student health, but if the district has signed a contract with the vendor guaranteeing a certain level of sales, does that mean the district has breached the contract?

New Law Makes Meeting a Contract an Impossibility The doctrine of impossibility can be used in situations where a condition has changed making it impossible for one of the parties to perform under the contract. For instance, in *Brauer v. Hyman*, 98 N.J.L. 743, (E & A 1923), a vendor owed money to their supplier for beer and wine. The money was to be paid in monthly installments and the supplies would be delivered monthly. As part of the agreement, if the vendor defaulted on the contract, he would have to give title to his business over to the supplier. As luck would have it, a federal law called the Wartime Prohibition Act of 1919 was enacted that made it illegal to sell wines and liquors. Consequently, the vendor could not meet his payments and the supplier sought a remedy in court.

The court found that the federal prohibition on the sale of wine and liquor practically destroyed the vendor's business and the contracts underpinning that business. The court ruled that an implied term of the contract was that if prohibition of the liquor traffic should be enacted into law, as it was, it would work a frustration of the contract, which would thereafter be unenforceable between the parties. Therefore the vendor was not held liable for the balance of the contract.

Changed Circumstances Make Bargaining Agreement an Impossibility Impossibility may not always be a matter of changing law or regulation, but of circumstance. In *Porcelli v. Titus*, 108 *N.J. Super.* 301 (App. Div. 1969), the Appellate Division upheld the Newark School Board's decision to change the way faculty were considered for promotion, despite the collective bargaining agreement that specified that faculty would be considered for promotion only after a written test. Against the backdrop of days of violent civil unrest in the City of Newark, the board, on the recommendation of the superintendent, adopted a new system of faculty promotion not based on exams. Instead, a screening committee made up of faculty and administrators would base their decisions on objective criteria.

The court upheld the unilateral change in the contract, stating that "faculty selection must remain for the broad and sensitive expertise of the School Board and its officials," and this we do, notwithstanding an existing employment agreement where subsequent conditions make impossible a literal *performance* of all of its terms.

The essence of the modern defense of impossibility is that, at the making of the contract, or thereafter, the promised *performance* was impracticable owing to some extreme or unreasonable difficulty or the like "rather than that it is scientifically or actually impossible." In this case the changing condition was the fact that the board realized that it needed to have diversity in leadership positions. Finding that the promotional tests embodied in the contract did not add to diversity, the court found that "the concept of impossibility should prevail where a particular provision in a school contract is rendered impracticable by subsequent events demanding changes in an educational program in order to give meaningful effect to an overriding public policy." Moreover, the court found that "*specific performance* will not be *decreed if the performance to be compelled* is contrary to *public welfare*."

For instance, in *Model Vending, Inc. v. Stanisci*, 74 *N.J. Super.* 12 (Law Div. 1962) a bowling alley owner and a vendor entered into an exclusive, five-year contract to have vending machines placed in his bowling alley. The bowling alley owner failed to abide by the exclusive nature of the contract and had merchandise, other than the exclusive vendor's, for sale on his premises. The bowling alley then burned down.

The court reasoned that the bowling alley owner was only liable for his breach of the agreement up until the time the bowling alley burned down since it would be impossible to continue to breach the contract after the building was destroyed. The court did not hold him liable for the contract after the building was destroyed.

The Meaning of Impossibility for Food Service Contracts How do these cases of impossibility apply to school districts and their food and beverage vending contracts? Depending on the specifics in your vending contract, you may not need to even contemplate the impossibility doctrine as a defense in a contract dispute. First, if there are no sales targets or hours of vending machine operation mentioned in the contract, then a district has much less to be concerned about concerning the regulations' effect on the district's contractual performance.

The impossibility doctrine may come into play if the district has guaranteed a certain level of sales, which will now be affected as a result of the change in regulations. If this is the case, then the impossibility doctrine may be helpful. A district could argue, as did the successful litigants in *Brauer*, that the change in regulations has made it impossible for the district to guarantee the level of sales in the contract. Or a district might argue, like the litigants in *Porcelli* and *Model Vending*, that circumstances have changed so drastically since the inception of their vending contract that it is impossible or highly impractical for the board to continue in the contract as required.

A court might then be inclined to agree that it is impossible, or at least highly impractical, to hold the district to its end of the contract. As a result the court would not hold the district responsible for any penalties it might incur as a result. A district could potentially argue that specific performance under the

cola contract should not be ordered, because the sale of soda is detrimental to the nutritional needs of students and contrary to the public welfare.

I hope your board attorney and business administrator have thought about all of these issues and have alerted the board to any potential problems that need to be addressed prior to the first set of requirements becoming effective in September 2006. Boards should ensure that their policy manuals are updated with these new requirements and that any resulting discrepancies between the new regulations and the existing vending contracts are addressed by district administration, in consultation with the board attorney. **sl**

John Burns, Esq., is a counsel for the New Jersey School Boards Association. He can be reached at jburns@njsba.org.

A sizable portion of a school district's budget is spent not just on educating special needs students, but on defending legal claims by parents filing requests for due process hearings under the Individuals with Disabilities Education Act. These hearings frequently span numerous days before the New Jersey Office of Administrative Law, involve many district staff, and are scheduled intermittently over several months.

Recent decisions by federal and administrative law judges have provided school districts with the authority to seek disposition of certain due process hearing requests by way of a motion or without the requirement of a hearing. These decisions advance the public policy of affording a school district an opportunity to implement a student's individualized education program before the parents can seek reimbursement for a unilateral out-of-district placement of their child.

Parents' Entitlement To Reimbursement Under the IDEA The Individuals with Disabilities Education Act was enacted to ensure that all disabled children in states that receive this funding are offered a free and appropriate public education in the least restrictive environment. Courts interpreting the IDEA have further held that parents can be awarded reimbursement for the unilateral placement of their child in an out-of-district school when the school district failed to provide the student an appropriate education.

The IDEA further provides that parents are entitled to recover attorney's fees and costs should they be a prevailing party at a due process hearing. Even if the school district does not initiate the litigation, it bears the burden of proof at the hearing. The prospect of undergoing the inherent uncertainties of a hearing, while possibly being responsible for the parents' attorney's fees, in addition to their own, has caused some school districts to settle with parents by paying all or a portion of the costs for a unilateral placement.

Particularly troublesome for districts is the prospect of being court-ordered to reimburse parents for a unilateral placement even before the district had an opportunity to implement a special education program for a student.

New Developments in Favor of School Districts Recent decisions have interpreted the 1997 IDEA amendments as prohibiting parents from obtaining reimbursement for a unilateral placement if the student had not previously received special education and related services from the local public school district.

In *Greenland School District vs. Amy N.*, the parents placed their child in a private school. The student was diagnosed with Attention Deficit Hyperactivity Disorder. The student, however, had not received special education and related services in the public school district. The court held that the IDEA amendments precluded the parents from obtaining reimbursement for such unilateral placement. The court reasoned that the purpose of this statute is to "give the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate program, and determine whether a free and appropriate program can be provided in the public schools."

A federal district court decision in New York has followed the *Greenland School District* court's interpretation of the IDEA *In Board of Education of the City School Dist. of the City of New York vs. Tom F.*, the court held that parents who unilaterally placed their learning disabled student out-of-district before the district could implement a program were not entitled to reimbursement, noting that "there is no ambiguity in the statutory language." The 2004 reauthorization of the IDEA did not result in any change to this statutory language.

New Jersey administrative law judges also have followed this line of case law. On April 25, 2005, an administrative law judge held in *K.H. and T.H. on behalf of A.H. vs. Clinton Township Board of Education*, that parents who unilaterally placed their child out-of-district before the district implemented a program are precluded from recovering tuition reimbursement for the same reasons, as in the *Greenland School District* and *Tom F.* decisions. The administrative law judge made this ruling even though the child was evaluated by the child study team before the placement and had received special education by another school district. The decision, entered without a hearing and based on a motion, went further than prior case law because the student had received special education services, just not from the current school district. It is too soon to determine how widely this interpretation of the IDEA will be followed by other administrative law judges.

Conclusion School districts must be allowed to provide a special education program before parents can seek reimbursement for a unilateral placement. Parents are free to choose to place their special needs child in the school of their choice. If they do so without allowing the school district to first provide a program of its own in-district or out-of-district, then they should not expect the school district to fund their choice.

In addition to saving school districts litigation costs, this case law development should encourage parents and their advocates to give the school district an opportunity to implement a special education program for a student before engaging in self-help unilateral actions.

Thus, in instances when the parents seek reimbursement for a unilateral placement before their child receives special education and related services by the district, there is now case law to support the school district prevailing on summary decision, without incurring the time and expense of undergoing a due process hearing. **sl**

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Zero Tolerance—Revisited

By Dominic Cotugno, Ed.D.

About four years ago, I wrote an article for *School Leader* magazine condemning zero tolerance policies. I thought it was a way for boards of education and administrators to circumvent their responsibilities in evaluating student purported misdeeds as they occur. After reading numerous articles over the years which chronicled primary students being removed from their schools in handcuffs and other similar situations, I decided to conduct a small survey of superintendents in the South Jersey–Southeastern Pennsylvania area. They were eager to share both experiences and views on the subject.

I should start by putting the issue in context. In response to other school shootings and the dreadful events at Columbine High School in April 1999, districts began to enforce the Gun-Free Schools Act of 1994, which mandated a one-year suspension for students who brought weapons to school. However, it also allowed superintendents and boards of education to modify the penalty on a case-by-case basis. Administrators often overlooked this caveat.

The "zero-tolerance" aspect of the law quickly spread to other areas of student behavior such as sexual harassment, drugs and bullying. It seemed to solve many problems. Statutes and a concerned public seemed to drive the movement. A superintendent told me that prior to Columbine there was little interest in the safe school movement. However, school violence and an aroused media spurred an aggressive response by schools. In the post-Columbine years, interest is again waning with politicians and the media. The public, however, demands a safe school environment for their children, one that protects them from any form of violence or harm. No one wants a student dispensing or possessing a drug that could adversely affect themselves or others. No one wants a student subjected to acts of sexual harassment without relief.

A true zero tolerance policy differentiates between offense and punishment in its application. This is the crux of the issue. How do school administrators convey an image that assures both students and the community that schools are indeed a safe haven, while using good judgment in the application of the policy?

An Associated Press article written by Mike Cronin in March 2005 examined this issue in detail. He states that most of the research in the area is anecdotal rather than empirical. There is no doubt that incidents of violence have been reduced. The few studies that attempt to quantify incidents of violence often make the mistake of using data, which combined egg throwing and the use of weapons in the same category. In some cases, this causes a misinterpretation of the meaning of the data gathered. In fact, some researchers have stated that these policies have exacerbated the situation.

How have superintendents responded to this evolving view of zero tolerance? One superintendent stated, "We have zero tolerance for the offense, but will use discretion in the punishment." All of the superintendents interviewed voiced a form of this idea. One stated that these policies often lead to an overreaction by some. For instance, a kindergarten student, who hugged his teacher and accidentally touched her derriere, was reported to the principal as violating the district's sexual harassment policy concerning inappropriate touching. The principal was forced by the policy's lack of flexibility to recommend the student and his parents for counseling.

Another superintendent relayed an incident where an Eagle Scout had brought his penknife to school. The policy called for the student to be turned over to the police for investigation. While being held in the detention center waiting for the court psychologist, he was assaulted. The superintendent was shaken. The lack of discretion in such a prescriptive policy was counterproductive to the intended result.

From my interviews it became clear that there is sometimes a lack of consistency in the interpretation of what is a true student behavior problem. If the behavior is the trigger that puts the policy into effect, then that process needs to be reviewed. However, most of the superintendents said it was very difficult to overrule a teacher or administrator who is overly ambitious in the application of a policy. They all agreed that a black and white application of the punishment phase of zero tolerance policies creates problems.

What is causing the apparent rift between overly prescriptive policies and their application by administration? It would seem that the community is comforted with the idea of a one-size-fits-all discipline policy, while superintendents see the inherent lack of fairness and the problems caused by the punishment portion of the policy. Communities want to know two things: first, that school policies are designed to protect their children, and second, that they are being applied fairly. It is this second item, the punishment phase, which has caused problems.

How do schools reassure parents that they are serious, but will also use discretion in the application of zero tolerance policies? One way would be to insert a single phrase into the policy, giving the superintendent discretion in the application of the policy's punishment phase. This option is never presented as an intelligent, student-centered approach to a serious problem. Boards and administrators rarely discuss this publicly for fear of misunderstanding by community members or being viewed as soft on violence or harassment.

Educators must return to the original intent of the policy, which is to provide a safe harbor for students and to serve as a sign to students that there will be a consequence to their actions. However, community members, teachers and administrators must embrace publicly the fact that discretion is an important part of the policy. This will, hopefully, regain the confidence of the public in the decision-making abilities of educators that has been lost by the specter of a primary student in handcuffs. sl

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Dominic Cotugno, Ed.D. is an associate professor at Chestnut Hill College in Philadelphia, Pennsylvania. He has served as a superintendent of schools for the Jackson School District and the Kingsway Regional High School District, and has held other administrative and teacher positions in the Camden City School District.

District Responsibility—When Does It Stop?

By Carl Tanksley

A school district's responsibility for student safety has recently been placed under scrutiny by the New Jersey courts. In an unpublished opinion (*Jerkins v. Anderson)* issued July 20, 2006, the Appellate Division of Superior Court held that a school district could be held liable for injuries a child received hours after being dismissed from school.

An After School Accident Usually, Joseph Jerkins' father or adult brother would pick up the nine-year-old student at the end of the school day. As the school year drew to a close, the district began its early dismissal program. The day before the accident, Joseph was dismissed from school at 1:05 instead of the normal 2:50 p.m. dismissal time. However, Joseph neglected to tell his father or brother about the early dismissal. The following day when his brother sought to pick-up his younger brother at the usual time, Joseph was not at school. Later that day, at approximately 4 p.m., while playing with a classmate, Joseph ran into the street and was struck by a car. The accident left him a quadriplegic.

Joseph's father filed suit claiming that the district was negligent in dismissing Joseph early, without making sure that he was placed in the care of a responsible adult. In defending against the suit, the district demonstrated that the early dismissal days were clearly identified in the annual calendar and monthly calendars, which were widely disseminated throughout the district. Based on the notice provided, the trial court dismissed the complaint. However, on appeal, the Appellate Division reversed the trial court's dismissal.

While the Appellate Court stopped short of imposing liability on the district, it held that several factors weighed heavily in Joseph's favor.

Did the School Exercise Reasonable Care? In reaching its conclusion that a duty of care was owed to Joseph, the Court considered four factors. First, the Court considered the nature of the relationship between Joseph and the district and determined that school administrators have an obligation to protect school children placed in their charge from foreseeable dangers. Secondly, the Court considered the nature of the risk and concluded that a nine-year-old child that is left without adult supervision faces a substantial risk of harm. The third factor considered by the Court was whether the district had the opportunity and ability to exercise reasonable care with respect to Joseph. The Court found that the staff could readily determine whether a student was met by an adult or responsible older sibling at the close of the school day. Additionally, school staff in the district's after-school program had established a practice of telephoning when a parent who had forbidden their child from walking home alone was late picking up that child. The Court reasoned that this practice could readily be extended to younger students. Both of these factors demonstrated that the district had both the opportunity and ability to exercise reasonable care toward Joseph. Finally, the Court determined that the public interest would be served by imposing a duty on school districts to ensure that younger students are not dismissed from school without proper supervision.

The Appellate Division next held that the school district's responsibility for its students included the duty to exercise reasonable care to ensure that younger students are properly supervised when dismissed.

On remand to the trial court, the Appellate Division held that a jury should determine whether the district breached its duty of care to Joseph when it dismissed him without adult supervision. Here, Joseph was not enrolled in the after-school program and his father had not told him not to walk home alone. The Court held that a jury should decide whether the school exercised the degree of care that the ordinarily reasonable district in the same circumstance would have exercised. If the jury determines that the district was negligent, it would also be required to determine whether that negligence caused Joseph's injury.

Questions Raised The *Jerkins* decision has raised the issue of the extent of district responsibility for the safety of students at the end of the school day. However, the decision raises more questions than it answers. For example, questions left open by *Jerkins* include the appropriate age at which the district can presume the child can be dismissed without proper supervision, the period of time for which a district may remain responsible for the child after dismissal, the appropriate age of a responsible person, and whether the district can shift or reduce the burden identified by the Court by adopting appropriate policy.

A second set of questions arise around the issue of school bus stops. For example, is a district responsible to ensure that young children exiting the bus are met by a responsible person? What is a district's obligation if the parent does not pick-up the child? Should the district return that child to the school and call the parent?

Policy Implications In *Jerkins,* the district's after school program had a practice of calling parents if those parents had previously instructed the child not to walk home alone. The Court extended this practice to include all "younger" children. While the *Jerkins* decision does not technically apply to all New Jersey districts, arguably, all districts have the same duty of care to younger children noted by the Court. Therefore, in order to comply with the *Jerkins* decision, districts should consider adopting policies that presume that "younger" children (those in pre-k to third grade) are unable to walk home alone, without parental consent.

This type of policy however, would require that each school "warehouse" each child until the parent appears. It would also require procedures to contact late parents and procedures to address situations where parents cannot be reached. Such a policy should also address the parent who habitually arrives late to pick up the child. Another area of concern is when an older sibling appears to pick-up the child or where the child attempts to leave with someone other than a parent or older sibling.

Ultimately, the Appellate Division held that public schools have a duty to care for younger children that extends past the dismissal bell. Despite the many questions left unanswered by *Jerkins,* districts should take reasonable steps to ensure that the safety of children is provided for at dismissal time. **sl**

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Governor Proposes $32 Billion Budget

Over 85 Percent of Districts Move to November Elections

Budget and Election Resources

Survey Issued on the Impact of Anti-Bullying Law

Share Your Expertise with Colleagues at Workshop 2012

Popular Student Achievement Program Returns

NJDOE Establishes Special Education Awards & Grants

Survey Results: Religious Holidays and Schools

County Scenes

Obituary: Walter J. Keiss, Mount Laurel

NJSBA Executive Committee to Meet

Budget and Election Resources

Updated Feb. 24, 2012

NJSBA has resources available for school districts concerning budget development and elections.

Governor's Budget Message Gov. Chris Christie delivered the annual budget message to the state Legislature on Feb. 21, and pledged an extra $135 million over last year in state aid to education. NJSBA has pledged to advocate strongly for adequate state funding for all local school districts.

Additional Resources:

- State aid summaries for 2012-2013
- Individual district print-out
- New Jersey Department of Education (NJDOE) on 2012-2012 school budget guidelines and budget software information.
- The 2012 NJDOE School Election and Budget Procedures Calendar
- A frequently asked questions document on the November election option from NJSBA.
- NJDOE's frequently asked questions document on the November elections.

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SCHOOL BOARD notes

228 Boards Switch to November Elections

Teacher Tenure Overhaul Introduced in Legislature

12 Removed for Non-Compliance with School Board Criminal Checks

NJ Student Test Scores Up Overall; Achievement Gap Persists

Online Radio Profiles Challengers of Anti-Bullying Mandate

MRSA in Schools Back in the News

NJSBA Partners to Offer Flexible Spending Accounts

Survey Results: Majority Favors Raising the Compulsory Education Age

County Scenes

Rutgers Program Focuses on Academic Success

Online Radio Profiles Challengers of Anti-Bullying Mandate

When the Anti-Bullying Bill of Rights Act was enacted last year, it was hailed as landmark legislation that would change the culture and environment in New Jersey schools. Lawmakers believed school districts could absorb the numerous provisions with no additional cost.

But one small district, Allamuchy Township in Warren County, challenged the law. While the local school officials supported the intent of the act, they believed the state should pay for the additional costs – and the board went to the Council on Local Mandates to make the case that the law violated the "State Mandate, State Pay" clause in the constitution. On Jan. 27, they won, as the council deemed the new law to be unconstitutional unless the Legislature provides funding for its implementation. The council will issue its written decision in late March, at which time the law would no longer be in effect unless the state amends it and/or provides funding.

At 2:30 p.m. Wednesday, Feb. 8, Conversations on New Jersey Education, NJSBA's online radio program, will feature the two primary individuals who argued the case before the Council on Local Mandates: Board President Francis Gavin and Superintendent Timothy Frederiks. In addition, a member of NJSBA's legal staff will join the conversation and discuss the role of the Council on Local Mandates.

About the Program *Conversations on New Jersey Education*, NJSBA's program on BlogTalkRadio.com, is similar to a live radio talk show, except it is broadcast through the Internet. The shows air live, but broadcasts are archived and available to hear online anytime.

Listeners only need a computer with high speed Internet access. To hear the live show or past recorded broadcasts, visit www.blogtalkradio.com/njsba.

Participate in the Program The call-in number to participate in the show is (347) 989-8904. Note that the call-in number is a New York area code; local/long distance charges may apply.

Add a Reminder There are four easy ways to get show reminders: receiving individual emails, syncing up with your favorite calendar application, downloading to Outlook, or via SMS to your cell phone. After going to the website for the program, click the "add reminder" button for more information.

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The New Jersey School Boards Association, a federation of boards of education, provides training, advocacy and support to advance public education and promote the achievement of all students through effective governance.

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STAFF DIRECTORY

For contact and biographical information about the NJSBA Officers, visit the **NJSBA Executive Committee page**.

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Sussex County Spring Meeting
Date: Wednesday, May 30, 2018
Time: 6:45 PM
Directions
Register Now

Bergen County Spring Meeting
Date: Thursday, May 31, 2018
Time: 6:45 PM
Directions
Register Now

NJSBA's 3rd Annual School Security Conference
Date: Friday, June 1, 2018
Time: 9:30 AM
Directions
Register Now

County Association Leadership Meeting
Date: Saturday, June 2, 2018
Time: 9:00 AM
Directions
Register Now

Advocating For Your District's Funding
Date: Wednesday, June 6, 2018
Time: 6:30 PM
Directions
Register Now

Urban Boards Meeting
Date: Friday, June 8, 2018
Time: 6:00 PM
Directions
Register Now

Spring School Law Forum
Date: Tuesday, June 12, 2018
Time: 9:00 AM
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Register Now

Are you I-STEAM Ready - Makerspaces
Date: Thursday, June 21, 2018
Time: 9:00 AM
Directions
Register Now

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The New Jersey School Boards Association, a federation of boards of education, provides training, advocacy and support to advance public education and promote the achievement of all students through effective governance.

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413 West State Street
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Requestors may also fax the form to the attention of the NJSBA Records Custodian at **609-695-1577**.

For further questions about how to obtain NJSBA Records, please call Cynthia J. Jahn, Esq., Records Custodian, at 609-278-5250 or e-mail: **cjahn@njsba.org**.

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