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Frank P. Cavallo, Jr., Esq.
Parker, McCay & Criscuolo
Three Greentree Centre, Suite 401
Route 73 & Greentree Road
Marlton, NJ 08053

Thomas J. Coleman, III, Esq.
Raymond & Coleman, LLP
325 New Albany Road
Moorestown, NJ 08057

Kevin M. O'Dowd, DAG
Department of Law and Public Safety
Richard J. Hughes Justice Complex
25 Market Street
P.O. Box 112
Trenton, NJ 08625

Dear Counsel:

I have reviewed the moving papers filed in the matter entitled *Board of Education of the Northern Burlington County Regional School District, Burlington County v. William L. Librera and Walter Keiss, Burlington County Superintendent of Schools*, Agency Dkt. No. 26-2/02, and *Township of Mansfield, Burlington County v. William L. Librera and Walter Keiss, Burlington County Superintendent of Schools*, Agency Dkt. No. 37-2/02, wherein the Regional Board and the Township of Mansfield respectively request that I clarify and reconsider my decision of April 12, 2002 upholding the County Superintendent of School's reapportionment of the Regional Board's nine seats among its four constituent districts.

The Regional Board avers that my prior decision was unclear with respect to its disregard of *N.J.S.A. 18A:13-8* and extension of the rationale of *Borough of Oceanport v. Hughes et al.*, 186 *N.J. Super.* 109 (Ch. Div. 1982) to permitting prisoners to be counted in the population of the district for apportionment purposes. The Board opines that reconsideration of its prior arguments for purposes of clarification will lead me to the conclusion that my prior

opinion was in error and should be vacated with respect to the counting of prisoners. (Letter Brief in Support of Notice of Motion at 1-2)

Mansfield Township similarly posits that by ignoring *N.J.S.A.* 18A:13-8, I have given the County Superintendent license to disregard the law and exceed the scope of his legal authority, and that permitting inmates housed in a State correctional facility in Chesterfield to be counted so that they may participate in the electoral process on an equal basis with other voters is contrary to both the State and Federal Constitutions, as well as law providing that prisoners are not entitled to vote. (Letter Brief in Support of Request for Reconsideration at 1-2)

Upon review of the decision at issue, I find no need to clarify or reconsider my holdings with respect to the methodology used for reapportionment or the inclusion of military personnel in the population count underlying it. On the question of inclusion of prisoners, however, I do find clarification necessary.

In upholding the County Superintendent's actions, I stated my reliance on respondents' arguments:

With respect to inmates in correctional facilities, the Commissioner cannot conclude, in light of the analogous decisional law cited by respondents, the inclusion of state and federal prison inmates in data provided by the United States Census Bureau and the counting of such inmates for purposes of Congressional districting and legislative apportionment, and in the absence of compelling contrary argument, that the County Superintendent's decision to include such inmates so as to avoid a violation of equal protection was either beyond the scope of his lawful authority or arbitrary and capricious. (Decision of April 12, 2002 at 3-4)

However, earlier in the decision, respondents' argument as to why prison inmates should be included in reapportionment population counts was characterized thus:

While conceding that no New Jersey court has specifically addressed the constitutionality of the portion of *N.J.S.A.* 18A:13-8 which states that inmates are to be excluded from the population for purposes of apportioning regional board member seats, respondents project that, based on analogous case law as cited within its brief, this provision would likely be struck down if challenged. Thus, respondents aver, *by ensuring that all institutionalized citizens are able to participate in the electoral process on an equal basis with other voters*, respondents have applied the statute so as to avoid constitutional infirmity. (Decision of April 12, 2002 at 2, *emphasis supplied*)

In fact, the assurance sought by respondents was not that the institutionalized population (in this case, prisoners) itself be accorded protection. Rather, respondents seek to protect the legitimate concern of *all inhabitants of the constituent district in which the institution is located*, the weight of whose individual votes would otherwise be compromised and whose proportionate representation on the Regional Board would otherwise be diminished because

some of its population resided in an institution. Thus, the focus of respondents' equal protection analysis is not the prevention of discrimination against inmates, but the prevention of discrimination against the collective population of the constituent district, whose numbers (and hence, weighting of individual votes in an election and level of representation on the Regional Board) would be reduced by not counting its *entire* population, including institutionalized persons. (Brief in Support of Motion to Dismiss [Board's Petition] at 5-8, Brief in Support of Motion to Dismiss [Township's Petition] at 5-8) The characterization of respondents' arguments in my prior decision has plainly led to misunderstanding of the rationale for my support of the County Superintendent's counting of inmates, and I, therefore, clarify the basis for my position herein.

Accordingly, with the clarification noted above, I reaffirm my prior decision and direct that the apportionment made by the County Superintendent on December 14, 2001 shall remain in full force and effect, unless and until reversed on appeal to the State Board of Education.*

Sincerely,

William L. Librera, Ed.D.
Commissioner

c: Board Secretary
County Superintendent

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