

#306-07 (OAL Decision: Not yet available on-line)

BOARD OF EDUCATION OF THE TOWNSHIP :  
OF BARNEGAT, OCEAN COUNTY, :

PETITIONER, :

COMMISSIONER OF EDUCATION

V. :

DECISION

ROBERT A. HOUSER, :

RESPONDENT. :

SYNOPSIS

Board of Education sought removal of respondent Board member on grounds that his wife’s Workers’ Compensation claim against the Board – which was pending when respondent sought and assumed office during the 2006 school election, but was withdrawn when the Board raised the issue of conflict shortly before filing its petition in May 2007 – disqualified him from Board membership. Respondent denied that the claim was disqualifying, and contended that in any event its withdrawal mooted the Board’s dispute; he further contended that the Board’s petition must be dismissed as untimely, and that he was entitled to indemnification of his defense costs.

The ALJ found the Petition of Appeal timely, since the Board did not become aware of respondent’s conflict until April 2007 and the matter was one of significant public interest; he further found that the dispute was not mooted by withdrawal of respondent’s wife’s claim. The ALJ concluded that such claim disqualified respondent from Board membership, and that his candidacy, election and seating were void from the outset. Respondent was ordered removed from the Board, with the County Superintendent of Schools to fill the resulting vacancy. Respondent was found to be entitled to indemnification of costs since the dispute arose out of his *de facto* Board membership.

The Commissioner adopted in part and reversed in part. The Commissioner concurred that the matter was not moot, and that it should be heard as a matter of significant public interest notwithstanding her disagreement with the ALJ’s reasoning as to timeliness. The Commissioner further concurred that a spouse’s Workers’ Compensation claim against the board was an inconsistent interest precluding board membership pursuant to *N.J.S.A. 18A:12-2*, and that where such a claim existed at the time a candidate assumed office, his or her board membership was susceptible to being declared void. However, the Commissioner reversed the ALJ’s finding that respondent was unable to run for Board office, holding instead 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. (*Thomas v. Edwards* State Board decision) The Commissioner also reversed, on equitable grounds, the ALJ’s directive that respondent be removed as a Board member. Finding that the Board and respondent were equally culpable for failing to recognize and resolve the disqualifying conflict prior to respondent’s assumption of office, 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 re-administration of his oath of office, which the Board was directed to effectuate forthwith. Respondent was held entitled to indemnification of costs, subject to the provisions of *N.J.S.A. 18A:12-20* as to accuracy and reasonableness.

This synopsis is not part of the Commissioner’s decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

July 30, 2007

OAL DKT. NO. EDU 2948-07  
AGENCY DKT. NO. 128-5/07

BOARD OF EDUCATION OF THE	:	
TOWNSHIP OF BARNEGAT,	:	
OCEAN COUNTY,	:	COMMISSIONER OF EDUCATION
	:	
PETITIONER,	:	DECISION
	:	
V.	:	
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RESPONDENT.	:	

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The record of this matter and the Order on Emergent Relief issued by the Office of Administrative Law (OAL) have been reviewed, as have the exceptions and replies filed by the parties upon notification by the Department of Education that the Commissioner would consider the Order of the Administrative Law Judge (ALJ) as an Initial Decision fully resolving the parties' dispute on the merits.<sup>1</sup>

On exception before the Commissioner, respondent initially objects to the ALJ's failure to dismiss the petition of the Board of Education (Board) as untimely filed pursuant to *N.J.A.C. 6A:3-1.3(i)*. Respondent contends that the ALJ erred not only in concluding that the regulation in question is inapplicable to boards of education, but also in determining that – even if the rule is deemed applicable – the Board was entitled to file within 90 days of either respondent's wife's notice of taking a day off to attend her Workers' Compensation proceeding or the Board attorney's advice regarding respondent's alleged conflict. According to respondent, his wife's Workers'

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<sup>1</sup> Although afforded the opportunity to do so, neither party objected to proceeding in this manner.

Compensation employee claim petition was filed a full year before his seating as a member of the Board in May 2006, so that the Board would be hard pressed to argue that it lacked constructive notice of the facts necessary to pursue its claim prior to the filing of its petition in May 2007. (Respondent's Exceptions at 2-5)

Respondent further contends that, if not for reason of untimeliness, the Board's petition should have been dismissed as moot in light of the undisputed withdrawal of his wife's Workers' Compensation claim. He recites at length the circumstances and holdings of *Acevedo, supra*, and *Margadonna, supra*, and, likening them to his own situation, asserts that the ALJ should have followed these precedents and allowed him to keep his seat rather than disregarding them and ordering him removed. (Respondent's Exceptions at 5-11)

Finally, respondent argues that the ALJ erred in finding that a spouse's Workers' Compensation petition constitutes a conflict of interest precluding board membership pursuant to *N.J.S.A. 18A:12-2*. Reviewing case law previously raised before the ALJ, including *Mercer, supra*, and *Taliaferro, supra*, he points to aspects of each case that either support or are distinguishable from his own situation, contending that he should not be found to have a disqualifying interest because: the claim at issue is indirect; there is no evidence that he would benefit from it in a substantial and material way; and the Board is unlikely to have any involvement whatsoever in handling it so as to place him in a position to exert improper influence. (Respondent's Exceptions at 11-16) Alternatively, respondent urges, if the Commissioner does find a spouse's Workers' Compensation claim to be a disqualifying interest, such interpretation should – as a matter of first impression – be applied prospectively and not be used as a basis for

reaching back to invalidate respondent's election and seating, especially where the offending claim has since been withdrawn. In this regard, respondent asserts that *N.J.S.A. 18A:12-2* does not, on its face, prohibit a Board member's spouse from seeking Workers' Compensation benefits, nor does any previous school law decision address precisely this issue; thus, the ALJ's comment that everyone is presumed to know the law is inapplicable because "no statute or published opinion could have given Respondent any notice of the possibility of a disqualifying conflict." (*Id.* at 17-19, quotation at 18-19)

The Board replies by reiterating its prior arguments and maintaining that: 1) its petition was timely notwithstanding respondent's untrue statement that the Board and its administrative staff had knowledge of his wife's Workers' Compensation claim at the time of his nomination and election;<sup>2</sup> 2) respondent's election was voided by the existence of such claim as well as the false statement of qualification on his nominating petition; 3) such claim is clearly disqualifying in light of prior case law; and 4) there is nothing novel about either the controlling statute or the ALJ's interpretation of it, so as to warrant prospective application. (Board's Reply Exceptions at 2-10)

Additionally, in primary exceptions of its own, the Board objects to the ALJ's holding that respondent is entitled to indemnification for the legal fees and costs incurred by him in defending against the present action, contending that such action *cannot* be found to have arisen out of respondent's performance of his duties as required by statute, since it pertains to his qualification and not to his conduct, and the public

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<sup>2</sup> The Board attempts to support this claim with a supplemental certification of the Board Secretary, to which respondent objected by letter dated June 19, 2007. Respondent urged – correctly – that such certification was submitted in violation of *N.J.A.C. 1:1-18.4(c)* and may not be considered by the Commissioner herein.

should not be forced to bear the cost of defending a Board candidate's false claim of qualification; at the very least, the Board asserts, it must be afforded the clear opportunity to contest his statements of fees and costs. (Board's Exceptions at 1-2) The Board also objects to the ALJ's statements suggesting that respondent neither engaged in, nor was alleged by the Board to have engaged in, wrongful concealment with respect to his qualification for Board membership, averring that – as it has consistently maintained from the outset – respondent *did* engage in fraudulent concealment by the very act of certifying that he was qualified for Board membership when he was not. (*Id.* at 3)

In reply, respondent contends that – in addition to the clear language of statute and case precedent entitling him to indemnification – it must be noted that the question of whether a spouse's Workers' Compensation petition disqualifies one from Board membership is a novel one before the Commissioner, and was in this instance raised by the Board a full year after respondent's election and seating. Respondent urges that he has at all times acted in good faith and diligence, even to the point where his wife withdrew her petition “so as to avoid even an appearance of conflict” once the issue was brought to his attention. (Respondent's Reply at 2-5, quotation at 5) Moreover, in anticipation of an almost certain challenge to “any and all fees and costs” submitted to the Board in conjunction with his request for indemnification, respondent asks the Commissioner to rule herein that the costs of defending against *that* challenge will also be indemnified, so as to prevent unnecessary litigation and put the Board on notice that it may not attempt to exert taxpayer-funded “financial muscle” in the form of continual legal challenges as a ploy to intimidate respondent and other present or prospective Board members who challenge district actions. (*Id.* at 5-7, quotation at 6)

Respondent additionally urges adoption of the ALJ's finding that he engaged in no wrongful concealment, contending that the Board's argument to the contrary relies solely on his signing of a nominating petition and taking the Board member's oath of office – neither of which remotely suggests that a spouse's previously filed Workers' Compensation petition is a matter that must be disclosed, let alone that it constitutes an impermissible conflict of interest. According to respondent, he at all times believed that his wife's pending claim petition was no impediment to Board membership, and the Board does not even allege that he ever took action as a Board member with regard to or in furtherance of it. (Respondent's Reply at 8-10)

Upon careful consideration, for the reasons set forth below, the Commissioner adopts in part, and rejects in part, the recommended Order/Initial Decision of the OAL.

Initially, the Commissioner concurs with the ALJ's rejection of respondent's attempts to have this matter dismissed on grounds of untimely filing and mootness, without adjudication on the merits. However, the Commissioner so holds for reasons of compelling public interest (Order/Initial Decision at 8), not because *N.J.A.C. 6A3-1.3(i)* places no limits on boards of education or because the Board's cause of action arose on the specific dates identified. To the contrary, the referenced rule does, in fact, apply to a petition brought by a local district board of education – as it applies to *any* interested party bringing action against a “district board of education, individual party, or agency” – and has consistently been so interpreted,<sup>3</sup> while reckoning the Board's cause of action as the specific date it purports to have acquired actual knowledge

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<sup>3</sup> The Commissioner acknowledges respondent's citation, in Reply Exceptions at 10-12, of a recent Commissioner decision dismissing as untimely a petition filed by a board of education.

of respondent's wife's pending Workers' Compensation petition – or was in receipt of the ensuing legal advice – is not appropriate in this matter for reasons more fully set forth below. Rather, the Commissioner concurs with the ALJ that dismissal of the instant dispute on procedural grounds would leave unaddressed a question of significant public interest – the legal status of a sitting board of education member – thus warranting relaxation of procedural rules pursuant to *N.J.A.C. 6A:3-1.16*.

Turning, then, to the Board's claim on the merits, the Commissioner first concurs with the ALJ that a spouse's pending Workers' Compensation claim constitutes an inconsistent interest disqualifying a board member from service pursuant to *N.J.S.A. 18A:12-2*. (Order/Initial Decision at 7-13) Initially, the Commissioner notes that a board member's own pending Workers' Compensation claim has already been held, in a decision that carefully considered the nature of such claims, to constitute a disqualifying interest. *In the Matter of Richard Tullo, Board of Education of the Pinelands Regional School District, Ocean County*, decided by the Commissioner April 26, 1999<sup>4</sup> Further, it is well established, through the long line of cases recited by the ALJ, that claims of family members resulting in a potential benefit to the board member's household constitute an indirect conflict of interest in violation of *N.J.S.A. 18A:12-2*,<sup>5</sup> and that the purportedly insignificant amount or nature of a claim – or the small likelihood of a board member actually being in a position to exert improper influence with respect to it – is immaterial when considering the existence of an

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<sup>4</sup> Although not recited by the ALJ, this decision was discussed by both parties in their OAL briefs. The Commissioner notes in the interest of clarity that the Workers' Compensation claim at issue in that matter arose out of the board member's prior employment with the board.

<sup>5</sup> See also, *Board of Education of the Borough of Palmyra, Burlington County v. Robert Marinnie*, decided by the Commissioner June 8, 2005.

inconsistent interest. See also *Tullo, supra*. Finally, it is of no import that – as argued by respondent – there is no prohibition against employment of a spouse by the board of education on which a board member sits, or that the spouse is seeking to vindicate rights arising from such employment; simply stated, a choice must be made between board membership and a claim which the board member or family member otherwise has the right to pursue. *Taliaferro, supra; Kennedy, supra*. Thus, under plainly evident principles of law, the existence of his wife’s pending Workers’ Compensation claim disqualified respondent from Board membership.

However, notwithstanding that a spouse’s Workers’ Compensation claim would preclude a person from assuming office, it would not – contrary to the finding of the ALJ and the arguments of the Board – preclude the pursuit of *candidacy* for such office. As held by the State Board of Education, it is evident from the “clear and unambiguous language” of *N.J.S.A. 18A:12-2* that “a victorious school board candidate who cured any conflicts prior to the commencement of his or her term of office would *not* be disqualified from board membership by operation of that statute,” which “cannot be read to disqualify individuals with inconsistent interests from being *candidates* for board membership”, in contrast to *N.J.S.A. 18A:12-1* – which addresses the basic qualifications of citizenship, residency, ability to read and write, voter registration, and so forth, required of candidates in order to file a nominating petition.<sup>6</sup> *Wayne W. Thomas, Acting Board Secretary, Board of Education of the Township of Willingboro, Burlington County v. Charlene J. Edwards*, decided by the State Board of Education November 3, 1993,

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<sup>6</sup> The Commissioner notes that the predecessor statute to *N.J.S.A. 19:60-5* (*N.J.S.A. 18A:14-10*, repealed and recodified as *N.J.S.A. 19:60-5/6* by P.L. 1995, c. 278) was in effect at the time of the State Board’s decision; however, there is no substantive difference between the two with respect to the point at issue.

emphasis in original (reversing a Commissioner’s decision, at 93 *N.J.A.R.2d* (EDU) 369, finding a candidate disqualified in accordance with then-existing case precedent consistent with *Howell, supra*)<sup>7</sup> Although the State Board recognized (slip opinion at 4) that the existence of a *contractual* relationship with a board might represent an incurable conflict, see also *Visotcky, supra*, at 266-67, that consideration is inapplicable under circumstances, such as here, where a choice can freely be made between board membership and maintaining a claim against the board.

Thus, respondent was able to seek election to the Board notwithstanding his wife’s pending Workers’ Compensation claim, since it represented a conflict capable of being cured if he were elected. As a consequence, he *cannot* be found to have made untruthful representations with respect to qualification in his nominating petition (Exhibit P-B/R-A<sup>8</sup>), so that the suggestion that he ran for office under false pretenses cannot be sustained, and the provisions of *N.J.S.A.* 19:3-7 – voiding the nomination and election of any candidate filing a false statement in conjunction with such election – do not apply.

Nonetheless, it remains true that, once elected, a candidate must cure any disqualifying interest prior to assuming office. It is well established – as correctly found by the ALJ – that a person who does not hold the requisite qualifications cannot take the necessary oath of office, and is consequently disqualified from entering into the duties of office; further, where the oath is taken and duties are assumed notwithstanding such

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<sup>7</sup> The State Board’s decision was inadvertently omitted by the publisher (Barclays) when the Commissioner’s decision was published at 93 *N.J.A.R.2d* (EDU) 369. A copy of the decision is appended hereto: [Wayne W. Thomas, Acting Board Secretary, Board of Education of the Township of Willingboro, Burlington County v. Charlene J. Edwards, Docket # SB 25-93.](#)

<sup>8</sup> It is worthy of note that the nominating petition itself clearly differentiates – both verbally and in the form’s graphic layout – the qualifications of *N.J.S.A.* 18A:12-1, which must be met by “candidates filing a nominating petition for board membership” from the self-contained cautionary statement that “no board of education member shall be directly or indirectly involved in any contract with, or claim against the board.”

disqualification, both the oath and the service will, upon subsequent adjudication, be invalidated from their inception. *Visotcky, supra*; see also, Attorney General Formal Opinion 1960 – No. 3, citing *Waldor v. Untermann*, 7 *N.J. Super.* 605 (Law Div. 1950), affirmed 10 *N.J. Super.* 188 (App. Div. 1950), *McCue v. Antisell*, 105 *N.J. Super.* 128 (App. Div. 1965) This result is not altered by case law cited by respondent for the proposition that board members have in the past been allowed to remain on the board if they eliminated their inconsistent interests; in those cases – unlike that of respondent herein – the inconsistent interest arose *during* their terms as board members, *subsequent* to their qualification and lawful assumption of office, and did not exist at the time of their election or appointment. In this instance, it is indisputable that respondent took the oath of office and entered into the duties of Board membership pursuant to *N.J.S.A.* 18A:12-2.1 notwithstanding that he had an inconsistent interest in violation of *N.J.S.A.* 18A:12-2; consequently, both his oath and his Board membership are susceptible to being declared void in their entirety.

In seeking to resolve this matter consistent with the holdings of law set forth above and the particular facts here presenting, then, the Commissioner is confronted with the novel (and troubling) scenario of a board of education seeking to remove from its membership a duly nominated and elected candidate who took the requisite oath of office, assumed the duties of membership, served as a member for nearly a year before his qualification was challenged,<sup>9</sup> and now continues to serve pending the outcome of this matter – all in violation of law, due to the existence of an inconsistent interest that

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<sup>9</sup> In this respect, the present matter differs from *Visotcky, supra*, where – although the board member in question remained on the board for several months after his appointment while the matter was being adjudicated – the challenge to the appointment’s validity was filed almost immediately.

went unrecognized (or unacknowledged) at the time of his seating and remained so for many months thereafter, but was promptly cured once raised.

In urging the Commissioner not to remove him from the Board, respondent argues that any finding of inconsistent interest based on his wife's pending Workers' Compensation claim has been rendered moot by her undisputed action to withdraw it, and that – even if this were not so – a finding of disqualification based on a spouse's Workers' Compensation claim cannot be applied retroactively since it is based on a previously unadjudicated point of law. The former argument, however, fails to recognize that respondent cannot simply “continue” as a Board member, since the existence of an inconsistent interest prevented him from being lawfully sworn and seated in the first place. The latter argument, on the other hand, ignores that: 1) candidates are responsible for evaluating their own circumstances in light of law which they must be presumed to know; 2) the language of *N.J.S.A. 18A:12-2*, and of the Board's nomination form based upon it, is sufficiently clear to have alerted respondent to the possibility that his wife's pending claim – awareness of which he does not deny – might constitute a disqualifying conflict of interest; 3) even the most cursory inquiry into the prior application of *N.J.S.A. 18A:12-2* in case law would have revealed the significant likelihood that a conflict existed in respondent's instance;<sup>10</sup> and 4) where the potential for a disqualifying interest even appears to exist, candidates have an obligation to seek clarification prior to assuming office, rather than keeping silent because they themselves

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<sup>10</sup> In this regard, the Commissioner views as disingenuous in the extreme respondent's contention that neither *N.J.S.A. 18A:12-2* nor published case law expressly required him to declare the existence of a spouse's Worker's Compensation claim or indicated that such was an impermissible conflict of interest. As set forth above, the inferences to be drawn on this point are clear, straightforward and based on longstanding precedent.

believe there is no conflict or because they prefer to await an actual challenge before addressing the issue..

The Board, on the other hand, insists that respondent must be removed from office, notwithstanding that its challenge to his qualification was raised nearly a year after his assumption of membership, and was promptly addressed once raised – because the Board could not have acted before it did given that it lacked knowledge of respondent’s wife’s Workers’ Compensation claim until April 2007, when she took a day off from work to attend her case hearing. However, the Commissioner finds that – while the Board may well have delegated administration of Workers’ Compensation matters to a third-party insurer and it may well be true that the Superintendent and Board Secretary/Business Administrator did not have personal knowledge of respondents’ wife’s claim until alerted to it by chance<sup>11</sup> – just as respondent had a responsibility to address his status vis-à-vis qualification for board membership in light of law he must be presumed to know, so, too, did the Board have a responsibility to assess that status in light of its imputed knowledge of claims filed against it, particularly by its own employees based on circumstances arising directly out of their employment and reported to building administrators (see Exhibit P-A/R-E). *NCP Litigation Trust v. KPMG LLP*, 187 N.J. 353, 366 (2006) (A principal is deemed to know facts that are known to its agent; notice of a fact that an agent knows or has reason to know is imputed to the principal if knowledge of that fact is material to the agent's duties to the principal; because the principal cannot avoid responsibility through ignorance, imputation also

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<sup>11</sup> Although respondent disputes the Board’s contention in this regard, it is lent credence by the Board’s silence until the referenced event and the alacrity with which it acted thereafter.

"encourages a principal to develop effective procedures for the transmission of material facts, while discouraging practices that isolate the principal or co-agents from facts known to an agent.) See also *Tullo, supra*.

In light of the above, then, the Commissioner concludes that the matter now before her could and should have been raised prior to respondent's seating as a Board member, but was not owing to omissions attributable, respectively, to respondent and the Board alike. Because both parties are equally culpable, and because the record clearly demonstrates the action each would have taken had the issue of respondent's qualification been timely considered by either – the Board refusing to seat respondent and respondent moving promptly to eliminate the alleged conflict – the Commissioner finds that the interests of justice, as well as those of the Barnegat Township electorate, would best be served by deeming *both* the Board's petition and respondent's curing of his disqualifying interest to be actions taken *nunc pro tunc*, as if they had occurred when they should have, between the time of respondent's election and his seating on the Board.

Consequently, the Commissioner rejects the ALJ's conclusion that that respondent must be removed as a Board member and the resulting vacancy filled by the Ocean County Superintendent of Schools pursuant to *N.J.S.A. 18A:12-15*. Instead, the Board is hereby found to be correct in its *nunc pro tunc* assertion that respondent had, at the time of his election, an inconsistent interest preventing him from being lawfully seated on the Board, so that he could not take the oath of office and assume his duties unless the conflict was cured; however, due to the prompt withdrawal with prejudice of his wife's Workers' Compensation employee claim petition, respondent is concomitantly found to have eliminated – by exercising *nunc pro tunc* the choice he should have been

compelled to make upon his election – any impediment to his lawful assumption of Board membership. Accordingly, the deficiency in respondent’s seating may now be cured by re-administration of his oath of office pursuant to *N.J.S.A. 18A:12-2.1*, thereby validating – on a retroactive basis – both his seating on May 1, 2006 and his subsequent Board service.

Turning to the last issue remaining in this matter, the Commissioner concurs with the ALJ that respondent is entitled to indemnification for the costs of defending against the Board’s action herein – subject, as would be any adjudicated entitlement to board indemnification, to the Board’s subsequent right to challenge, as a new cause of action, the accuracy, validity or reasonableness of actual costs submitted in accordance with *N.J.S.A. 18A:12-20*. In this regard, the Commissioner declines respondent’s request for a prospective ruling additionally directing the Board to indemnify him against any ensuing challenge of his submitted defense costs, since such request in the present context effectively constitutes a prayer for declaratory ruling seeking consequential relief based on underlying facts which are future, contingent and disputed, contrary to the clear provisions of *N.J.A.C. 6A:3-2.1(a)1*. Instead, the Commissioner holds that any question of indemnification, beyond respondent’s basic entitlement to it, is appropriately addressed – should the dispute respondent anticipates, in fact, arise – in the attendant contested case proceeding, based on the specific legal argument and factual record developed therein.

Accordingly, the recommended Order/Initial Decision of the OAL is adopted in part and rejected in part, as set forth above. Pursuant to the Commissioner’s determination herein, the Barnegat Township Board of Education is directed forthwith to

re-administer respondent's oath of office, *nunc pro tunc*, and to indemnify him for the costs of defending this action consistent with *N.J.S.A. 18A:12-20*.

IT IS SO ORDERED.<sup>12</sup>

COMMISSIONER OF EDUCATION

Date of Decision: July 30, 2007

Date of Mailing: July 30, 2007

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<sup>12</sup> This decision 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.*