STATE OF NEW JERSEY COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ARBITRATION OF THE TENURE CHARGE	::	DOE DOCKET NO. 255-9/15
between	::	
SCHOOL DISTRICT OF THE TOWNSHIP OF LAKEWOOD,	::	
Petitioner,	::	**OPINION**
-and-	::	**AND**
HELEN TOBIA,	::	**AWARD**
Respondent	::	

BEFORE: MICHAEL J. PECKLERS, ESQ., ARBITRATOR

DATE(S) OF HEARING: November 23, 2015; December 1, 2015; December 14, 2015; December 15, 2015

RECORD CLOSED: January 22, 2016 (Post-hearing briefs)

DATE OF AWARD: February 4, 2016

APPEARANCES:

For the Petitioner:

Marc H. Zitomer, Esq., SCHENCK, PRICE, SMITH & KING, LLP
Joseph Roselle, Esq, "
David Shatter, Lakewood State Monitor [November 23, 2015]
Elchanan Freund, Former Lakewood School Psychologist/Case Manager [November 23, 2015 via subpoena]
Joanne Butler, Esq., SCHENCK, PRICE, SMITH & KING, LLP [November 23, 2015]
Thad Thompson, Lakewood State Monitor [December 1, 2015]
Chana Zentman, School Social Worker/Case Manager [December 1, 2015]
Jennifer Kaznowski, Esq., School Social Worker "
Alison L. Kenny, Esq., SCHENCK, PRICE, SMITH & KING, LLP [December 1, 2015]

Katherine Gilfillan, Esq., SCHENCK, PRICE, SMITH & KING, LLP
[December 1, 2015]
Adina Weisz, Supervisor Related Services/I.D.E.A. Coordinator
[December 14, 2015]
Michael Azzara, Lakewood State Monitor [December 14, 2015]
Gila Nussbaum, LDTC [December 14, 2015 via subpoena]

For the Respondent:

Wayne J. Oppito, Esq., NJPSA
Helen Tobia, Supervisor of Social Studies, Fine Arts, Pupil Personnel Services

I. BACKGROUND CONSIDERATIONS

Helen Tobia is a tenured employee of the School District of the Township of Lakewood, New Jersey, currently serving as the Supervisor of Social Studies, Fine Arts, Pupil Personnel Services since on or about October 2012. On August 7, 2015, the District's State-Appointed Monitor Michael Azzara filed tenure charges against Ms. Tobia, charging her with unbecoming conduct, inefficiency, and other just cause warranting dismissal, pursuant to N.J.S.A. 18A:17-2 and 6-10, et seq. On or about August 26, 2015, a response to the charges was submitted to the Board by Ms. Tobia's counsel. The Lakewood Board of Education thereafter certified the tenure charges to the Commissioner of Education at its August 26, 2015 Meeting by a majority vote of the full membership, and additionally resolved to suspend Ms. Tobia without pay in accordance with N.J.S.A. 18A:6-14. See, CERTIFICATE OF DETERMINATION executed by Asst. Bus. Admin./Board Secretary Kevin Campbell.

These were received by the DOE on September 11, 2015, which acknowledged receipt of the certified tenure charges in a letter to the parties. Respondent Tobia through Counsel Oppito filed an ANSWER to the charges on September 23, 2015, which was received by the DOE Bureau of Controversies and Disputes on September 24, 2015. On October 5, 2015, M. Kathleen Duncan, Director Bureau of Controversies and Disputes advised the parties that:

> following receipt of the respondent's answer on September 24, 2015, the above captioned tenure charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of respondent's defenses and any motions which may be filed with the arbitrator. The arbitrator shall review those charges which are not dismissed as the result of a motion under the preponderance of the evidence standard.

That same date I was advised of my appointment as Arbitrator pursuant to *P.L. 2012, c. 26* by Ms. Duncan under separate cover. On October 13, 2015, a conference call was conducted with counsel, with a discovery schedule that included the propounding of interrogatories memorialized in my correspondence of that same date. Initial hearing dates were also set down. On October 23, 2015, Respondent Tobia filed a motion to disqualify Marc Zitomer, Esq. as counsel of record and/or disqualify other attorneys with the firm of SCHENCK, PRICE, et al. from testifying at hearing. On November 2, 2015, Mr. Zitomer submitted a letter brief in opposition to the motion, with supporting case citation. On November 12, 2015, I issued an ORDER denying Respondent's application. See, Joint Exhibit 5. The positions of the parties on the motion coupled with my findings included the following:

Respondent Helen Tobia

RPC 3.7(a) provides in pertinent part: "[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (3) disqualification of the lawyer would work substantial hardship on the client." Assuming arguendo that Mr. Zitomer may demonstrate that there would be substantial hardship to the Lakewood Board of Education by withdrawing at this time in the proceeding (the burden of proof is on Mr. Zitomer) then all attorneys connected to Schenck, Price are disqualified as witnesses.

Although RPC 3.7(b) provides that a lawyer may act as advocate in a trial with another lawyer in the firm likely to be called as a witness, unless precluded by RPC 1.7 or RPC 1.9, RPC 1.7 is the general conflict of interest rule. RPC 1.7(b) reads that a lawyer shall not represent a client which may materially limit the lawyer's responsibility to a third person. Helen Tobia was the Board of Education's employee, representative and/or agent in special education matters in which Schenck, Price represented the Board of Education's interest, but had attorney-client privileged discussions with Ms. Tobia during the conduct of the proceedings and prepared documents for Ms. Tobia to sign on behalf of the Board. In subparagraph (2) it specifically reads that a client may consent to the representation after full disclosure, "except that a public entity cannot consent to any such representation." Of note, paragraph (c) provides that this rule shall not alter ethics opinions.

Essentially, Schenck, Price represented the Board of Education in special education matters in which Ms. Tobia was the Board's employee, representative and/or agent. Attorneys for Schenck, Price discussed privileged attorney-client information with Ms. Tobia and prepared legal documents for Ms. Tobia's signature. There is a clear conflict of interest in having attorneys of Schenck, Price who had privileged discussions with Ms. Tobia testify to those discussions. Ethics Opinion 233 supports why the disqualification of attorneys at Schenck, Price as litigators and witnesses is required. The opinion speaks for itself and is entered in whole in support of this Motion, with the following emphasis:

> [i]f a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in

> the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and a witness are inconsistent, the function of an advocate is to advance or argue the case of another, while that of a witness is to state facts objectively.

In conclusion, if Mr. Zitomer opines that there is a hardship to the Lakewood Board of Education in his withdrawing from representation in this matter, it is respectfully requested that the Arbitrator disqualify all attorneys of Schenck, Price to be witnesses. Additionally, Respondent reserves the right to forward to the Attorney General's office to quash any subpoena served upon the mediators and/or employees of the New Jersey Department of Education and/or the Office of Administrative Law.

Petitioner School District City of The Township of Lakewood

The New Jersey Supreme Court has recognized that 'only in extraordinary cases should a client's right to counsel of his or her choice outweigh the need to maintain the highest standards of the profession.' Dewey v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 220 (1988). In that same case the Supreme Court observed, 'disqualification motions are often made for tactical reasons, but that, 'even when made in the best of faith, such motions inevitably cause delay in the underlying proceedings.' Id., at 219 (citing Evans v. Artek Systems Corp. 715 F.2d 788, 792 (2d Cir. 1983) (quoting Board of Education v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979).

Disqualifications cannot be premised on mere "doubt about the propriety of the representation." Realco Services, Inc. v. Holt, 479 F. Supp. 867, 872 n.4 (E.D. Pa. 1979). Courts recognize that a motion such as this is part of the gamesmanship of litigation and may be brought by a party seeking a tactical advantage. As a result, such motions require close judicial scrutiny in order to "prevent unjust results." In re A & T Paramus Co., Inc., 253 B.R. 606, 613 (D.N.J.) 1999); see also, Smith v. Whatcott, 757 F.2d 1098, 1099-1100 (10th Cir. 1985); J.P. Foley & Co. Inc. v. Vanderbilt, 523 F.2d 1357, 1360 (2d Cir. 1975) (Gurfein, J., concurring); Kalmanovitz v. G. Heileman Brewing Co., 610 F. Supp, 1319, 1323 (D. Del. 1985). For the reasons that follow, there is absolutely no legal basis for disqualifying this firm in this tenure proceeding.

A. Disqualification is Not Required under Subpart (a).

The undersigned will serve as the lead counsel in this matter and will prosecute the charges on behalf of the Board of Education. The undersigned is not a witness to the charges in this case, did not supply an affidavit and was not listed as a witness in the disclosures provided to opposing counsel, pursuant to N.J.S.A.18A:6-17.1(b)(3). Respondent has not even alleged in her motion that the undersigned "is likely to be a necessary witness." Indeed, even if Respondent had claimed that the undersigned will be a witness, the Court in J.G. Ries & Sons, Inc. v. Spectraserv, Inc., 384 N.J. Super. 216, 894 A.2d 681, 2006 N.J. Super. LEXIS 91 (App. Div. 2006), held that Defendant's mere representation, in support of its disqualification motion, that plaintiff's counsel would be called as a witness did not satisfy the threshold requirements of RPC 3.7 which specifies there must be a *likelihood* that a lawyer will be a necessary witness.

Moreover, the Court emphasized that the subject matter of the attorney's testimony could be provided through a lay witness' testimony. See, State v. Tanksley, 245 N.J. Super. 390, 393-94 (App. Div. 1991) (holding that testimony of trial attorney who had been present when his client made a statement to police was unnecessary because defendant had not alleged that the statement was false or argued that it was inadmissible); see also, Host Marriott Corp. v. Fast Food Operators, Inc., 891 F. Supp. 1002, 1010 (D.N.J. 1995) (holding that the record before the Court was insufficient for it to hold that the testimony of defendant's attorney would be "necessary" in the case). Simply put, there is no evidence at this point to suggest the undersigned will be a witness in this case.

It is for this reason that Respondent's reliance on *Opinion 233* is entirely misplaced. *Opinion 233* apparently involves a predecessor to RPC 3.7 which is different in many respects from RPC 3.7. Moreover, in that case, the Advisory Committee recommended that both law firms withdraw because the lawyers who were actually representing their clients in the proceeding were also likely to be witnesses. For the reasons previously discussed, that is not the case here. Therefore, disqualification of the undersigned in this case is neither required, nor appropriate.

Even if the Arbitrator were to somehow conclude that the undersigned will likely be a witness, disqualification would be improper under subpart (3) which addresses substantial hardship

on the client. At this juncture, we are approximately two (2) weeks away from trial and under a statutory mandate to start the hearing within forty-five (45) days from the date the matter was assigned to the Arbitrator, or by no later than November 18, 2015. N.J.S.A. 18A:6-17.1(b)(1). For the Board to have to secure a new counsel at this late juncture would be highly prejudicial to the Board of Education and a virtual impossibility, particularly given the specialty required in the area of employee tenure and school law. See, ABA Model Rules of Professional Conduct Rule 3.7 Comment (2000) (recognizing that in considering whether an attorney should be disqualified "due regard must be given to the effect of disqualification.") Thus, due to the extreme hardship which would flow to the Board, Respondent's motion should be denied.

A. Disqualification is Not Required under Subpart (b).

In this case, several lawyers from the undersigned's firm will be called as a witness which is permitted under subpart (b) unless there is a conflict of interest under RPC 1.7. RPC 1.9 (Duties to former clients) is not applicable to this matter. Respondent makes the blanket statement that there is a conflict in attorneys of Schenck, Price, Smith & King testifying about discussions they had with Respondent. However, Respondent fails to articulate what responsibilities counsel owes to Respondent under RPC 1.7 (a) (2) which would materially limit its responsibilities to the Board. The reason is simple — this firm owes no responsibility to Respondent. Moreover, the RPC 1.7 (a) (2) speaks to a "significant risk" that the lawyer's representation will be limited by responsibilities to a third person. Here, even assuming *arguendo* that there is such a risk, which is vehemently denied, the risk is certainly not "significant."

Finally, Ms. Tobia is not this firm's client, nor does Respondent claim that she is a client of the firm. Rather, this firm represents the Board of Education. Indeed, RPC 1.13 which deals with organizational clients provides that "a lawyer employed to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents." Even assuming arguendo that Respondent was a member of the organization's litigation control group, the fact remains that the privilege belongs to the Board, not to Respondent. For all the foregoing reasons, Respondent's disqualification motion must be denied.

STATEMENT OF THE CASE

At the outset of this discussion and as argued by Petitioner, notice is taken of the New Jersey Supreme Court's recognition that 'only in extraordinary cases should a client's right to counsel of his or her choosing outweigh the need to maintain the highest standards of the profession.' See, Dewy v. R.J. Reynolds Tobacco Co., 109 N.J. 201, 220 (1988). The Court went on to opine that "disqualification motions are often made for tactical reasons, but that 'even when made in the best of faith, such motions inevitably cause delay' in the underlying proceedings." Consequently, such motions require close judicial scrutiny to protect against unjust results. See, In re A & T Paramus Co., Inc., 253 B.R. 606, 613 (D.N.J. 1999); see also, Smith v. Whatcott, 757 F.2d 1098, 1099-1100 (10th Cir. 1985); J.P. Foley & Co., Inc. v. Vanderbuilt, 523 F.2d 1357, 1360 (2d Cir. 1975); Kalmanovitz v. G. Heilman Brewing Co., 610 F. Supp. 1319, 1323 (D.Del. 1985).

Parenthetically, as the TEACHNJ statute is in its relative infancy, arbitrators are well-advised to proceed cautiously when faced with such disqualification motions that operate as matters of first impression in this forum. And while guidance from our ALJ forebears is frequently provided and instructive in these tenure cases, Respondent has failed to provide any such citation in support of her application. Instead, my focus is initially directed to RPC 3.7(a), which provides in material part that '[a] lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless: (1) the testimony relates to an uncontested issue; (2) the testimony relates to the nature and value of legal services rendered in the case; or (3) disqualification of the lawyer would work substantial hardship on the client.'

As the moving party, Respondent assumes the burden of proving its entitlement to the desired relief and clearly has not done so concerning the disqualification of Mr. Zitomer as trial counsel. Instead, there is not currently a scintilla of evidence that he will likely be called as a witness, and as properly argued by Petitioner: Mr. Zitomer does not appear on any witness list provided pursuant to N.J.S.A. 18A:6-17.1(b)(3); he did not file an affidavit in support of the subject tenure charges. Even in the event that such a contingency should arise during the multiple hearings in this case that will be necessary, my review of the numerous emails recently provided by Petitioner pursuant to a discovery request convinces me that the subject matter of the testimony could be alternatively

provided by a lay witness. See, State v. Tanksley, 245 N.J. Super. 390, 393-94 (App. Div. 1991).

However, even assuming *arguendo* that Respondent had demonstrated that there was a likelihood of Mr. Zitomer being called as a witness, Petitioner has established to my satisfaction that his disqualification would work a substantial hardship on the Board of Education. In that regard, the initial hearing is scheduled for November 18, 2015 and there is a statutory mandate that it be completed within forty-five (45) days of the referral to arbitration. The field of school law *vis-à-vis* tenure hearings and particularly special education law is also highly specialized. Accordingly, based upon the foregoing considerations, Respondent's motion with respect to the disqualification of Mr. Zitomer is **DISMISSED WITH PREJUDICE**.

Counsel for Respondent has essentially conceded this result in his brief, but nevertheless insists that the other Schenck, Price lawyers must be disqualified as witnesses based upon RPC 3.7(b). This indicates that '[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 (Conflicts of Interest) or RPC 1.9 (Duties to Former Clients).' On that count, Respondent contends that Helen Tobia was the Board of Education's employee, representative and/or agent for special education matters in which Schenck, Price represented the Board of Education's interest, but had attorney-client privileged discussions with her during the conduct of the proceedings. It is also alleged that the firm prepared documents for Respondent to sign on behalf of the Board.

There are several concerns which militate against the acceptance of this argument at this juncture of the case, and render *Advisory Opinion 233* upon which Respondent relies inapposite. No evidence has been brought forward that the other attorneys who will be testifying have a conflict of interest under RPC 1.7. Rather, I share the view of the Petitioner that Respondent has failed to articulate what responsibilities the law firm owes per RPC 1.7(a)(2) that would materially limit its responsibilities to the Board. As to RPC 1.9, Ms. Tobia is not and has never been a client of Schenck, Price and no argument has been made in that regard. The first prong of the *substantial relationship test* under RPC 1.9(a)(1) has therefore not been satisfied. See generally, Host Marriott Corp. v. Fast Food Operators, 891 F. Supp. 1002, 1010 (D.N.J. 1995).

Furthermore, and as Petitioner has argued, evening assuming

> *arguendo* that Respondent was a member of the litigation control group, any privilege belongs to the Board and not to Ms. Tobia. That said, N.J.S.A. 18A:6-17.1c. requires that '[t]he Arbitrator shall determine the case under the American Arbitration Association rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.' There is no statutory or regulatory prohibition against the firm's attorneys testifying, so the AAA rules control. Rule 27 provides *inter alia*, that '[t]he arbitrator shall determine the admissibility, the relevance, and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant and conformity to legal rules of evidence shall not be necessary...'
>
> Accordingly, because it is not clear at this time what testimony the other attorneys for the firm will be offering, Respondent reserves the right to renew her objection to the same at hearing. That should be accomplished by a request for an Executive Session with opposing counsel and I. Following a proffer as to what the testimony will consist of, counsel for Respondent will articulate his objection. A short recess will be taken with a bench ruling then read into the record. Therefore, Respondent's motion for a blanket disqualification of all Schenck, Price attorneys who will testify at hearing is **DISMISSED WITHOUT PREJUDICE** at this time. IT IS SO ORDERED. [*Emphasis added in originals*].

Hearings in the case were thereafter convened at the Lakewood Board of Education, 200 Ramsey Avenue, Lakewood Township, New Jersey, on November 23, 2015; December 1, 2015; December 14, 2015; & December 15, 2015. At that time, counsel were afforded a full opportunity to introduce relevant and admissible documentary evidence; to engage in oral argument; and to undertake the direct and cross-examination of sequestered witnesses who testified under oath, some pursuant to a subpoena as previously indicated. A verbatim transcription of the proceedings was provided by TAYLOR & FRIEDBERG, LLC. Notice is taken that pursuant to my prior ruling on the motion,

Respondent preserved a standing objection to the testimony of all associates and partners of the firm of SCHENCK, PRICE, SMITH & KING, LLC. Post-hearing briefs were undertaken in lieu of closing argument, which following receipt of the transcripts were returnable January 22, 2016. By virtue of the briefing schedule and at my request, on December 23, 2015, Ms. Duncan graciously granted an extension for the issuance of this AWARD until February 5, 2016, which is therefore timely submitted.

II. FRAMING OF THE ISSUE

Has the Board satisfied the tenure charges by a preponderance of the credible evidence? If not, what shall the remedy be?

III. STATUTORY & REGULATORY FRAMEWORK

NEW JERSEY STATUTES ANNOTATED TITLE 18A

18A:6-10 Dismissal and reduction in compensation of persons under tenure in public school system. No person shall be dismissed or reduced in compensation,

(a) If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state or

(b) If he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner, except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or

members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.

* * *

18A:6-16 Proceedings before commissioner; written response; determination

* * *

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section 22 of P.L. 2012 Ch. 26 (C.18A:6-17.1) for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

* * *

18A:6-17.1 Panel of arbitrators

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L. 2012, c. 26 (C.18A:6-117 et al.):

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely, including, but not limited to,

documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S. 2A:24-7 through N.J.S. 2A:24-10.

f. Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.

g. An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval of the commissioner. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

* * *

18A:6-17.2 Consideration for arbitrator in rendering decision. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law; or other conduct prohibited by State or federal law;

(4) the district's actions were arbitrary and capricious.

(b) In the event that the employee is able to demonstrate that any of the provisions of paragraph (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

(c) The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

(d) The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

(e) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a decision within 45 days of the start of the hearing.

* * *

18A:46-14. Enumeration of facilities and programs. The facilities and programs of education required under this chapter shall be provided by one or more of the following:

a. A special class or classes in the district, including a class or classes in hospitals, convalescent homes, or other institutions;

b. A special class in the public schools of another district in this State or any other state of the United States.

c. Joint facilities including a class or classes in hospitals, convalescent homes or other institutions to be provided by agreement between one or more school districts;

d. A joint commission program;

e. A State of New Jersey operated program;

f. Instruction at school supplementary to the other programs in the school, whenever, in the judgment of the board of education with the consent of the commissioner, the handicapped pupil will be best served thereby;

g. Sending children capable of benefiting from a day school instructional program to privately operated day classes, in New Jersey or, with the approval of the commissioner to meet particular circumstances, in any other state in the United States, the services of which are nonsectarian whenever in the judgment of the board of education with the consent of the commissioner it is impractical to provide services pursuant to subsection a., b., c., d., e. or f. otherwise;

h. Individual instruction at home or in school whenever in the judgment of the board of education with the consent of the commissioner it is impractical to provide a suitable special education program for a child pursuant to subsection a., b., c., d., e., f. or g. otherwise.

Whenever a child study team determines that a suitable special education program for a child cannot be provided pursuant to subsection a., b., c., d., e., f., g. or h. of this section, and that the most appropriate placement for that child is in an academic program in an accredited nonpublic school within the State or, to meet particular circumstances, in any other state in the United States, the services of which are nonsectarian, and which is not specifically approved for the education of handicapped pupils, that child may be placed in that academic program by the board of education, with the consent of the commissioner, or by order of a court of competent jurisdiction. An academic program which meets the requirements of the child's Individual Education Plan as determined by the child study team, and which provides the child with a thorough and efficient education, shall be considered an approved placement for the purposes of chapter 46 of this Title, and the board of education shall be entitled to receive State aid for that child as provided pursuant to P.L.1996, c.138 (C.18A:7F-1 et al.), and all other pertinent statutes.

* * *

NEW JERSEY ADMINISTRATIVE CODE, TITLE 6A EDUCATION

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SUBCHAPTER 1. GENERAL PROVISIONS

* * *

6A:3-1.5 Filing and service of answer

* * *

(g) Nothing in this section precludes the filing of a motion to dismiss in lieu of an answer to a petition, provided that such motion is filed within the time allotted for the filing of an answer. Briefing on such motions shall be in the manner and within the time fixed by the Commissioner, or by the ALJ if the motion is to be briefed following transmittal to the OAL.

* * *

6A:3-5.1 Filing of written charges and certificate of determination

* * *

(c) If the tenure charges are charges of inefficiency pursuant to N.J.S.A. 18A:6-17.3, except in the case of building principals and vice principals in school districts under full State intervention, where procedures are governed by the provisions of N.J.S.A. 18A:7A-45 and such rules as may be promulgated to implement it, the following timelines and procedures shall be observed:

* * *

5. Upon receipt of the charge, the Commissioner or his designee shall examine the charge. The charge shall be served upon the employee at the same time it is forwarded to the Commissioner and proof of service shall be included with the filed charge. The individual against whom the charge is filed shall have 10 days to submit to the Commissioner a written response to the charge.

* * *

6A:3-5.3 Filing and service of answer to written charges

(a) Except as specified in N.J.A.C. 6A:3-5.1(c)(5), an individual against whom tenure charges are certified shall have 15 days from the date such charges are filed with the Commissioner to file a written response to the charges. Except as to time for filing, the answer shall conform to the requirements of N.J.A.C. 6A:3-1.5(a) through (d).

1. Consistent with N.J.A.C. 6A:3-1.5(g), nothing in this subsection precludes the filing of a motion to dismiss in lieu of an answer to the charges, provided the motion is filed within the time frame allotted for the filing of an answer. Briefing on the motions shall be in the manner and within the time fixed by the Commissioner, or by the arbitrator if the motion is to be briefed following transmittal to an arbitrator.

6A:3-5.5 Determination of sufficiency and transmittal for hearing

(a) Except as specified in N.J.A.C. 6A:3-5.1 (c) within 10 days of receipt of the charged party's answer or expiration of the time for its filing, the Commissioner shall determine whether such charge(s) are sufficient, if true, to warrant dismissal or reduction in salary. Where the charges are determined insufficient, they shall be dismissed and the parties shall be notified accordingly. If the charges are determined sufficient, the matter shall be transmitted immediately to an arbitrator for further proceedings, unless the Commissioner retains the matter pursuant to N.J.A.C. 6A:3-1.12.

* * *

CHAPTER 2. PROCEDURAL SAFEGUARDS

6A:14-2.3 Parental Consent, notice, participation, and meetings

* * *

(k) Meetings to determine eligibility and develop an IEP shall, if feasible, be combined as long as the requirements for notice of a meeting according to (g) 7ii above and (k) 3 through 5 below are met.

1. Any eligibility meeting for students classified according to N.J.A.C. 6A:14-3.5(c) shall include the following participants:

i. The parent;
ii. A teacher who is knowledgeable about the student's educational performance, a teacher who is knowledgeable about the district's programs;
iii. The student, where appropriate;
iv. At least one child study team member who participated in the evaluation;
v. The case manager;
vi. Other appropriate individuals at the discretion of the parent or school district; and
vii. For an initial eligibility meeting, certified school personnel referring the student as potentially having a disability, or the school principal or designee if they choose to participate.

* * *

6A:14-3.3 Location, referral and identification

(a) Each district board of education shall develop written procedures for

students age three through 21, including students attending nonpublic schools located within the school district regardless of where they reside, who reside within the local school district with respect to the location and referral of students who may have a disability due to physical, sensory, emotional, communication, cognitive or social difficulties.

* * *

6A:14-3.5 Determination of eligibility for special education and related services

(a) When an initial evaluation is completed for a student age three through 21, a meeting according to N.J.A.C. 6A:14-2.3(k) shall be convened to determine whether the student is eligible for special education and related services. A copy of the evaluation report(s) and documentation and information that will be used for a determination of eligibility shall be given to the parent not less than 1 calendar day prior to the meeting. If eligible, the student shall be assigned the classification "eligible for special education and related services." Eligibility shall be determined collaboratively by the participants described in N.J.A.C. 6A:14-2.3(k)1.

* * *

6A:14-4.2 Placement in the least restrictive environment

(a) Students with disabilities shall be educated in the least restrictive environment. Each district board of education shall ensure that:

1. To the maximum extent appropriate, a student with a disability is educated with children who are not disabled;

2. Special classes, separate schooling or other removal of a student with a disability from the student's general education class occurs only when the nature or severity of the educational disability is such that education in the student's general education class with the use of appropriate supplementary aids and services cannot be achieved satisfactorily.

3. A full continuum of alternative placements according to N.J.A.C. 6A:14-4.3 is available to meet the needs of students with disabilities for special education and related services;

4. Placement of a student with a disability is determined at least annually and, for a student in a separate setting, activities necessary to transition the student to a less restrictive placement are considered at least annually;

5. Placement is based on his or her individualized education program;

6. Placement is provided in appropriate educational settings as close to home as possible;

7. When the IEP does not provide specific restrictions, the student is educated in the school he or she would attend if not a student with a disability;

8. Consideration is given to:

i. Whether the student can be educated satisfactorily in a regular classroom with supplementary aids and services;

ii. A comparison of the benefits provided in a regular class and the benefits provided in a special education class;

iii. The potentially beneficial or harmful effects which a placement may have on the student with disabilities or the other students in the class;

9. A student with a disability is not removed from the age-appropriate general education classroom solely based on needed modifications to the general education curriculum;

10. Placement in a program option is based on the individual needs of the student; and

11. When determining the restrictiveness of a particular program option, such determinations are based solely on the amount of time a student with disabilities is educated outside of the general education setting.

b. Each district board of education shall provide nonacademic and extracurricular services and activities in the manner necessary to afford students with disabilities an equal opportunity for participation in those services and activities.

1. In providing or arranging for the provision of nonacademic and extracurricular services and activities, each district board of education shall ensure that each student with a disability participates with nondisabled children in those services and activities to the maximum extent appropriate.

* * *

6A:14-6.5 Placement in accredited nonpublic schools which are not specifically approved for the education of students with disabilities

(a) According to N.J.S.A. 18A:46-14, school age students with disabilities may be placed in accredited nonpublic schools which are not specifically approved for the education of students with disabilities with the consent of the Commissioner of Education, by an order of a court of competent jurisdiction, or by order of an administrative law judge as a result of a due process hearing. Preschool age students with disabilities may be placed by the district board of education in early childhood programs operated by agencies other than a district board of education according [to] N.J.A.C. 6A:14-4.3(d) or by an administrative law judge as a result of a due process hearing.

(b) The Commissioner's consent shall be based upon certification by the district board of education that the following requirements have been met:

1. The nonpublic school is accredited. Accreditation means the on-going, on-site evaluation of a nonpublic school by a governmental or independent educational accreditation agency which is based upon written evaluation criteria that addresses educational programs and services, school facilities and school staff.

2. A suitable special education program pursuant to N.J.S.A. 18A:46-14a through h cannot be provided to this student;

3. The most appropriate placement for this student is this nonpublic school.

4. The program to be provided shall meet the requirements of the student's individualized education program;

5. The student shall receive a program that meets all the requirements of a thorough and efficient education as defined in N.J.S.A. 18A:7A-5c through g. These requirements shall be met except as the content of the program is modified by the IEP based on the educational needs of the student. Statewide assessment and graduation requirements shall apply. Participation in statewide assessment and/or exemptions from graduation requirements shall be recorded in the student's IEP according to N.J.A.C. 6A:14-3.7c7 and 9.

i. All personnel providing either special education programs according to N.J.A.C. 6A:14-4.4 through 4.7 or related services according to N.J.A.C. 6A:14-3.9 shall hold the appropriate educational certificate and license, if one is required, for the position in which they function.

ii. All personnel providing regular educational programs shall either hold the appropriate certificate for the position in which they function or shall meet the personnel qualification standards of a recognized accrediting authority.

iii. All substitute teachers and aides providing special education and related

services shall be employed according to applicable rules at N.J.A.C. 6A:9B-6.5, N.J.A.C. 6A:32-4.7 and this chapter.

6. The student shall receive a comparable program to that required to be provided by the local district board of education according to N.J.S.A. 18A:35-1, 2, 3, 5, 7 and 8, 18A:40A-1, 18A:6-2 and 3, N.J.A.C. 6A:8-3.1, and N.J.A.C. 6A:14-1 through 4. These requirements shall be met except as the content of the program is modified by the IEP based on the educational needs of the student. Exemptions shall be recorded in the student's IEP according to N.J.A.C. 6A:14-3.7(e)7 and 9;

7. The nonpublic school provides services which are nonsectarian;

8. The nonpublic school complies with all relevant State and Federal antidiscrimination statutes;

9. Written notice has been provided to the student's parent regarding this placement which has included a statement that:

i. The nonpublic school is not an approved private school for students with disabilities and that the local school district assumes the ongoing monitoring responsibilities for the student's program;

ii. No suitable special education program could be provided to this student pursuant to N.J.S.A. 18A:46-14; and

iii. This is the most appropriate placement available to this student;

10. The placement is not contested by the parents; and

11. The nonpublic school has been provided copies of N.J.A.C. 6A:14, 1:6A and 6A:32.

* * *

IV. APPLICABLE BOARD POLICIES

1510 RIGHTS OF PERSONS WITH HANDICAPS OR DISABILITIES/ POLICY ON NON-DISCRIMINATION [Joint Ex. 2, Tab. 16]

It is the policy of the Board of Education that no qualified handicapped or disabled person shall, on the basis of handicap or disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in

employment or under any program, activity or vocational opportunities sponsored by this Board. The Board shall comply with §504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act of 1990. It shall also comply with the Individuals with Disabilities Education Act through the implementation of Policy No. 2460 and Regulations Nos. 2460 through 2460.14.

* * *

Educational Program Accessibility

No qualified handicapped/disabled person shall be denied the benefit of, be excluded from participation in, or otherwise be subjected to discrimination in any activity offered by this district.

The Board has an affirmative obligation to evaluate a pupil who is suspected of having a handicap/disability to determine the pupil's need for special education and related services. The Board directs that all reasonable efforts be made to identify unserved children with handicaps/disabilities in this district who are eligible for special education and/or related services in accordance with Policy No. 2460 and Regulations Nos. 2460 through 2460.14, the Individuals with Disabilities Education Act, §504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990.

Section 504 of the Rehabilitation Act requires the Board to address the needs of children who are considered handicapped/disabled under §504 and do not qualify for services under the Individuals with Disabilities Education Act. A pupil may be handicapped/disabled within the meaning of §504, and therefore entitled to regular or special education and related aids and services under the §504 regulation, even though the pupil may not be eligible for special education and related services under Part B of the Individuals with Disabilities Education Act.

No pupil will be denied, because of his/her educational handicap/disability, participation in co-curricular, intramural, or interscholastic activities or any of the services offered or recognitions rendered regularly to the pupils of this district.

There will be grievance procedures for persons alleging discriminatory acts by the Board and/or staff. The due process rights of pupils with handicaps/disabilities and their parents will be rigorously enforced.

* * *

2460 SPECIAL EDUCATION [Id. at Tab 17]

The Lakewood Board of Education assures compliance with Part B of the Individuals with Disabilities Education Act (IDEA) and the New Jersey

Administrative Code 6A:14-1 et seq. Furthermore, the Board will have programs and procedures in effect to ensure the following:

1. All pupils with disabilities, who are in need of special education and related services, including pupils with disabilities attending nonpublic schools, regardless of the severity of their disabilities, are located, identified, and evaluated according to N.J.A.C. 6A:14-3.3.

2. Homeless pupils are located, identified, and evaluated according to N.J.A.C. 6A:14-3.3, and are provided special education and related services in accordance with the IDEA, including the appointment of a surrogate parent for unaccompanied homeless youths as defined in 42 U.S.C. §§11431 et seq.

3. Pupils with disabilities are evaluated according to N.J.A.C. 6A:14-2.5 and 3.4.

4. An Individualized Education Program (IEP) is developed, reviewed and as appropriate, revised according to N.J.A.C. 6A:14-3.6 and 3.7.

5. To the maximum extent appropriate, pupils with disabilities are educated in the least restrictive environment according to N.J.A.C. 6A:14-4.2

6. Pupils with disabilities are included in State-wide and district-wide assessment programs with appropriate accommodations, where necessary according to N.J.A.C. 6A:14-4.10. All pupils with disabilities will participate in State-wide assessments or the applicable Alternative Proficiency Assessment in grades three, four, five, six, seven, eight, and eleven in accordance with their assigned grade level.

7. Pupils with disabilities are afforded procedural safeguards required by N.J.A.C. 6A:14-2.1 et seq., including appointment of a surrogate parent, when appropriate.

8. A free appropriate public education is available to all pupils with disabilities between the ages of three and twenty-one, including pupils with disabilities who have been suspended or expelled from school:

* * *

9. Children with disabilities participating in early intervention programs assisted under IDEA Part C who will participate in preschool programs under N.J.A.C. 6A:14 will experience a smooth transition and have an IEP developed and implemented according to N.J.A.C. 6A:14-3.3(e) and N.J.A.C. 6A:14-3.7

10. Full educational opportunity to all pupils with disabilities is provided.

11. The compilation, maintenance, access to, and confidentiality of pupil records are in compliance with N.J.A.C. 6A:32-7.

12. Provision is made for the participation of pupils with disabilities who are placed by their parent(s) in nonpublic schools according to N.J.A.C. 6A:14-6.1 and 6.2

13. Pupils with disabilities who are placed in private schools by the district Board are provided special education and related services at no cost to their parent(s) according to N.J.A.C. 6A:14-1.1(d) and N.J.A.C. 6A:14-7.5(b)3.

14. All personnel serving pupils with disabilities are highly qualified and appropriately certified and licensed, where a license is required, in accordance with State and Federal law.

15. The in-service training needs for professional and paraprofessional staff who provide special education, general education or related services are identified, and that appropriate in-service training is provided. The district Board shall maintain information to demonstrate its efforts to:

* * *

16. Instructional material will be provided to blind or print-disabled pupils in a timely manner.

17. For pupils with disabilities who are potentially eligible to receive services from the Division of Developmental Disabilities in the Department of Human Services the district will provide, pursuant to the Uniform Application Act, N.J.S.A. 30:4-25.10 et seq. the necessary materials to the parent(s) to apply for such services.

18. The school district will not accept the use of electronic mail from the parent(s) to submit requests to a school official

regarding referral, identification, evaluation, classification, and the provision of a free, appropriate public education.

19. The school district will provide teacher aides and the appropriate general or special education teaching staff time for consultation on a regular basis as specified in each pupil's IEP.

The school District shall provide an Assurance Statement to the County Office of Education that the Board of Education has adopted the required special education policies and procedures/regulations and the district is complying with the mandated policies and procedures/regulations.

2460.1 SPECIAL EDUCATION – LOCATION, IDENTIFICATION, AND REFERRAL [Id. at Tab 19]

All pupils with disabilities, who are in need of special education and related services, including pupils with disabilities attending nonpublic schools, and highly mobile pupils such as migrant workers' children and homeless pupils regardless of the severity of their disabilities, are located, identified and evaluated according to N.J.A.C. 6A:14-3.3.

* * *

2460.8 SPECIAL EDUCATION – FREE AND APPROPRIATE PUBLIC EDUCATION [Id. at Tab 20]

A free and appropriate public education is available to all pupils with disabilities between the ages of three and twenty-one including pupils with disabilities who have been suspended or expelled from school.

* * *

Procedures Regarding the provision of a Free, Appropriate Public Education to Pupils with Disabilities Who Are Advancing From Grade to Grade:

The Director of Pupil Personnel Services through in-service training shall ensure pupils with disabilities who are advancing from grade to grade with the support of specialty designed services, continue to be eligible when as part of a reevaluation, the IEP Team determines the pupil continues to require specially designed services to progress in the general education curriculum and the use of functional assessment information supports the IEP Team's determination.

* * *

3281 INAPPROPRIATE STAFF CONDUCT [Id. at Tab 21]

The Board of Education recognizes its responsibility to protect the health, safety and welfare of all pupils within the school district. Furthermore, the Board recognizes there exists a professional responsibility for all school staff to protect a pupil's health, safety and welfare. The Board strongly believes that school staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district.

In support of the Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.

The Board recognizes and appreciates the staff-pupil professional relationship that exists in a school district's educational environment. This Policy has been developed and adopted by this Board to provide guidance and direction to avoid actual and/or the appearance of inappropriate staff conduct and conduct unbecoming a school staff member toward pupils.

School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language toward or with pupils. School staff shall not engage or seek to be in the presence of a pupil beyond the staff member's professional responsibilities. School staff shall not provide transportation to a pupil in their private vehicle or permit a pupil into their private vehicle unless there is an emergency or a special circumstance that has been approved in advance by the Building Principal/immediate supervisor and the parent/legal guardian.

Inappropriate conduct by a staff member outside of their professional responsibilities may be considered conduct unbecoming a staff member. Therefore, school staff members are advised to be concerned with such conduct which may include, but is not limited to, communications and/or publications using emails, text-messaging, social network sites, or any other medium that is directed and/or available to pupils or for public display.

A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of

Education, an arbitration process, and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member.

* * *

SEPTEMBER 20, 2006 MEMORANDUM FROM W.T. ANDERSEN, ASSISTANT SUPERINTENDENT FOR CURRICULUM TO MS. TOBIA RE: PROFESSIONAL RESPONSIBILITIES [Id. at Tab 22]

Thank you for meeting with Yvette Cucuro and me on September 18, 2006 to clarify your responsibilities as Supervisor of Pupil Personnel Services and Yvette Cucuro's responsibilities as Supervisor of Special Education. I appreciated your thoughtful comments, concerns and suggestions.

Below is a list of your responsibilities:

- Coordinates, assigns, supervises, and evaluates all Child Study Team members;
- Works with Child Study Team members to create their individual Professional Improvement Plans;
- Ensures that Child Study Team members (e.g. school social workers, psychologists, and learning disabilities teacher consultants are informed of the requirements and regulations for disability identification;
- Coordinates instructional services provided to identified students with disabilities with the Supervisors of Special Education and Related Services;
- Supervises the eligibility determination of all students referred for special education;
- Supervises and coordinates IEP procedures to ensure that student evaluations are up-to-date, accurate, and thorough and that teachers have copies of their students' IEPs to facilitate appropriate services and instruction;
- Works with building administrators, the Supervisor of Special Education, the Supervisor of Related Services and Child Study Team members to assure appropriate services for identified students;

- Plans professional development activities and in-service training for members of the Child Study Team on topics related to pupil personnel services, such as legal requirements concerning pupil records and information and improving the quality of report writing.

- Oversees, in conjunction with the Assistant Superintendent of Curriculum and Instruction, the Supervisor of Special Education, Assistant Superintendent for Human Resources, and building administrators that teacher and paraprofessional assignments throughout the district maintain compliance with state program standards;

- Directs the TIENET-IEP pupil information data system program in support of educational services, in accordance with governmental laws and regulations for the school district;

- Attends county meetings related to pupil personnel services and shares information with principals, supervisors and members of the Child Study Team;

- Completes all required state and federal reports accurately and on time;

- Prepares for state monitoring visits by asking questions of appropriate state overseers before monitoring visits to assure that all materials and support documents are complete, accurate and ready for inspection;

- Maintains compliance with federal and state special education regulations;

- Ensures that transition of classified students from elementary to middle school and from middle school to high school are put in place by CST members before the new school year begins;

- Works with CST members to help special education students and their parents cope with transitions from one school to another;

- Develops and maintains compliance programs to meet legal requirements concerning students' rights to privacy and due process of law in accordance with applicable laws and regulations;

- Directs and coordinates activities of the CST secretarial staff engaged in compiling, maintaining, and releasing pupil records and information;

- Confers with staff and reviews records management system to recommend changes to improve system;

- Prepares budgets, reports, and plans for special education programs and keeps accurate records on pupil accounting and expenditures of funds;

- Informs the Director of Transportation of the transportation needs for the students with disabilities during the regular school year and summer sessions;

- Coordinates with the Supervisor of Nurses health services provided for classified students;

- Interviews candidates for positions on the Child Study Team;

- Performs related duties as assigned by the Assistant Superintendent of Curriculum and Instruction in accordance with the school/system policies and practices.

I thank you for your concern and cooperation.

V. CONTENTIONS OF THE PARTIES

Petitioner Lakewood Township Board of Education

In the case presently before the Arbitrator, the Lakewood Board of Education ("Board" or "District") has proven far beyond a preponderance of the evidence that Respondent, Helen Tobia ("Ms. Tobia" or "Respondent"), a tenured supervisor employed by the Board, has committed numerous acts of unbecoming conduct or other just cause sufficient to warrant her dismissal from her position. Testimony and voluminous documentary evidence introduced at the hearing

proved that during the course of her employment with the Board, Ms. Tobia engaged in a pattern of inappropriate behavior in violation of District policies, procedure and the general standard of behavior to which certificated staff members are expected to adhere. More importantly, many of her actions were in violation of State law and regulation and had a deleterious effect on the District and its students.

In fact, Ms. Tobia's false swearing, under oath, in an affidavit submitted to the Court in a matter directly involving the District, as well as her improper and highly inappropriate directives to her staff regarding special education eligibility determinations, student placements and the use of Section 504 Plans, evidence a clear inability to carry out her duties as a supervisor or act as a role model for the District's students and the community. This is even more evident when one considers that Ms. Tobia's actions cavalierly and negatively affected the education provided to the very students who most require assistance – special education students, and resulted in increased costs to the District and its taxpayers, as well as a negative finding from the New Jersey Department of Education. Consequently, Ms. Tobia's actions mandate her dismissal.

For example, in or about July of 2013, the parents of student M.W. filed a petition for due process and request for emergent relief, seeking to have the student remain at the Special Children's Center ("SCC"), an out-of-District placement. Ms. Tobia submitted an affidavit in opposition to the petition, signed under oath, regarding the SCC's education program. Therein, she indicated that

there were religious symbols and icons present in the school. The ALJ later referenced Ms. Tobia's affidavit when issuing her decision granting the parents' application.

However, the SCC is not, and has never been, a religious institution. Moreover, as the Supervisor of Pupil Personnel Services, Ms. Tobia was fully familiar with the SCC and knew that it was not a religious school. Furthermore, when giving sworn testimony in an unrelated special education matter, Ms. Tobia admitted that her affidavit in the M.W. matter was false and agreed that the SCC was a nonsectarian placement. She also admitted that she had never seen any religious symbols on the walls in the SCC and that she could not attest that the M.W. affidavit was true.

Based on well-settled case law, Ms. Tobia's decision to lie under oath, in and of itself, requires her dismissal, particularly since her false affidavit was related not only to her duties as a District employee but to specific matters involving the education of a District special education student. However, Ms. Tobia also engaged in deplorable and inappropriate behavior when she improperly and illegally directed the District's Child Study Team ("CST") to find certain students eligible or ineligible, as the case may be, for special education related services, and to discontinue the use of Section 504 plans in the District.

Although she was not a member of the CST, she also directed CST members to place students in yeshivas, including giving case managers the

exact wording for insertion into said students' Individualized Education Plans ("IEPs"), despite the fact that the Department of Education had not approved such placements. Due, in part, to Ms. Tobia's actions, a complaint was filed against the District with the Office of Special Education Programs ("OSEP"). OSEP substantiated the complaint and specifically referenced Ms. Tobia's improper conduct in its findings.

As a result of its investigation, OSEP placed the District on a corrective action plan ("CAP"), and ordered that a number of students placed in yeshivas and other unapproved, unaccredited placements be reevaluated and educated in lawful, approved placements. Nevertheless, despite OSEP's findings, Ms. Tobia continued to direct staff to place students in unapproved placements and entered into so-called "parent agreements," by which the District would reimburse parents for monies paid for tuition to private schools, in an apparent effort to subvert the legal requirements for such placements. Finally, in June of 2015, Ms. Tobia refused to sign a certification in support of the District's petition for due process to block a parent's request for certain independent evaluations. Because Ms. Tobia did not sign the certification or even contact Board counsel to discuss same, counsel was unable to file the Petition and consequently, the District became legally required to provide the evaluations at its own expense.

Simply put, Ms. Tobia's actions, particularly given the extent of her admittedly improper conduct when lying under oath, her failure and outright refusal to follow applicable law and regulations governing the provision of an

appropriate education to special needs students and her directives to staff regarding certain students' eligibility or ineligibility for special education, among other similar wrongdoing, demonstrate that she is patently unfit to perform the functions of a certificated supervisor in the District. Certainly, Ms. Tobia's conduct is clear evidence of her blatant disregard for the law as well as her own duties, District policies and procedures, and evidence a lack of integrity in her position. It is also noteworthy that at no point did Ms. Tobia take any responsibility for her actions, but rather, blames everyone from other staff members to the former Board attorneys for her misconduct.

Accordingly, the Board has sustained its burden of proving that Ms. Tobia has committed conduct unbecoming a teaching staff member. Furthermore, her conduct is of such an egregious nature that it is more than sufficient to warrant her dismissal from her position in the District.

PROPOSED FINDINGS OF FACTS

The following facts were gleaned through witness testimony and documentary evidence presented at the hearing, as well as from Respondent's admissions and responses as set forth in her Answer to the Charges and Answers to Interrogatories (Exhibits J-1, J-2, J-3, B-1-B7).

Ms. Tobia is a tenured employee of the Lakewood Board of Education, currently serving as the District's supervisor of Pupil Personnel Services ("PPS"). Ms. Tobia began employment in the District in or about January of 1995,

becoming tenured as a District teacher approximately three (3) years later in January of 1998. Throughout her employment she has served in a number of positions, having most recently been assigned to her current position in or about July of 2013, where she has served since that time.

A. Facts in Support of Tenure Charge One (False Swearing/Lying under Oath)

In or about July of 2013, the parents of student M.W. filed a Petition for Due Process and Emergent Relief against the Board, in which they sought placement of M.W. at the SCC, in accordance with the student's IEP. Exhibit J-2, Tab 1. Ms. Joanne L. Butler, Esq., partner at the law firm Schenck, Price, Smith & King, LLP, the newly appointed Board counsel, then contacted Ms. Tobia and discussed the case for approximately thirty-five (35) minutes. Exhibit J-2, ¶7; Exhibit B-1; T. Joanne Butler ("JLB"), 33:18-19. At that time, Ms. Butler was wholly unaware of the SCC in general or whether it was a religious institution. T.JLB, 36:21-25.

During their conversation, Ms. Tobia informed Ms. Butler that the SCC was an unapproved and unaccredited school, that the New Jersey Department of Education had verbally informed the District that students could not be placed at the SCC, and that the SCC had very few, if any, certified teachers. T.34:21-25. Ms. Tobia also informed Ms. Butler that "there were religious symbols, icons, around the building, and there was writing in Hebrew on the building." T.34:25-35:5. Ms. Butler's contemporaneous notes memorializing her conversation with

Ms. Tobia confirm that Ms. Tobia informed Ms. Butler that the SCC was religious in nature. Exhibit B-1.

Based upon Ms. Tobia's information, Ms. Butler then prepared a draft affidavit of facts for Ms. Tobia's signature, which was to be submitted to the Office of Administrative Law in support of the District's opposition to M.W.'s emergent relief application. Exhibit J-2, Tab 1, ¶9. The affidavit reflected Ms. Tobia's statements to Ms. Butler regarding the SCC, including that Ms. Tobia had visited the SCC and was aware of the school's staffing levels, and that there were "religious symbols and icons present in and around the building." Exhibit J-2, Tab 1, ¶10-11.

Ms. Tobia reviewed the affidavit on numerous occasions and went so far as to make multiple edits to the statements contained therein before signing the affidavit. However, at no time did Ms. Tobia modify paragraph 32 of the affidavit, which stated that the "SCC has religious symbols and icons present in and around the building." Exhibit J-2, Tab 1, Exhibits A and B. On July 12, 2013, Ms. Tobia signed the final version of the affidavit which contained paragraph 32 in its entirety, and informed Ms. Butler that it was "accurate and signed." Exhibit J-2, Tab 1, ¶16 and Exhibit C; T.JLB, 43:17-20. The affidavit was submitted to Administrative Law Judge Patricia M. Kerins, who relied upon the information contained therein when rendering her decision on the matter. In fact, Judge Kerins noted in her decision that the Board had raised the issue of whether SCC was sectarian, in an apparent reference to Ms. Tobia's affidavit. Exhibit J-2, Tab

1, Exhibit D at page 8.

At the hearing, Ms. Butler testified that Ms. Tobia told her that she had personally seen religious icons and symbols at the SCC. T.JLB, 37:4-9. Ms. Butler further testified that she believed it was important to include that information in the affidavit because it supported a possible defense to the Petition on behalf of the Board, since the District is prohibited from educating a student in an unapproved, unaccredited or religious institution. T.JLB, 35:6-21, 37:5-9. Ms. Butler also stated that Ms. Tobia never told her that any part of paragraph 32 of the affidavit, regarding the presence of religious symbols and icons at SCC, was incorrect or needed revision prior to its submission to the Court. T.JLB, 46:15-19, 51:15-19.

Nearly two (2) years later, in March of 2015, Ms. Tobia provided testimony in a matter captioned C.F. and L.F. o/b/o L.F. v. Lakewood Board of Education, OAL Dkt. No. EDS 13665-14, before the Hon. John Schuster, ALJ. Exhibit J-2, Tab 5. When asked during her testimony about the affidavit she submitted in the M.W. case, Ms. Tobia admitted that the SCC was not a religious institution. Exhibit J-2, Tab 5 at 275. Ms. Tobia also admitted that she had "no idea" why there was a reference to religious icons and symbols in her prior affidavit. Id.

According to Ms. Tobia, she had "never seen any of those symbols on the walls in [the SCC]," despite having "been there several times." Id. She also testified that she "had to have missed" paragraph 32 in her original affidavit in the

M.W. matter. Id. at 277. When asked how she could have signed the M.W. affidavit and attest that it was true, Ms. Tobia simply replied, "I don't know." Id. Even after reviewing Judge Kerins' decision in the M.W. matter, Ms. Tobia made no attempt to correct the record or inform anyone that her affidavit was false. Id. at 282. Ms. Tobia also admitted during her testimony in the C.F. matter that the affidavit was "not accurate." Id. at 281.

At the hearing in this matter, Ms. Tobia alleged that the statement in her M.W. affidavit regarding the presence of religious icons and symbols at the SCC, as set forth in paragraph 32, was one that "Miss Butler and I devised and put together for the affidavit." However, she stated that she did not stand by statement set forth therein and that "anyone in the District knows there was no religious connotation with SCC. There never has been". T. Helen Tobia ("HT"), 72:24-25, 76:13-16, 25-74:2. On cross-examination, Ms. Tobia further admitted that she made revisions to the affidavit on multiple occasions but did not seek to change the wording of paragraph 32. T.HT, 75:10-77:18. Ms. Tobia also testified that she was "well aware" of the contents of her affidavit, including paragraph 32, when she signed it in July of 2013. T.HT, 79:11-12.

B. Facts in Support of Tenure Charge Two (Predetermination of Eligibility for Student D.D.)

In or about May of 2013, Ms. Chana Zentman, a school social worker/case manager employed by the District, was assigned by Ms. Tobia to serve as case manager for student D.D. Exhibit J-2, Tab 12; T. Chana Zentman ("CZ"), 7:6-17.

Ms. Tobia directed Ms. Zentman to hold an eligibility meeting for the student, during which Ms. Zentman and the rest of the CST assigned to D.D. was to review the results of D.D.'s evaluations and determine whether the student was eligible for special education or related services. T.CZ, 9:16-25. According to Ms. Zentman, such a determination must be made collaboratively by the CST, rather than by a single individual. T.CZ, 11:4-10.

Prior to the eligibility meeting taking place, and despite the fact that Ms. Tobia was not even a member of the CST, much less assigned to D.D.'s team specifically, Ms. Tobia copied Ms. Zentman on an email, dated May 29, 2013, and stated that "[Ms. Zentman] is to schedule an eligibility meeting. **The student is not eligible**." Exhibit J-2, Tab 12 [*Emphasis supplied*]. Upon receiving the email, Ms. Zentman became concerned that the student had been determined to be ineligible for special education when she had not yet reviewed the results of his evaluations. T.CZ, 14:2-4.

In the afternoon on May 29, 2013, Ms. Zentman followed up with Ms. Tobia via email, in which Ms. Zentman indicated that she had concerns with regard to Ms. Tobia's predetermination of D.D.'s eligibility. Exhibit J-2, Tab 13. Ms. Tobia replied to Ms. Zentman, again stating that "The student is not eligible and based on the assessments will not be eligible for special ed and related services." Id.

D.D.'s eligibility meeting took place on June 17, 2013, after which the

student was found ineligible for special education services. Exhibit B-2, T.CZ,19:14-20:5. The student's eligibility conference report was dated June 14, 2013, which further indicated that the student's eligibility status was predetermined. Exhibit B-3.

At the hearing, Ms. Zentman testified that it was not within Ms. Tobia's purview to make such a determination regarding a student's eligibility or ineligibility for special education. T.CZ, 16:8-10. Ms. Zentman also testified that both before and after the eligibility meeting was held, she continued to express her concerns to Ms. Tobia regarding her directive to predetermine the student's ineligibility, particularly since Ms. Zentman had reviewed the student's evaluations, which, in her view, were sufficient to support the classification of the student for special education purposes. T.CZ, 16:8-17:14.

In fact, on June 6, 2013, Ms. Zentman emailed Ms. Tobia to discuss the results of D.D.'s evaluations. Exhibit B-6. Therein, Ms. Zentman informed Ms. Tobia that the evaluating doctor stated that "the student is appropriate to receive all supporting educational services possible . . . possible classification and other health impaired, emotionally disturbed would be appropriate for [the student]." Id. Ms. Zentman again expressed her concerns to Ms. Tobia regarding the student's classification status, noting that "this seems to be a strong implication to classify which concerns me if we're going to be determining ineligible." Id. Ms. Tobia continued to insist to Ms. Zentman that the student was not eligible for special education. T.CZ, 21:15-22:8.

Ms. Zentman also brought her concerns regarding Ms. Tobia's directive to find the student ineligible to Elchanan Freund, then-Supervisor of the Child Study Team. According to Mr. Freund, Ms. Zentman felt "trapped" by Ms. Tobia's directive and that the District may have been "inhibiting [D.D's] ability to receive the appropriate services," by finding him ineligible even though Ms. Zentman's review of his evaluations supported a determination that he was eligible for special education. T. Elchanan Freund ("EF"), 20:16-24. Mr. Freund also testified that he and Ms. Zentman had a telephone conference with Ms. Tobia, who again repeated her directive that "this child is not eligible." T.EF, 21:18-23. According to Mr. Freund, at the conclusion of that conversation, Ms. Zentman "had no choice but to find [D.D.] ineligible." T.EF, 22:16-25.

Ms. Zentman also testified she was so troubled that D.D.'s ineligibility had been predetermined by Ms. Tobia that she informed her union of Ms. Tobia's actions. T.CZ, 21:13-14, 22:12-3:17. Because the directive to find D.D. ineligible for special education had come from Ms. Tobia, who was Ms. Zentman's direct supervisor, the union advised Ms Zentman to follow the directive so as not to be found insubordinate. T.CZ, 22:19-23:15. Consequently, Ms. Zentman and the other members of the CST found D.D. ineligible because "we were given a directive that the student's not eligible . . . by Ms. Tobia." T.CZ, 20:15-18. After the student was determined to be ineligible, the student's parents filed a petition for due process against the District. T.CZ, 23:18-20.

Ms. Tobia later testified on behalf of the Board in the due process hearing

for D.D. During her testimony in that proceeding, she admitted that D.D.'s eligibility conference report was dated prior to the date on which the eligibility meeting actually took place, and that the student's ineligibility was pre-determined. Exhibit J-2, Tab 8 at 149. In fact, when asked by D.D.'s counsel whether "you predetermined ineligibility, correct?" Ms. Tobia replied "yes." Id. at 248.

In January of 2014, six (6) months after the student's June, 2013 eligibility meeting in which he was found to be ineligible, D.D. was ultimately found eligible for special education services. T.CZ, 24:22-25. The student was classified as "multiply disabled," and placed in an out-of-District program. T.CZ, 25:1-11.

C. Facts in Support of Tenure Charges Three and Four (Placement of Various Students, Including Y.T., in Unapproved, Unaccredited Schools and/or Yeshivas/OSEP Investigation)

Beginning in the spring of 2013, the District began to receive a significant number of records requests relating to students who had been placed in private, unaccredited and/or religious schools from a local attorney, Michael Inzelbuch. T.EF, 24:1-25:5. These records requests sought a number of students' entire student file, and oftentimes were a precursor to litigation. Id. At the time the records requests were received, Ms. Tobia had complete oversight over District litigation matters involving special education students. T.EF, 11-21; Exhibit J-2, Tab 4, Affidavit of Elchanan Freund at ¶5-7.

At the time the records requests were received, Mr. Freund attended a

meeting with Ms. Tobia and Laura Winters, District Superintendent, to discuss the handling of the requests and the possibility that litigation might result. T.EF, 26:2-11. At that meeting, Ms. Tobia directed Mr. Freund to hold IEP meetings for each student and to "offer these parents whatever they wanted." T.EF, 26:13-19. Ms. Tobia went on to say that if the parent sought to place their student in an unaccredited, unapproved school, the placement could be done through the student's IEP, despite the fact that such placements were illegal. T.EF, 26:20-27:8, Exhibit J-2, Tab 4 at ¶¶5 and 10.

Mr. Freund then met with each Child Study Team member to inform them that per Ms. Tobia's directive, they were to write IEPs for each student and place the students "wherever the parents wanted to send the children." T.EF, 28:20-25. In addition, during the summer and/or fall of 2013, Ms. Tobia also personally met with case managers and directed them to place students in yeshivas through the use of IEPs. T.EF, 31:13-24. At the hearing, Mr. Freund testified that such placements were improper and that the New Jersey Administrative Code does not allow students to be placed in unaccredited, unapproved schools or religious yeshivas. T.EF, 29:19-31:9.

In or about September of 2013, Ms. Tobia requested that Katherine A. Gilfillan, Esq., an attorney at SPSK, review approximately seventy (70) tuition contracts for special education students who had been placed in out of District placements at Ms. Tobia's request. T. ("KAG"), 7:10-25; Exhibit J-2, Tab 2, Affidavit of KAG at ¶3. Upon her review of the contracts, Ms. Gilfillan had a

number of concerns, including that the contracts were being utilized to place children in either unaccredited, unapproved or religious placements. T.KAG, 8:10-17; Exhibit J-2, Tab 2, ¶4. However, pursuant to New Jersey law and regulation, such placements were impermissible without specific approval from the New Jersey Department of Education. Id. Accordingly, Ms. Gilfillan informed Ms. Tobia, via correspondence dated September 25, 2013, that the contracts governing the placement of students in yeshivas could not be approved. Id., Exhibit 1 to KAG Affidavit at page 3. Specifically, Ms. Gilfillan advised Ms. Tobia that without State approval, the Board "would not legally be able to enter into those agreements." T.KAG, 9:20-23.

At the hearing, Ms. Gilfillan testified that she had numerous conversations with Ms. Tobia regarding the placements of students in yeshivas and the fact that such placements were illegal. T.KAG, 10:12-11:14. Ms. Gilfillan further testified that Ms. Tobia responded that "she wanted to avoid litigation with Michael Inzelbuch at all cost. She wanted to give the parents what they wanted. That would include putting these students at private religious placements." T.KAG, 11:20-25. Nevertheless, Ms. Tobia failed to heed Ms. Gilfillan's advice and took no steps to discourage the placement of students in yeshivas. T.KAG, 13:1-5; Exhibit J-2 at Tab 2, ¶6-7.

Thereafter, in or about January of 2014, a complaint investigation regarding the District's practice of placing students in yeshivas was filed by Mr. Inzelbuch with the New Jersey Department of Education, Office of Special

Education Programs ("OSEP"). In the complaint, Mr. Inzelbuch raised an issue regarding the District's actions to place student Y.T. in Yeshiva Tiferes Torah ("YTT"), an unapproved, unaccredited yeshiva, for the 2013-2014 school year. Exhibit J-2, Tab 14.

During the 2012-2013 school year, Y.T., a then-six-year-old student classified as eligible for special education, attended the School for Children with Hidden Intelligence ("SCHI") via an IEP issued by the District. SCHI was an approved, accredited school for the disabled. T. Gila Nussbaum ("GN"), 8:22-9:2. In or about January of 2013, the student's case manager, Gila Nussbaum, began the process of reevaluating the student for the upcoming 2013-2014 school year. T.GN, 10:9-22. The student's father informed her that he wanted Y.T. to attend YTT as a public school student through an IEP, so that the student would receive an aide and other additional related services that he would not receive if he enrolled in YTT as a private school student subject to a service plan. T.GN, 11:7-18, 8:14-17. The student's father also told Ms. Nussbaum that he had spoken to Ms. Tobia and they had already reached an agreement to place Y.T. in YTT as a public school student for the 2013-2014 school year. T.GN, 14:2-7. Ms. Nussbaum and the CST then arranged for Y.T. to attend YTT pursuant to an IEP. T.GN, 14:22-15:4.

Ms. Nussbaum also sent a letter to the student's parents, dated April 8, 2013, which stated that the student was to attend YTT "full time as a public school student, as per the director of Pupil Personnel Services." T.GN, 20:10-14;

Exhibit B-4. According to Ms. Nussbaum, "Ms. Tobia did give me a directive that [Y.T.] was to be placed at YTT as a public school student, and that's why I did go ahead and include that in the IEP." T.GN, 20:20-22. Ms. Nussbaum also testified that she never completed a Naples application for Y.T.'s placement and did not receive State approval to place the student there. T.GN, 21:1-11. On April 6, 2013, Ms. Tobia emailed Ms. Nussbaum and informed her again that Y.T. was to be a public school student while attending YTT, and that the District would enter into a parent agreement with Y.T.'s parents, by which the parents would be reimbursed for costs related to Y.T.'s education, rather than the school itself. Exhibit R-1.

In or about March of 2014, OSEP substantiated the complaint and placed the District on a Corrective Action Plan ("CAP"). Exhibit J-2 at Tab 14. In its initial report, OSEP found that that Ms. Tobia had "issued a directive to the IEP team that the team should write an IEP placing the student at [YTT]," an unapproved, unaccredited yeshiva. Exhibit J-2, Tab 14 at ¶7. OSEP further found that the District had failed to follow procedures to place the student in an unapproved placement. Exhibit J-2, Tab 2 at ¶8. The CAP required the District to submit a list of all students who were being educated in unapproved placements, along with supporting documentation evidencing the approval of any of the placements by either the State or an Administrative Law Judge. Id. at ¶10; Exhibit J-2, Tabs 14 and 15.

Ms. Gilfillan responded to the initial CAP on behalf of the District. T.KAG,

15:4-11, Exhibit J-2, Tab 2, ¶10. Ms. Gilfillan also requested that Ms. Tobia provide her with any approval forms for the placements. Id. While Ms. Tobia initially provided some documentation to Ms. Gilfillan, she was unable to provide any evidence to support the approval of the out-of-district placements. Id. at ¶11, T.KAG, 15:16-16:5.

In or about August of 2014, OSEP issued a supplemental CAP which required the District to hold IEP meetings for those students who had been placed in yeshivas or other unapproved, unaccredited schools. T.KAG, 16:25-17:4. OSEP further directed the District to rewrite the students' IEPs to offer an approved placement for them. Id., Exhibit J-2, Tab 2 at ¶12.

However, after the IEP meetings were held, a large number of the parents of the affected students, if not all of them, filed requests for mediation or petitions for due process, seeking to maintain the students' placements in the yeshivas. Exhibit J-2, Tab 2 at ¶13. In defending these actions and the initial CAP, the District incurred "tens of thousands of dollars" in costs, to be paid for by taxpayer funds. T.KAG, 13:9-21. A large number of administrative time and work hours were also required to not only respond to the CAP, but to schedule and hold IEP meetings and staff briefings. T.EF, 45:14-46:7; Exhibit J-2, Tab 4 at ¶12. In addition, the District's State-provided funding for special education programs was placed at risk due to the State's findings. T.KAG, 13:18-21.

D. Facts in Support of Tenure Charges Five and Six (Improper Actions With Regard to Students S.S., Y.S. and M.W.)

In response to OSEP's directive to hold IEP meetings for students who had previously been placed in unapproved yeshivas, the District convened an IEP meeting for student Y.S. on September 15, 2014 T.EF, 50:25-51:3. At the conclusion of the IEP meeting, the CST recommended that the student be removed from the yeshiva and placed in the District's Clifton Avenue Elementary School. T.EF, 51:21-25. Ms. Tobia, along with Mr. Freund, then met with the student's parents and their education advocate, Rabbi Eisemann. T.EF, 52:3-9.

During the meeting, Ms. Tobia advised Rabbi Eisemann and the student's family to file for mediation or due process in order to allow the student to continue in his yeshiva placement under "stay put." T.EF, 53:24-54:5. Mediation is a process by which parents request a meeting with the District, facilitated by a State-employed mediator, in order to discuss a student's education plan or proposed placement and attempt to reach a resolution of the matter prior to filing a formal petition for due process with the Office of Administrative Law. T.EF, 55:10-17. Once mediation is filed, the student must "stay put" in his or her current placement while the mediation process is ongoing. T.KAG, 18:5-11, T.EF, 59:9-14. Mr. Freund testified that Ms. Tobia advised the parents of their option to filing for mediation or due process in order to "get around" the implementation of the proposed placement. T.EF, 54:12-22, 59:9-14.

Thereafter, in or about October of 2014, the student's parents heeded Ms. Tobia's advice and filed a request for mediation for Y.S., as well as a separate request for his brother, S.S. However, the mediation was never held and the

Department of Education closed the files for both students. T.KAG, 17:5-9; T.EF, 55:3-21. Because the mediations were not held, the proposed placements for the students, which included removing them from their yeshivas and educating them in-District, should have gone into effect by operation of law. T.KAG, 18:12-16, T.EF, 56:1-4.

Via email dated November 11, 2014, Ms. Gilfillan informed Ms. Tobia that the mediations were closed. Exhibit J-2, Tab 2 at Exhibit 6. Therein, Ms. Gilfillan also told Ms. Tobia that "stay put no longer applies and these students should be transitioned to their new placement if, in fact, that was what was proposed for them." Id. However, Ms. Tobia disregarded Ms. Gilfillan's advice and took no steps to implement the new placements for either Y.S. or S.S. T.KAG, 20:1-2. Moreover, the District continued to pay all costs associated with the placements of Y.S. and S.S. in their yeshivas, in direct contravention to OSEP's directive and CAP. T. KAG, 20:3-7, T.E.F., 56:15-19.

Similarly, in response to the CAP issued by OSEP, the District convened an IEP meeting in October of 2014 for student M.W. who had, like S.S. and Y.S., been placed in a yeshiva. T.EF, 57:8-15. At the conclusion of the IEP meeting, the CST determined that the student could be educated in the District's Clifton Avenue School. T.EF, 58:2-11. Ms. Tobia and Mr. Freund then attended a meeting with the advocate retained by M.W.'s family, Rabbi Eisemann, to discuss the newly recommended placement. T.EF, 58:21-59:2.

As she did with S.S. and Y.S., during the meeting to discuss M.W.'s placement, Ms. Tobia again advised the family's advocate to file for mediation or due process in order to prolong the student's placement in his yeshiva. T.EF 59:9-14. By doing so, the District would remain legally obligated to pay for the student's attendance in his unapproved, unaccredited private school. Id. M.W.'s family did, in fact, file a request for mediation subsequent to Ms. Tobia's meeting with Rabbi Eisemann. T. Alison L. Kenny, Esq. ("ALK"), 7:14-20.

E. Facts in Support of Tenure Charges Seven and Eight (Improper Actions During Mediation Sessions)

On December 29, 2014, Ms. Kenny, along with Ms. Tobia, represented the Board of Education at scheduled mediation sessions for students M.W. and Y.S. Almost immediately at the start of the mediation, Ms. Tobia informed the parents and the State mediator that the placements proposed by the CST for the students were "completely inappropriate." T.ALK, 8:14-17; Exhibit J-2, Tab 4, Affidavit of Alison L. Kenny, at ¶2-3. Instead, Ms. Tobia, on her own, contrary to OSEP's directives and without CST input, agreed to continue each student in their sectarian placements. T.ALK, 9:11-18; Exhibit J-2, Tab 4 at ¶4.

Ms. Kenny advised Ms. Tobia not to enter into any agreement to that effect, because "there was a corrective action plan issued by the State stating that . . . the District was required to remove all students from sectarian placements." T.ALK, 10:2-6; Exhibit J-2, Tab 4 at ¶4, Tab 2 at ¶17. Specifically, Ms. Kenny testified that the agreements were "against the corrective action plan

and that [she] recommended against signing it." T.ALK, 35:11-13.

Ms. Kenny also testified that the mediator was unable to memorialize Ms. Tobia's agreements with the students' parents in writing because the agreement reached between Ms. Tobia and the students' parents was a continuation of an illegal placement. T.ALK, 11:9-22. Ms. Kenny further stated that she was "quite surprised" that Ms. Tobia expressed a viewpoint contrary to the District's official position, particularly since doing so had the potential to compromise the District's position in future litigation and because Ms. Tobia lacked the individual authority to make such a statement or enter into an agreement to maintain the students' placements in their yeshivas. T.ALK, 8:23-9:4; Exhibit J-2, Tab 4 at ¶4.

Furthermore, Ms. Kenny testified that Ms. Tobia's personal feeling on whether the proposed in-District programs for the student were "of no moment, because it is the IEP team that determines the appropriateness of the student's program and placement." T.ALK, 38:12-21. Nevertheless, Ms. Kenny was unprepared for Ms. Tobia's actions during the mediation, as she testified that prior to the start of the mediation session, she had met with Ms. Tobia in preparation for the meetings and "at no time during that discussion did Ms. Tobia opine that the proposed placement in the IEP was inappropriate." T.ALK, 31:24-32:1.

On January 2, 2015, Ms. Gilfillan emailed Ms. Tobia to again inform her that the agreements regarding Y.S. and M.W. were improper. Exhibit J-2, Tab 2,

Exhibit 7. Therein, Ms. Gilfillan stated that "these agreements could be seen as having circumvented the State's directive that these students be placed in approved and accredited placements." Id. In closing, Ms. Gilfillan unequivocally stated that "the District must find appropriate, approved placements for these students in very short order." With regard to Ms. Tobia's actions at the mediation sessions when announcing her personal disapproval of the in-District placements proposed for the students, Ms. Gilfillan told Ms. Tobia that while she may have had some concerns in that regard, "stating as much in front of the parents ensures that we will be unsuccessful at due process," further memorializing the potentially devastating effect that Ms. Tobia's actions had on the District's position in future litigation. Id.

On or about March 9, 2015, Ms. Gilfillan, along with Ms. Tobia, attended mediation for student S.S. As she did with Y.S. and M.W., Ms. Tobia informed Ms. Gilfillan that the program proposed for S.S. was wholly inappropriate for him, despite not having been a member of S.S.'s CST. T.KAG, 24:3-12. Ms. Gilfillan and Ms. Tobia then spoke with the student's case manager, Shana Shiffrin, who stated that the proposed placement was appropriate, that the student had been accepted into the program. T.KAG, 25:6-17, Exhibit J-2, Tab 2 at ¶20. At the mediation, which was attended by the student's parents and their advocate, Rabbi Eiesmann, it was requested by the parents that the student remain in his yeshiva. T.KAG, 26:6-9. Ms. Gilfillan responded that such a placement was improper and that the District could not legally continue the placement as

requested. T.KAG, 26:16-17. The parents then replied that Ms. Tobia had already agreed to continue the placement for S.S.'s brother, Y.S., and were therefore surprised and angry that the same agreement could not be reached for S.S. T.KAG, 27:4-12.

At that point, the mediator suggested that he, Ms. Tobia and Ms. Gilfillan leave the room so that S.S.'s mother had the opportunity to privately with her advocate. Exhibit J-2, Tab 2 at ¶21; T.KAG, 28:22-25. Ms. Tobia refused to heed the mediator's request. Id. When the mediator requested that Ms. Gilfillan again ask Ms. Tobia to leave the room and to "get control of [her] client, Ms. Tobia responded by shutting the door in Ms. Gilfillan's face. T.KAG, 29:8-13; Tab 2 at ¶22. Ms. Tobia then engaged in a private conversation with S.S.'s parent and Rabbi Eisman for approximately ten (10) minutes before allowing Ms. Gilfillan and the mediator to return to the room. Id. The matter did not settle at the mediation, and is currently pending before the Office of Administrative Law as a due process proceeding. Tab 2 at ¶22.

At the hearing, Ms. Gilfillan testified that it was her belief that during those conversations and mediations, Ms. Tobia provided advice to the parents and their advocate, as evidenced by the manner in which they were comporting themselves as if a decision had already been made. T.KAG, 32:4-12. Ms. Gilfillan memorialized her concerns regarding Ms. Tobia's actions during the mediation session in an email to Michael Azzara, State Monitor, dated March 10, 2015. Exhibit J-2, Tab 2, Exhibit 9.

Six months later, on June 1, 2015 Ms. Kenny emailed Ms. Tobia to inquire about the students' placements and again inform her IEPs must be developed to offer an approved or non-sectarian, accredited school. Exhibit J-2, Tab 2, Exhibit 8. Ms. Kenny further opined that "the District cannot begin the 2015-2016 [school year] with the students in the current sectarian placements." Id. Ms. Tobia replied that as of the date of the email, June 2, 2015, the students remained in their current, sectarian placements. In addition, the Department of Education reached out to Mr. Azzara to express its disapproval that the District was continuing to allow students to remain in the yeshivas instead of placing these students in approved placements as required by the CAP issued by OSEP. T. Michael Azzara ("MA"), 64:22-25.

F. Facts in Support of Tenure Charge Nine (Discontinuance of Section 504 Plans)

Section 504 of the Rehabilitation Act of 1973 requires that eligible students with disabilities receive the necessary accommodations and modifications to their educational program to ensure that these students have access to their education on the same level as their non-disabled peers. T. Adina Weisz ("AW"), 9:14-22. Students eligible for such services are provided with a Section 504 Plan, which sets forth the parameters for the implementation of any accommodations that the student needs. In general, Section 504 Plans are issued to students with physical disabilities. Students with cognitive disabilities, on the other hand, would normally be classified as eligible for special

education. T.AW, 10:6-12.

During the 2012-2013 school year, Ms. Tobia, as part of her duties as Supervisor of Pupil Personnel, oversaw the Section 504 and IEP process. T.AW, 8:13-15. In that capacity, in or about April of 2013, Ms. Tobia issued a directive to all staff to discontinue the use of new Section 504 plans in the District, as she felt that too many students were being provided with Section 504 Plans. T.EF, 60:10-22; T.AW, 9:2-4; T. Jennifer Kaznowski ("JK"), 24:4-7.

Ms. Adina Weisz currently serves as the District's supervisor of Related Services and IDEA Coordinator. As part of her responsibilities, Ms. Weisz implements occupational, physical and speech therapy services pursuant to students' Section 504 Plans. On May 17, 2013, Ms. Weisz emailed Mr. Freund, with a copy to Ms. Tobia, and asked for guidance regarding the implementation of occupational therapy services to a student pursuant to the student's 504 Plan. Exhibit J-2, Tab 9. Ms. Weisz was concerned because although Ms. Tobia had directed staff to discontinue the use of Section 504 Plans, the 504 Plan at issue was already signed by the parties and consequently, the District was legally required to implement the services set forth therein. T.AW, 13:16-24, 28:25-29:4.

One week later, on May 24, 2013, Ms. Weisz again emailed Mr. Freund for guidance and copied Ms. Tobia on that email. Id. Ms. Tobia responded to Ms. Weisz's request and simply informed her to "throw it out," in reference to the student's Section 504 Plan. Id. Although Ms. Weisz did not destroy the Section

504 Plan, she did not implement the services required by the plan, based on Ms. Tobia's email. T.AW, 15:14-15.

In August of 2013, Ms. Weisz emailed Ms. Tobia and asked her to "please advise if we will be servicing students for occupational therapy under a 504 plan for [the 2013-2014 school] year, as there were concerns last year." Exhibit J-2, Tab 9. Via email dated August 26, 2013, Ms. Tobia informed Ms. Weisz that rather than implement Section 504 Plans, the staff was to instead refer all children, regardless of need, to the CST for evaluation to determine whether the students were eligible for special education. Id. When Ms. Weisz again asked Ms. Tobia if she meant that "all new and existing 504 request (sic) should be referred to CST and not provided an evaluation or therapy through a 504," Ms. Tobia replied "yes" in the affirmative. Id.

Ms. Weisz testified at the hearing that she had numerous concerns with Ms. Tobia's directives, in that many students who required Section 504 Plans did not also require special education. T.AW, 17:8-15. Furthermore, on or about November, 20, 2013, a number of staff approached Ms. Gilfillan during a training session, informed Ms. Gilfillan that Ms. Tobia had given a directive not to utilize Section 504 plans and inquired as to whether that directive was legal. T.KAG, 33:16-23, 36:1-4; Exhibit J-2, Tab 2 at ¶¶23-24. Ms. Gilfillan replied that such an action was impermissible, and that "the District has an affirmative obligation to provide students who do not qualify for IDEA with services, including evaluations, through a 504 Plan." T.KAG, 34:1-4.

As a result of Ms. Tobia's directive, there was a substantial drop off in the number of Section 504 plans for students with occupational and physical therapy needs from the 2012-2013 school year, when approximately thirty-six (36) students were serviced pursuant to their individual plans, to the following 2013-2014 school year, when zero students whatsoever were serviced. T.AW, 18:10-18; T.JK, 38:18-34. According to one member of the CST, Jennifer Kaznowski, there was "absolutely" an increase in referrals to the CST due to the elimination of Section 504 Plans in the District. T.JK, 26:9-11.

In addition, Ms. Gilfillan met with Ms. Tobia, Mr. Freund and Ms. Winters after the November 20, 2013 training session and advised that the District was legally prevented from discontinuing 504 Plans. Exhibit J-2, Tab 2 at ¶24. However, Ms. Tobia did not retract her prior directive or issue additional clarification of same. Id. When asked on cross-examination to explain her reasoning for directing Ms. Weisz to throw out a student's Section 504 Plan or to discontinue the use of 504 Plans generally, Ms. Tobia had no answer. T.HT, 109:3-10.

G. Facts in Support of Tenure Charge Ten (Private Agreements for Out-of-District Placements)

Pursuant to the so-called Naples Act, N.J.S.A. 18A:46-14, the District must submit an application for approval to the New Jersey Department of Education prior to placing a student in an accredited, but unapproved, out-of-District school. The student may not legally be placed in the proposed school

absent the Department of Education's approval. Nevertheless, during the 2013-2014 school year, Ms. Tobia instructed District staff to place students in non-approved schools without State approval through the use of independent parent agreements.

For example, at the hearing, school social worker Jennifer Kaznowski testified that she was the case manager for student R.M. during the 2012-2013 school year. At that time, R.M. was a five year old student attending an out-of-District placement at SCHI. T.JK, 7:10-16. In May of 2013, the CST held an eligibility meeting for R.M. and determined that he no longer required an out-of-District placement. T.JK, 8:19-21. The CST instead believed that an in-District, in-class resource program was more appropriate for the student. T.JK, 9:2-7. However, because the student required a climate-controlled environment, the District could not meet the student's needs and Ms. Kaznowski began to inquire whether other public school districts had the capacity to educate the student. T.JK, 10:8-15. In response, the student's mother raised the possibility of the student attending Orchos Chaim, a private, unapproved, unaccredited yeshiva, and informed Ms. Kaznowski that she would prefer that the student attend the yeshiva rather than a public school. T.JK, 10:16-11:3.

Ms. Kaznowski testified that it was her understanding that Ms. Tobia had engaged in private discussions with Rabbi Mandelbaum, Head Rabbi at Orchos Chaim, regarding the placement of the student at the school. Consequently, on May 13, 2013, Ms. Kaznowski emailed Ms. Tobia and sought guidance on

placing the student at the school. Exhibit J-2, Tab 10; T.JK, 11:15-17. Therein, Ms. Kaznowksi informed Ms. Tobia that the District had not received a Naples approval for the placement from the Department of Education. Id. Ms. Tobia responded that an acceptance letter from the school was required before the student could be placed there, but then directed Ms. Kaznowski to "not hold up the meeting. If the Naples process is not completed by the school, we will do a parent agreement to place the student. Parent will be reimbursed on a monthly basis for tuition." Id.

According to Ms. Kaznowski, the process for entering into a parent agreement of this type was for Ms. Tobia to meet with the student's parents and "come up with an agreement that their child can attend Orchos Chaim, and will work it out between the school, the parent and [the District]." T.JK, 15:5-8. Thereafter, on June 6, 2013, Ms. Kaznowski again emailed Ms. Tobia seeking guidance regarding student R.M. and the fact that he was leaving SCHI prior to the 2013-2014 school year. Ms. Tobia replied that "all IEPs must state an approved placement as recommended by the IEP team." Exhibit J-2, Tab 11. However, Ms. Tobia continued to state that "for existing students who were already placed in other programs, the parents will most probably reject placement. At that point I will meet with the parents to reach an agreement." Id.

Ms. Kaznowski testified that the student's mother also informed her that Ms. Tobia met with the parent on August 6, 2013. When asked what the substance of the meeting was, Ms. Kaznowski replied that it was "to do the

parent agreement so that their child can be placed at Orchos Chaim." T.JK, 20:14-15.

During the 2014-2015 school year, Ms. Kaznowski also served as case manager for student R.J. T.JK, 20:18-24. In August of 2015, R.J.'s parents requested that the student be placed in a nonpublic yeshiva. T.JK, 21:7-14. Ms. Kaznowski, along with Ms. Tobia, met with the parents to discuss the request. At the meeting, Ms. Tobia informed the parent of additional documentation which would substantiate a placement at the yeshiva, and that if the documentation was provided, the student would be placed via an IEP at the school. T.JK, 22:13-25. Ultimately, the documentation was provided, and R.J. was placed at the Bais Faiga yeshiva pursuant to an IEP. T.JK, 23:2-19.

In addition, on various occasions, Ms. Tobia met privately with Rabbis and other principals at various yeshivas to discuss whether students could be placed in those schools. At the conclusion of the meetings, Ms. Tobia then directed students' case managers to modify certain IEPs and place the students into the yeshivas, contrary to the CAP issued by OSEP.

On March 23, 2015, Ms. Rosemarie Frazer, former secretary to Ms. Tobia, testified under oath in the "C.F." matter before the Hon. John Schuster, III, ALJ, in the Office of Administrative Law. Ms. Frazer stated that she was present in many of these meetings between Ms. Tobia and the Rabbis, and that agreements were reached to change the students' placements to yeshivas.

Specifically, Ms. Frazer testified as follows:

> Q So even though we may not always see Helen Tobia's signature, it is your testimony, as her executive secretary, that any child that went out of district, the Shared Services, the rationale, the notice of placement, the IEP, the supporting documentation, for sure, was observed and reviewed and put for Helen's review?
>
> A That's correct.
>
> Q And you're certain on that?
>
> A I am certain.
>
> Q Okay. Now we heard testimony that there were certain students who were not recommended for Yeshiva's, like case managers, and then Helen would meet with maybe Yankie Mandelbaum, Rabbi Mandelbaum, you know Rabbi Mandelbaum, yes?
>
> A Yes, I do.
>
> Q And would meet with others and they would have a meeting with Helen and then we heard testimony and we know from parents that magically, almost, the placement, whether it be wherever it was, an approved placement or accredited place was then changed to a Yeshiva; are you aware of that?
>
> A Yes.
>
> Q Ms. Frazer, I'll let you testify without asking -- I asked you if you're aware, and you said "yes," and I appreciate your honesty, as does the court, that there were cases you know of where case managers were directed [by Tobia] to change the placements to Yeshivas, correct?
>
> A Correct.
>
> A For the most part the -- what I recall is that Helen [Tobia] and the Rabbis would be speaking about how they could accommodate the student.

Q Oh, good, okay.

A And –

Q What happened next? The IEP was changed to Yeshiva.

A Yes.

Exhibit J-2, Tab 6.

At the hearing, Ms. Tobia did not refute or address these allegations.

H. Facts in Support of Tenure Charge Eleven (Failure to Sign Certification in Support of Due Process Petition)

In April of 2015, Ms. Kenny was assigned to represent the Board in a special education matter involving student J.Q. T.ALK, 13:14-18. In May of that year, Ms. Kenny received documentation from the parents' attorney purporting to show that a request for pre-classification evaluations of the student was sent to Ms. Tobia's attention on April 15, 2015. T.ALK, 14:1-4.

On June 1, 2015, Ms. Kenny emailed Ms. Tobia to inquire whether she had ever received the request for evaluations. Exhibit J-2, Tab 3 at Exhibit 2. Ms. Tobia replied that she had been out of the office on April 15th, but would inquire with her staff to determine if anyone else had received it. Id. at ¶6. Having received no answer from Ms. Tobia, Ms. Kenny followed-up with her via email on June 9, 2015. Id. at ¶7. It was determined that the parents' request had been sent to an unused facsimile machine and therefore had not been received by the District. Id.

The District decided to file for due process in order to deny the request for evaluations. T.ALK, 16:3-23. The petition for due process must be filed within fifteen (15) days of the date on which the request for those evaluations was received. Id. In support of the petition, and because the original request was purportedly sent directly to Ms. Tobia, Ms. Kenny drafted a certification for Ms. Tobia's signature in order to address the late receipt of the request. Exhibit J-2, Tab 3 at ¶8. According to Ms. Kenny, a certification from Ms. Tobia was "absolutely necessary to explain the discrepancy that the letter from the parents was dated April 15th and we would not be filing [the due process petition] until early June." T.ALK, 19:20-24. The certification was provided to Ms. Tobia for review on June 16, 2015. Exhibit J-2, Tab 3 at Exhibit 2.

Ms. Tobia responded to Ms. Kenny and informed her that she would not certify to the facts in the certification as she was not familiar with the facts relating to the parents' initial request for evaluations. Id. at Exhibit 3, T.ALK, 21:1-5. However, Ms. Kenny simply required Ms. Tobia to certify that she had not received the initial request for evaluations, rather than to any specific facts related to the child's education or potential classification. T.ALK, 21:8-17. Ms. Kenny then forwarded a revised certification to Ms. Tobia which further narrowed the facts to which Ms. Tobia was to certify and focused solely on whether she had received the initial request for evaluations. T.ALK, 21:23-22:9; Exhibit B-7. Ms. Tobia did not otherwise respond to Ms. Kenny's requests for clarification or return a revised certification to her. Exhibit J-2 at Tab 3, ¶9.

Because Ms. Tobia did not reply to Ms. Kenny's requests for clarification, and would not certify that she had not received the request for evaluations, Ms. Kenny was unable to file the petition to deny the evaluations on behalf of the District. T.ALK, 22:23-24. Consequently, the District became legally obligated to provide, at District expense, all of the independent evaluations that had been requested by J.Q.'s parents, notwithstanding the District's initial position that the evaluations need not be offered to the student. T.ALK, 23:1-3; Exhibit J-2 at Tab 3, ¶10 and Exhibit 4. According to Ms. Kenny, such evaluations would typically cost upwards of $5,000.00 to $10,000.00. T.ALK, 23:13-14.

I. Facts in Support of Tenure Charges Twelve, Thirteen, Fourteen, Fifteen, Sixteen and Seventeen (Violation of Board Policies and Procedures)

i. District Job Description

In a September 20, 2006 memorandum to Ms. Tobia from then-Assistant Superintendent W.T. Anderson, Mr. Anderson set forth the expectations of the Board of Education with respect to the job duties of the position of Supervisor of Pupil Personnel Services. Pursuant to the memorandum, the Supervisor of Pupil Personnel Services was expected to, among many other things, satisfy the following minimum requirements:

a) Coordinates, assigns, supervises and evaluates all Child Study Team Members;

b) Ensures that Child Study Team members (e.g., school social workers, psychologists and learning disabilities teacher consultants) are

informed of the requirements and regulations for disability identification.

c) Coordinates instructional services provided to identified students with disabilities with the Supervisors of Special Education and Relates Services;

d) Supervises the eligibility determination of all students referred for special education;

e) Supervises and coordinates IEP procedures to ensure that student evaluations are up-to-date, accurate and thorough, and that teachers have copies of their students' IEPs to facilitate appropriate services and instruction;

f) Works with building administrators, the supervisor of special education, the supervisor of related services and child study team members to ensure appropriate services for identified students;

g) Completes all required state and federal reports accurately and on-time;

h) Maintains compliance with federal and state special education regulations;

i) Works with CST members to help special education students and their parents cope with transitions from one school to another; and

j) Develops and maintains compliance programs to meet legal requirements concerning students' rights to privacy and due process of law in accordance to applicable laws and regulations.

Exhibit J-2, Tab 22.

Ms. Tobia's actions, as set forth above, including her failure to adhere to various laws and regulations, her failure to comply with directives issued by OSEP, her improper directives to CST members and her involvement in, and handling of, student eligibility for special education and Section 504 Plan

implementation, all fall far short of these requirements and did not satisfy the high expectations for a District' supervisor as set forth therein.

ii. Board Policy #1510

Board Policy #1510, "Rights of Persons with Handicaps or Disabilities Policy on Non-Discrimination," provides, in pertinent part, that:

> The Board has an affirmative obligation to evaluate a pupil who is suspected of having a handicap/disability to determine the pupil's need for special education and related services.
> . . .
> Section 504 of the Rehabilitation Act requires the Board to address the needs of children who are considered handicapped/disabled under §504 and do not qualify for services under the Individuals with Disabilities Education Act. A pupil may be handicapped/disabled within the meaning of §504 and therefore entitled to regular or special education and related aids and services under the §504 regulation, even though the pupil may not be eligible for special education and related services under Part B of the Individuals with Disabilities Education Act.
> . . .
>
> The Board shall not interfere, directly or indirectly, with any person's exercise or enjoyment of the rights protected by the §504 of the Rehabilitation Act of 1973, the Americans with Disabilities Act of 19990, the Individuals with Disabilities Education Act or Title IX.
>
> Exhibit J-2, Tab 16.

At the hearing, State Monitor Azzara testified that Ms. Tobia's actions when directing staff not to implement Section 504 Plans for students who required them, predetermining eligibility for certain students and directing staff to

find students not eligible for special education, were in violation of Policy #1510. T.MA, 41:14-43:24. Specifically, Mr. Azzara noted that the policy at issue provided both that certain students may be eligible for Section 504 Plans even if not eligible for special education, and that the Board has an obligation to evaluate any student to determine whether special education services are necessary. Mr. Azzara then stated that by directing that certain students should not receive Section 504 Plans or should not be given special education subject to an IEP, Ms. Tobia violated the policy. T.MA, 43:19-44:17.

Moreover, as set forth at length supra, as well as by testimony provided by District administrators, case managers and the Board's own attorneys and the documents in evidence, Ms. Tobia, by her actions, violated Policy 1510.

iii. Board Policy #2460

Policy #2460, entitled "Special Education, sets forth the responsibilities of the District and its employees with regard to the identification, treatment and education of students eligible for special education. Pursuant to this Policy, the District must ensure that "all pupils with disabilities, who are in need of special education services, including pupils with disabilities attending nonpublic schools, regardless of the severity of their disabilities, are located, identified and evaluated according to N.J.A.C. 6A:14-3.3. Exhibit J-2, Tab 17. In addition, the policy requires that IEPs be "developed, reviewed and revised as appropriate" in accordance with State regulation, and that, to the extent possible, "pupils with

disabilities are educated in the least restrictive environment." Id.

By her actions, Ms. Tobia violated this policy. As set forth supra, at the hearing, the District's case managers, Ms. Kaznowksi, Ms. Nussbaum and Ms. Zentman, each testified that Ms. Tobia had directed them to find students eligible or ineligible for special education, notwithstanding the fact that Ms. Tobia was not a member of the CST or that evaluations of each student appeared to support the opposite outcomes.

Furthermore, Mr. Freund testified that the District is required to educate each student in the "least restrictive" environment possible, which would normally constitute placement in a general education classroom with supports and modifications. T.EF, 48:8-13. Ms. Tobia's actions in directing students be placed in yeshivas contrary to the recommendations of the CST, and her negotiation of parent agreements to accomplish this goal in an apparent attempt to circumvent the law, further demonstrates her disregard for this requirement. See, *generally*, Testimony of Rosemarie Frazer, Exhibit J-2 at Tab 6; CAP issued by OSEP, Exhibit J-2 at Tab 14; Hearing Testimony of Jennifer Kaznowski, Katherine A. Gilfillan, Esq., Adina Weisz and Eli Freund. Similarly, Ms. Tobia's directive to Ms. Zentman that student D.D. be found ineligible for special education services, prior to reviewing any of the student's evaluations, is contrary to law and regulation, and fails to ensure that the student be evaluated pursuant to State regulation, as required by Policy #2460.

Mr. Azzara also testified at the hearing that Ms. Tobia's actions contravened Policy #2460, particularly with respect to the fact that she predetermined that a student was not eligible for special education and directed that students should not receive Section 504 Plans when they may have been legally entitled to receive same. T.MA, 45:9-12. According to Mr. Azzara, Ms. Tobia's actions were "noncompliant" with this Policy. T.MA, 45:11-12.

iv. Board Regulation #2460.1

District Regulation #2460.1, entitled "Special Education – Location, Identification and Referral," provides, in pertinent part, that "the Director of Pupil Personnel Services will coordinate the child find activities to locate, identify and evaluate all children, ages three through twenty-one, who reside within the school district or attend nonpublic schools within the school district and who may be disabled." Exhibit J-2, Tab 19.

As set forth supra, Ms. Tobia was not a member of the CST. Nevertheless, she directed that certain students be found ineligible for special education services and that other students should attend specific yeshivas after reaching agreements with the students' parents. Rather than coordinate the location and identification of these children to determine whether the students are disabled or whether it is appropriate to educate them in out-of-district placements, Ms. Tobia unilaterally made these decisions without the necessary input from the CST or an in-depth review of the student's evaluations or individual needs, contrary to the requirements of Regulation #2460.1. See,

Exhibit J-2, Tabs 2, 4, 6, 11, 14 and 15. In fact, while providing sworn testimony in another matter, Ms. Tobia admitted to predetermining eligibility for at least one student, D.D. Exhibit J-2, Tab 5.

Mr. Azzara further testified that that it was his understanding that Regulation 2460.1 concerned the District's obligations to identify students with [special] needs and that the Regulation requires the District to "locate, identify and evaluate children. Not to predetermine that they're not eligible." T.MA, 45:21-46:8.

v. Board Regulation #2460.8

District Regulation 2460.8 entitled "Special Education – Free and Appropriate Public Education," mandates, in pertinent part, that "a free and appropriate public education is available to all pupils with disabilities between the ages of three and twenty-one . . ." Exhibit J-2, Tab 20.

The Regulation further provides that referrals of preschool age children are processed in accordance with the requirements set forth in law, and that for special education pupils advancing from grade to grade, "the Director of Pupil Personnel Services . . . shall ensure pupils with disabilities who are advancing from grade to grade with the support of specially designed services continue to be eligible when as part of a reevaluation, the IEP Team determines the pupil continues to require specially designed services to progress in the general education curriculum and the use of functional assessment information supports

the IEP Teams determination." Id.

At the hearing, Mr. Azzara testified that Ms. Tobia's actions with regard to the SCC constituted a violation of this Regulation. According to Mr. Azzara, when he was first appointed by the Commissioner of Education to serve as the District Monitor in 2014, the SCC had been approved by the Department of Human Services as a child care provider. T.MA, 11:21-12:3. Because the school was not approved by the Department of Education, the District was permitted to place classified preschool students in the program only if the students attended inclusion classes with their nondisabled peer. A number of District preschool students had been placed at the SCC pursuant to their IEPs with this understanding. T.MA, 13:3-14. However, upon visiting the school, Mr. Azzara found that all of the classes were self-contained special education classes, rather than inclusion classes. T.MA, 13:12-14. Ms. Tobia informed Mr. Azzara that she was unaware of that fact. Id.

Mr. Azzara also testified that Ms. Tobia had negative feelings towards the SCC in general. For example, the SCC was also in the process of obtaining State approval as a private school for the disabled so that it could educate a greater number of students without the requirement that disabled students only be placed in inclusion classes. T.MA, 11:21-12:3. The SCC requested that the District complete a needs assessment form as part of the application process. T.MA, 12:2-15. When Mr. Azzara discussed the needs assessment with Ms. Tobia, she "became very irritated and started a rant about the school, and she

was not going to sign any needs assessment." T.MA, 17:5-14.

Mr. Azzara further testified that Ms. Tobia also demonstrated her dislike of the SCC by, among other things, underreporting the number of District students that attended the SCC, which negatively affected the school's application to the Department of Education, and scheduling meetings with representatives from the school but failing to attend those meetings. T.MA, 20:9-14, 21:21-22:20.

Mr. Azzara also testified that because District preschool students were placed in the SCC but being educated in self-contained classes, with Ms. Tobia's knowledge, such an action violated both the law and Board Regulation 2460.8. T.MA, 47:4-13. According to Mr. Azzara, had the SCC been approved as a private school for the disabled, or, had the students placed in the SCC been educated in inclusion classes, such placements would have been lawful. T.MA, 47:14-18.

vi. <u>Board Policy #3282</u>

Board Policy #3282, entitled "Inappropriate Staff Conduct" provides, in pertinent part, that:

> The Board of Education holds all school staff to the highest level of professional responsibility in their conduct with pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.
>
> . . .
>
> School staff's conduct in completing their professional

> responsibilities shall be appropriate at all times.
>
> . . .
>
> A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member.
>
> Exhibit J-2, Tab 21.

According to Mr. Azzara, Ms. Tobia, by her actions, failed to exhibit the 'highest level of professional responsibility," as required by the Policy. T.MA, 48:9-12. Mr. Azzara stated that Ms. Tobia's demeanor and attempts to mislead him with regard to (i) whether she had visited the SCC; (ii) whether applications for Naples approvals for yeshivas were filed with the State prior to each student placement; (iii) her attempts to circumvent the Naples approval process for yeshivas, which, as sectarian schools, could not be approved by the State for any placement; (iv) her insubordination towards Mr. Azzara, and (v) her attesting to false information on an affidavit later submitted to the Court, among other things, were all evidence of her disregard for her professional responsibilities. T.MA, 48:14-55:9. Mr. Azzara also testified that staff members were fearful of retaliation from Ms. Tobia, further leading to the conclusion that Ms. Tobia's

actions were violative of Policy #3282. T.MA, 56:5-58:5.

LEGAL ARGUMENT

POINT I

THE BOARD HAS PROVEN BY A PREPONDERANCE OF THE CREDIBLE EVIDENCE THAT RESPONDENT COMMITTED CONDUCT UNBECOMING A TEACHING STAFF MEMBER

In the State of New Jersey, a tenured certificated staff member shall not be dismissed from his or her position or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause." N.J.S.A. 18A:6-10. In tenure cases in which a teacher is alleged to have committed unbecoming conduct, the Board of Education has the burden of establishing the allegations supporting the charges by a preponderance of the evidence. In re Polk License Revocation, 90 N.J. 550, 560 (1982); In re Tenure Hearing of Tyler, 236 N.J. Super. 478 (App. Div. 1989); In Re Tenure Hearing of Marrero, 97 N.J.A.R. 2d (EDU) 104 (Cmm'r of Educ., 1996). The term "preponderance of the evidence" means "the greater weight of credible evidence in the case. It does not necessarily mean the evidence of the greater number of witnesses but means that evidence which carries the greater convincing power to our minds." State v. Lewis, 67 N.J. 47 (1975).

The classic definition of this standard holds that if the evidence in support of and against the charges is equally balanced on the scales of justice, where the Board of Education adds so much as the weight of a feather to its proofs, the

Board has carried its burden by a preponderance of the evidence. See, *e.g.*, Lesniewski v. W.B. Furze Corp., 308 N.J. Super. 270 (App. Div. 1998). Proof "need not have the attribute of certainty, but it must be well-founded in reason and logic." Id. at 279.

In the New Jersey Supreme Court case of Karins v. Atlantic City, 152 N.J. 532 (1998), the term "unbecoming conduct" is found to be a broadly defined, elastic term encompassing any conduct which has a tendency to destroy public respect for government employees and competence in the operation of public services. Indeed, in Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1957), the Court established that the touchstone of unbecoming conduct is the teaching staff member's fitness to discharge the duties and functions of one's office or position. Moreover, it has been held that a finding of unbecoming conduct does not require a violation of any specific rule or regulation, but rather, may be based primarily on an implicit standard of good behavior "which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

According to the Commissioner of Education, teachers are professional employees "to whom the people have entrusted the care and custody of . . . school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment." In re Tenure Hearing of William Thomas, OAL Dkt. No.

EDU 2908-07 (October 11, 2007), *quoting* In re Tenure Hearing of Jacque L. Sammons, 1972 S.L.D. 302.

The evidence at the hearing clearly established that Ms. Tobia is patently unfit to be a supervisor in a public school environment. The Board proffered eighteen (18) tenure charges against Ms. Tobia, including multiple subparts, alleging that she committed unbecoming conduct due to, among other things: (1) false swearing and/or lying under oath on an affidavit submitted to the Court; (2) directing that student D.D. be found ineligible for special education prior to the student's eligibility meeting taking place and despite the fact that Ms. Tobia lacked the authority to make such a determination; (3) directing that the District no longer place students on Section 504 Plans, regardless of their need for such a plan; (4) entering into parent agreements to place students in unapproved, unaccredited yeshivas in contravention to law and a State-issued corrective action plan; and (5) compromising the District's position during mediation sessions.

With these charges in mind, the Board introduced extensive evidence at the hearing which established beyond any doubt that Ms. Tobia committed unbecoming conduct. Importantly, she herself admitted to a great deal of the conduct as alleged during sworn testimony given before the Office of Administrative Law in unrelated special education matters, including that she signed an affidavit containing false information, which was then submitted to the court, and that she predetermined eligibility for a student. Moreover, the

evidence in the record clearly supports a finding of unbecoming conduct for those actions to which she did not admit.

Ms. Tobia's actions have breached the public trust and cast doubt on her ability to perform the functions of her position in light of the high standard of morality and self-restraint imposed on public school employees. In re Emmons, supra. Consequently, the Board has established by a preponderance of the evidence that Ms. Tobia engaged in conduct unbecoming a certificate holder warranting her dismissal.

With regard to Ms. Tobia's actions in signing, under oath, an affidavit containing false information, Administrative Law Judges and the Commissioner of Education have held that engaging in such dishonest actions constitutes unbecoming conduct. For example, in I/M/O Tenure Hearing of John Howard, OAL Dkt. No. EDU 7442-01; 2005 N.J. Agen. Lexis 46 (Cmm'r, 2005), the East Orange Board of Education filed a set of tenure charges against the District's superintendent, alleging that he had lied under oath during a deposition.

During the deposition, the superintendent stated that he had no knowledge about a particular Board employee, did not know where she lived, did not know how long she was employed in the District and had never dated her. However, in a separate certification, the superintendent admitted that he did have a personal relationship with the employee and that the information provided at his deposition was false.

Although the superintendent claimed that he simply corrected the record when he admitted to his personal relationship with the employee and asserted that no criminal charges for perjury were filed against him in an attempt to mitigate his actions, the ALJ found these defenses "irrelevant" and determined that he had committed unbecoming conduct. Initial Decision at 3. According to the ALJ, teaching staff members must be held to a high standard of "honesty, integrity and judgment," and that by lying during a deposition in a case involving his employment, the superintendent "violated fundamental principles underlying out system of justice in circumstances which . . . directly relate to his employment. There is no greater breach of the public trust."

The Commissioner of Education affirmed the ALJ's determination, noting that he "is not persuaded by respondent's contention that correcting his testimony mitigates his conduct. While recantation may be an affirmative defense to perjury, it does not excuse respondent's deceptive and dishonest conduct in a school setting." Cmm'r Decision at 6. According to the Commissioner, the "respondent not only violated the fundamental principles underlying our system of justice, but also violated the public trust placed in him as superintendent of schools. The Commissioner, therefore, finds respondent guilty of conduct unbecoming a teaching staff member." Id. The Commissioner further emphasized that because the respondent was a high-level administrator, the standard of behavior to which he is held is even more stringent than a teacher. Id.

Similarly, the Commissioner, ALJs, and the State Board of Examiners have also found that a staff member's dishonest actions, such as falsifying documents, constitute unbecoming conduct. See, e.g., I/M/O Teaching Certificate of Crawford, OAL Dkt. No. EDE 8665-98, 1999 N.J. Agen. Lexis 270 (1999) (teacher engaged in dishonesty and unbecoming conduct by submitting documents that he knew or should have known contained false information); I/M/O Certificates of Cantz (OAL Dkt. No. EDE 4520-12, 202 N.J. Agen. Lexis 584 (2012) (teacher's actions in submitting a falsified copy of her certificate constituted unbecoming conduct).

In this matter, Ms. Tobia submitted an affidavit to the Court containing information that she knew or should have known to be false. In the affidavit, which was submitted to the OAL on behalf of the Board in a special education matter concerning a dispute over a student's placement, Ms. Tobia certified that she had visited the Special Children's Center and was fully familiar with the school. See, Exhibit J-2, Tab 1, Exhibit C at ¶29. However, in paragraph 32 of that affidavit, Ms. Tobia stated that the "SCC has religious symbols and icons present in and around the building." Exhibit J-2, Tab 1. Despite Ms. Tobia's assertion in her affidavit, the SCC is not, and never has been, a religious institution.

The attorney who represented the Board in that case, Joanne L. Butler, Esq., testified at the hearing that she had no knowledge of the SCC when she prepared the affidavit for Ms. Tobia's signature, and that all information regarding

the SCC was provided by Ms. Tobia, including that the school was a religious institution. T.JLB, 37:4-9; Exhibit B-1.

Furthermore, Ms. Tobia revised the affidavit numerous times before declaring it to be final and submitting it to the Court, yet did not disturb the wording of paragraph 32 with regard to the SCC's religious nature. Exhibit J-2, Tab 1, ¶16 and Exhibits C; and D' T.JLB, 43:17-20. Ms. Tobia went so far as to inform Ms. Butler that the affidavit, including paragraph 32 in its entirety, was "accurate and signed." Id. When issuing her decision in the case, Judge Kerins noted that the Board "has raised an issue whether SCC is sectarian," in reference to Ms. Tobia's assertion. Id.

Two years later, in March of 2015, during sworn testimony before the Office of Administrative Law in another student education matter, Ms. Tobia admitted that the SCC was not a religious institution. Exhibit J-2, Tab 5 at 275. Ms. Tobia also admitted that she had "no idea" why there was a reference to religious icons and symbols in her prior affidavit. Id.

According to Ms. Tobia, she had "never seen any of those symbols on the walls in [the SCC]," despite having "been there several times." Id. Although she testified that that she was "well aware" of the contents of her affidavit when she signed it in July of 2013, T.HT, 79:11-12, she admitted during her testimony in the C.F. matter that the affidavit was "not accurate." Id. at 281.

Thus, Ms. Tobia's assertion in her affidavit that the SCC had religious

icons and symbols in the building was patently, and knowingly, false. In fact, Ms. Tobia was well aware of the SCC, having visited the school on multiple occasions in her capacity as Supervisor of Pupil Personnel Services, and candidly admitted at the hearing that "anyone in the district knows there was no religious connotation with SCC. There never has been". T. Helen Tobia ("HT"), 72:24-25, 76:13-16, 25-74:2.

Ms. Tobia's negative feelings towards the SCC further supports the allegation that she would lie on an affidavit regarding the school. Mr. Azzara testified that Ms. Tobia did not approve of the SCC and that she felt that if the school was approved by the State, it would bankrupt the District. T.MA, 14:9-22, 21:17-19. Mr. Azzara also testified that Ms. Tobia had "intense animosity" towards the SCC and refused to sign a needs assessment in support of the SCC's application to receive State approval. T.MA, 26:21-25. Thus, it stands to reason that she would certify that the school was religious, even if it were not, in an attempt to harm the school and block a family's attempt to enroll their child there.

As in Howard, supra, Ms. Tobia's actions clearly constitute unbecoming conduct and were directly related to her employment. In fact, because her actions had the potential to affect the education provided to a special needs student, including whether the student would remain at his placement in the SCC, Ms. Tobia's improper actions far exceed those of the superintendent in Howard.

Ms. Tobia's attempts to deflect blame and [imply] that Ms. Butler suggested she include information in her affidavit regarding the SCC's religious nature have no basis in fact and as set forth in Howard, have no bearing on the determination of whether her actions constitute unbecoming conduct. The fact that she was not criminally charged with perjury for swearing to false information also does not alter the fact that her actions mandate a finding of severe unbecoming conduct. Moreover, unlike in Howard, she did not even attempt to correct the record after receiving and reviewing Judge Kerin's decision. Exhibit J-2, Tab 5 at 275.

Notwithstanding, and in addition to, Ms. Tobia's admitted unbecoming conduct concerning the affidavit in the M.W. matter, her other actions, including her directive to find student D.D. ineligible for special education, her directive not to place students on Section 504 plans and her actions in entering into parent agreements to place students at unapproved, unaccredited yeshivas, among other things, also constitute unbecoming conduct.

As stated supra, unbecoming conduct is defined as any conduct which has a tendency to destroy public respect for government employees and competence in the operation of public services. Karins, supra. Unbecoming conduct may be exhibited by a violation of a specific rule or regulation, or may be based primarily on an implicit standard of good behavior "which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Emmons supra.

Ms. Tobia's actions not only violated numerous State laws, regulations and directives, but had the potential to, and did, negatively affect the District, its finances and, most importantly, the quality of the education provided to District students. There can be no greater example of activity which destroys the public respect for Ms. Tobia or casts doubt on her competence in the performance of her duties.

As stated herein and at the hearing, there are a number of statutes and regulations governing the determination of eligibility for special education students. For example, N.J.A.C. 6A:14-2.3(k) provides, in part, that a meeting to determine a student's eligibility and develop an IEP shall include the parent, a teacher, the student, one CST member, the case manager, and other appropriate individuals. The determination as to a student's eligibility shall be made only after this meeting takes place. N.J.A.C. 6A:14-2.3(i).

N.J.A.C. 6A:14-3.5(a) provides that "when an initial evaluation is completed for a student age three through 21, a meeting . . . shall be convened to determine whether the student is eligible for special education and related services." If the student is determined to be eligible, the student's educational program and placement must be set forth in his or her IEP. N.J.A.C. 6A:14-3.7. Section 504 of the Rehabilitation Act of 1973, 34 C.F.R. 104, provides certain protections for disabled students who may or may not be eligible for special education, but who require accommodations in order to receive an education on the same level as their non-disabled peers.

The Naples Act, N.J.S.A. 18A:46-14, permits a child study team to place a classified student in a non-approved school if a suitable special education program cannot be provided elsewhere. Such a placement requires the consent of the Commissioner of Education. N.J.A.C. 6A:14-6.5. The Commissioner may only approve the placement when the District certifies, among other criteria, that: (1) the school is accredited; (2) the school is the most appropriate placement for the student; (3) it meets the requirements of the student's IEP; and (4) the school provides services which are nonsectarian. N.J.A.C. 6A:14-6.5(b). See also H.W. and J.W. o/b/o A.W. v. Greater Brunswick Charter School and Highland Park Bd. of Educ., OAL Docket No.: EDS 905-00 (August 28, 2001) ("Under the Naples Act . . . [t]he implementing regulations specify that the private school must meet certain conditions, including that the school must be fully accredited, that it must be nonsectarian, that its teaching staff must be appropriately certified, and that it must comply with State and federal antidiscrimination statutes.").

As set forth in detail above, Ms. Tobia's various actions and directives violated all of these laws and regulations and thus constitute unbecoming conduct. In fact, the requirement that a staff member's actions comport with law and regulation, particularly where the education of students is involved, is self-evident. Knowingly or purposely violating such laws, as Ms. Tobia did, clearly constitutes unbecoming conduct.

At no time was Ms. Tobia a member of the Child Study Team. Nevertheless, she frequently exceeded her authority and issued various directives regarding the placement and education of special education students. For example, in May of 2013, Ms. Tobia assigned Ms. Zentman as case manager for student D.D. and directed her to hold an eligibility meeting for the student. At the same time, Ms. Tobia unequivocally informed Ms. Zentman that "the student is not eligible." Exhibit J-2, Tab 12. When Ms. Zentman asked for clarification because she was concerned that the student may be eligible based on her initial review of the student's evaluations, Ms. Tobia again replied that "the student is not eligible and based on the assessments will not be eligible for special education." Exhibit J-2, Tab 13.

Based on Ms. Tobia's directive, the student was found ineligible for special education. T.CZ, 16:8-10. Six months later, after the student's family filed for due process and the matter proceeded to litigation the Court determined that the student should have been classified and provided with any and all necessary special education and related services. T.CZ, 25:1-11. Ms. Tobia's actions with regard to D.D. caused the District to incur significant legal fees in order to defend the due process petition, and resulted in the student not receiving services for which he should have been entitled under the law.

Similarly, in or about May of 2013, Ms. Tobia directed that no new Section 504 Plans would be written or provided to students. Rather, all students would be referred to the Child Study Team for evaluation for special education. When

Adina Weisz, Supervisor of Related Services, asked Ms. Tobia if her directive meant that students should not be provided an evaluation or therapy through a 504 Plan, Ms. Tobia responded in the affirmative. Exhibit J-2, Tab 9. Additionally, when Ms. Weisz asked whether a particular student's 504 Plan should be implemented because the plan had been signed by the parents, therefore legally requiring the District to adhere to it, Ms. Tobia advised Ms. Weisz to "throw it out." Id.

Ms. Tobia's actions resulted in students being denied services to which they were entitled, and in fact, based on Ms. Tobia's directive, the District did not implement or follow any Section 504 plans whatsoever during the 2013-2014 school year. T.AW, 18:10-18. This resulted in a significant rise in the number of referrals of students to the Child Study Team despite the fact that the students may have merely needed accommodations and not special education services. T.JK, 26:9-11; T.AW, 13:16-24, 28:25-29:4 Exhibit J-2, Tab 2 at ¶24. These actions are clearly contrary to the requirements of Section 504, 34 C.F.R. 104.

Ms. Tobia also entered into numerous agreements with parents and approved the placements of students at yeshivas without proper Commissioner of Education approval under the Naples Act. T.AW, 13:16-24, 28:25-29:4; T.GN, 20:10-14; T.JK, 11:15-17; Exhibit J-2, Tabs 2, 4, 10, and 11; Exhibit B-4. In fact, pursuant to the Act, approval was not possible for these students. Nevertheless Ms. Tobia disregarded the advice of the District's attorneys, Ms. Gilfillan and Ms. Kenny, and continued to effectuate these placements, going so far as to direct

her staff to "offer these parents whatever they wanted." T.EF, 26:13-19.

Per Ms. Tobia, if a parent sought to place their student in an unaccredited, unapproved school, the placement could be done through the student's IEP, despite the fact that such placements were illegal. T.EF, 26:20-27:8, Exhibit J-2, Tabs 2, 3 and 4 at ¶¶5 and 10; T.KAG, T.ALK. At one point, Ms. Tobia ceased to even complete the Naples paperwork since the approvals would not, and could not, be granted. T.MA, 49:7-12.

Ms. Tobia also failed to comply with OSEP's directive to reduce the number of students placed in out-of-District yeshivas. In or about March of 2014, OSEP placed the District on a Corrective Action Plan. Exhibit J-2 at Tab 14. In its initial report, OSEP found that that Ms. Tobia had "issued a directive to the IEP team that the team should write an IEP placing the student at [YTT]," an unapproved, unaccredited yeshiva. Exhibit J-2, Tab 14 at ¶7. In response, OSEP directed the District to hold IEP meetings for all students placed in unaccredited, unapproved private schools and offer them an approved placement. In complete disregard for OSEP's ruling, Ms. Tobia took no steps to transfer the affected students to new placements. T.KAG, 13:1-5; Exhibit J-2 at Tab 2, ¶6-7. Ms. Tobia further advised parents during mediation sessions on ways to maintain their students' current placements, notwithstanding the recommendations of the District's attorneys, CST or the requirements of the CAP, and also refused to sign a certification of facts to support the District's petition to block a request for independent evaluations filed by the parents of

students J.Q. See, *e.g.*, Exhibit J-2 at Tabs 2, 3, and 4.

All of Ms. Tobia's actions, as set forth above, had a negative effect on the District. Her misconduct required the District to expend significant legal fees in the defense of numerous due process petitions, as well as in preparing a response to the CAP issued by OSEP. Furthermore, Ms. Tobia's actions resulted in negative attention being placed on the District from the Department of Education and potentially jeopardized the District's receipt of State aid. T.KAG, 13:9-21; T.EF, 45:14-46:7; T.MA, 64:22-25; Exhibit J-2, Tab 5 at ¶12.

More importantly, Ms. Tobia's actions had the potential to negatively affect the education provided to District special needs students. As stated supra, numerous students were placed in unapproved, unaccredited yeshivas, which is prohibited by law. Moreover, students were denied educational services to which they may have been entitled, including services pursuant to Section 504 plans for extended periods of time. In addition, students did not receive all necessary services, as recommended by the CST, while due process petitions were ongoing, some of which, including the D.D. petition, were filed as a direct result of Ms. Tobia's actions.

Therefore, as set forth above and as proven by the testimony introduced at the hearing and in the documentary evidence submitted by the Board, Ms. Tobia's actions were in violation of law, regulation and State directive, and resulted in harm to the District and its students. Thus, her actions clearly

constitute unbecoming conduct.

In addition to the specific instances above, Ms. Tobia's actions, taken as a whole, also constitute insubordination. Generally, insubordination is an action or series of actions which demonstrate a willful refusal to comply with a supervisor's directive. In re Tenure Hearing of Ingram, OAL Dkt. No. EDU 9068-01, *aff'd* St. Bd. of Educ. (2002). Insubordination has also been found to include a failure to comply with District policies. In re Certificates of Resto, OAL Dkt. No. EDU 3869-04, *aff'd* St. Bd. of Educ. (2005) (Violation of policy constituted unbecoming conduct and reflected "a disregard for the appropriate role of a teacher, which in turn lowers students' respect for authority").

Insubordination, on its own, constitutes conduct unbecoming a teaching staff member. In re Tenure Hearing of Getty, 2009 N.J. Agen. Lexis 319, *aff'd*, Cmm'r, 2009 N.J. Agen. Lexis 731; In re Tenure Hearing of Duran, et al., OAL Dkt. NO. EDU 6754-06, Agency Dkt. No. 307-9/06 (2007) (Finding that insubordination may be, but need not be, an outright refusal to obey directives); In re Certificates of Turner, S.B.E. Dkt. No. 0405-257 (St. Bd. of Exam., 2005) (Failure to follow directives constitutes insubordination).

There is no doubt that Ms. Tobia was insubordinate by failing to comply with District policies regarding the identification of special education students, the provision of special education to eligible students, the implementation of Section 504 Plans and the maintenance of a healthy workplace environment. Exhibits J-

2, Tabs 16-22. She also failed to adhere to, and actively disregarded, the State's corrective action plan and directive that the District take steps to effectuate the removal of students from unapproved yeshivas. Ms. Tobia refused to comply with legal advice and various requirements set forth in New Jersey and Federal law concerning special education students, and consistently provided false or misleading information to direct requests from the State Monitor appointed by the Commissioner of Education to oversee the District. T.MA, 14:9-15, 53:17-24.

Taking the facts of this matter into account, there can be no dispute that Ms. Tobia committed numerous instances of conduct unbecoming a teaching staff member by engaging in all of the actions alleged by the Board in the tenure charges. Exhibit J-1. Each of Ms. Tobia's actions were documented and supported by the evidence in the record, fall far short of the high standard required of an individual serving in Ms. Tobia's position, and violate the implicit standard of good behavior for public school employees, "which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." In re Emmons, 63 N.J. Super at 140. Any one of her actions in this regard, taken independently, would constitute unbecoming conduct. All of them, when considered together, mandate such a finding.

POINT II

THE TESTIMONY PRESENTED AT THE HEARING BY MS. TOBIA WAS CONTRADICTORY, SELF-SERVING AND NOT CREDIBLE

Ms. Tobia's testimony was not credible and should be given no weight.

The trier of fact is the individual best situated to judge whether a witness is credible. I/M/O Tenure Hearing of Dennis Cooke, 1991 S.L.D. 1381, *citing* In re Perrone, 5 N.J. 513, 522 (1950). A finding of credibility results from that which "common experience and observation of mankind can approve as probable in the circumstances" and which is derived from "that quality of testimony or evidence which makes it worthy of belief." Id. To be believed, testimony must itself be credible. It must be such as the common experience and observation of mankind can approve as probable in the circumstances. Perrone, supra. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura- Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958).

In order to assess credibility, inferences may be drawn concerning the witness' expression, tone of voice and demeanor. MacDonald v. Hudson Bus Transportation Co., 100 N.J. Super. 103 (App. Div. 1968). In addition, the witness' interest in the outcome, motive or bias should be considered. State v. Spruill, 16 N.J. 73 (1954) (Court looked to the interest of a party in the outcome of a trial as a factor in evaluating the evidence).

With this in mind, a great deal of Ms. Tobia's testimony at the hearing was contradicted by her own statements, other testimony and documentary evidence. These contradictions cast doubt on the veracity of her denials and testimony relating to the conduct as alleged herein. During her testimony, Ms. Tobia

embellished certain points in an effort to appear blameless and attempted to shift the blame from her own wrongful actions to other individuals.

For example, Ms. Tobia testified unequivocally that she did not supervise the District's special education department in September of 2013. T.HT., 66:13-18. However, Ms. Tobia submitted a sworn affidavit in a Federal court matter, dated September 17, 2013, in which she stated that she "supervise[d] the District's special education department." Exhibit B-5. After being asked on cross-examination whether the affidavit was false, Ms. Tobia was evasive and would not admit that it was untrue, yet again declared that she "did not supervise the special education department in 2013." T.HT, 69:11-18. After again being asked regarding the veracity of the affidavit, Ms. Tobia simply replied "I don't know. I don't know how we got to that point there." T.HT, 70:15-20. She also blamed the Board's attorney, Katherine A. Gilfillan, Esq., who prepared the affidavit for Ms. Tobia's signature. T.HT, 71:1-6.

Regarding the affidavit she submitted in the M.W. matter concerning the SCC (Exhibit J-2, Tab 1), Ms. Tobia repeatedly answered in the affirmative when asked whether the affidavit was true and accurate. T.HT, 72:7-12, 74:7-9. In her answers to interrogatories, submitted under oath, Ms. Tobia also stated that the affidavit was true to the best of her knowledge and belief. Exhibit B-2, Answer to Question 6. She also testified that paragraph 32 of the affidavit, which stated that "the SCC has religious symbols and icons present in and around the building," was a true statement. T.HT, 72:20-25.

In response to the very next question, however, in which Ms. Tobia was asked for clarification concerning that statement and whether she stood by the contents of paragraph 32 of the affidavit, Ms. Tobia answered "No, I do not." T.HT, 73:13-16. Ms. Tobia further conceded that paragraph 32 of the affidavit, concerning religious symbols and icons in the building, is "not true because I don't know them to be religious symbols."

In addition, Ms. Tobia testified that she was aware of the affidavit prior to signing it, made revisions to the affidavit and knew that paragraph 32 was present in the affidavit prior to signing it. T.HT, 77:12-78:4. However, in the C.F. matter, Ms. Tobia testified that she was not aware that paragraph 32 was contained in the M.W. affidavit when she signed it, that she "must have missed it," and that the SCC does not have religious symbols and icons. Exhibit J-2, Tab 5 at 277; T.HT, 78:4-17.

Ms. Tobia also continually attempted to try and shift responsibility to Ms. Butler for including paragraph 32 in the M.W. affidavit. However, Ms. Butler testified unequivocally that at the time she prepared the affidavit for Ms. Tobia's signature, Ms. Tobia informed her that the SCC was a religious school. Exhibit B-1. Ms. Butler's handwritten notes from her conversation with Ms. Tobia further support her recollection. Id. Ms. Butler also testified that she had only been representing the Board at that time for a matter of days, and was completely unaware of what type of school the SCC was. Exhibit J-2, ¶7; Exhibit B-1; T.JLB, 33:18-19, 34:25-36:25.

Regarding student D.D., Ms. Tobia testified that she "absolutely" did not predetermine the student's eligibility for special education prior to his case manager scheduling his evaluation meeting. However, during her testimony in the D.D. due process matter, Ms. Tobia, under oath, admitted that D.D.'s eligibility conference report was dated prior to the date on which the eligibility meeting actually took place, and the student's ineligibility was pre-determined. Exhibit J-2, Tab 8 at 149. In fact, when asked by D.D.'s counsel whether "you pre-determined ineligibility, correct?" Ms. Tobia replied "yes." Id. at 248.

Furthermore, despite her prior testimony in the D.D. matter, Ms. Tobia, when presented with her May 29, 2013 email to Ms. Zentman, in which she informed Ms. Zentman that the student was not eligible, provided evasive answers and refused to acknowledge the contents of the email. T.HT, 91:15-17. Ms. Tobia also stated that she was trying to avoid litigation by including this information in her email to Ms. Zentman, but could not explain how finding a student ineligible, rather than eligible, for special education would lead to less, not more, litigation. T.HT, 95:13-16.

Ms. Tobia's actions in lying under oath clearly and completely demonstrate her lack of credibility. Howard, supra. However, Ms. Tobia also continually provided evasive answers when directly questioned regarding the remaining allegations in the tenure charges. For example, Ms. Tobia continually testified that she did not remember whether she directed staff not to provide students with Section 504 plans, even when presented with emails to that effect.

T.HT, 108:15-111:17. At one point, Ms. Tobia was provided with her email to Ms. Weisz, which stated that students should be referred to the CST rather than placed on a 504 Plan. Exhibit J-2, Tab 9. When asked on cross-examination what that sentence meant, Ms. Tobia stated that she was "not sure what this all says and means here." T.HT, 111:18-20.

Ms. Tobia also testified that she did not know who made the decision to place student R.M. at the Orchos Chaim yeshiva and that she was unaware of the identity of the case manager for the student. T.HT, 122:3-4. However, Ms. Tobia was present during the testimony of Jennifer Kaznowski, the student's case manager, at which time Ms. Kaznowski testified at length regarding R.M.'s placement. Moreover, it was Ms. Tobia herself who determined the placement for R.M. Exhibit J-2, Tab 10. Ms. Tobia also provided evasive answers with regard to Naples approvals and parent agreements to place students in yeshivas, informing Board counsel that his questions over those items were simply issues of "semantics." T.HT, 125:24.

Ms. Tobia's remaining testimony was entirely self-serving and dismissive of the tenure allegations. She did not address or refute the majority of the allegations on her direct testimony, including allegations that she was present during mediation sessions with rabbis or that she held private discussions with parents and rabbis to reach agreements regarding student placement, and no other witnesses testified or responded to the allegations on Ms. Tobia's behalf. Clearly, Ms. Tobia's testimony was offered for the sole reason of self-

preservation and embellished or tailored accordingly.

Furthermore, when questioned regarding her conduct, Ms. Tobia fashioned a number of possible theories and motives to explain her actions, going so far as to blame others for her actions. She also claimed, among other things, that she was merely following attorney advice, despite the voluminous evidence in the record showing that each attorney provided advice to Ms. Tobia regarding her responsibilities with regard to special education student placements and regulations, which she disregarded.

Ms. Tobia also claimed that the false statements in her affidavits were placed there by Ms. Butler and/or Ms. Gilfillan despite her having reviewed and revised each affidavit in depth, and that her directives to staff with regard to student placement and eligibility determinations were intentionally vague and misunderstood. Ms. Tobia never once took responsibility for her actions or expressed remorse. Such facts merely serve to further support the proposition that her testimony was not credible.

To the contrary, the Board's witnesses were credible in all respects. Each witness testified competently and directly regarding the facts comprising the actual tenure charges before the Arbitrator. All of the testimony, including that of Ms. Butler, Ms. Gilfillan, Ms. Kenny, Mr. Azzara, Mr. Freund, Ms. Nussbaum, Ms. Kaznowski, Ms. Zentman and Ms. Weisz, was supported by evidence introduced at the hearing. This evidence including, but was not limited to, emails authored

by Ms. Tobia which directly prove her alleged misconduct, transcripts of sworn testimony given by Ms. Tobia herself and other individuals which address, and confirm, the allegations at issue, and the OSEP CAP, which specifically identifies Ms. Tobia as having improperly directed that a student be placed in an unapproved, unaccredited yeshiva. See, Exhibit J-2. The testimony provided by each of the Board's witnesses complemented, and did not contradict, one another, and unlike Ms. Tobia, none of the Board's witnesses had ulterior motives to fabricate or embellish their testimony. In fact, taking into account the Board's evidence, it is more likely than not that Ms. Tobia engaged in the conduct alleged in the Tenure Charges.

POINT III

MS. TOBIA SHOULD BE DISMISSED FROM HER EMPLOYMENT

Ms. Tobia's inappropriate and improper conduct, as set forth in the tenure charges, each of which are independently substantiated, as set forth above, warrants a finding of unbecoming conduct and/or other just cause for dismissal. Moreover, tenure charge eighteen (18) alleges that Ms. Tobia has engaged in a course of behavior which constitutes a pattern of conduct unbecoming a teaching staff member. When the charges are viewed in their totality, a pattern of unbecoming conduct emerges sufficient to warrant Ms. Tobia's dismissal from her tenured position. See, Cowan v. Bernardsville Bd. of Educ., 224 N.J. Super. 737, 751 (App. Div. 1988).

The determination as to whether an employee has engaged in unbecoming conduct warranting dismissal from a tenured position requires consideration of the nature of the act(s), the totality of the circumstances and the impact on the teacher's career. I/M/O Tenure Hearing of Molokwu, OAL Dkt. No. EDU 9650-04 (Dec. 12, 2005), *citing* In re Fulcomer, 93 N.J. Super 404 (App. Div. 1967). Usually, a series of events demonstrating a pattern of behavior is an indication of "unbecoming conduct." Id. However, if an incident is sufficiently flagrant, one incident will suffice to remove a teaching staff member from his or her position. Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943), *aff'd* o/b/ 131 N.J.L. 326 (E&A, 1944). See also, I/M/O Tenure Hearing of Stephen Fox, OAL Dkt. No. EDU 7955-04 (Regardless of a teacher's long and distinguished career, one sufficient flagrant event could lead to a tenured teacher's dismissal for conduct unbecoming).

Here, Ms. Tobia's career has been anything but distinguished. Her conduct is of such a sufficiently flagrant level that her dismissal is warranted based on her actions as set forth in each individual tenure charge. In fact, her lying under oath in an affidavit submitted to the Court in a contested case involving the appropriate educational placement of a student is, by itself, sufficient to require her dismissal.

In Howard, supra, the ALJ held that the respondent committed unbecoming conduct by lying under oath. According to the ALJ, "there is no question that this conduct warrants the imposition of the most severe sanction

available." When issuing the decision, the ALJ paid particular attention to the fact the respondent's actions were directly related to his employment. The Commissioner of Education also noted that "[i]n assessing the penalty to be imposed, the Commissioner concurs with the reasoning of the ALJ that respondent's conduct warrants the imposition of the most severe sanction available." Teaching staff members have also had their certificates revoked for engaging in dishonest conduct similar to that exhibited by Ms. Tobia. See, *e.g.*, Crawford, supra; Cantz, supra.

Ms. Tobia's actions were clearly related to her employment, as she submitted a false affidavit to the Court in her capacity as Supervisor of Pupil Personnel Services. The affidavit was provided in support of the Board's opposition to an emergent relief application and petition for due process filed by a student's family. As stated supra, the fact that Ms. Tobia's statements, later proven to be false, were referenced by the ALJ in her decision and had the potential to affect a student's educational placement is only further indicative of the seriousness of this offense. Consequently, her actions clearly violate the fundamental principles of honesty and integrity and the public trust placed in public school employees. Emmons, supra; Howard, supra. Thus, Ms. Tobia's dismissal is warranted.

In addition, her other actions, including (1) directing that a student be found ineligible for special education; (2) directing that students no longer receive Section 504 plans; (3) reaching parent agreements to place students in yeshivas;

(4) disregarding the advice of the District's attorneys and the directives of the New Jersey Office of Special Education Programs; and (5) her general insubordination, among other things, have no place in a school environment. Her actions have had a negative effect on the District and the education provided to its students, and therefore warrant her dismissal from her position.

In fact, in I/M/O Margaret Sidberry, OAL Dkt. No. EDU 9572-97S, a school district filed tenure charges against a school psychologist, alleging that she failed or refused to complete timely reports for special education students as mandated by law. The respondent claimed that a number of mitigating factors were present, including that: (1) she had an excellent employment record; (2) her actions were not deliberate; and (3) staff cutbacks and increased duties led to her inability to complete the reports. Nevertheless, the ALJ ruled that the respondent be dismissed from her position. In doing so, the ALJ found that her actions "resulted in the delayed implementation of programs. Students have been denied access to appropriate educational programs and [the respondent has] contributed to placing the district in jeopardy of noncompliant status." Initial Decision at 24.

The Commissioner concurred with the ALJ's findings and ordered that the respondent be dismissed from her position, rejecting as "untenable" her claim that there was no deleterious effect to students or the District as a result of her actions. The Commissioner specifically found that "at a very minimum, the untimely preparation and submission of her reports delayed the initial or re-

evaluative placement of students in appropriate educational programs and placed the District in unnecessary jeopardy of potential legal action for failure to comply with federal and state statutes and regulations governing the rights to classified students." Cmm'r Decision at 9. See also, I/M/O Certificates of Oberwanowicz, Dkt. NO. 0910-218 (2014) (in which a retired director of special education was ordered to surrender his license for a period of thirty (30) months for, among other things, allowing the district to place special education students in sectarian schools and underreporting the number of students placed by the District in a yeshiva on State reports).

In this case, Ms. Tobia behaved in a manner strikingly similar to that of Sidberry and Oberwanowicz. Her actions resulted in the delay of educational services to the very students who need them most – special education students, and in at least one case, a student who she had ordered be found ineligible for services, D.D., was later found to be eligible after a protracted and costly litigation. He received no services during the interim period between the finding of ineligibility and the ALJ's determination that he be entitled to special education services. T.CZ, 25:1-11. Moreover, she ordered that students no longer be placed on Section 504 plans, again denying services to eligible students and continued to allow and negotiate for the placement of students in yeshivas, despite the law's prohibitions against such placements. See, Exhibit J-2.

In addition, her actions not only cost the District thousands of dollars in legal fees, but placed its State funding at risk, particularly since Ms. Tobia

continued to allow students to remain in yeshivas despite a directive from OSEP that it reevaluate those students and place them in approved schools or programs. T.KAG, 13:9-21. Moreover, as set forth at length supra, Ms. Tobia's insistence on participating in and overseeing student placement and eligibility decisions, despite not being a member of the CST, was contrary to law and exposed the District and its students at risk. She also disregarded attorney advice and compromised the District's legal position during mediation sessions by informing the parents that the CST's proposed program for certain students was inappropriate and by reaching agreements with parents to maintain student placements in yeshivas.

All of Ms. Tobia's actions, like those of the respondents in Sidberry and Oberwanowicz, placed the district at risk of legal and administrative penalties. More importantly, her actions jeopardized the education provided to students with special needs. Accordingly, Ms. Tobia has failed to satisfy the standards of one whose profession is inextricably linked to the shaping and teaching of young minds, and who is held to a higher standard than that of the general public. Indeed, as an administrator, Ms. Tobia is held to a higher standard than even a classroom teacher. Howard, supra. Her actions in lying under oath are, alone, sufficient to pierce the inherent trust placed in her and negate her position as a role model in the school community. See, *e.g.*, Howard, supra; Crawford, supra.

The remainder of her unbecoming conduct, all of which is focused on or related to the District's provision of a free and appropriate education to special

needs students, further evidences Ms. Tobia's inability to remain a supervisor in the District. Moreover, her flippant disregard of the severity of the charges, her attempts to deflect blame from her actions and refusal to even address many of the charges does not engender confidence that such actions will not reoccur in the future if she is returned to the District. See, *e.g.*, Karins, supra; Laba, supra; Emmons, supra.

Accordingly, Ms. Tobia's demonstrated pattern of unbecoming conduct is certainly sufficient to warrant her dismissal. Her unbecoming conduct, when taken together as a whole, demands such a penalty.

POINT IV

THE BOARD OF EDUCATION IS NOT PRECLUDED FROM INTRODUCING EVIDENCE RELATED TO MS. TOBIA'S CONDUCT DURING MEDIATION SESSIONS

At the hearing, Ms. Tobia's counsel objected to the Board's introduction of evidence concerning Ms. Tobia's actions during mediation sessions. In fact, tenure charge seven and eight directly concern Ms. Tobia's improper behavior during mediation sessions for students M.W., S.S. and Y.S. These charges allege, among other things, that during mediation, Ms. Tobia reached independent agreements with the students' parents to place the students in yeshivas, that she disregarded attorney advice when doing so and that she compromised the District's litigation position by informing the parents that the CST's findings and recommendations for the students' programs, *i.e.*, the very

reason that the parties had gone to mediation, were inappropriate T.ALK, 8:14-17; Exhibit J-2, Tab 4 at ¶2-3.

However, while certain discussions during mediation are confidential in nature, the intent of this confidentiality is to ensure that discussions and settlement offers elicited during mediation are not referred to or relied upon during subsequent due process hearings between the parents and the District. N.J.A.C. 6A:14-2.6(a) provides that "mediation is a voluntary process that is available to resolve disputes arising under this chapter. Mediation shall be available for students age three through 21 years when there is a disagreement regarding identification, evaluation, classification, educational placement or the provision of a free, appropriate public education." *[Emphasis added].* Thus, per the regulation, mediation is utilized only for special education disputes pursuant to N.J.A.C. 6A:14, and only between a school district and a student's parents.

Furthermore, N.J.A.C. 6A:14-2.6(d)(6) provides that "discussions that occur during the mediation process shall be confidential and shall not be used as evidence in any subsequent due process hearings or civil proceedings." Even a cursory reading of this provision, when read together with section (a) of the same regulation, reveals that confidentiality during a mediation session relates only to discussions stemming from disputes arising between the District and the student's parent pursuant to special education law. In other words, mediation, and the rules governing same, does not apply to tenure matters such as the case at issue or to other types of contested cases before the Commissioner or an

Arbitrator.

There is no prohibition against a District from identifying wrongdoing committed by school staff during a mediation session and taking action to address same. Indeed, under Ms. Tobia's interpretation of this regulation, a school district would be prohibited from disciplining a staff member who had yelled at or struck a parent during a mediation session. Such an interpretation is simply absurd and certainly not the intent of the regulation.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Board has met its burden of proof on each of the tenure charges and that the evidence warrants Ms. Tobia's dismissal from the Lakewood School District.

Respondent Helen Tobia

The Lakewood School District appears to be rather unique to New Jersey. According to the State Monitor, Michael Azzara, there are approximately 6400 students in the Lakewood Public Schools and about 25,000 students attending sectarian schools primarily Orthodox. The majority of the members of the Lakewood Board of Education, which is responsible for the administration and operation of the Lakewood Public Schools, are Orthodox. Thus, the operation of the public schools is controlled by members of the Orthodox community.

Mr. Azzara testified that he was assigned to Lakewood by the New Jersey Department of Education to oversee the financial situation in the school district.

The two primary issues he is addressing are transportation for the nonpublic school students and out of district special education costs. The transportation issue was the cause of the school district's original budget deficit and Mr. Azzara recalled this being an issue in Lakewood when he was still "assistant commissioner back in 2000". Mr. Azzara's educational background is that he has a business administration degree from Rutgers and a M.A. in educational leadership from Kean. He has worked primarily at the NJ Department of Education. He admitted that he never taught in the public schools. He was an assistant superintendent in Paterson, a state operated school district. His duties in Paterson were that he was in charge of the business office, technology, transportation, food services and the operation and maintenance of the plant (facilities).

It was not his role to evaluate principals and assistant principals. He has no background in special education and in fact, the Department of Education appointed a special education monitor for Lakewood, Ms. Teri Sinatra. Ms. Sinatra is the expert in special education and was assigned by the Department of Education to oversee the operation of the special education matters in Lakewood. Ms. Sinatra did not testify in this matter, even though she is the special education monitor assigned to the school district and the issues herein concern special education.

In effect, Mr. Azzara was assigned to Lakewood to try to straighten out the budget deficit, primarily due to "courtesy bussing". "Courtesy bussing" is the

name given to the transportation of students who live less than the state mandated limits for a district to provide transportation for those students. The state limit for elementary school students is two miles and for high school students is 2 1/2 miles. Students living within these limits and are transported are said to be provided with "courtesy bussing". The Department of Education does not reimburse school districts for transportation costs for "courtesy bussing".

Other than Mr. Azzara, the other witnesses for the Board were the litany of attorneys from Schenck, Price, the law firm, including Mr. Zitomer which represents the Lakewood Board of Education, none of which supervised Ms. Tobia. Mr. Azzara testified that when he came to the Lakewood School District, he felt there was a "culture of fear", fear on behalf of those staff members who were Orthodox for reprisals in the Orthodox community, if they made a decision contra to a member of that community. This turns out to be important in that, through the testimony of these witnesses, it becomes apparent that when any controversial decision had to be made, they went to Ms. Tobia, who is not a member of the Orthodox community, to make the decision. In this way, it was easy to blame Ms. Tobia for the decision and no repercussions would come to them in the community. Apparently decisions were controversial enough concerning student placements in the yeshivas, that Robert Singer, the state senator representing Lakewood, and the former mayor of Lakewood, went to Mr. Azzara and told him to fire Ms. Tobia. Thus, even the politicians are involved in

the operation of the Lakewood School District, when it comes to the Orthodox community. Why would it not be so, since this community represents a sizeable voting bloc.

The other underlying theme in this matter is the involvement of Michael Inzelbuch, Esq., an attorney noted for his work in special education. Mr. Inzelbuch was for many years the board counsel in Lakewood and concurrently served as the special education attorney/director/consultant. Prior to becoming board attorney, Mr. Inzelbuch had represented parents in special education matters against the Lakewood Board of Education. He was so successful that the Board appointed him as their general counsel and also the special education attorney/director/consultant. (No one in the district testified to his board actual approved title). During this period of time, when Mr. Inzelbuch headed special education, Ms. Tobia was hired as the Supervisor of Pupil Personnel Services and worked under the supervision of Mr. Inzelbuch. There were other supervisors in charge of special education.

After approximately 12 years, Mr. Inzelbuch was replaced by the Schwartz, Simon law firm as the attorneys in Lakewood. Mr. Zitomer was a member of the Schwartz, Simon law firm at the time. Upon his replacement as board attorney, Mr. Inzelbuch again began representing parents in Lakewood against the Board. Not coincidentally, in all of the cases involving an attorney referred to in this matter, Mr. Inzelbuch was the attorney for the parents.

Helen Tobia is a staff member in the Lakewood School District for over 21 years. She has been a teacher, supervisor, assistant principal and a supervisor again. During the 21 years, her employment service has always been satisfactory to commendable. Mr. Azzara testified that when compiling information for the charges that he signed, items in her personnel file were scarce. The events alleged in most of the charges occurred prior to Mr. Azzara coming to the district as state monitor. There were no disciplinary actions taken against Ms. Tobia, prior to the filing of these charges. There was no progressive discipline and no corrective action plan. Ms. Tobia's file is squeaky clean. The school district did not present one witness who evaluated Ms. Tobia in a negative manner. In fact, the school district did not produce a witness who evaluated Ms. Tobia at all.

For all the following reasons, respondent, Helen Tobia, respectfully requests that the Arbitrator dismiss all of the charges in this matter and reinstate Ms. Tobia, awarding her the 120 day lost in pay and benefits. In the alternative, Ms. Tobia respectfully says that the charges, if true, would not warrant her dismissal and requests that arbitrator award a penalty short of dismissal.

TENURE CHARGES

CHARGE ONE

MS. TOBIA DID NOT WILLFULLY OR DELIBERATELY LIE UNDER OATH

The underlying allegations in CHARGE ONE is that prior to July, 2013,

MW was a student, whose parents were represented by Michael Inzelbuch, Esq. in a special education matter. Robert Mucciolo, Esq. of the law firm of Schwartz, Simon was representing the school district from on or about January, 2013 to June, 2013. According to Ms. Tobia, Mr. Mucciolo had reached out to the Ocean County Supervisor of Special Education concerning whether a program at the Special Children's Center (SCC) would be appropriate for the proposed placement of M.W. Mr. Mucciolo did not receive a response. Mr. Mucciolo also drafted a status update for the Lakewood Board of Education.

While this matter was still ongoing, effective July 1, 2013, the Board appointed new counsel, Schenck, Price. Joanne Butler, Esq. was assigned by the new law firm to represent the Board in the M.W. matter. Over the July 4th, 2013 holiday, Mr. Inzelbuch filed a Motion for Emergent Relief. Ms. Butler, brand new to the case, drafted an affidavit for Ms. Tobia to sign. Ms. Tobia testified that when asked by Ms. Butler what Ms. Tobia may have observed in the SCC, Ms. Tobia responded she saw a "wooden reed-type looking object in the doorway". Neither Ms. Butler nor Ms. Tobia are Jewish. Eventually, Ms. Butler placed in the affidavit for Ms. Tobia to sign that the wooden reed-like object was a "religious" object. Although Ms. Tobia was apprehensive, Ms. Butler told her "to trust her and that she knew what she was doing". Ms. Butler is an experienced special education attorney. When Ms. Tobia signed the affidavit, it was true to the best of her knowledge and belief. (Testimony of Helen Tobia pp 19-27).

In a separate special education litigation, in March 2015 (almost 2 years later) and which by this time, Eli Freund is the Supervisor of the Child Study Team, Ms. Tobia is subpoenaed to testify by the parents' attorney, Michael Inzelbuch. This is one of those situations where Ms. Tobia is being set up to be the "bad guy". Ms. Tobia is being asked to testify in a matter that she was not involved. In her words, she was ambushed and had no preparation. Despite the efforts by Eric Harrison, Esq., the attorney representing the Board, (not with Schenk, Price) to quash the subpoena, Ms. Tobia testified.

Mr. Inzelbuch placed the affidavit from almost two years prior in the M.W. matter. (the only commonality is that Mr. Inzelbuch was the attorney for the parents in both matters). Under Mr. Inzelbuch's examination of Ms. Tobia, as a witness, Mr. Inzelbuch elicited that there was a discrepancy from the affidavit in M.W. and her testimony in D.D., the discrepancy being whether or not the SCC was a religious school. This hardly amounts to lying under oath. Rather, an experienced attorney, Mr. Inzelbuch, found an inconsistency in an affidavit from two years past and her testimony in another special education matter, D.D. which was not a case that she was familiar with. Ms. Tobia was blindsided at the hearing, but did not willfully lie or deliberately mislead.

The Board will point to In the Matter of the Tenure Hearing of Dr. John Howard, Jr., Dr. Howard was the superintendent of schools in East Orange. Dr. Howard admittedly lied under oath at a deposition concerning a romantic relationship he had with a subordinate. Shortly thereafter, he recanted and

admitted the relationship. The situation in the Howard matter and this matter are polar opposites. In a manner of speaking, Howard got caught with his pants down. Here Ms. Tobia had signed an affidavit drafted by an experienced special education attorney, Joanne Butler, who told her to trust her and that she knew what she was doing. Two years later, another experienced attorney, Michael Inzelbuch, crossed her up on the witness stand by asking her questions about that two year old affidavit in a totally different special education matter. Ms. Tobia may not have been a good witness, but she did not intentionally lie.

CHARGE TWO

With regards to the allegations in CHARGE TWO, Ms. Tobia denies any wrongdoing. Again this Charge revolves around the representation of the parents and child, D.D., by the former board attorney, Michael Inzelbuch. With regards to the D.D. matter, see Testimony of Helen Tobia, pp 31-35. Again this is another situation resulting from the changeover of attorneys in July 2013 from Schwartz, Simon to Schenk, Price. Prior to Schenck, Price becoming the attorneys, the former attorney, Marc Mucciolo, Esq. reached an agreement to have D.D. be assessed by the Monmouth-Ocean Education Services Commission. Eventually, there was an agreement on the placement, but not implementation. When Schenk, Price came in, apparently Mr. Inzelbuch made additional demands and the matter was litigated. At all times, the school district was represented by counsel. Furthermore, effective July 1, 2013, Mr. Freund was the Supervisor of the Child Study Teams. Again this is another situation

when someone else had the responsibility (Mr. Freund), but the matter is being put on Ms. Tobia. Also, this event occurred in July, 2013, why did the district wait until August, 2015 to bring this charge. Two years passed without any mention of this to Ms. Tobia. No letter of reprimand, corrective action plan or any other letter was presented to Ms. Tobia for a response.

CHARGE THREE

MS. TOBIA DENIES ANY WRONGDOING WITH REGARDS TO THIS CHARGE

Charge THREE is a vague charge intended to paint a broad brush on Ms. Tobia. Ms. Tobia denies any wrongdoing. In May or June, 2013, Schwartz, Simon was the Board's attorneys. The numerous record requests made concerning students all came from the same attorney, Michael Inzelbuch. As previously noted, Mr. Inzelbuch was the longtime Board attorney and special education director/consultant. After his separation from the Board, he again represented parents against the Board, as he did prior to being board attorney. As noted in documents (R-3 and R-4), all tuition contracts were reviewed by the board special education counsel, whether that was Schwartz, Simon or Schenck, Price and placement notification was sent to the Ocean County Office of Special Education. Tuition contracts, once reviewed by special education counsel, were sent to Business Office and Board of Education for approval. The Board of Education and the Business Office approved all tuition contracts. If there was a problem with the contracts in September, 2013 (two years prior to these Tenure

Charges), the attorneys could have advised the Board and the Business Office. The attorneys could have certainly advised the Board that if the student placements were inappropriate, the Board should not pay on the tuition contracts. The tuition contracts were, for the most part, to schools operated by the Orthodox community and the Board of Education majority was Orthodox and approved the contracts. The Board paid on the contracts.

CHARGE FOUR

Charge FOUR references a complaint investigation by the NJDOE, Office of Special Programs (OSEP) in January, 2014. The complaint was filed with the NJDOE by Michael Inzelbuch. Subsequently, the NJDOE substantiated the complaint and issued a corrective action plan (CAP) to the school district to place students in approved placements. The CAP was just that a plan to correct past problems. Like most CAPs, the district was given a timeline to make corrections. As Ms. Tobia testified, the school district was given a year. Not coincidently, Ms. Sinatra, the special education monitor, was not called by the district to discuss what progress the district was making towards correcting the deficiencies. Rather, the Charges cite deficiencies that were noted by the CAP, but do not indicate how and when the deficiencies were corrected. (See Board document 15) Further this CAP was placed on the Lakewood School District, not Ms. Tobia. This Charge against Ms. Tobia was never proven and Ms. Tobia denies any deliberate refusal to perform her duties. She further denies any gross misconduct which would warrant her dismissal.

CHARGES FIVE, SIX, SEVEN AND EIGHT

Essentially Charge FIVE concerns the placement of two brothers, Y.S. and S.S. The Charge is about a special education matter that was closed by the state in November, 2014. It erroneously indicates that Ms. Tobia continued tuition payments, when it was well established at the hearing that tuition contracts are reviewed by Special Education Counsel and approved by the Board and the Business Office. Quite clearly, Ms. Tobia does not pay the bills, which requires Board approval and payment from the Business Office. Charges SIX, SEVEN and EIGHT deal with the interaction between Ms. Tobia and Schenck, Price attorneys, Alison Kenny, Esq. and Kate Gilfillan, Esq. Again nothing in these Charges warrants dismissal of Ms. Tobia. With regards to the mediation process in which Ms. Tobia and Ms. Gilfillan were involved, it must be noted that pursuant to NJDOE special education regulations, the substance of mediation is confidential. While Ms. Gilfillan testified as to her recollection of the substance of the mediation, consistent with this requirement, Ms. Tobia did not divulge the substance of what occurred, but indicated that she disagreed with Ms. Gilfillan's characterization of the confidential discussions. (Testimony of Helen Tobia, Pp 33 to 40).

CHARGE NINE

Charge NINE revolves around a series of emails concerning 504 Plans. This is another charge that involves other supervisors not wanting to make a

decision in an area of their responsibility. This charge alleges that Ms. Tobia directed staff to discontinue use of 504 Plans in the Spring, 2013. At this time, Mr. Freund was the District's 504 Coordinator and Adina Weisz was the Supervisor of Related Services. In Board document (9), there is an initial inquiry by e-mail concerning 504 Plans and a request for guidelines from Mr. Freund and annual reviews of 504 Plans. The process for 504 Plans is outlined by Ms. Tobia in a March 25, 2013 e-mail. In May, 2013, Ms. Weisz indicates to Mr. Freund that there was no doctor's note for a student whose 504 Plan was signed on 1/23/12 and to please advise. Instead of Weisz or Freund making a decision, they inquire to Ms. Tobia on how to proceed. From the dates in the e-mail, the plan is past the annual review date and there is no doctor's note supporting the 504 Plan, so Ms. Tobia responds to throw it out, meaning it's not valid. The proper procedure should be used as outlined in the March 25, 2013 e-mail. During these proceedings, the school district did not name one student who was improperly denied a 504 Plan and to this day, 504 Plans continue to be written in Lakewood. There simply is no wrongdoing on behalf of Ms. Tobia.

CHARGE TEN

Charge TEN alleges, at various time during the 2013-2014 school year, that Ms. Tobia instructed various staff members to enter into individual agreements for student placement at non-approved yeshivas. First and foremost, during this school year, Mr. Freund was the Supervisor of the Child Study Teams, not Ms. Tobia. Another example of Ms. Tobia being blamed for

someone else's responsibility. However, more importantly, in the NJDOE letter to Laura Winters, Superintendent, dated April 28, 2014 concerning "Review of Corrective Action Plan..." (Board document - 15), the NJDOE found that with regard to item #1, the district was to revise its procedures for placing students in unapproved schools. The district submitted its procedures and they satisfied the OSEP directive. Ms. Tobia denies any wrongdoing and the NJDOE was satisfied with the procedures in place.

CHARGE ELEVEN

Charge ELEVEN deals with a request by Schenck, Price attorney, Alison Kenny, Esq. to have Ms. Tobia sign an affidavit in a case that she was not involved. In or about April and June, 2015, a request was made by, who else, Michael Inzelbuch, Esq., for independent student evaluations. Ms. Kenny was working with Mr. Freund, Supervisor of Child Study Teams on this matter. When the request from Mr. Inzelbuch was sent by fax to a no longer operating fax number, Ms. Kenney wanted Ms. Tobia to sign an affidavit to that effect.

Conveniently Mr. Freund was not available. Ms. Tobia would not sign an affidavit in a case that she was not familiar with. Having been "burnt" in an affidavit drafted by Joanne Butler, Esq, a Schenck, Price attorney, that Ms. Tobia signed 2 years before. ("Trust me, I know what I'm doing), Ms. Tobia would not sign. The affidavit could have been signed by the Supervisor of Technology, as to the inoperative number, but he refused as well. There was nothing preventing Ms. Kenny from submitting an affidavit based on what was told to her or

telecommunicating with Mr. Freund to sign. Simply put, the refusal by Ms. Tobia to sign an affidavit in a case that she was not involved does not amount to unbecoming conduct and does not warrant any discipline.

CHARGE TWELVE

Charge TWELVE is a non-issue involving a memorandum from 2006 to Ms. Tobia from then Assistant Superintendent William Anderson. The memorandum was not disciplinary in any sense, but rather an outline of job duties. As Ms. Tobia testified her duties had changed over the past 10 years and part of that time, she was an assistant principal.

CHARGES THIRTEEN THROUGH SEVENTEEN

Charges THIRTEEN THROUGH SEVENTEEN are a regurgitation of regulations and policies that are generic to all. Nowhere in the hearing did the Board produce a verbal or written reprimand citing Ms. Tobia's failure to comply with the policies and/or regulations. Furthermore, the failure to follow policy amounts to inefficiency. There are no negative evaluations or individual corrective action plan for Ms. Tobia to improve her performance and there certainly was no progressive discipline before these charges were filed.

CHARGE EIGHTEEN

Charge EIGHTEEN is a catch-all. Ms. Tobia denies any wrongdoing, inefficiency or unbecoming conduct which individually or collectively would

warrant her dismissal.

CONCLUSION

As set forth in the beginning, these charges revolve around the change of the school district's attorneys on or about July 1, 2013; Ms. Tobia's interaction with the "new" attorneys; litigation matters and special education demands by a former board attorney and special education consultant/director; and the "culture of fear" which the State Monitor, Michael Azzara, testified to existing in Lakewood Orthodox staff members, [who] were afraid of repercussion in the Orthodox community, if they made the "wrong" decision. Each of the Charges had been answered in the preceding text. None, whether individually or collectively, warrant Ms. Tobia's removal from her tenured position in Lakewood School District, where she has served honorably for 21 years. Included for the arbitrator's convenience is N.J.A.C 6A:3-5.1 et. seq., the Department of Education regulations concerning Tenure Charges. Of note, with regard to the charges of inefficiency, the regulations require that the evaluation process be followed. Here the process was not followed because the Board did not produce any evaluation instrument. Simply put there are no negative evaluations of Ms. Tobia's job performance and no progressive discipline of any kind.

Also included for convenience is the enabling legislation, referred to as the Teach NJ ACT N.J.S.A. 18A:6-117 et. seq. The Act addresses "corrective action plan", "evaluation" and "individual professional development plan", none of which has been followed in this matter. The only Charge which really refers to

unbecoming conduct is Charge 1, lying under oath. This Charge was addressed (see Response to Charge 1) and even in the Howard matter where Dr. Howard (the case relied upon by the Board) admittedly lied under oath, his penalty was 120 days suspension of pay. Again, in this matter Ms. Tobia did not lie under oath.

For all the foregoing, respondent, Helen Tobia, respectfully requests that the Arbitrator determine that she is not guilty of any wrongdoing, inefficiency or unbecoming conducts which individually or collectively warrant her removal from her tenured positions. Alternatively, if the arbitrator determines that some penalty is warranted, Ms. Tobia requests that the penalty be less than dismissal.

VI. STATEMENT OF THE CASE

Notice is taken at the outset that the tenure laws of our State were originally enacted and designed to establish a "competent and efficient school system," and to protect teaching and other staff from dismissal for "unfounded, flimsy or political reasons. See generally, Viemeister v. Prospect Park Board of Education, 5 N.J. Super, 215, 218 (App. Div. 1949); Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982). The statutory status of a tenured individual should accordingly not be lightly removed. See, In re Tenure Hearing of Claudia Ashe-Gilkes, City of East Orange School District, 2009 WL 246266 (January 12, 2009), *adopted* by the Commissioner of Education (May 2, 2009).

N.J.S.A. 18A:6-10 provides that a tenured teacher may not be dismissed or

reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause..." As the moving party in this disciplinary matter, the District encumbers the prefatory burden of making a *prima facie* showing that it has satisfied or established the sufficiency of the unbecoming conduct and other just cause tenure charges by a *preponderance* of the credible evidence. See, Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987); In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 23 (App. Div. 1974 *cert. denied* 65 N.J. 292 (1974)); In re Phillips, 117 N.J. 567, 575 (1990); In re Polk, 90 N.J. 550 (1982); Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Tenure Hearing of Ziznewski, A-0083-10T1, 2012 WL 1231874 (New Jersey Sup. Ct. App. Div. April 13, 2012) (unreported); see also, State v. Lewis, 67 N.J. 47 (1975) (defining *preponderance* as the "[g]reater weight of the credible evidence in the case."); Bornstein v. Metropolitan Bottling Co., 26 N.J. 263, 275 (1958); Spagnuolo v. Bonnet, 16 N.J. 546, 554-555 (1954); see also, In re Polk License Revocation, 90 N.J. 550, 560 (1982); In re Tenure Hearing of Tyler, 236 N.J. Super 478 (App. Div. 1989); In re Tenure Hearing of Marrero, 97 N.J.A.R. 2d (EDU) 104 (Cmm'r of Educ. 1996).

Should that be accomplished, the burden of production will shift to Respondent to proffer and establish her affirmative or exculpatory defenses. In that event, the burden will finally return to the District to rebut this showing with substantial, credible evidence. Once a determination has been made of whether the tenure charges have been established, Petitioner is then tasked with the

additional burden of demonstrating that the dismissal of Ms. Tobia for the charged conduct is warranted. In deciding whether to remove Respondent from her tenured administrative position with the Lakewood Township School District, I am required to consider the totality of the circumstances, the nature of the act(s) and the impact on her career. See, In re Fulcomer, 93 N.J. Super. 404, 421 (App. Div. 1967).

In Karins v. Atlantic City, 152 N.J. 532 (1998), the Supreme Court of New Jersey determined the phrase *unbecoming conduct* "is an elastic one that has been defined as 'any conduct which adversely affects the morale or efficiency of the bureau... [or] which has a tendency to destroy public respect for municipal employees and confidence in the operation of municipal services.'" citing, In re Emmons, 63 N.J. Super. 136, 164 A.2d 184 (App. Div. 1990) (quoting, In re Zeber, 398 Pa. 35, 156 A. 2d. 821, 825 (1959); see also, Laba v. Board of Education, 23 N.J. 364, 129 A.2d 271 (1957); I/M/O The Tenure Hearing of Christopher Molokwu, OAL Docket No. EDU 9650-04 (Jones, ALJ)

Following a comprehensive analysis of all evidence of record, with full consideration given to the respective positions of the parties as well as the case citation, I find that the Petitioner made its prefatory showing which was not rebutted by Respondent, requiring that the instant tenure charges be **SUSTAINED**. The facts of the instant case are both disputed and undisputed, and with respect to the former, the District's version is credited over that of the Respondent. They are found to be the following:

1. Helen Tobia has been employed by the Lakewood Board of Education for the period of a little over 21 years. At all times that are relevant for the purposes of this proceeding, she held the position of a tenured supervisor of Social Studies, Fine Arts and Pupil Personnel Services since October 2012. Ms. Tobia was also previously the supervisor of the Child Study Teams from 2012 – 2013, an assistant principal from 2007 until 2012, and served as a teacher of special education within the District. T6:7-24; T7:1-25 (December 15, 2015).

2. In October of 2011, then-Lakewood Superintendent of Schools Silva had asked Ms. Tobia to assist her with the Child Study Team and other special education issues. These duties were performed along with the assistant principal responsibilities until the supervisor of Child Study Team job was assumed in 2012. During the initial period of time in 2011, Michael Inzelbuch was still Board counsel, later being replaced by the SCHWARTZ, SIMON, EDELSTEIN & CELSO firm in April 2012, with Marc Mucciolo, Esq. assigned to work with the District on special education matters.T8:13-21; T10:21-23; T11:2-5.

3. Regarding out-of-district contracts for special education students, the practice would be that the contracts would be prepared by the receiving school and come into the Pupil Personnel Office, which would review the student's name and placement. At that point, the contracts were sent to the Board counsel as well as the Business Office for review, eventually being placed on the Board agenda for approval. T9:15-25; T10:1-19; T13:2-4.

4. The procedure for the preliminary review of out of district contracts prior to Board adoption was modified somewhat following the replacement of the SCHWARTZ, SIMON firm by SCHENCK, PRICE, SMITH & KING firm which took over on or about July 1, 2013. After initially forwarding the contracts to Marc Zitomer, Esq. and on to Joseph Roselle, Esq., at some point Business Administrator D'Ambola advised Ms. Tobia that he would be reviewing them and would speak to SCHENCK PRICE as need be on the contracts. T13:9-22. See also, Respondent Exhibits 4A – 4F.

5. In or about July 2013, the parents of pre-school Lakewood student M.W. filed a Due Process & Emergent Relief Petition

against the District through their counsel, Michael I. Inzelbuch, Esq. This sought placement of the child at the Special Children's Center ("SCC"), which was not an approved/or accredited special education school, pursuant to M.W.'s April 3, 2013 IEP. T26:3-25; T27:14-24; T28:4-7 (November 23, 2015); August 6, 2015 AFFIDAVIT OF JOANNE L. BUTLER, ESQ, at Joint Exhibit 2, Tab 1.

6. Upon receiving the petition, on July 11, 2015, Schenck, Price Partner Joanne L. Butler, Esq. contacted Ms. Tobia by telephone. They then discussed the facts of the case for approximately thirty-five (35) minutes. During the conversation, Ms. Tobia told Ms. Butler that M.W.'s IEP called for placement at SCC but that Janina Zak-Krasucki, Supervisor of Child Study at the Ocean County Office of the New Jersey Department of Education had verbally advised her that students could not be placed at SCC because it was not approved or accredited and could not satisfy the Naples requirements. Ms. Tobia also indicated that there was a computer based curriculum; that there were very few, if any, certified teachers; and that there were religious symbols, icons, around the building as well as writing in Hebrew on the building. The issue of SCC being a religious school was significant, because even if a school is unapproved but accredited, a student may be placed there if the Naples criteria are satisfied. There is a prohibition against any placement in a religious school, however. T28:18-22; T34:21-25; T35:1-25; T36:1-20; Ibid; see also, NOTES at Petitioner Exhibit 1.

7. The District through Ms. Tobia had discussed with the parents the potential of placing M.W. at either the Lakewood Early Children's Center or the School for Children with Hidden Intelligence ("SCHI"), which were both approved special education schools. Upon being told that the District could no longer honor M.W.'s placement at the SCC and that he would have to be removed, the parents then filed for the emergent relief, seeking to trigger the *stay put* provisions that would not permit any change in the student's placement at that time. T29:22-25; T30:1-25; T31:1-8; Ibid.

8. Upon receiving the M.W. file, Ms. Butler knew nothing about the operation of the SCC or any other of the local schools, and had never personally visited the SCC. As the District was going to oppose the application for emergent relief by arguing that it was legally prevented from maintaining the SCC placement as stay put based upon the verbal directive from the DOE, Ms. Butler

spoke to Ms. Tobia about the need to have an affidavit discussing the facts of the case to present to the court. Included in the same as a defense, was the fact that SCC was a religious school.T32:11-25; T33:1-11; T37:10-21; Ibid.

9. Following the July 11, 2013 call to Ms. Tobia, Ms. Butler prepared an answer, a letter memorandum, and the affidavit on behalf of the Lakewood School District. After reviewing the affidavit, Ms. Tobia sent back handwritten changes in two sets of revisions by e-mail. No changes were made by Ms. Tobia to the references to religious symbols and icons present in and around the building that appear in ¶ 32 at the bottom of page 4 in either version or at page 5 of the July 12, 2013 final document that was executed by Ms. Tobia. T38:5-19; T40:25; T41:1-25; T42:1-25; T43:1-25; Joint Exhibit 2, Id., at Tab 1, Exhibits A, B, C.

10. On July 16, 2013, ALJ Kerins granted the motion for emergent relief on behalf of M.W. and ordered that he be enrolled at the Special Children's Center with all supports and services as specified in his April 3, 2013 IEP. At page 5 of the decision, the ALJ remarked that "[i]t should be noted that respondent has raised an issue whether SCC is sectarian. However, it provided no evidence in that regard and petitioners dispute any such assertion." Id. at Exhibit D; T44:16-22; T45:5-10. Ms. Butler later provided a copy of this decision to Ms. Tobia as well as District Superintendent Winters. At no point subsequent to this period of time, did Ms. Tobia indicate to Ms. Butler that this was not a true statement.T46:5-19.

11. Ms. Tobia later recanted her position that the SCC was a religious school during direct examination by Mr. Inzelbuch in an unrelated L.F. OAL matter, when on March 23, 2015 she denied that SCC was a sectarian placement or that she ever thought that it was, and had no idea why she had signed the affidavit. Joint Exhibit 2, Id., at Tab 5, T268; 271; 275.

12. According to State Monitor Michael Azzara, Ms. Tobia had negative feelings toward the SCC. These included that if it was approved by the State, it would bankrupt the District; her refusal to sign a Needs Assessment in support of the SCC's application to receive State approval. T21:17-19; T17:9-14.

13. Chana Zentman has served as a school social worker/case manager with the Lakewood School District for a period of eleven

(11) years. Her job responsibilities require her to evaluate, develop, plan and implement the IEPs of special needs children and to serve as a resource/liaison between the school and the parents. Ms. Zentman assisted teachers in implementing the IEPs, and made sure they were implemented. She additionally served as a member of the Child Study Team in connection with her school social worker responsibilities. T5:23-25; T6:1-25. [December 1, 2015].

14. In May of 2013, Ms. Tobia assigned Ms. Zentman to serve as the case manager for student D.D., and directed her to hold an eligibility meeting for the student. At that time, the CST was to review the results of D.D.'s evaluations and determine whether the child was eligible for special education and related services. While such a determination must be made collaboratively by the CST, on May 29, 2013 Ms. Tobia copied Ms. Zentman on an e-mail which stated that she was to schedule the eligibility meeting, and that "[t]he student is not eligible. The judge ordered/agreed to certain evaluations. Omy will scan you copies of the evaluations." Ms. Zentman became concerned, because the student had been determined not eligible for special education when she had not yet reviewed the results of his evaluations and did not know what this determination was based on. See, Joint Exhibit 2, Tab 12; T9:16-25; T10:4-10; T11:4-8; T13:24-25; T14.

15. Later in the afternoon of May 29, 2013, Ms. Zentman replied to Ms. Tobia's e-mail, stating "I have some concerns in regard to this. I am in the process of gathering some information and investigating myself. I would like to discuss this with you. Please let me know when you are available to discuss with me." Ms. Tobia responded to Ms. Zentman later that evening, explaining "I am not available to meet until next week. In the meantime, please schedule the meeting. I have the documentation which court orders us to proceed. We will meet to discuss. The student is not eligible and based on the assessments will not be eligible for special ed. and related services. We cannot wait until we meet to send out the meeting notice. Please send it out tomorrow and send me a copy. I must send a copy of the meeting notice to our attorney. Omy will schedule a meeting for next week after you have reviewed the documentation to address your concerns." Id. at Tab 13; T14:19-25; T15:1-15.

16. The eligibility meeting for D.D. was held on June 17, 2013, with the mother; LDTC; special education teacher; school psychologist; regular education teacher; case manager; and

translator signing the attendance sheet. After the meeting, and per the ELIGIBILITY CONFERENCE REPORT ("Report"), D.D. was found not to meet the criteria for special education and related services. The June 14, 2013 date in the lower right hand corner of each page indicates that the Report was generated prior to the actual eligibility meeting. See, Petitioner Exhibit 3; T19:14-25; T20:1-8; T21:1-7.

17. Prior to the eligibility meeting, Ms. Zentman continued to express concern to Ms. Tobia concerning D.D.'s eligibility for special education and related services. On June 6, 2013, Ms. Zentman e-mailed Ms. Tobia after receiving a doctor's report on the child. This stated: "[t]he doctor mentions in #5 that 'the student is appropriate to receive all supporting educational services possible for them to be academically successful. Possible classification under Other Health Impaired or Emotionally Disturbed would be appropriate for [D.D.].' In the summary of his psychological evaluation it states 'they may also want to consider an Other Health Impairment or 504 plan if medical documentation is supportive.' Helen, this seems to be a strong indication to classify which concerns me if we are going to be determining ineligible. Please advise how we should proceed and deal with this information. Thanks for your support." Ms. Zentman also spoke to the Union president, who advised her to follow Ms. Tobia's directive or risk a charge of insubordination. See, Petitioner Exhibit 6; T21:8-25; T22:1-23.

18. Later in the afternoon of June 6th, Ms. Tobia answered Ms. Zentman's e-mail: "Chana, are you implying that you think the student should be classified? RTI? SST? Was the I & RS process ever completed with this student? Has anyone ever raised a concern regarding this child's ability to learn? Please provide me with an extensive list of strategies and interventions, work samples and frequency and duration of each; date, an FBA and documentation to support that interventions were provided to this student. Ms. Zentman replied to Ms. Tobia on June 7th, saying, "Helen, No I was not implying this student should be classified. I just wanted to clarify this point since this is a legal case. I appreciate your guidance and support always." Ibid; T23:1-15.

19. Ms. Zentman also approached the then-supervisor of the Child Study Team Elchanan Freund regarding the situation. Mr. Freund never discussed the situation with Ms. Tobia, but was privy to a discussion Mr. Zentman had with her on speakerphone

at the conclusion of an I & RS meeting, when Ms. Tobia essentially told them both that the child was not eligible. At that time, Ms. Zentman had advised Ms. Tobia that there was something they could go on, but the latter was adamant that the child could not be found eligible. T20:20-25; T21:1-24; T22:1-25. [November 23, 2015].

20. Based upon the lack of eligibility finding, the parents of D.D. then filed for due process. Ms. Zentman testified in that matter, consistent with the testimony presented in the instant case on December 1, 2015. Ms. Tobia also presented testimony on behalf of the Board in the D.D. due process hearing. On cross-examination by Mr. Inzelbuch, Ms. Tobia: admitted the bottom of the ELIGIBILITY CONFERENCE REPORT indicates that it was written June 14, 2013, while the conference was held on June 17, 2013; agreed 100 % that "we do not write up Eligibility Conference Reports ahead of time, because the Child Study Team and the parent determine all of the things that will happen at the meeting and they are then put in; that is apparently what happened in the D.D. case as ineligibility was determined before the meeting; she had spoken to the case manager who did not agree with what Ms. Tobia had said, but that was her interpretation based on the documents; Joint Exhibit 2, Tab 8 at T147:23-25, T148:1-25, T149:1-4.

21. As a result of that litigation, it was determined in January 2014 that D.D. was eligible for special education and related services, classified as Multiply Disabled, and should receive an out-of-District placement. (CZ)T23:23-25; T24:22-25; T25:1-11.

22. Section 504 of the Rehabilitation Act of 1973 mandates that qualifying students with disabilities receive necessary accommodations and modifications to their educational program, to ensure that they have access to education at the same level as their non-disabled peers. These children receive a Section 504 Plan, detailing the confines for the implementation of the accommodations, which are usually related to physical disabilities. By contrast, students with cognitive disabilities are referred to the Child Study Team for possible classification and eligibility for special education and related services. (A.W.)T9:14-22; T10:6-12. [December 14, 2015].

23. Included in Ms. Tobia's job responsibilities as Supervisor of Pupil Personnel Services was oversight of the Section 504 and IEP process during the 2012 – 2013 School Year. In or about

April of 2013, Respondent issued a directive to all staff that the use of new Section 504 Plans in the District should be discontinued as too many students were being provided with them. T8:13-15; T9:2-4; (EF)T60:10-22; (JK)T24:4-7.

24. Supervisor of Related Services Adina Weisz is charged with implementing the occupational, physical and speech therapy programs contained with the Section 504 Plans. On May 17, 2013, Ms. Weisz sent an e-mail to 504 Coordinator Mr. Freund with a copy to Respondent seeking direction concerning occupational therapy services for a student under the 504 Plan. Joint Exhibit 2, Tab 9. Although Ms. Tobia had instructed that the 504 Plans should be discontinued, this 504 Plan had already been signed by the parties, thereby legally requiring the District to implement the same. T13:16-24; T28:25; T29:4.

25. Ms. Weisz e-mailed Mr. Freund again on May 24, 2013, and copied Ms. Tobia. Respondent replied to Ms. Weisz to "throw it out." Ms. Weisz did not discard the 504 Plan, however, based upon Ms. Tobia's e-mail, it was not implemented. In August of 2013, Ms. Weisz e-mailed Ms. Tobia stating "please advise if we will be servicing students for occupational therapy under a 504 Plan for the 2013 – 2014 School Year, as there were some concerns last year." See, Joint Exhibit 2, Tab 9. In an e-mail dated August 26, 2013, Respondent advised Ms. Weisz that rather than implement Section 504 Plans, the staff was to refer all children to the Child Study Team for a determination of whether they were eligible for special education. Ms. Tobia replied "yes," when asked by Ms. Weisz if she meant all new and existing 504 requests. Ibid. On November 20, 2013, a number of the District staff approached Ms. Gilfillan during a training session, and informed her of Respondent's directive not to utilize Section 504 Plans and asking whether the directive was legal. (KAG)T33:16-23; T36:1-4; Joint Exhibit 2, Tab 2 at ¶¶23-24.

26. The Lakewood School District had an affirmative obligation to provide students who do not qualify for special education and related services under IDEA with services, including evaluations, through a 504 Plan. T34:1-4. During the 2012 – 2013 School Year, approximately 36 students were serviced under a 504 Plan, and in the 2013 – 2014 School Year no students received this accommodation. (A.W.)T18:10-18; (JK)T38:18-34. Child Study team Member Jennifer Kaznowski testified that there was "absolutely an increase in CST referrals due to the elimination of Section 504 Plans in the District." T26:9-11.

27. Following the November 20th training session, Counsel Gilfillan met with Ms. Tobia, Mr. Freund and Superintendent Winters to inform them that the District was legally prevented from discontinuing 504 Plans. Joint Exhibit 2, Tab 2, ¶24. Respondent did not issue additional clarification to District staff or retract the prior directive afterwards. Ibid.

28. Commencing in the Spring of 2013, the Lakewood School District received a significant number of records requests concerning students who had been placed in private, unaccredited and/or religious schools, from Michael Inzelbuch, Esq. (EF)T24:1-25; T5. These sought the students' entire file, and often were a precursor to litigation. At this time, Ms. Tobia had the responsibility of overseeing District litigation matters related to special education students. T11-21; Joint Exhibit 2, Tab 4; AFFIDAVIT of Elchanan Freund, ¶¶5-7.

29. During the time that the records requests were received, Mr. Freund attended a meeting with Ms. Tobia and Ms. Winters, to discuss the requests and potential resulting litigation. T26:2-11. During the meeting, Ms. Tobia instructed Mr. Freund to hold IEP meetings for each student, and to "offer the parents whatever they wanted." T26:13-19. Respondent continued that if the parent sought a placement in an unaccredited, unapproved school, this could be done through the student's IEP. T26:20 – T27:8. Id. at ¶¶5 and 10.

30. Mr. Freund later met with each Child Study Team Member to inform them that per Ms. Tobia, they were to write IEPs for each student and place the child wherever the parents wanted to send the children. T28:20-25. During the summer and fall of 2013, Ms. Tobia also personally met with case managers and directed them to place students in Yeshivas through the use of IEPs. The New Jersey Administrative Code does not permit students to be placed in unaccredited, unapproved schools or religious yeshivas. T29:19-T31:9.

31. In or around September, 2013, Ms. Tobia asked Katherine A. Gilfillan, Esq. of Schenck, Price to review approximately seventy (70) tuition contracts for special education students who had been placed in out-of-District placements. T7:10-25; Exhibit J-2, Tab 2, AFFIDAVIT, ¶3. After reviewing the contracts, Ms. Gilliland was concerned that some of the contracts were being utilized to place children either in unaccredited, unapproved or religious placements. T8:10-17; Id. at ¶4. Therefore, in a

correspondence dated September 25, 2013, Ms. Gilfillan advised Ms. Tobia that the contracts governing the placement of students in yeshivas could not be approved, and that without State approval the Board would legally not be able to enter into those agreements. T9:20-23; Id. at Exhibit 1 attached to AFFIDAVIT.

32. In or about January 2014, a complaint was filed with the New Jersey Department of Education, Office of Special Education Programs ("OSEP") by Mr. Inzelbuch. This related to the District's placing of students in yeshivas, in particular the decision to place student Y.T. in Yeshiva Tiferes Torah ("YTT") for the 2013 – 2014 School Year. Id. at Tab 14.

33. Y.T. attended the approved and accredited SCHI during the 2012 – 2013 School Year. (GN)T8:22-T9:2. In or around January 2013, Case Manager Gila Nussbaum began reevaluating the student for the coming 2013 – 2014 School Year. The student's father advised Ms. Nusssbaum that he wanted Y.T. to attend YTT as a public school student through an IEP, and also told her he had spoken with Ms. Tobia and that they had already reached an agreement to place Y.T. in YTT as a public school student during the 2013 – 2014 School Year. T11:7-18; T8:14-17; T14:2-7. Ms. Nussbaum and the CST then arranged for Y.T. to attend YTT under an IEP, with Ms. Nussbaum sending a letter to the parents on April 8, 2013, confirming that Y.T. was to attend YTT full-time as a public school student, "per the Director of Pupil Personnel Services." Ms. Tobia e-mailed Ms. Nussbaum on April 6, 2013, verifying that Y.T. was to be a public school student while attending YTT, and that the District would enter into a parent agreement with the parents under which they would be reimbursed for costs related to the education. No Naples application was generated and State approval was not approved to place the student there. T20:10-14; T14:22; T15:4; T21:1-11; Petitioner Exhibit 4; Respondent Exhibit 1.

34. OSEP substantiated the Inzelbuch complaint in or around March 2014, and placed the Lakewood School District on a Corrective Action Plan ("CAP"), which required the District to submit a list of all students who were being educated in unapproved placements, with any supporting documentation demonstrating the approval of any of the placements by either an ALJ or the State. See, Joint Exhibit 2 at Tab 14. This found inter alia that Ms. Tobia had issued a directive to the IEP Team that it should write an IEP placing the student at YTT, which was an

unapproved, unaccredited yeshiva. Id. at ¶7. A further finding was made that the District had failed to follow procedures in placing the student in an unapproved placement. Id., at ¶¶8, 10; Tab 15.

35. Ms. Gilfillan addressed the initial CAP on behalf of the District, and asked that Ms. Tobia provide her with any approval forms for the placements. Some documentation was initially provided by Respondent, however, ultimately Ms. Tobia was unable to provide evidence supporting the out-of-District placements. T15:4-16; T16:5; Joint Exhibit 2, Id., at Tab 2, ¶¶10,11.

36. A supplemental CAP was issued by OSEP in August 2014, requiring the District to hold IEP meetings for those students who had been placed in yeshivas or other unapproved, unaccredited schools, and to rewrite the same to offer an approved placement for them. T16:25; T17:4; Id. at ¶12.

37. Once the IEP meetings were held, many if not all of the parents of the affected children filed for due process or requested mediation, seeking to maintain the students' placement in the yeshivas. Id., at ¶13. Due to these factors, a large number of work hours and administrative time was expended to respond to the CAP, as well as hold the IEP meetings. The District's State special education funding was also placed at risk. T13:9-21; (EF)T45:14-T46:7; Ibid.

38. In compliance with OSEP's directive to hold IEP meetings for students who had previously been placed into unapproved yeshivas, a meeting was convened on September 15, 2014 for student Y.S. At the conclusion of the meeting, the CST recommended that the student be removed from the yeshiva and placed in the District's Clifton Avenue Elementary School. Ms. Tobia along with Mr. Freund then met with the student's parents and their educational advocate, Rabbi Eisemann. (EF)T50:25; T51:3-21-25; T52:3-9.

39. During the meeting, Ms. Tobia advised Rabbi Eisemann and the family to file for mediation or due process, in order to permit the student to continue in his yeshiva placement under the IDEA's "stay put" provision. T53:24-54:5.

40. In October of 2014, the parents filed a request for mediation for Y.S. as well as a separate one for his brother S.S. The mediations were never held, however, and the DOE closed the

files for both students. Because of this fact, new proposed placements for these students returning them to the District should have gone into effect. (KAG)T17:5-9; T18:12-16; (EF)T55:3-21; T56:1-4. In an e-mail dated November 11, 2014, Ms. Gilfillan informed Ms. Tobia of the mediations being closed, that stay put no longer applied, and that the students should be transitioned into their new placements. See, Joint Exhibit 2, Tab 2, Exhibit 6. Respondent failed to implement the new placements for either student, and the District continued to pay the cost of the placement of Y.S. and S.S. in their yeshivas. This inaction was in violation of the OSEP CAP. (KAG)T20:1-2; 3-7; (E.F.)T56:15-19.

41. A similar IEP meeting was convened in October of 2014 with the parents of student M.W., who also had been attending a yeshiva. The Child Study Team concluded at the end of the meeting that the student could be placed at the District's Clifton Avenue School. Ms. Tobia and Mr. Freund later attended a meeting with the child's family and Rabbi Eisemann. At that time, Ms. Tobia advised the family advocate to file for mediation or due process, to maintain the student's placement in the yeshiva. Subsequent to the meeting, a request for mediation was filed, which legally required the District to continue to pay for the placement under stay put. (EF)T57:8-15; T58:2-11, 21; T59:9-14.

42. On December 29, 2014, Ms. Tobia attended mediation sessions for students M.W. and Y.S. along with Alison Kenny, Esq. of Schenck, Price, as representatives of the District. At the start of the mediation, Ms. Tobia informed the parents and the State mediator that the placements proposed by the CST for the students were "completely inappropriate," and agreed to continue the students in their sectarian placements. This action was contrary to the CAP, taken without input from the CST, and Respondent lacked the authority to make such an offer. (ALK)T8:14-17, 23 – T9:4; T9:11-18; AFFIDAVIT, at Joint Exhibit 2, Tab 4, at ¶2-3.

43. The mediator was unable to memorialize Respondent's agreements with the parents in writing, because they were continuations of an illegal placement. T11:9-22.

44. On January 2, 2015, Ms. Gilfillan e-mailed Ms. Tobia to advise her that the agreements concerning Y.S. and M.W. were improper, stating that "[t]hese agreements could be seen as having circumvented the State's directive that these students be

placed in approved and accredited placements." See, Joint Exhibit 2, Tab 2, Exhibit 7.

45. On or about March 9, 2015, Ms. Gilfillan and Ms. Tobia attended a mediation for student S.S. Respondent informed counsel that the program proposed for S.S. was wholly inappropriate for him. (KAG)T24:3-12. They then spoke with the case manager, Shana Shiffrin, who stated that the proposed placement was appropriate, and that the student had been accepted into the program. T25:6-17. Id., at ¶20. Rabbi Eisemann requested that the child be permitted to remain in the yeshiva, and Ms. Gilfillan responded that such a placement was improper and that the District could not legally continue the placement. T26:6-9, 16-17. The parents replied that Ms. Tobia had already agreed to continue the placement for Y.S., the brother of S.S., and were surprised and angry that the same agreement could not be reached for S.S. T27:4-12.

46. The mediator then suggested that he, Ms. Tobia and Ms. Gilfillan leave the room, so that the mother of S.S. could speak with the advocate. Respondent refused to do so, and when the mediator again requested that Ms. Gilfillan ask Ms. Tobia to leave the room and "get control of her client," Ms. Tobia shut the door in the attorney's face. Respondent then took part in a conversation with the parents and Rabbi Eisemann for roughly ten (10) minutes before permitting the mediator and Ms. Gilfillan to return to the room. Ms. Gilfillan recorded her concerns about Ms. Tobia's actions during the mediation session in a March 10, 2015 e-mail to State Monitor Michael Azarra, Id., at ¶ 21; Exhibit 9; T28:22-25; T29:8-13.

47. On June 1, 2015, Ms. Kenny e-mailed Ms. Tobia to inquire about the students' placement and advised her that IEPs must be developed to offer an approved, non-sectarian, accredited school, stating "the District cannot begin the 2015 – 2016 School Year with the students in the current sectarian placements." Ms. Tobia replied on June 2, 2015 that the students remained in their current, sectarian placements. The DOE later contacted Mr. Azzara to express disapproval that the Lakewood District was continuing to allow students to remain in yeshivas rather than placing them in approved placements as required by the CAP. (MA)T64:22-25; Id., at Exhibit 8.

48. In May of 2013, the CST held an eligibility meeting for R.M., determining that an out-of-District placement was no longer

required, and that an in-District resource program would be appropriate. The student, however needed a climate controlled environment, which Lakewood could not accommodate. School Social Worker Jennifer Kaznowski according made an inquiry as to whether other public school districts had this capability. The child's mother raised the issue of R.M. attending Orchos Chaim, an unapproved and unaccredited yeshiva and advised the school social worker that she would prefer he attend there rather than a public school. (JK)T 7:10-16; T8:19-21; T9:2-7; T10:8-15, 16-T11:3.

49. Based upon her understanding that Ms. Tobia had discussions with Rabbi Mandelbaum, the head Rabbi at the school, Ms. Kaznowski e-mailed Respondent concerning placing the student in the school, informing her that a Naples approval from DOE had not been received. Ms. Tobia responded that an acceptance letter from the school was required, but directed Ms. Kaznowski not to hold up the meeting, and submitted that if the Naples process was not completed by the school a parent agreement would be done providing reimbursement for tuition on a monthly basis. See, Joint Exhibit 2, Tab 10; T11:15-17.

50. In a June 6th follow-up e-mail, Ms. Kaznowski again sought direction from Ms. Tobia regarding student R.M., based upon the fact that he was leaving SCHI prior to the 2013 – 2014 School Year. Respondent replied that "[a]ll IEPs must state an approved placement as recommended by the IEP Team. For existing students who were already placed in other programs, the parents will most probably reject placement. At that point I will meet with the parents to reach an agreement." R.M.'s mother told Ms. Kaznowski that she met with Ms. Tobia on August 6, 2013 to do the parent agreement placing the child at Orchos Chaim. Id, at Tab 11; T20:14-15.

51. Alison Kenny, Esq. was assigned to represent the Lakewood Board of Education in a special education matter involving student J.Q. in April of 2015. After receiving documentation from the parents' attorney in May purporting to show that a request for pre-classification evaluations was sent to Ms. Tobia on April 15, 2015, Ms. Kenny called Respondent on June 1st. Ms. Tobia stated that she had been out of the office that date, but would check with her staff. When no response was received, a follow-up e-mail was sent on June 9th. It was later determined that the request had been sent to an unused facsimile machine and therefore was not received by the District. (ALK) T13:14-18;

T14:1-4; Joint Exhibit 2, Tab 3 at Exhibit 2.

52. The District decided to file for due process to challenge the request for evaluations, with the petition needing to be filed within fifteen (15) days of the date of receipt of the request. It was therefore absolutely essential for a certification to be provided by Ms. Tobia indicating that the parents' fax had not been received, and Ms. Kenny provided the same to her for review on June 16, 2015. Respondent replied to Ms. Kenny and said that she would not certify to the facts in the certification, as she was not familiar with the facts concerning the parents' initial request for evaluations. A revised certification was later forwarded to Ms. Tobia by Ms. Kenny, which was narrowly tailored to focus on whether the initial request for evaluation was received. Respondent did not return the revised certification, or respond to Ms. Kenny, resulting in the District's inability to file the petition seeking to deny the evaluations and accordingly became legally obligated to pay for the same. T16:3-23; T21:1-5, 8-17; T21:23 – T22:9; Board Exhibit 7; Joint Exhibit 2, Id. at Tab. 3.

53. By virtue of her job description, Ms. Tobia was aware of the duties and responsibilities of her position, and due to her education, training and experience, was or should have been aware of the operative State statutes and regulations, and Board policies which were violated by the established unbecoming conduct.

The District's *prima facie* showing of unbecoming conduct was easily accomplished based upon the voluminous evidence relied upon by the Petitioner in bringing the tenure charges, coupled with the credible testimony of its witnesses. Tenure Charge One pertains to the Due Process & Emergent Relief petition filed by the parents of M.W., which was designed to trigger the *stay put* provision of the IDEA, thereby permitting the child to remain in the SCC as the out-of-District placement. Ms. Butler provided credible testimony on the District's case-in-chief in this regard. Generally, this recalled that as Schenck, Price had just taken over as Board counsel, the M.W. file was the first one she received.

As such, she was unfamiliar with the SCC (as well as the other schools) and had never been there. She accordingly relied upon the information provided to her by Ms. Tobia, which included inter alia, that this was a religious school with icons and symbols, as well as Hebrew writing on the building. That information was significant, as one of the Naples criteria that prohibits DOE approval of a student placement in an otherwise accredited though unapproved school is that it cannot be a religious school.

This information was later incorporated into an affidavit executed by Ms. Tobia in opposition to M.W.'s application before ALJ Kerins. The ALJ in fact referenced the same in her DECISION, which granted the petition and ordered that M.W. remain at the SCC. However, as the Petitioner has emphasized, although she knew that this assertion was untrue Respondent took no steps to inform the District. Subsequent to this in another unrelated OAL proceeding involving student L.F. two years later, Ms. Tobia recanted her prior position in very damaging testimony that was elicited by Mr. Inzelbuch. In doing so, she: initially denied that SCC was sectarian or that she had ever believed it was; when confronted with her affidavit, agreed that she had read it before signing it; denied that it was her position at the time that SCC was sectarian; denied that she had ever seen any religious symbols or icons on the walls and was there several times; given these facts, was unable to explain why she had signed the affidavit; while denying the statement was false, agreed it was definitely a mistake; agreed that she had reviewed Judge Kerins decision, but did not ever tell her lawyers

there was a mistake in her affidavit. See, Joint Exhibit 2, Tab 5.

Given these facts, it is clear that Ms. Tobia submitted an affidavit that she knew or should have known contained false information. The Petitioner's argument is therefore credited that both ALJs and the Commissioner of Education have found that engaging in such a dishonest action constitutes unbecoming conduct. See generally, I/M/O Tenure Hearing of John Howard, OAL Docket No. EDU 7442-01; 2005 N.J. Agen. Lexis 46 (Cmm'r, 2005). In that case, there were two (2) consecutive sets of tenure charges filed by the Board. The Commissioner affirmed the initial ALJ decision sustaining the termination in Howard I. A second hearing then ensued in Howard II, related to the charge of conduct unbecoming charging Dr. Howard had lied under oath during a deposition conducted in anticipation of the Howard I litigation. In finding that the Board properly imposed a second 120 day period of suspension, ALJ Mancini La Fiandra opined:

> [a]s I noted in the Initial Decision in **Howard I**, the Commissioner has repeatedly and consistently affirmed the importance of holding teaching staff members to a high standard of honesty, integrity and judgment. The Board cites *In re* **Tenure Hearing** of Ortiz, 86 *S.L.D.*, *aff'd,* Comm'r of Ed., 86 *S.L.D.* 1004, *aff'd*, St. Bd., 86 *S.L.D.* 1008, where the Commissioner of Education found that a **tenured** teacher's falsification of an employment application constituted unbecoming conduct as to warrant dismissal and in *In the Matter of Vitacco, 97 N.J.A.R. 2d (EDU) 449, aff'd*, Comm'r of Ed., 97 N.J.A.R. 2d (EDU) 454 where the Commissioner referred to the position of a school superintendent as a person in whom the public is required to place considerable reliance with respect to, among other things, his honesty and integrity. In lying during his deposition, Dr. **Howard** violated fundamental principles underlying our system of justice in circumstances which, as the Board points out, directly related to his employment. There is no greater breach

> of the public trust. I **FIND**, therefore, the conduct in which Respondent **Howard** engaged was deceptive and dishonest.
>
> There is no question that this conduct warrants the imposition of the most severe sanction available. Since dismissal cannot be ordered and, as the Board notes, the only penalty available is forfeiture of the 120 days' pay withheld at the time this suspension was imposed, I **CONCLUDE** that is the penalty to be imposed in this matter. Further, I **CONCLUDE** this matter should be referred to the State Board for consideration of revoking Respondent's certificates.
>
> * * *

[*Emphasis supplied in original*]; see also, I/M/O The Teaching Certificate of Robert Crawford, OAL Docket No. EDE 8665-98 (Cambell, ALJ 1999); I/M/O The Certificates of Deborah Cantz, OAL Docket No. EDE 4520-12 (Miller, ALJ).

Tenure Charge Two alleges that in her capacity as supervisor of Pupil Personnel Services, Ms. Tobia indicated via e-mail to School Social Worker/Case Manager Chana Zentman that she should schedule an eligibility meeting for student D.D., while directing her that the child should nevertheless be found ineligible for special education and related services.

Ms. Zentman testified credibly to her significant concerns regarding this predetermination decision and multiple attempts to level the playing field by calling Ms. Tobia's attention to comments made in reports by D.D's evaluating doctors, which appeared to weigh in favor of classifying the student. These efforts are memorialized in e-mails as previously discussed, and Mr. Freund testified that he was present when Ms. Zentman called Ms. Tobia and the call was placed on speaker. Respondent then reiterated her prior instructions in no uncertain terms.

Following the perfunctory finding of ineligibility at the June 17, 2013 eligibility meeting with the parent and myriad team members, D.D.'s parents filed for due process. At that time, Ms. Zentman provided testimony consistent with that given before me at the December 1, 2015 hearing with regard to her concerns. For her part Ms. Tobia acknowledged on cross that the ELIGIBILITY CONFERENCE REPORT dated June 14, 2013 amounted to a predetermination of the eligibility status; explained that this is not done before hand, as the parent and the CST determine all the things that will happen at the meeting; and that the case manager had disagreed with her assessment, but allowed that was her assessment based on the documentation. Ultimately, D.D. was found eligible for special education and related services and Ms. Tobia's admissions were recorded in the transcript of the proceeding. See, Joint Exhibit 2, Tab 8.

These facts support the District's posture that Ms. Tobia's actions inter alia, violated numerous State laws, regulations and directives, and most importantly negatively affected the quality of the education provided to a Lakewood student. N.J.A.C. 6A:14-2.3(k) provides in relevant part, that a meeting to determine a student's eligibility and develop an IEP shall include the parent, a teacher, the student, one (1) CST member, the case manager, and other appropriate individuals. N.J.A.C. 6A:14-2.3(i) requires that the determination as to a student's eligibility shall be made only after the meeting takes place. See also, N.J.A.C. 6A:14-3,5 ("Eligibility shall be determined collaboratively by the participants described in N.J.A.C. 6A:14-2.3(k)1."). N.J.A.C. 6A:14-3.5(a) further states that

"[w]hen an initial evaluation is completed for a student age three through 21, a meeting ... shall be convened to determine whether the student is eligible for special education and related services. Thereafter, if the student is determined to be eligible, the student's educational program and placement are set forth in the IEP, per N.J.A.C. 6A:14-3.7.

Tenure Charge Nine also pertains to Respondent's failure to comply with a statutory mandate. Section 504 of the Rehabilitation Act of 1973 requires that eligible students with disabilities not necessarily eligible for special education and related services receive necessary accommodations or modifications to their educational programs, so that they receive the same level of education as their non-disabled peers. Notwithstanding this clear mandate, as testified to by Ms. Weisz, Mr. Freund, and Ms. Kaznowski, in or about April of 2013, Ms. Tobia issued a directive that no new 504 Plans would be written or provided to students.

Instead, all students would now be referred to the Child Study Team for a special education evaluation. I recognize that the Respondent has objected to the admission of the hearsay statement by Ms. Kaznowski that staff members were talking about Respondent's 504 Plan directive. However, as Petitioner has countered, and my bench ruling found, hearsay evidence is admissible in this forum, subject to the *residuum rule*. See e.g., I/M/O The Tenure Hearing of Cowan, 224 N.J. Super. 737 (App. Div. 1988 at p. 8) citing, Weston v. State, 60 N.J. 36 (1972) (the ultimate finding of fact must be supported by a residuum of

competent evidence.).

When asked by Supervisor of Related Services Adina Weisz in an e-mail if this meant that students should not be provided an evaluation or therapy under a 504 Plan, Respondent confirmed that was the case. See, Joint Exhibit 2, Tab 9. Furthermore, when Ms. Weisz inquired on May 17, 2013 as to whether a particular student's 504 Plan should be implemented because it had been signed by the child's parents legally requiring the District to follow it, Ms. Tobia told Ms. Weisz to "throw it out."

The end result was that the District did not implement or adhere to any 504 Plans during the 2013 – 2014 School Year, resulting in a significant number of referrals to the Child Study Teams notwithstanding the fact that the children may have needed an accommodation rather than a classification. And following a number of staff approaching Ms. Gilfillan during a November 20, 2013 training session, inquiring as to the discontinuance of the 504 Plans, the attorney held a meeting with Mr. Freund, Ms. Tobia and Superintendent Winters. At that time, Ms. Gilfillan advised them that they could not legally discontinue 504 Plans. Despite this guidance, Ms. Tobia never rescinded her earlier directive or issued a clarification. These actions contravened the clear and unambiguous language of Section 504, 34 C.F.R. 104 and constitute unbecoming conduct under the operative case law.

Tenure Counts Three, Four and Ten generally chronicle Ms. Tobia's

further directives that classified students be placed at unapproved and sometimes unaccredited private schools, including yeshivas. The *Naples Act*, N.J.S.A. 18A:46-14 allows the CST to place a classified student in an unapproved out-of-District school if a suitable special education program cannot be provided elsewhere. Pursuant to N.J.A.C. 6A:14-6.5, the placement must be approved by the Commissioner of Education and only when inter alia, (1) the school is accredited; (2) the school is the most appropriate placement for the student; (3) the requirements of the student's IEP are met; (4) the school provides services which are nonsectarian. Id. at (b). See also, H.W. and J.W. o/b/o A.W. v. Greater Brunswick Charter School and Highland Park Bd. Of Education, OAL Docket No. EDS 905-00 (August 28, 2001).

The evidence of record as buttressed by the credible testimony of Ms. Nussbaum and Mr. Freund underpins the District's position that Ms. Tobia entered into numerous agreements with parents and approved the placement of students at yeshivas without proper *Naples* approval being received or even sought. As a practical matter, due to the sectarian nature of the yeshivas, they would be eliminated from consideration under any circumstances.

Nevertheless, Ms. Tobia repeatedly attempted to pull an "end-run" around the State special education regulations by writing the illegal placements into the IEPs, and entering into private contracts with the parents that provided for direct reimbursement. In response to numerous record requests from the District's nemesis Mr. Inzelbuch in the Spring of 2013, which would eventually trigger

litigation, Respondent went so far as to direct Mr. Freund to hold IEP meetings and "give the parents anything they wanted." This message was then passed along to the Child Study Team members.

Mr. Inzelbuch initiated a complaint with OSEP with regard to one of these placements, Y.T. Following an investigation, a CAP was issued and included within the FINDINGS OF FACT was that Respondent had issued a directive to the IEP Team that it should write an IEP placing the student at the unapproved, unaccredited yeshiva. Among the provisions of the CAP was that the District was to hold IEP meetings for all of the students in the unaccredited, unapproved private schools, with an approved placement offered. Ms. Tobia, however, did not adhere to this requirement and did not transfer any of the students to new placements, as Ms. Gilfillan remarked during her testimony. See, Joint Exhibit 2, Tab 14.

Were these transgressions not enough, the District has also established to my satisfaction that Respondent acted in a grossly insubordinate way, which also constitutes unbecoming conduct. See generally, I/M/O The Certificates of Jennifer Turner, DOE Docket No. 0405-257 (2005). A consistent theme throughout the charges is Ms. Tobia's concerted attempts to adopt positions in meetings with parents and others that were diametrically opposed to the best interests of the Lakewood School District and contrary to Board counsel's legitimate and legal positions that were being advanced. As detailed in Tenure Charges Five and Six, this took place with regard to students S.S., Y.S. and

M.W. More particularly, this was evident at the mediation sessions that provided the basis for Tenure Charges Seven and Eight, where Respondent's behavior may only be characterized as outrageous, when she refused to leave the room at the mediator's request and then slammed the door in Ms. Gilfillan's face. Tenure Charge Eleven also bears stark testimony to Ms. Tobia's obstinate nature, when she refused to even reply to Ms. Kenny and sign an affidavit that had been narrowly tailored to only confirm the fact that she had not received the parent's request for evaluations by fax. The cumulative result of Respondent's actions was that she incurred countless additional and needless financial expenses for the Lakewood Board of Education, and meaningfully compromised the educational entitlements of a fragile special education population that she was immutably obligated to assist. In doing so, she violated numerous State statutes and regulations, as well as the Board policies cited by the District and engaged in repetitive unbecoming conduct within the contemplation of Karins and its progeny. See also, I/M/O Margaret Sidbery, OAL Docket No. EDU 0952-97S (Harned, ALJ); I/M/O Certificates of Oberwanowicz, Docket No. 0910-218 (2014).

The District's *prima facie showing* having been accomplished, the burdens of production and persuasion shift to the Respondent. My attention is initially directed to the uniqueness of the Lakewood School District, coupled with the composition of its School Board. The record indicates that as Mr. Azarra testified and Respondent underlined, there are approximately 6,400 children enrolled in the Lakewood public schools, with roughly another 25,000 attending sectarian

schools, primarily Orthodox yeshivas. The Board of Education is primarily comprised of Orthodox Jews. On these bases, Respondent concludes that the operation of the public schools is controlled by members of the Orthodox community.

Respondent has seized upon the testimony of the state monitor that upon his arrival in Lakewood his impression was that a "culture of fear" existed among Orthodox staff members, who feared reprisal from the Orthodox community for any decisions viewed as contrary. Mr. Azarra's testimony that Senator Singer had advised him to fire Ms. Tobia, is also amplified. These contentions are all supported by the evidence. As the involvement of politics, sectarian and non-sectarian alike, is not unusual in school districts around our state, the operative question becomes whether this consideration was a motivating factor in whole or in part for the personnel decision made.

The totality of the evidence convinces me that it was not. Instead, Mr. Azarra's testimony was credible and at times incredibly candid. The testimony of the Schenck, Price attorneys was likewise straight forward, reliable and credible. The same may be said of the lay witnesses who testified for the District, some who courageously did so under subpoena. These findings require the conclusion that not an ounce of proof has been provided by Respondent in support of her further position that as a result of the pervasive culture, Orthodox staff members were reluctant to make hard decisions on issues related to the special education and related services of Lakewood children and went to Ms. Tobia instead

because she was not Orthodox. Nor do I believe that Mr. Azarra was assigned to Lakewood by the State Department of Education merely to address the courtesy busing issue, as he plainly testified that was one of the issues as well as out-of-District special education costs. The latter of course is partially related to the instant tenure charges.

Any suggestion that Ms. Tobia was somehow "set-up as the fall guy" by the inaction of her colleagues is not supported by the evidentiary record, as it is abundantly clear to me that Respondent was at all times, "driving the bus." Mr. Freund in fact, testified to the general reluctance of staff members to question the directives of Ms. Tobia. Respondent's testimony was inconsistent, self-serving and at times incredible. In Abbott Northwestern Hospital, 94 LA 621, 630-631 (Berquist, 1990), Arbitrator Berquist provides a useful balancing test for analyzing the credibility of witnesses, which includes consideration of the following:

1. interest or lack of interest in the outcome of the case;
2. their relationship to the parties;
3. ability and opportunity to know, remember, and relate the facts;
4. their manner and appearance;
5. their age and experience;
6. their frankness and sincerity or lack thereof;
7. the reasonableness or unreasonableness of their testimony in light of all the other evidence in the case;
8. any impeachment of their testimony;
9. any other factors that bear on believability and weight.

See also, I/M/O Tenure Hearing of William Thomas, School District of the City of Plainfield, Union County, OAL Docket No. EDU 01763-08 (Solomon, ALJ 2008 at p. 6 "[c]redibility is the value that a finder of fact gives to a witness's testimony. It requires an overall assessment of the witness's story in light of its rationality, its internal consistency, and the manner in which it 'hangs together' with the other evidence." Citing, Carbo v. United States, 314 F.2d 718, 749 (8th Cir. 1963)).

Many of the tenure charges at hand concern children from the Lakewood School District whose parents were represented by Michael Inzelbuch, Esq., who for many years was Lakewood Board counsel, while concurrently serving as its special education attorney/director/consultant. Respondent has noted that during this time period, Ms. Tobia was hired as supervisor of Pupil Personnel Services and worked under his supervision. And while his fingerprints are on many of the cases that form the basis for the subject charges, generally speaking his purported influence operates as a *red herring* from my perspective.

In defense of Charge One, related to the Due Process/Emergent Relief petition of M.W, Respondent attempts to be portrayed as being led down the garden path by the very experienced special education counsel Ms. Butler. The record discloses however, that this was the first case the attorney had handled after her firm took over as Board counsel, and was totally unaware of any of the facts attendant to the SCC. She therefore relied upon the information provided by Ms. Tobia.

Parenthetically, Ms. Butler's contemporaneous notes at Petitioner Exhibit 1 establish that Ms. Tobia broached the issue of there being religious icons and symbols in the building, as well as Hebrew writing on it. There is similarly no

support for the premise that this falsehood was placed into the affidavit by Ms. Butler and merely obligingly signed by Ms. Tobia. Instead, as shown by Exhibits A, B, C of Joint Exhibit 2, Tab 1, Respondent corresponded with Ms. Butler by e-mail and made a number of corrections to the affidavit that was ultimately submitted, with counsel incorporating the same each time.

These considerations undercut Respondent's testimony upon cross-examination at the December 15, 2015 hearing. This asserted that the affidavit provided in the M.W. case was true and accurate; that paragraph 32 related to religious symbols and icons was a true statement that she and Ms. Butler had devised for the affidavit; that she never asserted they were religious, but that was the statement that came out of Ms. Butler; and that anyone in the District who knows her knows that there is no religious connotation with SCC, and never has been. Significantly, Ms. Tobia allowed that Ms. Butler had not encouraged her to sign an affidavit that was not true.

As the District has underlined, noticeably absent was any modification to the religious icons/symbols language that appears in paragraph 32. Ibid. The testimony of Mr. Azzara also touched upon the animus that Ms. Tobia apparently had toward the Special Children's Center. This provides a motive for the false swearing and included: that Respondent did not approve of the SCC; felt that if the school was approved it would bankrupt the district; had intense animosity toward SCC and refused to sign a needs assessment in support of the SCC's application to receive State approval.

In defense of Charge Two, Respondent attempts to deflect blame onto succeeding Board counsel. The argument is advanced that prior to Schenck, Price coming on, Marc Mucciolo, Esq. of the predecessor Schwartz Simon firm reached an agreement to have D.D. be assessed by the Monmouth-Ocean Education Services Commission. And while there was eventually an agreement on the placement as well, this was never implemented as apparently Mr. Inzelbuch made additional demands upon Schenck Price, causing the matter to be litigated. This leads to the conclusion that this is another situation when someone else had the responsibility (Mr. Freund, who was the supervisor of Child Study Teams in July of 2013) but the matter is being put on Ms. Tobia. Finally, Respondent rhetorically asks why two years passed within incident before this issue was raised.

Preliminarily, the record does not disclose why the D.D. issue was never previously addressed with Ms. Tobia, or any action taken by the Board. Given that there were a number of Board counsel it may have fallen through the cracks, and while the one person who could shed some light on that topic, State Monitor Azzara, was asked a few questions on D.D. during cross, that issue was not broached. Under the circumstances, I therefore do not believe that this charge is so remote in time or stale that Ms. Tobia has been prejudiced by its inclusion.

Respondent addressed D.D. during her testimony, and recalled that in April 2013, Mr. Mucciolo of Schwartz Simon with the assistance of Nathanya Simon, Esq., reached an agreement with Mr. Inzelbuch. This provided that three (3)

independent evaluations would be conducted by the Monmouth Ocean Educational Services Commission and not the Lakewood Child Study Team. According to the testimony, these were performed and Ms. Zentman briefly touched upon these as well during her testimony. Who conducted the evaluations however is of no moment in these proceedings, and unless there was also an agreement as to placement (which there was not), the normal procedural safeguards control.

Respondent later categorically denied that she had made any independent predetermination of ineligibility for D.D., and that position is at odds with her sworn testimony contained in the transcript of the D.D. OAL hearing, which appears at Joint Exhibit 2, Tab 8. It is also at variance with the e-mail evidence in the record and the credible testimony of Ms. Zentman in this regard. There is likewise no evidence that this job was tasked to Mr. Freund, who apparently took over as the supervisor of the CST in July 2013. It is worth remembering, however, that the chain of events was set in motion by Ms. Tobia in her May 29, 2013 e-mail to Ms. Zentman and later, when a decision of ineligibility was made by Respondent when she was in charge.

I similarly do not believe that the proverbial 504 Plan buck was passed to Ms. Tobia to make a hard decision, as she implies in her affirmative defense to Charge Nine. Several District witnesses credibly testified that they themselves had been directed by Respondent to cease utilization of the same, and when a number of staff approached Ms. Gilfillan during a November 20, 2013 training

session to inquire as to the legality of Ms. Tobia's action, a meeting was held with Mr. Freund, Ms. Winters and Ms. Tobia.

At that time they were all unequivocally told that Lakewood could not legally discontinue the utilization of 504 Plans. Despite this fact, there were NO 504 Plans written during the 2013 – 2014 School Year, and Ms. Tobia never retracted or clarified her prior instruction. [*Emphasis supplied*]. I recognize that in the instance of the one student cited, there was a 504 Plan signed on January 23, 2012 with no doctor's note included. This may have rendered the plan invalid, requiring that it be updated or revisited during an annual review, as detailed in the "504 Process Memo" sent out by Ms. Tobia on March 25, 2013. See, Joint Exhibit 2, Tab 9. Clearly, however, "throw it out," would not appear to be a valid response under the circumstances.

Nor do I believe that the District was required to establish that "one" student was improperly denied a 504 Plan. Instead, there was unrebutted testimony from the District that there were no plans completed during 2013 – 2014. During her testimony, Ms. Tobia denied that she had told Ms. Weisz not to implement the 504 Plans, and contended that there were in fact 504 Plans written and implemented during the 2013 – 2014 School Year, with monthly reports provided to Superintendent Winters. These positions run counter to the record evidence and no documentation has been provided by Respondent in support of these claims. The testimony has accordingly been discounted.

Respondent's defense to Charges Three and Four may be combined for the purposes of this discussion. With respect to the former, Ms. Tobia insists that all contracts were reviewed by past Board counsel, and approved by the Orthodox majority Board of Education, with the schools paid. In support of this proposition, reliance is placed upon Respondent Exhibit 3 and 4, which are a series of memos. Respondent Exhibit 3(a) is a July 17, 2012 Memo from Ro Frazer to Nathanya Simon, Esq. and Marc Muccio, Esq. of the Schwartz Simon firm, then-Board counsel. This merely states "[p]lease confirm that you have received the packet of contract for nursing services, Commission of the Blind and several tuition contracts for students placed in non-public schools. Thank you." Mr. Mucciolo later responds "[y]es, we got it yesterday and are in the process of reviewing the contracts." Respondent Exhibit 3(b) is an undated Memo from Ms. Frazer to Mr. Mucciolo, which indicates: "I understand you will be here next Friday. Can you please bring the following contracts:

* * *

A.B. – Yeshiva Orchos Chaim;

* * *

S.G. – Bnos Yaakov Ruchama Wenger – Bais Rivka Rochel"

Respondent Exhibit 4(a) – (f) is a series of e-mails and memos related to counsel approval of certain out-of-District placement contracts. There is no dispute that all contracts had to be reviewed by counsel in conjunction with the Business Office prior to official Board action. The mere mention of Hebrew names in isolation, however, does not justify the actions of Respondent, and

short of identifying the documents this area was not explored on direct examination.

Rather, based upon Ms. Tobia's education, experience and training first as a special education teacher and later as director of the Child Study Team, she knew or should have known that the actions taken and directives given were in direct violation of the controlling State statutes and regulations governing special education. The District's witnesses who testified with no apparent bias toward Respondent, were acutely aware that such was the case. Therefore, absent evidence that prior or current Board counsel had actual or constructive notice of or directed the same, Ms. Tobia's actions constitute additional unbecoming conduct. Accordingly, viewed simply in burden of proof terms, this affirmative defense has not been established.

Charge Four is the allegation tied to the OSEP CAP. I credit Respondent's position that this was a CAP imposed upon the Lakewood School District and not Ms. Tobia personally, but do not share the view that the charge against Ms. Tobia was never proven. Moreover, Issue # 1 of the COMPLAINT INVESTIGATION REPORT posed the question "[w]hether the district board of education followed appropriate procedures to develop an IEP for a student with disabilities?"

FINDINGS OF FACT numbers 6, 7 & 8 then detail the circumstances of Y.T.'s transition from SCHI to YTT, including the fact that the Director of Special

Services met with the student's parents to discuss the parents' request to have their child attend YTT the following year. Number 7, in particular, states that "[f]ollowing the meeting, the Director of Special Services issued a directive to the IEP team that the team should write an IEP placing the student at YTT." This finding is on "all fours" with the testimony of Ms. Nussbaum on this topic, and further evidence of Respondent's unbecoming conduct.

Tenure charges Five through Eight pertain to the conduct of Ms. Tobia at a series of mediation sessions involving a variety of students. Admittedly, Respondent's position that the substance of mediations is confidential has surface appeal. That said, adoption of such a premise would require me to endorse an unduly myopic reading of N.J.A.C. 6A:14-2.6(d)(6) which provides that "[d]iscussions that occur during the mediation process shall be confidential and shall not be used as evidence in any subsequent due process hearings or civil proceedings."

Instead, this language is intended to encourage the free flow of information and respective positions during the mediation process that per N.J.A.C. 6A:14 may only takes place between a school district and the child's parents, in keeping with the prior offer of compromise rule. I do not read the same to prohibit a board from attempting to discipline a staff member, as here, for what it perceives to be *ultra vires* conduct. Accordingly, Ms. Tobia's actions are fair game.

In keeping with her prior position, Respondent attempts to parry Charge

Ten by resort to the "burned by the affidavit" defense. The record instead establishes that the certification drafted by Ms. Kenny simply reflected that the fax was not received by Mr. Tobia on April 15, 2015, without resort to any facts of the case. It is true that a number of other individuals could have been asked to complete the certification, but as the District's agent Ms. Kenny reasonably asked Ms. Tobia to do so. Respondent was therefore under an affirmative obligation to execute it or provide a legitimate explanation why she would not. She did neither.

Finally, in response to Charges Twelve through Seventeen, Respondent properly identifies that *inefficiency* charges have not been filed against Ms. Tobia and that she has had no negative evaluations or CAP. I do not subscribe to the proposition, however, that allegations related to violations of District policies are exclusively filed on inefficiency grounds.

Because the District has established the subject unbecoming conduct tenure charges by a preponderance of the credible evidence, the remaining issue becomes the appropriate penalty. The In re Fulcomer balancing test requires that I consider the totality of the circumstances, the nature of Ms. Tobia's acts, and the impact the discipline will have upon her career. 93 N.J. Super., supra at 421. Respondent has properly argued that she has an unblemished record with the Lakewood School District throughout her roughly 21 years of service.

Reduced to its lowest terms, the question becomes whether the spirit and the letter of N.J.S.A. 18A:6-10 may be harmonized by returning Ms. Tobia to her

position as supervisor of Social Studies, Fine Arts and Pupil Personnel Services with less than a termination. In my considered opinion, that question must be answered in the negative as the aggravating factors abundantly outweigh the mitigating. Charge One comes the closest to being a *cardinal* violation as the District posits, which standing alone warrants Ms. Tobia's removal. It is axiomatic that even in the absence of progressive discipline, as here, one serious flagrant event may warrant termination. See generally, Redcay v. State Bd. Of Educ., 130 N.J.L. 369, 370 (Bodine, 1943). Respondent has attempted to minimize the reach of Howard upon which the District relies, by arguing that Dr. Howard in fact received only a 120 day suspension for his perjury.

A careful reading of the ALJ's *dicta* in Howard II, as cited above, however, reveals that she would have upheld a termination if that was before her. Because she was limited to the issue of a 120 suspension, that was the extent of her ruling. Even assuming without deciding this charge would not have been sufficient standing alone, the record is replete with other acts of unbecoming conduct committed by Ms. Tobia which palpably and materially comprised the educational opportunities of the Lakewood special needs population.

Pursuant to Charge 2, ineligibility for special education and related services for student D.D. was predetermined prior to the June 17, 2013 conference with the parent and other team members with the report generated June 14th. And when the case manager repeatedly attempted to call Ms. Tobia's attention to the comments made by doctors in various evaluation reports that would suggest the

child may be classified, the supervisor shut her down on numerous occasions ultimately adopting a heavy-handed tone in her June 6th e-mail, while demanding that voluminous documentation be provided to support even the mere implication that there was eligibility for special education. Per Charge Nine, Ms. Tobia determined *willy nilly* that the Lakewood School District would no longer issue §504 Plans under the Rehabilitation Act of 1973. Illegal yeshiva placements were effectuated by merely writing them into IEPs. These actions evidence an outrageous disregard for the very statutes and regulations that Ms. Tobia was charged with ensuring compliance with under her job description, further ignored the Corrective Action Plan put in place by the DOE, and constituted a startling display of poor judgment.

I am fully cognizant of the crushing effect the loss of Respondent's Lakewood position will have upon her both personally and professionally. In balancing the equities, however, I remain unconvinced that returning her to the same position would modify her behavior as she took no responsibility whatsoever for her actions at hearing and showed no remorse. Doing so would therefore continue to place the special needs community in jeopardy. Based upon the foregoing findings, I therefore determine that the tenure charges are **SUSTAINED**, with Respondent removed from her supervisory position.

VI. CONCLUSION

Petitioner Lakewood Township Board of Education has established the tenure charges of unbecoming conduct under N.J.S.A. 18A:6-10 by a preponderance of the credible evidence.

AWARD

THE TENURE CHARGES BROUGHT BY THE LAKEWOOD TOWNSHIP SCHOOL DISTRICT ARE SUSTAINED, WITH RESPONDENT TERMINATED FROM HER TENURED POSITION AS SUPERVISOR OF SOCIAL STUDIES, FINE ARTS, AND PUPIL PERSONNEL SERVICES. IT IS SO ORDERED.

Dated: February 4, 2016
NORTH BERGEN, N.J.

MICHAEL J. PECKLERS, ESQ.
ARBITRATOR

STATE OF NEW JERSEY
SS}
COUNTY OF HUDSON

ON THIS 4TH DAY OF FEBRUARY, 2016, BEFORE ME PERSONALLY CAME AND APPEARED **MICHAEL J. PECKLERS, ESQ.**, TO BE KNOWN TO ME TO BE THE INDIVIDUAL DESCRIBED HEREIN AND WHO EXECUTED THE FOREGOING INSTRUMENT, AND HE DULY ACKNOWLEDGED TO ME THAT HE EXECUTED THE SAME.

NOTARY PUBLIC

CRISTINA JIMENEZ
Notary Public of New Jersey
ID. No. 2416114
My Commission Expires 8/12/2017