266-21

New Jersey Commissioner of Education

Final Decision

A.B.,

Petitioner,

v.

Board of Education of the City of Hackensack,
Bergen County,

Respondent.

Synopsis

Petitioner challenged the respondent Board's dissemination of information about her former employment as a teacher in the Hackensack school district, contending that it released employment-related information that was inaccurate and violative of her 2013 settlement agreement with the Board and which subsequently led to the loss of a job offer from the Clifton Board of Education. Petitioner sought, *inter alia*, to compel the Board to rescind and correct its response to Clifton's employment questionnaire, and to obtain an injunction prohibiting Hackensack from reporting, transmitting, or communicating information to any prospective employer of A.B. that is the subject of an inquiry pursuant to *N.J.S.A.* 18A:6-7.7. The Board contended that it was obligated to release the information pursuant to the "Pass the Trash" Statute, *N.J.S.A.* 18A:6-7.6, et seq. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: the Board's disclosure of information in response to Clifton's questionnaire was required under *N.J.S.A.* 18A:6-7.7 because in 2013 – while petitioner was employed as a teacher in Hackensack schools – the Board had been conducting a sexual misconduct investigation regarding petitioner's social media posts which contained content that is prohibited under *N.J.S.A.* 18A:6-7.6's definition of sexual misconduct; the inappropriate and sexually explicit social media posts at issue were shared on a platform where they were viewed and commented on by some of petitioner's students; *N.J.S.A.* 18:6-7.12 did not exempt settlement agreements entered into before June 1, 2018 from the mandatory disclosure provisions of the "Pass the Trash" statute; petitioner consented to the disclosure of the information when she signed a form requesting Hackensack to release information and documents in regard to her former employment in the school district; and, further, the language of the authorization signed by A.B. tracks the requirements set forth in the mandatory disclosure provisions of *N.J.S.A.* 18A:6-7.7. Accordingly, the ALJ granted the Board's motion for summary decision, denied petitioner's opposing motion, and dismissed the petition in its entirety.

Upon a comprehensive review, the Commissioner agreed with the findings and conclusions of the ALJ in this matter. Finding the petitioner's exceptions unpersuasive, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter. The petition was dismissed.

266-21
OAL Dkt. No. EDU 16958-19
Agency Dkt. No. 300-11/19

New Jersey Commissioner of Education

Decision

A.B.,

Petitioner,

v.

Board of Education of the City of Hackensack, Bergen County,

Respondent.

The record of this matter and the Initial Decision of the Office of Administrative Law (OAL) have been reviewed, as have the exceptions filed by the petitioner in accordance with *N.J.A.C.* 1:1-18.4, and the Board's reply thereto.

This matter stems from two sexually explicit posts shared on social media by petitioner in 2013, when she was employed as a teacher by the Board. Despite the fact that several students had access to her social media posts, petitioner posted "Kiss me, I'm Irish. F*** me, I'm Irish" as well as "Women say, men only think with their penis – Ladies, don't be afraid to blow their minds." When the Board became aware of the posts, it considered taking disciplinary action against petitioner. Thereafter, petitioner, her union representatives, and her legal counsel met with the Board and its legal representation, which resulted in a settlement agreement dated April 25, 2013 and petitioner's subsequent resignation. The settlement agreement contained a confidentiality provision with the disclaimer "to the extent provided by law."

In 2019, petitioner sought employment with the Clifton School District (Clifton). Pursuant to the "Pass the Trash" statute, *N.J.S.A.* 18A:6-7.6 through 7.13, which was enacted in 2018, Clifton submitted a questionnaire to the Board inquiring about whether petitioner had been the subject of a child abuse or sexual misconduct investigation. The Board answered "Yes", that petitioner had been the subject of a child abuse or sexual misconduct investigation and that petitioner had resigned while the allegations were pending or under investigation. As a result, Clifton withdrew its offer to hire petitioner.

Petitioner filed a complaint in Superior Court, Chancery Division, seeking to compel the Board to correct its response to the employment questionnaire. The matter was transferred to the Commissioner and transmitted to the OAL. Following cross motions for summary decision, the Administrative Law Judge (ALJ) found that the Board's disclosure of information in its response to Clifton's questionnaire was required by *N.J.S.A.* 18A:6-7.7 because in 2013, while petitioner was a teacher in Hackensack schools, the Board had been conducting a sexual misconduct investigation regarding petitioner's social media posts which contained content proscribed under *N.J.S.A.* 18A:6-7.6's definition of sexual misconduct. The ALJ also concluded that *N.J.S.A.* 18:6-7.12 did not exempt settlement agreements entered into before June 1, 2018 from the mandatory disclosure provisions of the "Pass the Trash" statute. Additionally, the ALJ found that petitioner consented to the disclosure of the information by signing an authorization form.

In her exceptions, petitioner takes exception to many of the ALJ's factual findings and conclusions of law. Petitioner mainly objects to the factual finding that students saw petitioner's social media posts in 2013, as well as the conclusion that a sexual misconduct investigation had taken place thereafter. Petitioner points to the certification of Richard E. Salkin, Esq., the Board attorney who negotiated the settlement with petitioner, which indicated

that to his knowledge, there was no investigation into petitioner for sexual misconduct or child abuse. Petitioner also points to the certification of Lauren E. McGovern, Esq., who certified that she spoke with the Detective who reviewed the social media posts in 2013, and that he met with the prosecutor and agreed that an investigation was not warranted. Petitioner contends that the ALJ misinterpreted the definition of sexual misconduct and that petitioner was not accused of sexual misconduct as it was defined at the time of her resignation.

Petitioner argues that the 2013 settlement agreement is exempt from the statute's reporting requirements because the clear language of *N.J.S.A.* 18A:6-7.12 creates a savings clause. *N.J.S.A.* 18A:6-7.12 states that "On or after the effective date of this act," districts may not enter into contracts or agreements that will suppress or destroy information relating to a child abuse or sexual misconduct investigation; affect the ability of a school district to report such behavior; or require a district to expunge such information (unless found to be false or unsubstantiated). *N.J.S.A.* 18A:6-7.12 also states that "[a]ny provision of an employment contract or agreement for resignation or termination or a severance agreement that is executed, amended, or entered into after the effective date of this act and that is contrary to this section shall be void and unenforceable." Petitioner argues that because the statute specifically refers to contracts entered into after the effective date as being unenforceable, those entered into before that date are still valid. Petitioner also contends that the signing of a consent form so that Clifton could obtain necessary employment records did not waive the confidentiality terms of her 2013 settlement agreement. She further argues that she did not authorize the release of information that is not true, as she was not accused of sexual misconduct. Finally, petitioner argues that her due process rights were violated because she did not have the opportunity to challenge the Board's answer to the employment questionnaire, which had the result of ending her teaching career. As such, the petitioner asks the Commissioner to reverse the Initial Decision.

In reply, the Board argues that the ALJ was correct in his determinations. The Board points out that the certification of principal Jim Montesano demonstrates that a sexual misconduct investigation occurred, and that he had reached out to law enforcement for assistance. Additionally, the Board maintains the certification also demonstrates that Montesano was informed that students had viewed the social media posts and commented on them. The Board points out that the ALJ engaged in an extensive analysis of the definition of sexual misconduct and concluded that the Board appropriately found that petitioner's actions warranted an investigation. The Board contends that the ALJ properly determined that the legislation does not exempt settlement agreements that were entered into prior to the effective date of the Act. According to the Board, petitioner authorized the release of the information and she has not demonstrated that the Board acted in bad faith. As such, the Board urges the Commissioner to adopt the Initial Decision.

Upon review, the Commissioner agrees with the ALJ that the Board appropriately disclosed information regarding a sexual misconduct investigation into petitioner as a response to Clifton's employment questionnaire. The "Pass the Trash" statute defines sexual misconduct as:

> any verbal, nonverbal, written, or electronic communication, or any other act directed toward or with a student that is designed to establish a sexual relationship with the student, including a sexual invitation, dating or soliciting a date, engaging in sexual dialogue, making sexually suggestive comments, self-disclosure or physical exposure of a sexual or erotic nature, and any other sexual, indecent or erotic contact with a student.
>
> [*N.J.S.A.* 18A:6-7.6.]

The statute requires schools to reach out to the past employers of applicants and inquire whether they were ever the subject of a child abuse or sexual misconduct investigation, unless the allegations were found to be unsubstantiated; whether they were disciplined, discharged,

nonrenewed, asked to resign, or resigned pending an investigation; or whether they had action taken against a professional license or certificate due to the allegations. *N.J.S.A.* 18A:6-7.7b.

In this matter, the Board reported that petitioner had been the subject of a sexual misconduct investigation and that she resigned while the investigation was still pending. The Commissioner finds that the Board accurately answered the questions on the employment questionnaire. The certification of principal Jim Montesano indicates that as a result of petitioner's social media posts, "the school launched an investigation into [petitioner's] potential sexual misconduct." Other certifications in the record do not directly dispute that statement. For example, the certification of Richard E. Salkin, Esq., the Board attorney at the time, states that "[t]o my knowledge, there was no investigation of [petitioner] for sexual misconduct or child abuse by the School Administration, DYFS, the Hackensack Police or the Bergen County Prosecutor's Office." While he may not have been personally aware of an investigation, that statement does not mean that one did not occur. Additionally, while law enforcement may have chosen not to act, it is important to note that the question does not require that the investigation involve the police. The Board was required to answer if petitioner "was the subject of any child abuse or sexual misconduct investigation by any employer, State licensing agency, law enforcement agency, or the Department of Children and Families." *N.J.S.A.* 18A:6-7.7b. As such, even though petitioner was not the subject of a sexual misconduct investigation by law enforcement, the Board answered yes because she had been the subject of an investigation at the school level. Moreover, the fact that the principal reached out to law enforcement further demonstrates that an investigation was underway – even if it was in the early stages – when petitioner reached a settlement agreement with the Board and resigned her teaching position in the wake of the sexual misconduct allegations.

Considering the definition of sexual misconduct, the Commissioner finds that it is reasonable that the Board conducted an investigation into sexual misconduct based on petitioner's actions. Petitioner's social media posts could meet the definition of electronic communications that are directed toward or with a student that are designed to establish a sexual relationship with the student, such as making sexually suggestive comments. The Commissioner notes that the Board did not report that she committed sexual misconduct, but rather that they had launched an investigation into potential sexual misconduct, and that petitioner resigned prior to the completion of the investigation. As such, it is not necessary to conduct a full analysis of whether her actions met the definition of sexual misconduct; it is sufficient that her actions could meet the definition and that the Board therefore opened an investigation.

The Commissioner also agrees with the ALJ that *N.J.S.A.* 18:6-7.12 did not exempt settlement agreements entered into before June 1, 2018 from the mandatory disclosure provisions of the "Pass the Trash" statute. *N.J.S.A.* 18A:6-7.12 states:

> a. On or after the effective date of this act, a school district, charter school, nonpublic school, or contracted service provider may not enter into a collectively bargained or negotiated agreement, an employment contract, an agreement for resignation or termination, a severance agreement, or any other contract or agreement or take any action that:
>
> (1) has the effect of suppressing or destroying information relating to an investigation related to a report of suspected child abuse or sexual misconduct by a current or former employee;
>
> (2) affects the ability of the school district, charter school, nonpublic school, or contracted service provider to report suspected child abuse or sexual misconduct to the appropriate authorities; or
>
> (3) requires the school district, charter school, nonpublic school, or contracted service provider to expunge information about allegations or finding of suspected child abuse or sexual misconduct from any documents maintained by the school district, charter school, nonpublic school, or contracted service provider,

> unless after investigation the allegations are found to be false or the alleged incident of child abuse or sexual misconduct has not been substantiated.
>
> b. Any provision of an employment contract or agreement for resignation or termination or a severance agreement that is executed, amended, or entered into after the effective date of this act and that is contrary to this section shall be void and unenforceable.

Accordingly, the statute provides that "On or after the effective date of this act," school districts cannot enter into agreements or contracts that would hinder the reporting obligations of the statute. That provision places an obligation on school districts moving forward and cannot be interpreted as waiving settlement agreements entered into before that date. Similarly, Part B above automatically voids contracts or agreements that are contrary to the section but fails to exempt prior settlement agreements from the reporting obligations of the Act. The Commissioner also notes that the Act requires the disclosure of information regarding an applicant's past 20 years of work history. It would be contrary to the spirit and purpose of the legislation to permit the shielding of information prior to the Act's effective date. Moreover, while petitioner's settlement agreement is not exempt from the Act's requirements, the Commissioner further notes that petitioner also consented to the disclosure of information by signing an authorization form and that her settlement agreement provided a waiver of its confidentiality provision when required by law.

The Commissioner does not find petitioner's exceptions to be persuasive. The ALJ's finding of fact that students saw petitioner's social media post was supported by the record. The certification of principal Jim Montesano stated: "I requested that Detective Luis Furcal, in conjunction with the Bergen County Prosecutor's office, review AB's social media postings to confirm that students were able to view, access, and comment on AB's social media page. Detective Furcal stated AB's pages were viewed and commented on by AB's

students." Petitioner points to the certifications of Richard E. Salkin, Esq. and Lauren E. McGovern, Esq., but neither of those certifications dispute that students saw the social media posts. Salkin's certification did not discuss the viewing of the posts at all. McGovern's certification indicates that she met with the Detective who recalled seeing the social media posts, and he decided with the prosecutor's office not to pursue an investigation; however, the certification does not address whether he confirmed that students viewed the social media posts. Petitioner also argues that her due process rights were violated. Here, the Board complied with the requirements of the Act, and petitioner has been afforded the opportunity to challenge the Board's action in this forum.

Accordingly, the Initial Decision of the OAL is adopted as the final decision in this matter. The petition is hereby dismissed.

IT IS SO ORDERED. [1]

ACTING COMMISSIONER OF EDUCATION

Date of Decision: October 21, 2021
Date of Mailing: October 21, 2021

[1] This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 16958-19
AGENCY REF. NO.:300-11/19

A.B.,

Petitioner,

vs.

CITY OF HACKENSACK BOARD OF EDUCATION, BERGEN COUNTY,

Respondent.

Alfred Maurice, Esq., for Petitioner, A.B. (Springstead & Maurice, attorneys)

John Geppert, Esq., for Respondent, Hackensack BOE (Scarinci & Hollenbeck, attorneys)

Record Closed: April 7, 2021 Decided: July 22, 2021

BEFORE: **JOHN P. SCOLLO**, ALJ

STATEMENT OF THE CASE

Petitioner, A.B., challenges Respondent, City of Hackensack Board of Education's (hereinafter the "BOE") dissemination of information regarding her employment. Petitioner contends that Hackensack BOE released certain employment-related information, which was inaccurate and violative of their April 25, 2013 Settlement Agreement, causing her to lose her teaching job with a subsequent employer, the Clifton BOE. Hackensack BOE contends that it was obligated to release

the information pursuant to the "Don't Pass the Trash" Statute, N.J.S.A. 18A:6-7.6, et seq.

PROCEDURAL HISTORY

After an exchange of several letters between counsel for a woman herein referred to only as "A.B." and the BOE's counsel, A.B. filed a Verified Complaint in the Superior Court of New Jersey, Chancery Division (Docket Number BER-C-216-19) seeking: to enforce the terms of the parties' April 25, 2013 Settlement Agreement (officially signed by Hackensack BOE's representative on May 6, 2013); to compel the BOE to rescind and correct its response to the Clifton BOE's questionnaire; to procure a permanent injunction prohibiting Hackensack BOE from reporting, transmitting, or otherwise communicating information to any prospective employer of A.B. that is the subject of an inquiry pursuant to N.J.S.A. 18A:6-7.7, and seeking an award of compensatory and punitive money damages from Hackensack BOE arising out of the loss of the teaching job which A.B. had been offered and which she had accepted from the Clifton BOE with an effective start date of September 1, 2019.

On November 19, 2019, James J. DeLuca, J.S.C. of the Chancery Division issued an Order dismissing the Verified Complaint and transferring the dispute to the Commissioner of the New Jersey Department of Education for a substantive determination of the issues raised in the parties' cross-motions for Summary Judgment. Upon receipt of the matter by the Department of Education's Office of Controversies and Disputes, the matter was transmitted to the Office of Administrative Law, where it was filed on November 26, 2019 as a contested case pursuant to N.J.S.A. 52:14B-1 to -15 and N.J.S.A. 52:14F-1 to 13.

On December 20, 2019, the matter was assigned to John P. Scollo, ALJ. After an Initial telephone Conference, a Pre-Hearing Order was issued on December 20, 2019 and the parties embarked on the discovery process. After several telephone conferences, it was decided that the parties would file cross-motions for Summary Decision. The parties filed for Summary Decision on July 8, 2020 followed by Opposition papers and Reply papers, which were received by August 12, 2020. On

March 19, 2021, the Tribunal asked for additional briefing. The parties submitted their additional papers on April 7, 2021 and the record closed.

UNDISPUTED FACTS

From their submissions, the Parties are in agreement regarding the following statements of fact.

(1) In 2013, A.B. posted images and statements on her personal social media account on the Internet.

(2) Some of A.B.'s postings denoted or connoted or contained sexual content.

(3) One of A.B.'s postings contained an image depicting the statements, '"Kiss me, I'm Irish" followed by the statement "Fuck Me, I'm Irish." Another image posted by A.B. referred to male genitalia and the act of fellatio and contained words, which if taken literally, encouraged ladies to engage in fellatio. It read, "Women say, men only think with their penis – Ladies, don't be afraid to blow their minds."

(4) Some of A.B.'s postings contain material which, depending upon the viewer's sensibilities, range from being insensitive, showing poor taste, being crude, coarse, or vulgar, to being perceived as obscene, lewd or lascivious.

(5) Among those who had access to A.B.'s social media posts were some students in the Hackensack School District, where A.B. was employed as a teacher.

(6) The Principal of Hackensack High School, Jim Montesano, stated in his Certification (which has not been shown to be inaccurate) that the aforesaid posts were made on A.B.'s social media account, which was accessible by students. In his Certification, Montesano stated that Detective Luis Furcal, in conjunction with the Bergen County Prosecutor's Office, confirmed to him that students had viewed A.B.'s pages and had commented on them.

(7) A.B. is a school teacher. Like police officers, teachers are among the class of individuals who are under a duty to behave appropriately wherever they may

be, because by the very nature of their professions, they are visible to the public and represent their professions.

(8) In 2013, A.B.'s postings came to the attention of school officials and to the Hackensack Board of Education and the BOE considered taking disciplinary action, which led to discussions between A.B. and her representatives and the BOE and its representatives.

(9) In April, 2013, A.B., her union representatives, and her legal counsel met with the BOE and the BOE's legal counsel regarding the controversy over the postings. The BOE asserted, and A.B. did not deny, that the discussions between the two sides took place between April 22, 2013 and April 25, 2013. The discussions and all related matters concluded when the parties reached an agreement on April 25, 2013 whereupon A.B. signed the Settlement Agreement. After the BOE, at its meeting on May 6, 2013 approved the settlement, it was signed and it became effective as of April 25, 2013.

(10) Both sides to this matter have copies of the April 25, 2013 Settlement Agreement and have forwarded same to the OAL.

(11) The "Don't Pass the Trash" statute is codified at N.J.S.A. 18A:6-7.6 through 7.13 and its effective date was June 1, 2018.

(12) There was no accusation of "child abuse" against A.B.

(13) In answer to Clifton's questionnaire, the Hackensack School District gave "yes" answers to Clifton's questions which asked if A.B. was: (1) the subject of an investigation into child abuse or sexual misconduct by any employer, State licensing agency, law enforcement agency or the Department of Children and Families, and (2) was disciplined, discharged, nonrenewed, asked to resign, resigned or was otherwise separated from employment while child abuse or sexual misconduct allegations were pending or were under investigation, or due to an adjudication or finding of child abuse or sexual misconduct.

DISCUSSION

A.B.'s Position

A.B. maintains that N.J.S.A. 18A:6-7.12 specifically exempts agreements entered before the statute's effective date of June 1, 2018 from the disclosure requirements set forth in N.J.S.A. 18A:6-7.7. Referring to N.J.S.A. 18A:6-7.12 as a "grandfather provision" or "savings clause", A.B. maintains that any agreement entered before June 1, 2018 effective date of the "Don't Pass the Trash" statute, such as the April 25, 2013 Settlement Agreement, is exempt from the purview of the "Don't Pass the Trash" statute, including the reporting requirements set forth in N.J.S.A. 18A:6-7.7.

A.B. maintains that her social media posts can not be construed to meet the definitions of "child abuse" or of "sexual misconduct" as those terms are defined by the "Don't Pass the Trash" statute, N.J.S.A. 18A:6-7.6.

It is A.B.'s position that the subject matter that led to the Settlement Agreement concerned her use of or alleged misuse of social media, not sexual misconduct. Specifically, A.B. stated in her July 7, 2020 Certification that the BOE's accusation was that her use of social media was "unprofessional behavior that included offensive social media posts, some of which were sexual in nature."

It is A.B.'s position that she underwent a "disciplinary review", not an investigation into sexual misconduct. A.B. contends that there was no investigation conducted by the BOE (or by any other agency of government) which was an investigation into child abuse or sexual misconduct *as those terms are defined by N.J.S.A. 18A:6-7.6*. Thus, A.B. maintains that the BOE acted improperly when it stated in answer to the questionnaire from Clifton that A.B. separated from her employment with Hackensack School District while an investigation into child abuse or sexual misconduct was occurring.

A.B. maintains that the Confidentiality provision, Numbered Paragraph 11 of the April 25, 2013 Settlement Agreement, absolutely prohibited the BOE from divulging any information about the circumstances leading to her resignation. In her action against the

BOE, A.B. maintains that the BOE violated the terms of their April 25, 2013 Agreement. A.B. maintains that that the BOE was obligated, under the April 25, 2013 Settlement Agreement, not to release any information beyond her name, position, dates of employment and salary to a prospective employer.

The BOE's Position

It is the position of the BOE that the subject matter that led to the Settlement Agreement concerned A.B.'s use of sexually-suggestive images and words in her postings on her social media account, which was accessible by students in the Hackensack School District. The BOE maintains that it conducted an investigation of whether A.B. used her social media account in 2013 in a manner consistent with sexual misconduct as that term was understood in 2013 and as it was later defined with the enactment of the "Don't Pass the Trash" statute in 2018. It is the BOE's position that it actually did conduct a sexual misconduct investigation of A.B. because it probed into whether she used sexually suggestive images and content on her social media account in 2013 and because it sought and obtained confirmation that students viewed A.B.'s posts.

It is the BOE's position that when it received an inquiry from a school (in this case the Clifton School District or "Clifton") seeking information about an applicant under the "Don't Pass the Trash" statute, it was - from June 1, 2018 forward - required to report any investigation into sexual misconduct (whether the investigation took place in the past or the present) during which a separation from employment took place either while such allegations were pending or while an investigation was still in progress; and to do so regardless of how the term "sexual misconduct" was understood in 2013 and how it was later defined with the enactment of the "Don't Pass the Trash" statute in 2018.

The BOE points out that the April 25, 2013 Settlement Agreement contains, in Numbered Paragraph 11 entitled "Confidentiality", two references to the Settlement Agreement being subject to the prevailing law of the State of New Jersey. The first reference simply states that the terms of the agreement and the matters discussed in

negotiating the terms of the agreement "*are confidential, to the extent permitted by law.*" The BOE's point is that the confidentiality provision of the Settlement is not absolute; it is subject to the requirements of the prevailing law of the State of New Jersey. The BOE maintains that the enactment of the "Don't Pass the Trash" statute modified the scope of things that were previously shielded by the confidentiality provision of the April 25, 2013 Settlement Agreement.

The second reference to the Settlement Agreement being subject to the prevailing law of the State of New Jersey, is a provision obligating the parties not to "divulge, discuss, publicize, disclose or in any way communicate ... circumstances leading to A.B.'s resignation in the District *except as required by law* without the express written authorization by an authorized representative off the other party."

The BOE's position is that as of June 1, 2018, when the "Don't Pass the Trash" statute became effective, the prevailing law of New Jersey changed. The change obligated the BOE to respond to a prospective employer's background check questionnaire regarding A.B.'s employment history, a history which contained a resignation that occurred while a sexual misconduct investigation was ongoing.

Analysis of the Parties' Respective Positions

The definition of "sexual misconduct" set forth in N.J.S.A. 18A:6-7.6 refers to "communications", "acts" and "other contacts" (referring to communicative contacts, not physical contacts). Several questions arise. They are: Did any content of A.B.'s posts include any of the several specific types of proscribed "communications", "acts" or "contacts" with students set forth in the definition of sexual misconduct? For instance, were there any "sexually suggestive comments" in the posts? If so, were any comments "directed toward or with a student that was designed to establish a sexual relationship with a student"? What is meant by "directed toward"? What is meant by "designed"? The answers to these questions will affect the outcome of the matter at bar.

A.B. characterizes her posts as attempts at humor directed toward her adult audience, not toward students. A.B. states that none of her posts could seriously be

construed as an attempt on her part to establish a sexual relationship with a particular student or with students in general. The BOE considers the posts quoted herein to have been sexually suggestive communications and violative of the standard of conduct appropriate to someone who has regular contact with students. Moreover, the BOE points out that A.B.'s posts were directed to her entire audience, which included students, and therefore must be considered as directed toward students, among others.

The BOE maintains that it was required by law (N.J.S.A. 18A:6-7.7) to report whether the applicant resigned, was terminated, etcetera while an investigation into sexual misconduct was in progress. The BOE's position is that as long as a student had access to A.B.'s social media posts, any statements, images, etcetera contained in the posts must be considered as "directed toward students", even if the same posts were also directed toward others. The BOE relies on the confirmation by Detective Luis Furcal, who confirmed that some of A.B.'s students had access to the posts in question and that at least one student commented on one of the posts. The BOE maintains that since A.B. resigned during an ongoing investigation of "sexually suggestive comments" (one of the proscribed forms of conduct listed in the "Don't Pass the Trash" statute's definition of "sexual misconduct"), it was obligated to report this when answering Clifton's questionnaire.

The question of intent is always difficult to analyze and decide. A.B. pointed out that she is a married woman, that she has had no intent to establish a sexual relationship with a student, and that there is absolutely no evidence of any kind proving that such has been her intent. A.B.'s counsel criticized the BOE for attempting to read A.B.'s mind.

The BOE would be forced to concede that, without direct evidence (testimonial or documentary) of an actual communication or action by and between A.B. and a student regarding the establishment of a sexual encounter or relationship, it would have no way of looking into A.B.'s mind to prove what A.B.'s actual intent was when she made her posts on social media. The BOE is left with the task of finding some circumstantial evidence, (relying on an inference to prove its case) or resting its case on a

presumption to prove that her communications were *designed* (not "intended") to establish a sexual relationship with a student.

Here, in its attempt to prove "design" (i.e., the A.B.'s posts were "designed to establish a sexual relationship"), the BOE points to the sexually-charged and provocative nature of the statements (and the specific words used therein) which A.B. consciously and deliberately decided to post on her social media, knowing that some students had access to her site. The BOE points to two (of several) statements (posts) in particular. The first post was: "Kiss me, I'm Irish" followed by "Fuck me, I'm Irish". The BOE's position is that this post, on its face, can be construed as a frank invitation by the person posting it to engage in an act of sexual intercourse. The second post was: "Women say men only think with their penis. Ladies, don't be afraid to blow their minds." The BOE's position is that this post equates a man's penis to his mind and that the person posting it encourages ladies to "blow" (a slang reference to fellatio) the man's mind/penis. The latter posting was accompanied by A.B.'s admission: "This is totally inappropriate for me to post, but it actually made me laugh." In support of its position, the BOE presents A.B.'s admission that her post was "inappropriate" and that she decided to post it anyway despite the fact that students could see it.

The BOE's approach to establishing A.B.'s "design" appears to be as follows. The BOE notes that A.B.'s posts contained sexually-suggestive statements, which were knowingly made to an audience that included students. The BOE notes that the "Don't Pass the Trash" is remedial and seeks to prevent persons who have a history of improper sexual conduct from having regular contact with students. The BOE's position appears to be that, going forward from June 1, 2018, for the purposes of reporting a present or former employee's improper sexual conduct (be it "child abuse" or "sexual misconduct") under 6-7.7, the remedial and preventative intent of the statute is to require the reporting district to report any prior (going back twenty years) or present allegation or investigation into child abuse or sexual misconduct to the inquiring employer (unless the investigation found the allegations to be false or "not substantiated".)

The Tribunal finds it noteworthy that the definition of "sexual misconduct" contains the word "designed" rather that the word "intended". This suggests that the Legislature did not seek to place the burden of proving the actor's or communicator's intent on the reporting district. The use of the word "designed" indicates that the Legislature envisioned situations wherein the actor's or communicator's conduct might be suspected as an attempt to entice a student into a sexual relationship, but without placing the burden on the district of proving the actor's or communicator's actual intent. The wording of the definition of "sexual misconduct" in 6-7.6 is such that it assumes, and perhaps establishes a presumption, that when a teacher communicates, acts or contacts a student with a message that includes "a sexual invitation, dating or soliciting a date, engaging in sexual dialogue, *making sexually suggestive comments*, self-disclosure or physical exposure of a sexual or erotic nature, and *any other sexual, indecent or erotic contact* with a student", that message is inherently suspicious and is to be treated by the BOE as being "designed" (which connotes something approaching being "intended") to establish a sexual relationship.

Analysis of the "grandfather provision" or "savings clause"

N.J.S.A. 18A:6-7.12(b) reads as follows:

> "b. Any provision of an employment contract or agreement for resignation or termination or a severance agreement that is executed, amended, or entered into after the effective date [June 1, 2018] of this act and that is contrary to this section shall be void and unenforceable."

A.B. maintains that when the Legislature enacted the "Don't Pass the Trash" statute , N.J.S.A. 18A:6-7.6 to 6-7.12, it intended that the disclosure requirements of N.J.S.A. 18A:6-7.7 would apply only to inquiries made by prospective employers made after the June 1, 2018 effective date of the statute; and that any such inquiries could only inquire into allegations, investigations, findings or agreements entered after June 1, 2018. A.B. maintains that the literal meaning of N.J.S.A 18A:6-7.12, specifically 6-7.12 (b), should be give full effect.

The lynchpin of A.B.'s argument, indeed of her entire case, is that the Legislature intended that the disclosure provisions of 6-7.7 only apply prospectively from June 1, 2018. A.B.'s position is that 6-7.12's automatic voiding of agreements which seek to shield or suppress information about child abuse or sexual misconduct investigations or findings made *after* the effective date of the statute, June 1, 2018, clearly demonstrates the Legislature's intent to *exempt* these types of provisions in agreements entered *before* June 1, 2018 from being voided. It therefore follows that any agreement, such as the one entered by the Hackensack BOE and A.B. before June 1, 2018 containing provisions which shield information about whether an employee separated from his or her employment over allegations, an investigation, a finding or an agreement related to child abuse or sexual misconduct is not subject to the disclosure provisions of 6-7.7.

Utilizing an English translation of the maxim *Expressio unius est exclusio alterius* (The expression of one [thing] is the exclusion of the other [thing])", A.B. set forth her position as follows: if the Legislature wanted to make settlement agreements which were entered before June 1, 2018 subject to 6-7.7, it would have said so expressly in the statute. A.B. furthermore states that the absence of such a provision means that the Legislature literally intended to keep all prior agreements intact and not subject to 6-7.7 disclosure requirements. A.B. contends that it follows that the April 25, 2013 Settlement Agreement precludes the release of any information about the discussions leading up to the parties' agreement, including the nature of the BOE's disciplinary inquiry into A.B.'s actions, whether or not there was an investigation into child abuse or sexual misconduct, and the reasons for the cessation of A.B.'s employment with the Hackensack BOE. A.B.'s conclusion is that pre-June 1, 2018 agreements containing such confidential information were "grandfathered-in" by 6-7.12.

The BOE maintains that N.J.S.A. 18A:6-7.12 does not exempt Settlement Agreements entered before June 1, 2018 from the statute's reporting requirements. The BOE recognizes that the provisions of 6-7.12(b), specifically prohibit agreements entered after June 1, 2018 which suppress, destroy or otherwise safeguard information that would be disclosable under 6-7.7. However, the BOE argues that the application of "Expressio unius est exclusio alterius" could also be employed to favor the BOE's

position. That is, if the Legislature intended pre-June 1, 2018 agreements to be *exempt* from the reporting requirements of 6-7.7, it would have expressly stated this.

The BOE contends that there is no Legislative intent in the "Don't Pass the Trash" statute to create a "grandfather" provision or "savings clause". The BOE contends that A.B.'s interpretation and use of "Expressio unius est exclusio alterius" would run counter the spirit of the "Don't Pass the Trash" statute and thereby undermine its purpose. The BOE contends that the clear intent of the "Don't Pass the Trash" statute was to identify persons who were either adjudicated to be involved in child abuse or in sexual misconduct or who became separated from their employments while such charges were alleged or were being investigated (thus avoiding adjudication).

The BOE, although not specifically quoting it, relies on the maxim, "Ratio legis est anima legis" ('The reason for [or underlying] the law is the soul [spirit] of the law"). Indeed, the BOE contends that the entire intent behind N.J.S.A. 18A:6-7.6 through 7.13 was to remediate a system that continued to allow people with histories of child abuse or sexual misconduct from having the opportunity to interact with students. The intent of the statute is to specifically require that such histories be revealed pursuant to 6-7.7 in order to protect students by identifying such people and deterring them from applying for positions in which they would have regular contact with students.

Analysis of the Parties' Positions about the Authorization signed by A.B.

The BOE argues that A.B. signed an authorization in 2018 specifically authorizing the release of "... any and all information and the release of documentation within your (the school district's) possession in relation to any investigation in which I was accused of child abuse or sexual is conduct ...." A.B.'s response to the BOE's argument is that she was required by N.J.S.A. 18A:6-7.7 (a)(2) to provide her signed authorization, which she did indeed provide. However, A.B. further responds that the BOE was required to honor the April 25, 2013 Settlement Agreement by only giving A.B.'s name, position, dates of employment, and salary.

Analysis of the Parties' Positions on whether a Sexual Misconduct Investigation Took Place

A.B. contends that she was accused of misue of social media and that there was no investigation into sexual misconduct *as defined by the statute*. Therefore, A.B. contends that the information which the BOE released to Clifton was incorrectly and improperly disclosed and was done with malice. The BOE relies on the Certification of Principal Joe Montesano, in which he stated that A.B.'s posts came to the school officials' attention, that the posts appeared to contain inappropriate content and sexual content. He stated that the BOE looked into the content and confirmed by Detective Furcal that it was viewed and commented upon by students. Based upon this, meetings were held, which resulted in A.B. submitting her resignation as part of the April 25, 2013 Settlement Agreement.

Bottom Line Analysis

The BOE maintains that A.B. authorized the release of the information, and that it is therefore immune from liability. The BOE further says that it had been conducting a sexual misconduct investigation. The BOE believed that A.B. made sexually-suggestive posts, which were viewed and commented upon by students. The BOE maintains that the inquiry ended because parties negotiated the Settlement Agreement. Essentially, the BOE's case is that it followed the law (N.J.S.A. 18A:6-7.7).

Essentially, A.B.'s entire case hangs on her contentions that the BOE did not conduct a sexual misconduct investigation in 2013 (as that term was defined five years afterwards in the "Don't Pass the Trash" statute) and that N.J.S.A 18A:6-7.12 "grandfathered" any agreements sheltering any information about any investigation which the BOE may have conducted into allegations of A.B.'s suspected involvement in sexual misconduct in 2013. A.B. maintains that the BOE breached the April 25, 2013 Settlement Agreement by maliciously releasing confidential information costing her a job with Clifton.

APPLICABLE LAW

The "Don't Pass the Trash Statute" is found at N.J.S.A. 18A:6-7.6 to 7.13. For the matter at bar, the applicable sections of the statute are:

(1) N.J.S.A. 18A:6-7.6 (Definition of "sexual misconduct");

(2) N.J.S.A. 18A:6-7.7 (Requirements for certain school employees);

(3) N.J.S.A. 18A:6-7.9 (Verification, disclosure of information);

(4) N.J.S.A. 18A:6-7.10 (Review, further inquiries); and

(5) N.J.S.A. 18A:6-7.11 (Information not deemed public record; immunity);

(6) N.J.S.A. 18A:6-7.12 (Prohibited actions relative to certain agreements, employment contracts).

The definition of "sexual misconduct" is set forth in N.J.S.A. 18A:6-7.6 as follows:

> "Sexual misconduct" means any verbal, nonverbal, written, or electronic communication, or any other act directed toward or with a student that is designed to establish a sexual relationship with the student, including sexual invitation, dating or soliciting a date, engaging in a sexual dialogue, making sexually suggestive comments, self-disclosure or physical disclosure of a sexual or erotic nature, and any other sexual, indecent or erotic contact with a student."

The "Don't Pass the Trash" statute specifies certain duties and procedures for the employer or former employer to follow and for the applicant/ teacher to follow in regard to providing information to prospective employers about whether the applicant's work history includes information about his or her conduct regarding the subjects of sexual misconduct and child abuse. They are set forth in N.J.S.A. 18A:6-7.7 as follows:

> "A school district, charter school, nonpublic school, or contracted service provider holding a contract with a school district, charter school or nonpublic school shall not employ for pay or contract for the paid services of any person serving in a position which involves regular contact with

students unless the school district, charter school, nonpublic school, or contracted service provider:

a. Requires the applicant to provide:

(1) A list, including name, address, telephone number and other relevant contact information of the applicant's:
(a) Current employer;
(b) all former employers within the last 20 years that were schools; and
(c) all former employers within the last 20 years where the applicant was employed in a position that involved direct contact with children; and

(2) A written authorization that consents to and authorizes disclosure of the information requested under subsection b. of this section and the release of related records by the applicant's employers listed under paragraph (1) of this subsection, and that releases those employers from liability that may arise from the disclosure or release of records;

(3) A written statement as to whether the applicant:

(a) has been the subject of any child abuse or sexual misconduct investigation by any employer, State licensing agency, law enforcement agency, or the Department of Children and Families, unless the investigation resulted in a finding that the allegations were false or the alleged incident of child abuse or sexual misconduct was not substantiated;

(b) has ever been disciplined discharged, nonrenewed, asked to resign from employment, resigned from or otherwise separated from any employment while allegation of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct; or

(c) has ever had a license, professional license, or certificate suspended, surrendered, or revoked while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct; and

b. Conducts a review of the employment history of the applicant by contacting those employers listed by the applicant under the provisions of paragraph (1) of subsection a. of this section and requesting the following information:

(1) The dates of employment of the applicant; and
(2) a statement as to whether the applicant:

> (a) was the subject of any child abuse or sexual misconduct investigation by any employer, State licensing agency, law enforcement agency, or the department of Children and Families, unless the investigation resulted in a finding that the allegations were false or the alleged incident of child abuse or sexual misconduct was not substantiated;
>
> (b) was disciplined, discharged, nonrenewed, asked to resign from employment, resigned from or otherwise separated from any employment while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct; or
>
> (c) has ever had a license, professional license, or certificate suspended, surrendered, or revoked while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication of finding of child abuse or sexual misconduct.

The review of the employment history may be conducted through telephonic, electronic, or written communications. If the review is conducted by telephone, the results of the review shall be documented in writing by the prospective employer."

N.J.S.A. 18A:6-7.9 (a) provides that the applicant's employer or former employer must respond to the prospective employer's request for information submitted under N.J.S.A. 18A:6-7.7 within 20 days after receiving the request.

N.J.S.A. 18A:6-7.9 (b) provides that the prospective employer must make diligent efforts to verify the information requested of out-of-state employers.

N.J.S.A. 18A:6-7.9 (c) provides that the failure of an employer or former employer to provide the information requested by a prospective employer under N.J.S.A. 18A:6-7.7 may be grounds for the automatic disqualification of an applicant from employment. If that is the case, then the prospective employer shall not be liable to the applicant who is not offered employment or whose employment is terminated due to information received or due to the prospective employer's inability to conduct a full review of the applicant's employment history.

The full text of N.J.S.A. 18A:6-7.9 (d) reads as follows:

> "A school district, charter school, nonpublic school or contracted service provider shall have the right to

> immediately terminate an individual's employment or rescind an offer of employment if:
>
> (1) the applicant is offered or commences employment with the school district, charter school, nonpublic school, or contract service provider following the effective date [June 1, 2018] of this act; and
>
> (2) information regarding the applicant's history of sexual misconduct or child abuse is subsequently discovered or obtained by the employer that the employer determines disqualifies the applicant or employee from employment with the school district, charter school, nonpublic school or contracted service provider.

The termination of employment pursuant to this subsection shall not be subject to any grievance or appeals procedures or tenure proceedings pursuant to any collectively bargained or negotiated agreement or any law, rule, or regulation."

N.J.S.A. 18A:6-7.10 (a) provides that if a prospective employer receives information from an applicant's employer or previous employer indicating that there is a history of child abuse or sexual misconduct, then the prospective employer is required to make further inquiries to ascertain additional details regarding the matter(s) disclosed. N.J.S.A. 18A:6-7.10 (b) provides that a prospective employer may employ an applicant on a provisional basis for no more than 90 days as long as:

> (1) the applicant has complied with N.J.S.A. 18A:6-7.7(a), disclosing current and previous employers; and
>
> (2) the applicant has submitted a written statement disclosing whether he or she has ever been the subject of any child abuse or sexual misconduct investigation; has been disciplined, discharged, nonrenewed, asked to resign, resigned, or otherwise been separated from employment while allegations of child abuse or sexual misconduct were pending or under investigation; or has ever had a license, professional license, or certificate suspended, surrendered or revoked while allegations of child abuse or sexual misconduct were pending or under investigation; and
>
> (3) the prospective employer determines that special or emergent circumstances exist that justify the temporary employment of the applicant.

The full text of N.J.S.A. 18A:6-7.11 reads as follows:

> "a. Information received by an employer under this act [C.18A:6-7.6, et seq.] shall not be deemed a public record under P.L. 1963, c.73 (C.47:1A-1 et seq.) or the common law concerning access to public records.
>
> b. An employer, school district, charter school, nonpublic school, school administrator, or contracted service provider that provides information or records about a current or former employee or applicant shall be immune from criminal and civil liability for the disclosure of the information, unless the information or records provided were knowingly false. The immunity shall be in addition to and not in limitation of any other immunity provided by law.

The full text of N.J.S.A. 18A:6-7.12 reads as follows:

> "a. On or after the effective date [June 1, 2018] of this act a school district, charter school, nonpublic school, or contracted service provider may not enter into a collectively bargained or negotiated agreement, an employment contract, an agreement for resignation or termination, a severance agreement, or any other contract or agreement or take any action that:
>
> (1) has the effect of suppressing or destroying information relating to an investigation related to a report of suspected child abuse or sexual misconduct by a current or former employee;
>
> (2) affects the ability of the school district, charter school, nonpublic school, of contracted service provider to report suspected child abuse or sexual misconduct to the appropriate authorities; or
>
> (3) requires he school district, charter school, nonpublic school, or contracted service provider to expunge information about allegations or findings of suspected child abuse or sexual misconduct from any documents maintained by the school district, charter school, nonpublic school, or contracted service provider, unless after investigation the allegations are found to be false or the alleged incident of child abuse or sexual misconduct has not been sustained.

> b. Any provision of an employment contract or agreement for resignation or termination or a severance agreement that is executed, amended, or entered into after the effective date [June 1, 2018] of this act and that is contrary to this section shall be void and unenforceable."

The Law of Decorum for Public Employees

Members of certain professions are held to a high standard of conduct because the nature of their callings demand exemplary behavior. The New Jersey Supreme Court defined unbecoming conduct as conduct "which adversely affects the morale or efficiency of the [department]" or "has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." In re Young, 202 N.J. 50, 66 (2010), (quoting Karins v. Atlantic City, 152 N.J. 532, 554 (1998). See also, In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960) and Asbury Park v. Department of Civil Service, 17 N.J. 419, 429 (1955). The Supreme Court also stated in Karins that a finding of unbecoming conduct "need not 'be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the 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.'" Karins v. Atlantic City at 555 (quoting Hartmann v. Police Department of Ridgewood, 258 N.J. Super. 32, 40 (App. Div. 1992)). In Bound Brook Board of Education v. Glenn Ciripompo, 228 N.J. 4, 14 (2017) the Supreme Court of New Jersey emphasized the interplay of the high standard of conduct borne by teachers and the delicacy of the respect paid by members of the public to the teaching profession when it stated:

> "A charge of unbecoming conduct requires only evidence of inappropriate conduct by teaching professionals. It focuses on the morale, efficiency, and public perception of an entity, and how those concerns are harmed by allowing teachers to behave inappropriately while holding public employment."

Statutory Interpretation

In the case at bar, it is necessary to address the subject of statutory interpretation. When interpreting a statute, the main objective is to discern and further the intent of the Legislature. Bosland v. Warnock Dodge, Inc., 197 N.J. 543, 553 ((2009)

(citing D'Annunzio v. Prudential Ins. Co. of America , 192 N.J. 110 (2007); Daidone v. Buterrick Bulkheading, 191 N.J. 557, 565 (2007)). To discern the Legislature's intent, courts look first to the plain language of the statute in question. DiProspero v. Penn, 183 N.J. 477, (2005) (citing Lozano v. Frank DeLuca Constr.,178 N.J. 513 (2004)). When reading statutory language, courts will give words their ordinary meaning unless the Legislature directs to the contrary. Serv. Armament Co. v. Hyland, 70 N.J. 550 (1970) (citing Safeway Trails, Inc. v. Furman,41 N.J. 467, 487 (1964)). In Richardson v Bd. of Trs, , Police, Firemens's Ret. Sys., 192 N.J. 189 (2007) (citing DiProspero, supra, 183 N.J. at 492), the Supreme Court stated flatly, "If the plain language leads to a clear and unambiguous result, then [the] interpretive process is over." However, if the plain meaning does not point to a "clear and unambiguous result," the courts will then consider extrinsic evidence from which it may glean the Legislature's intent. Bedford v. Riello, 195 N.J. 210 (2008) (citing DiProspero, supra, 183 N.J. at 492-93). Included within the extrinsic evidence rubric are legislative history and statutory context, which may shed light on the drafters' motives. Aponte-Correa v. Allstate Ins. Co., 162 N.J. 318 (2000) (citing Twp. of Pennsauken v. Schad, 160 N.J. 156 (1999)). Regardless of the materials relied upon and the analytical tools employed, in the final analysis, courts should "seek to effectuate the 'fundamental purpose for which the legislation was enacted.'" Schad, supra, 160 N.J. at 170 (quoting N.J. Builders Ass'n. v. Blair, 60 N.J. 330, 338-39 (1972)).

ISSUES

(1) Does N.J.S.A. 18A:6-7.12 exempt settlements entered before June 1, 2018 from the mandatory disclosure provisions of N.J.S.A. 18A:6-7?

(2) Did the BOE conduct a sexual misconduct investigation of A.B.?

(3) What is meant by the words "directed toward or with a student" as used in the definition of "sexual misconduct"?

(4) Was any content of A.B.'s comments "directed toward or with a student that was 'designed' to establish a sexual relationship with a student"?

(5) Did any content of A.B.'s social media posts include any of the several specific types of proscribed "communications", "acts" or "contacts" with students set forth in the definition of "sexual misconduct" as found in N.J.S.A. 18A:6-7.6?

(6) Did A.B. authorize the Hackensack B.O.E. to disclose information to Clifton B.O.E. about the sexual misconduct investigation in 2013?

(7) Did Hackensack B.O.E. follow the requirements of N.J.S.A. 18A:6-7.6, et seq. (the "Don't Pass the Trash Law")?

(8) If so, is the Hackensack B.O.E. entitled to immunity?

LEGAL ANALYSIS AND CONCLUSIONS

Preliminary Conclusions

From a review of all the evidence in the case, I **CONCLUDE** that there is no evidence of child abuse in the case at bar. The allegations against A.B. were not for "child abuse", but rather were for "sexual misconduct".

There was discussion about a certain photograph of teenagers in a swimming pool, clad in bathing suits and standing next to each other facing the photographer. Both sides agree that the teenagers are appropriately clad, are doing nothing except posing for a photograph, and I **CONCLUDE** that there is nothing sexual depicted in said photograph. Moreover, I **CONCLUDE** that no one has demonstrated that A.B. was in the photograph with the teenagers. I **CONCLUDE** that the photograph adds nothing to the outcome of this matter.

ISSUE # 1: Does N.J.S.A. 18A:6-7.12 exempt agreements entered before June 1, 2018 from the mandatory disclosure provisions of N.J.S.A. 18A:6-7 ?

The parties each presented arguments employing the maxim "Expression unius est exclusio alterius" to their respective advantage. A.B. employed the maxim to support the proposition that by means of 6-7.12 the Legislature sought to regulate only post-June 1, 2018 contracts and agreements and to exempt or leave intact all pre-June 1,

2018 contracts and agreements. The effect of this argument would be the preservation of the confidentiality of certain information protected by the April 25, 2013 Settlement Agreement. The BOE looked to the remedial and protective intent of the "Don't Pass the Trash" statute, reasoning that it would not be consistent for the statute's purposes to exempt pre-June 1, 2018 agreements (like the April 25, 2013 Settlement Agreement) and thus shield the histories of people whom the Legislature sought to deter from taking jobs that allowed regular contact with students. Following the Supreme Court's reasoning in Schad and N.J. Builders Ass'n, supra, I **CONCLUDE** that the BOE's argument is stronger than A.B.'s argument. However, here, the statute itself contains the answer to the question.

N.J.S.A. 18A:6-7.12(b) reads as follows:

> "b. Any provision of an employment contract or agreement for resignation or termination or a severance agreement that is executed, amended, or entered into after the effective date [June 1, 2018] of this act and that is contrary to this section shall be void and unenforceable."

The inclusion of the word "amended" can only refer to contracts or agreements entered before the June 1, 2018 effective date of the "Don't Pass the Trash" statute. This indicates that the Legislature contemplated that after the effective date of the "Don't Pass the Trash" statute, people or entities might attempt to amend their pre-June 1, 2018 contracts or agreements in a way to avoid the disclosure requirements of N.J.S.A. 18A:6-7.7. I **CONCLUDE** that this means that the Legislature intended that pre-June 1, 2018 contracts and agreements are subject to the disclosure requirements of the "Don't Pass the Trash" statute.

ISSUE # 2: Did the BOE conduct a sexual misconduct investigation of A.B. ?

A.B. confined the question to "sexual misconduct' *as defined by N.J.S.A. 18A:6-7.6.* Certainly, the term "sexual misconduct" can be defined different ways in different jurisdictions and at different times. So the real question is whether the BOE conducted any type of sexual misconduct investigation in 2013 that would be reportable when it was called-upon to answer Clifton's background questionnaire in 2019. The Certification

of Hackensack High School Principal Jim Montesano provides his own sworn assertion that an investigation took place and that Detective Furcal reported to him that he examined the postings on A.B.'s social media account and found that students had viewed the postings and even posted comment. I **CONCLUDE** that this proves that what was undertaken in 2013 was a sexual misconduct investigation, which was reportable in 2019 pursuant to be requirements of the "Don't Pass the Trash' statute.

ISSUE # 3: What is meant by the words "directed toward or with a student" as used in the definition of sexual misconduct found in N.J.S.A. 18A:6-7.6 ?

Inasmuch as students were among the people who had access to A.B.'s social media posts, I **CONCLUDE** that there is no doubt that A.B.'s posts were directed toward students.

ISSUE # 4: Was any content of A.B.'s comments "directed towards or with a student that was 'designed' to establish a sexual relationship with a student ?

In New Jersey, remedial legislation, necessary for the protection of its citizens, is liberally construed to effectuate the purposes and intent thereof. The "Don't Pass the Trash" is remedial and seeks to prevent persons who have a history of improper sexual conduct from having regular contact with students.

As noted above in the analysis of the parties' arguments and positions, the definition of "sexual misconduct" uses the word "designed" rather that the word "intended", which suggests that the Legislature did not seek to place the burden of proving the actor's or communicator's intent on the reporting district.

As stated above in my analysis, I **CONCLUDE** that the use of the word "designed" in the definition of "sexual misconduct" indicates that the Legislature envisioned situations wherein the teacher's conduct might be suspected as an attempt to entice a student into a sexual relationship, but did not wish to place the burden of proving the actor's or communicator's actual intent on the district. Here, although there is no direct evidence of A.B.'s actual *intent*, A.B.'s own words are fraught with notions of

improper invitation and provocation and therefore, I **CONCLUDE** that her words were capable of being understood as *designed* to establish a sexual relationship with a member of her audience, including a student.

ISSUE # 5: Did any content of A.B.'s social media posts include any of the several specific types of proscribed "communications", "acts" or "contacts" with students set forth in the definition of "sexual misconduct" found in N.J.S.A. 18A:6-7.6 ?

The definition of "sexual misconduct' proscribes "sexually suggestive comments" and three types of "other contacts" (communicative contacts, not physical contacts) set forth as "sexual contact", "indecent contact" or "erotic contact". One of A.B.'s posts stated "Kiss me, I'm Irish" followed by "Fuck me, I'm Irish". Taken literally, the meaning of each statement, especially the latter statement, is a frank invitation to erotic activity. A.B. claimed to have posted this post as an attempt at humor, but to accept her explanation would require that whenever such a statement is uttered, the person who makes a communication to a student, even a person who is actually seeking an erotic encounter, would avoid any consequences for his or her statement by merely claiming to have spoken in jest. Knowing her status as a teacher, A.B. posted statements, which she knew or should have known could be construed as sexually suggestive or as sexual, indecent or erotic contacts. A.B. may well have made her posts innocently and in jest, but she should have considered how her postings could affect the school environment, the safety of students and her duty to maintain the integrity of the teaching profession in the eyes of the public. While it is legitimate for an adult person to enjoy the casual communication which social media offers, the Supreme Court's decision in Bound Brook, supra, warns us that it is incumbent upon a teacher whose social media site is accessible to students to be mindful of her position, to exercise caution about the content of the communications she makes, and to make a careful assessment of her priorities.

The "Don't Pass the Trash" statute is a remedial and preventative statute that is intended to identify those who pose a threat to the well-being of students. I **CONCLUDE** that its passage changed the law of New Jersey regarding what was beforehand

regarded as confidential and what was henceforth to be regarded as confidential in pre-June 1, 2018 agreements concerning the termination or separation of teachers from their employments, even their former employments. In New Jersey, the provisions of remedial statutes are construed liberally so as to effectuate the purposes and intent thereof to the fullest extent possible. Therefore, I **CONCLUDE** that to effectuate the statute's remedial and protective intent, it must be read as requiring a reporting school district (Hackensack BOE) to report to the inquiring school district (Clifton BOE) any present or prior allegation or investigation into child abuse or sexual misconduct (unless the investigation found the allegations to be false or "not substantiated") regardless of when the investigation took place and regardless of whether the information was previously shielded by an agreement between the parties.

I **CONCLUDE** that A.B.'s posting of "Kiss me, I'm Irish" followed by "Fuck me, I'm Irish" meets the criteria of being "sexually suggestive", as well as being "sexual contact", "indecent contact" and "erotic contact". I **CONCLUDE** that A.B.'s aforesaid posting contained content proscribed by N.J.S.A. 18A:6-7.6's definition of "sexual misconduct".

I **CONCLUDE** that the other post, "Women say men only think with their penis. Ladies, don't be afraid to blow their minds", also meets the criteria of being "sexually suggestive", as well as being "sexual contact", "indecent contact" and "erotic contact". Moreover, in the post itself, A.B. admitted that her statement was inappropriate.

I **CONCLUDE** that this post also contained content proscribed by N.J.S.A. 18A:6-7.6's definition of "sexual misconduct".

ISSUE # 6: Did A.B. authorize the Hackensack BOE to disclose information to Clifton about the sexual misconduct investigation of 2013?

The language of the authorization signed by A.B. tracks the requirements set forth in N.J.S.A. 18A:6-7.7. The authorization signed by A.B. she requested the Hackensack BOE to release information and documents to the Clifton BOE as follows:

> "I consent to and authorize the disclosure of any and all information and the release of documentation within your

possession in relation to any investigation in which I was accused of child abuse or sexual misconduct pursuant to New Jersey Public Law 2018, C.5. I expressly request all investigative materials, if any exist, be disclosed including the following:

- Any investigative reports of child abuse or sexual misconduct investigation conducted by your company, a State licensing agency, law enforcement agency, or the Division of Child Protection and Permanency in the Department of Children and Families unless the Investigation was found to be false or unsubstantiated;

- Any documentation, including, but not limited to, resolutions or agreements in which I was disciplined, discharged, nonrenewed, asked to resign from employment, resigned from or otherwise separated from any employment while allegations of child abuse or sexual misconduct were pending or (under)* investigation, or due to an adjudication or finding of child abuse or sexual misconduct [were pending or under investigation, or finding of child abuse or sexual misconduct]**; and

- Any documentation which shows my license or certificate was suspended, surrendered or revoked while allegations of child abuse or sexual misconduct were pending or under investigation, or due to an adjudication or finding of child abuse or sexual misconduct.

*NOTE: The word "under" in parentheses did not appear on the form signed by A.B., but was inserted by the Tribunal because it conforms with the wording of 6-7.7 (a) (3)(b).

** NOTE: The words "were pending or under investigation, or finding of child abuse or sexual misconduct" in brackets appear in the form signed by A.B., but are superfluous and were mistakenly included on the form.

The consent form, at the top, states that A.B. consents to disclosure and release of all "information", "documentation" and "investigative materials". The language is plain and comprehensive and does not contain any reservations.

In the first bullet point, A.B. consents to the disclosure of investigative reports unless same were found to be false or unsubstantiated. This is not applicable in the present case.

In the second bullet point, A.B. consents to the disclosure of any documents, including resolutions and / or agreements put into effect while allegations were pending against her or while she was under investigation for child abuse or sexual misconduct or due to an adjudication against her of child abuse or sexual misconduct. The inclusion of the word "agreements" certainly put A.B. on notice that her April 25, 2013 Settlement Agreement was included in the items she was consenting to disclose.

In the third bullet point, A.B. consents to the disclosure of any documentation which shows that her license or certificate was suspended, surrendered, or revoked while allegations of child abuse or sexual misconduct were pending against her or under investigation. This is not applicable in the present case.

Returning to the crucial issue of whether N.J.S.A. 18A:6-7.12 exempts the disclosure of the April 25, 2013 Settlement Agreement or includes it in the types of items that must be disclosed, I have already concluded that 6-7.12 does not exempt pre-June 1, 2018 agreements and I have concluded that the enactment of N.J.S.A. 18A:6-7.6 through 7.13 changed the law of New Jersey regarding what would be considered as confidential. I **CONCLUDE** that A.B.'s signing of the authorization consented to the disclosure of information in the April 25, 2013 Settlement Agreement and I **CONCLUDE** that the BOE had the right and the duty under the statute to disclose it.

ISSUE # 7: Did the Hackensack BOE follow the requirements of N.J.S.A. 18A:6-7.6, et seq. ?

I **CONCLUDE** that the BOE's disclosure of the information set forth in its response to Clifton's questionnaire was required by the "Don't Pass the Trash" statute, notably, 6-7.7.

ISSUE # 8: If so, is the Hackensack BOE entitled to Immunity ?

I **CONCLUDE** that the BOE followed the requirements of the "Don't Pass the Trash" statute, notably 6-7.7, and is therefore immune from liability, civil or criminal.

ORDER

It is hereby **ORDERED** that the Hackensack BOE's motion for **SUMMARY DECISION** is **GRANTED**, and it is further **ORDERED** that A.B. 's motion for **SUMMARY DECISION** is **DENIED** and her Petition is **DISMISSED** in its entirety.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION,** who by law is authorized to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500,** marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

John P. Scollo

July 22, 2021
DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency: July 22, 2021

Date Mailed to Parties: July 22, 2021

db