

DIANE BASILE, :

PETITIONER, : COMMISSIONER OF EDUCATION

V. : DECISION

BOARD OF EDUCATION OF THE :  
BOROUGH OF FAIRVIEW, :  
BERGEN COUNTY :

RESPONDENT. :

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SYNOPSIS

Petitioner – who had been employed in Fairview schools for twenty years as a Speech Language Pathologist, under an Educational Services Certificate – was transferred by the respondent Board to a full-time teaching assignment as a second grade teacher for the 2017-2018 school year. Petitioner did not consent to the transfer, and subsequently filed the within appeal challenging her reassignment. Petitioner asserted that the Board’s action violated her tenure rights under *N.J.S.A.* 18A:28-5. The Board denied any violation of petitioner’s tenure rights, contending that she suffered no loss in compensation or rank. The parties filed opposing motions for summary decision.

The ALJ found, *inter alia*, that: the factual background which led to the filing of the within petition is not in dispute, and the matter is ripe for summary decision; petitioner is tenured as a speech language pathologist pursuant to her Educational Services Certificate with an endorsement as a Speech Correctionist, as she had been employed with the Board in this capacity for over twenty years; the Board’s decision to transfer petitioner from the position of Speech Language Pathologist to classroom teacher was done without petitioner’s consent and not for disciplinary reasons; for the 2017-2018 school year, the Board employed two other speech language pathologists who were not tenured; transfers made during a reduction in force, or for disciplinary reasons, or those made with the consent of the employee are legitimate exceptions to the tenure statute, but do not apply in this case; and the Board’s reliance on *Carpenito v. Board of Education of the Borough of Rumson*, 322 *N.J. Super.* 522, is misplaced, as this decision clearly affirms that it is within the Board’s managerial discretion to transfer a tenured teacher, *however*, such transfer must be within the scope of the teacher’s certification so as not to violate the tenure statute. The ALJ concluded that the Board erred in transferring petitioner to a teaching position, as she is tenured under her educational services certification and could only be transferred to other positions within the scope of her certification. Accordingly, the ALJ granted petitioner’s motion for summary decision, denied the Board’s cross motion, and ordered the Board to reinstate petitioner to her tenured position as Speech Language Pathologist.

Upon review, the Commissioner adopted the Initial Decision of the OAL as the final decision in this matter, for the reasons expressed therein.

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

July 26, 2018

OAL DKT. NO. EDU 11837-17  
AGENCY DKT. NO. 127-6/17

DIANE BASILE, :  
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 PETITIONER, : COMMISSIONER OF EDUCATION  
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 BOROUGH OF FAIRVIEW, :  
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The record of this matter and the Initial Decision of the Office of Administrative Law have been reviewed. The parties did not file exceptions to the Initial Decision.

Upon such review, the Commissioner adopts the Administrative Law Judge's recommended decision for the reasons expressed therein. Accordingly, petitioner's motion for summary decision is granted and respondent's motion for summary decision is denied.

IT IS SO ORDERED.<sup>1</sup>

COMMISSIONER OF EDUCATION

Date of Decision: July 26, 2018

Date of Mailing: July 26, 2018

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<sup>1</sup> This decision may be appealed to the Superior Court, Appellate Division, pursuant to *P.L. 2008, c. 36* (*N.J.S.A. 18A:6-9.1*).



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. EDU 11837-17

AGENCY DKT. NO. 127-6/17

**DIANE BASILE,**

Petitioner,

v.

**BOARD OF EDUCATION OF FAIRVIEW**

**PUBLIC SCHOOLS, BERGEN COUNTY,**

Respondent.

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**Gregory T. Syrek, Esq.,** for petitioner (Bucceri & Pincus, attorneys)

**Stephen F. Pellino, Esq.,** for respondent (Basile, Birchwale & Pellino, LLP,  
attorneys)

Record Closed: June 18, 2018

Decided: August 1, 2018

BEFORE **JULIO C. MOREJON, ALJ:**

**STATEMENT OF THE CASE AND PROCEDURAL HISTORY**

Petitioner, Diane Basile (Basile), a tenured teacher employed as a speech therapist, challenges the action of the Fairview Board of Education ("the Board") decision to transfer her from speech therapy to a full-time teaching assignment.

On June 29, 2017, Basile filed a Verified Petition with the Commissioner of Education, contesting the Board's decision of June 8, 2017, to transfer her from her position as speech therapist<sup>2</sup> to a second-grade teacher. Basile did not consent to the transfer and she contends that the Board violated her tenure rights under N.J.S.A. 18A:28-5.

On August 3, 2017, the Board filed its Answer to Verified Petition, denying Basile's charge that the Board violated her tenure rights, inasmuch as she suffered no loss in compensation or rank.

On August 15, 2017, the Commissioner of Education transmitted this matter to the Office of Administrative Law (OAL) for a hearing on the merits of the underlying claims raised in the petition. The same was filed with the OAL Clerk's Office on August 17, 2017.

On October 4, 2017, a telephonic prehearing conference was held and a Prehearing Order was filed thereafter. On December 15, 2017, a telephonic status conference was held and a hearing was scheduled for February 23, 2018. On February 9, 2018, following a telephonic status conference, the parties agreed to waive a hearing and agreed to submit mutual motions for summary decision concerning the issue of whether the Board violated Basile's tenure rights under N.J.S.A. 18A:28-5, in transferring her from her position of a speech therapist to second grade teacher.

On April 9, 2018, Basile filed her motion for summary decision, and on April 12, 2018, the Board filed its motion for summary decision. Oral argument was heard on June 18, 2018, at which time the record was closed.

### **DISCUSSION**

The parties concede that the factual background which led to the filing of the petition is not in dispute and have mutually submitted a Stipulation of Facts and Exhibits

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<sup>2</sup> The job title of "Speech Language Pathologist" is the same title as "Speech Therapist". Both titles are interchangeable (Exhibit A, Board, Stipulation of Facts and Exhibits, stipulation 5).

(Stipulation).<sup>3</sup> The salient facts contained in the Stipulation are set forth below, and I **FIND** them to be the **FACTS** of this case:

1. Basile holds an Educational Services Certificate with endorsements as a Speech Correctionist, issued in August 1980. She also holds a Speech Language Specialist Equivalent, issued in 2012.
2. Basile holds an Instructional Certificate, with the following endorsements: Elementary School Teacher, issued October 1982, Teacher of the Deaf or Hard of hearing, issued August 1980, Reading Specialist, issued September 1991, Teacher of the Handicapped, issued December 1980, and Teacher of Reading, issued October 1983.
3. From 1997 forward, with the exception of an approved leave of absence from January 2012 to January 2013, Basile was employed by the Board as a speech therapist.
4. Basile's current job title "Speech Language Pathologist" is the same as the title "Speech Therapist" used in describing Basile's employment history. The titles "Speech Language Specialist" and "Speech Therapist" are interchangeable.
5. For the 2017-2018 school year, the Board transferred Basile to teach second-grade in the elementary school, where she has an appropriate endorsement.
6. The Board's decision to transfer Basile to teach second-grade was done without Basile's consent and not for disciplinary reasons.
7. The transfer of Basile to teach second grade was done without loss of pay or benefits and without a change in her tenure.
8. For the 2017-2018 school year, the Board employed two other speech language therapists (pathologists) who are not presently tenured.

Although not stipulated to by the parties or conceded by the Board, I **FIND** that by operation of law under N.J.S.A. 18A:28-5, Basile is tenured as a speech therapist pursuant to her Educational Services Certificate with an endorsement as a Speech

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<sup>3</sup> The Stipulation was submitted as Exhibit "A", with corresponding exhibits labeled "J-1 through J-8". For purposed of this decision, the Stipulation will be identified as Exhibit J-1A, and it along with exhibits J-1 through J-8 are made part of the record.

Correctionist, as she has been employed with the Board in this capacity for over twenty years.

Basile and the Board seek relief pursuant to N.J.A.C. 1:1-12.5, which provides that summary decision should be rendered "if the papers and discovery which have been filed, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Our regulation mirrors R. 4:46-2(c) which provides that "the judgment or order sought shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law."

A determination whether a genuine issue of material fact exists that precludes summary judgment requires the judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party. Our courts have held that the "judge's function is not himself [or herself] to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540 (1995), citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). When the evidence "is so one-sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. Anderson, 477 U.S. at 252. Conversely, it is critical that a favorable ruling on a summary judgment motion not "shut a deserving litigant from his [or her] trial." Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 77 (1954).

The parties having stipulated to the facts in this matter, what is at issue here is whether the Board's transfer of Basile is violative of her tenure rights under N.J.S.A. 18A:28-5.

Basile argues that she is entitled to the full protection and the security of tenure in the position of speech therapist. Her claim of tenure status is based on the operation

of N.J.S.A. 18A:28-5. This statute provides the requirements for achieving tenure as a staff member in a school district. <sup>4</sup>

Basile submits that she is entitled to full tenure rights and protections in the position of speech therapist. Specifically, she argues that she cannot be transferred to a position outside the area of her tenure protections: a transfer from speech therapist (tenure based on her Educational Services Certificate) to classroom teacher (within the scope of her Instructional Certificate) is contrary to law and should be reversed.

The Board argues that Basile may be assigned to another position, since Basile's transfer was done without loss of pay or benefits and leaves her essentially in the same position she was prior to the transfer, albeit as a second-grade teacher. As justification for its decision, the Board relies exclusively on Carpenito v. Board of Educ. of Borough of Rumson, Monmouth County, 322 N.J. Super. 522 (App. Div. 1999), and Vidal-Turner v. Board of Educ. of Atlantic City, 2017 N.J. Super. Unpub. LEXIS 2020.

N.J.S.A. 18A:28-6 provides a relaxed tenure structure for teaching staff members who are transferred with their consent to new positions. "Transfer' refers to the right [sic] of a school board to assign a teacher to a position within the scope of his or her certification." Carpenito, 322 N.J. Super. at 529 (emphasis supplied). Therefore, tenure laws do not prohibit a school board from transferring a teaching staff member "within the scope of his or her certification" even without their consent, but do prohibit removing the staff member completely from a position which she has certification for and is tenured

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<sup>4</sup> N.J.S.A. 18A:28-5

**a.** The services of all teaching staff members employed prior to the effective date of 2012...in the positions of teacher, ... and such other employees as are in positions which require them to hold appropriate certificates issued by the board of examiners, serving in any school district or under any board of education, ... shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in the manner prescribed by subarticle B of article 2 of chapter 6 of this Title, after employment in such district or by such board for:

**(1)** Three consecutive calendar years, or any shorter period which may be fixed by the employing board for such purpose; or  
**(2)** Three consecutive academic years, together with employment at the beginning of the next succeeding academic year; or  
**(3)** The equivalent of more than three academic years within a period of any four consecutive academic years.

in, absent any of the enumerated statutory exceptions. See Gerdes v. Board of Educ. of the Borough of Spotswood, Middlesex County, 92 N.J.A.R. 2d (EDU) 168, aff'd Docket No. A-6460 91 (App. Div., November 15, 1993) (holding that a tenured cooperative education coordinator under an educational services certificate could not be transferred back to a teaching position under a standard instructional certificate absent any exceptions under N.J.S.A. 18A:28-5 or N.J.S.A. 18A:28-9).

Furthermore, the appellate division has held that once a teaching staff member has attained tenure in the new position in accordance with N.J.S.A. 18A:28-6, she "cannot . . . be unilaterally dismissed from that position without the hearing required by N.J.S.A. 18A: 6-10." Childs v. Union Twp. Board of Educ., 1982 S.L.D. 1456, 1459 (1982).

Since Basile has been a speech therapist for twenty years, it is established, and the Board does not dispute, that Basile has attained tenure in this position. As stated above, a speech therapist operates under the educational services certificate, not a standard instructional certificate. See N.J.A.C. §6A:9B-14.6. Therefore, Basile is tenured under her educational services certification and can only be transferred to other positions within that certification. Gerdes v. Board of Educ. of the Borough of Spotswood, Middlesex County, 92 N.J.A.R. 2d (EDU) 168, aff'd Docket No. A-6460 91 (App. Div., November 15, 1993); Childs v. Union Twp. Board of Educ., 1982 S.L.D. 1456, 1459 (1982). When a teaching staff member has "gone to considerable lengths to obtain her certification in the new position [and] has [attained tenure] . . . it is pure sophistry to assert that her 'transfer' is anything less than dismissal from her clearly tenured position." Childs, 1982 S.L.D. at 1460.

The facts in this case clearly demonstrate that Basile was not transferred to a position within her educational services certificate. An elementary school teacher is covered under a standard instructional certificate and Basile "has earned her right to tenure in her separately certificated position [as a speech therapist]." Childs, 1982 S.L.D. at 1461.



An additional decision examining tenure under an Educational Services Certificate is Kartan v. Bd. of Ed., North Arlington, State Board of Education (May 6, 1998), 1998 WL 34275707 (N.J. Admin.). In Kartan, a tenured guidance counselor was transferred to teach one period of math per day. This partial transfer out of his tenured guidance position was held to be a violation of his tenure rights. Once tenure is gained in a particular area, an employee may not be transferred to a position outside the scope of his or her tenure protections. A transfer from guidance counselor or speech therapist (Educational Services Certificate) to teacher (Instructional Certificate) is a blatant violation of tenure rights.

The Board's reliance on Carpenito in justifying its decision to transfer Basile and arguing that it has not violated the tenure laws by doing so is misplaced. The facts of Carpenito are veritably distinguishable from this case. In Carpenito, the teacher was transferred to a different position within his standard instructional certificate. Carpenito, 322 N.J. Super. at 526. Moreover, Carpenito was transferred because the school was forced to eliminate the social studies teacher position, and the dispute arose when the school reinstated the position a year later and did not allow Carpenito to resume the same. Id. Thus, the fact that the transfer in Carpenito was within the same certificate and arose after the position was formally eliminated make it materially different from the facts in this case, and thus of little applicability.

I **CONCLUDE** that Basile was transferred to teach full-time, which is outside the scope of her tenure protections in the educational services position of speech therapist. The Board concedes that said transfer was not done for disciplinary reasons, and was without the Basile's consent, both exceptions to the tenure statute. I **CONCLUDE** that once tenure is gained in a particular area, an employee may not be transferred to a position outside the scope of his or her tenure protections, except for disciplinary reasons or a reduction in the work force. Childs v. Union Township Bd. of Ed., 1980 S.L.D. 1134; Ayoub v. South Plainfield Bd. of Ed., 1988 S.L.D. 941; Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63.

I **CONCLUDE** that a transfer from Basile's position of speech therapist (Educational Services Certificate) to teacher (Instructional Certificate) is a violation of tenure rights inasmuch as the transfer did not occur "within the scope" of her certification. Carpenito v. Board of Educ. of Borough of Rumson, Monmouth County, 322 N.J. Super.,531; Childs v. Union Township Bd. of Ed., 1980 S.L.D. 1134; Payne v. Board of Education of the Village of Ridgewood, 1976 S.L.D. 605, 610.

I **CONCLUDE** further that the Board's reliance upon Carpenito v. Board of Educ. of Borough of Rumson, Monmouth County 322 N.J. Super. 522, as justification for the transfer as Basile is "without loss of pay or benefits and leaves her essentially in the same position she was prior to the transfer" is erroneous. The Appellate Division's decision in Carpenito, clearly affirmed that it is within the Board's managerial discretion to transfer a tenured teacher; however, the same must occur "within" the scope of her certification so as not to violate the tenure statute, which did not occur in the within matter as the Board sought to transfer Basile from speech therapist to school teacher. Id. at 531.

Accordingly, Basile's motion for summary decision is **GRANTED**, and the Board's motion for summary decision is **DENIED**.

### **ORDER**

It is hereby **ORDERED** that Basile's motion for summary decision that the Board's transfer of Basile is a violation of her tenure status is **GRANTED**.

It is hereby **ORDERED** that the Board is to reinstate Basile to her tenured position as Speech Therapist.

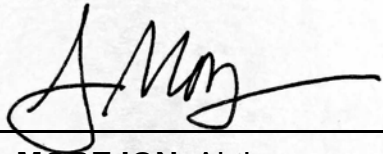
It is hereby **ORDERED** that the Board's motion for summary decision is **DENIED**.

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.

June 21, 2018  
DATE

  
JULIO C. MOREJON, ALJ

Date Received at Agency:

June 21, 2018

Date Mailed to Parties:

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The following exhibits were admitted into evidence by consent:

1. Job Description – Speech Language Pathologist (Exhibit J-1)
2. Job Description – Elementary/Middle School Teacher (Exhibit J-2)
3. Petitioner’s educational certificates and endorsements:
4. Elementary School Teacher, issued October 1982 (Exhibit J-3)
5. Teacher of the Deaf and Hard of Hearing, issued August 1980 (Exhibit J-4)
6. Reading Specialist, issued September 1991 (Exhibit J-5)
7. Teacher of the Handicapped, issued December 1980 (Exhibit J-6)
8. Teacher of Reading, issued October 1983 (Exhibit J-7)
9. Speech Language Specialist Equivalent, issued June 21, 2012 (Exhibit J-8)