NOTES

ADMINISTRATIVE LAW—SCHOOLS AND SCHOOL DISTRICTS—THE SUBTLE MOVE TOWARD TOTAL STATE CONTROL —*Board of Education of Elizabeth v. City Council of Elizabeth*, 55 N.J. 501, 262 A.2d 881 (1970); *Board of Education of East Brunswick Twp. v. Township Council of East Brunswick*, 48 N.J. 94, 223 A.2d 481 (1966).

In March 1970 the New Jersey Supreme Court again found itself confronted with the perplexity of specifying and delineating the powers of various subdivisions under the New Jersey Education Law.[1] The controversy, following the trend of the past decade, involved the clarification of the interrelated broad statutory powers granted to the various governmental entities which administer the public school system. The result of the court's decision was the intensification of the already extensive power of the Commissioner of Education and the correlative degeneration of the powers of local school boards, municipal governing bodies and the electorate.[2]

1 The statutes on education are found in N.J. STAT. ANN. § 18A:1 to § 18A:76 (1968).

2 The legislature, pursuant to the mandate of art. VIII, § 4, par. 1 of the NEW JERSEY CONSTITUTION, has enacted a series of laws pertaining to the administration of the educational system in New Jersey. These laws are found in N.J. STAT. ANN. tit. 18A (Education) which became effective on January 11, 1968, replacing tit. 18 of the REVISED STATUTES of 1937.

The administrative hierarchy established by the legislature has at its peak two large subdivisions, the Department of Higher Education, N.J. STAT. ANN. § 18A:3-1 (1968), and the State Department of Education, N.J. STAT. ANN. § 18A:4-1 (1968). It is not necessary to elucidate the organizational makeup of the Department of Higher Education, since this note deals only with the powers conferred upon the Department of Education and its divisions. However, it should be noted that prior to the present Education law, the government of the institutions of higher learning came under the jurisdiction of the Department of Education.

The Department of Education is composed of the State Board of Education, which is at the zenithal position in the Department's diagrammatic structure, and the Commissioner of Education. N.J. STAT. ANN. § 18A:4-1 (1968). The State Board consists of fourteen persons, two of whom, the chairman of the Board of Higher Education and the chancellor, are members ex officio without voting authority. N.J. STAT. ANN. § 18A:4-3 (1968). The members of the State Board are appointed by the governor with the consent of the senate for six year terms without compensation. N.J. STAT. ANN. §§ 18A:4-4, 6 (1968). The State Board is invested with the general supervision and control of public education in the state, except higher education, and is given the power to make, repeal, alter and enforce rules for its own government and for carrying out the school laws. N.J. STAT. ANN. §§ 18A:4-10, 15 (1968). Under N.J. STAT. ANN. § 18A:4-16 (1968), it also has "all powers . . . requisite to the performance of its duties."

The Commissioner of Education is both the chief executive and administrative officer of the Department of Education and also the official agent of the State Board for all

In *Board of Education of Elizabeth v. City Council of Elizabeth*,[3] the court affirmed and extended the position taken in the leading case of *Board of Education of East Brunswick Twp. v. Township Council of East Brunswick*.[4] Although both cases were brought by local boards of education and involved the sufficiency of school budgets approved by the respective municipal governing bodies, the three major issues, and one issue in the form of dicta, which evolved from these cases were: (1) the power and authority of the Commissioner of Education; (2) the standard the Commissioner is to apply in reviewing controversies and disputes under the school laws; (3) the standard the court is to apply in reviewing the Department of Education's decisions; and (4) the power of the electorate in relation to the municipal governing body, the local board of education and the Department of Education.

Petitioner, Board of Education of Elizabeth, pursuant to the supreme court's decision in the *East Brunswick*[5] case, appealed to the Commissioner of Education from a certification by the municipal governing body of a school budget one million dollars less than that requested by the petitioner for the school year commencing July 1, 1969.[6] The board of education had submitted, pursuant to the statutes governing a type I school district,[7] a budget of $10,967,401.23 to the board of school estimate, who reduced the budget to $9,539,333.23.[8]

purposes. N.J. STAT. ANN. § 18A:4-22 (1968). The Commissioner has general supervisory power over all schools of the state receiving state appropriations except institutions of higher education, and has the duty of enforcing all rules prescribed by the State Board. N.J. STAT. ANN. § 18A:4-23 (1968).

Concerning the area of educational quarrels, the Commissioner has original jurisdiction to hear and determine all controversies and disputes arising under the school laws or under rules promulgated by him or the State Board. N.J. STAT. ANN. § 18A:6-9 (1968). Thereafter, appeal from the Commissioner's decision is taken to the State Board of Education. N.J. STAT. ANN. § 18A:6-27 (1968).

On the district level, each school district has its own board of education which is a body corporate that conducts and supervises the schools of that district. N.J. STAT. ANN. § 18A:10-1 (1968). The boards of education of the local districts are under the supervision and control of the Commissioner of Education and the State Board of Education. The election of the members of the local boards and the latter's powers in their respective districts differ as to whether the district is a type I or type II district, which distinction is discussed note 12 *infra*.

3 55 N.J. 501, 262 A.2d 881 (1970).

4 48 N.J. 94, 223 A.2d 481 (1966).

5 *East Brunswick* held that where the dispute consisted of the local board of education's contention that the reduced budget, certified by the township council, was insufficient to provide for a thorough and efficient system of public schools, the controversy arose under the school laws, and appeal to the Commissioner and the State Board should be exhausted before judicial review is granted.

6 55 N.J. at 504, 262 A.2d at 882.

7 N.J. STAT. ANN. § 18A:22-7 (1968).

8 55 N.J. at 504, 262 A.2d at 882.

Thereafter, the municipal governing body, following public hearings and consultation with the board of education, fixed the sum at $9,967,339.23.[9] From this determination the board of education appealed to the Commissioner of Education, who found that an additional appropriation of $866,702 was necessary "for the maintenance and operation of a thorough and efficient system of public schools in the City of Elizabeth for the 1969-70 school year," and so directed such appropriation.[10] Upon petition of both the board of education and the governing body the supreme court allowed direct appeal to it.[11]

East Brunswick and *Elizabeth* reached the supreme court on the issues of the Commissioner of Education's authority to review and adjudicate a budget dispute between the local board of education and the municipal governing body, and the requisite of exhaustion of administrative remedies before seeking judicial review. The court in *East Brunswick* affirmed the appellate division's ruling that the Commissioner of Education has jurisdiction over such disputes in a type II district,[12] and that the administrative remedies must be exhausted be-

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[9] *Id.*; N.J. STAT. ANN. § 18A:22-17 (1968) provides:

> The governing body of the municipality shall include the amount so appropriated in its tax ordinance, and the same shall be assessed, levied and collected in the same manner as other moneys appropriated are assessed, levied and collected, but the governing body shall not be required so to appropriate any amount in excess of 1½% of the assessed valuation of the ratables of the municipality, but may do so if it so determines by resolution.

All budget figures involved in *Elizabeth* were more than twice the amount of 1½% of assessed valuations for the year and therefore the city council had authority to reject the budget and fix a new amount. *See* Gualano v. Board of Estimate, 39 N.J. 300, 188 A.2d 569 (1963); Barber v. Board of School Estimate, 71 N.J. Super. 556, 177 A.2d 600 (L. Div. 1962).

[10] 55 N.J. at 504-05, 262 A.2d at 882-83.

[11] *Id.* at 505, 262 A.2d at 883.

[12] The local school districts in New Jersey are classified as type I and type II districts. N.J. STAT. ANN. §§ 18A:9-1, 2, 3 (1968). For present purposes, the major difference between a type I and type II district is the procedure for adopting and certifying a school budget.

In a type I district the board of education prepares the budget and submits it to the board of school estimate. N.J. STAT. ANN. § 18A:22-7 (1968). After public hearings, the board of estimate fixes and determines the amount of money necessary for the use of the public schools in the district for the ensuing school year. N.J. STAT. ANN. § 18A:22-14 (1968). Thereafter, the board of school estimate's certification goes to both the local board and the governing body of the municipality, the latter having the duty of directing appropriation in line with N.J. STAT. ANN. §§ 18A:22-15, 17 (1968).

In a type II district the school budget is also prepared by the local board of education. N.J. STAT. ANN. § 18A:22-7 (1968). However, instead of being sent to an intermediary body as in a type I district, it is submitted to the voters who accept or reject it. N.J. STAT. ANN. §§ 18A:22-32, 33 (1968). If the budget is rejected, the local board then resubmits it, in the same or altered form, within 15 days at a special election. N.J. STAT. ANN. § 18A:22-36 (1968). If again rejected, it comes before the municipal governing

fore judicial review could be obtained. *Elizabeth* reaffirmed this holding[13] and extended the Commissioner's power, giving him authority to overrule the governing body of a type I district. The court's rationale was that the Commissioner's responsibilities as chief agent of the State Board of Education included the duty to enforce the New Jersey Constitution, which mandates that "[t]he Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools . . . ."[14] and that N.J. STAT. ANN. §§ 18A:22-17 and 18A:22-37 do not limit the authority of the Commissioner in exercising this duty.[15]

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The powers of the State Board of Education and the Commissioner of Education under the school laws have historically been extremely broad, both as to the authority to promulgate rules and to determine controversies on appeal.[16] N.J. STAT. ANN. § 18A:6-9 (1968), provides:

> The commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the state board or of the commissioner.

The appellate authority of the State Board of Education is likewise broad: "Any party aggrieved by any determination of the commis-

body, who after consultation with the board of education, certifies to the county board of taxation the amount which it determines "is necessary to be appropriated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district . . . ." N.J. STAT. ANN. § 18A:22-37 (Supp. 1969). It should be noted that some type II districts may have a board of estimate in which case the procedure differs. This however is not necessary to discuss here.

13 55 N.J. at 505, 262 A.2d at 883. Generally speaking, the primary difference between *Elizabeth* and *East Brunswick* is that the former involved a type I district whereas the latter involved a type II district. The major issue in each case is the extent of the Commissioner's jurisdiction. The only other significant divergence between the cases is that *East Brunswick*, since it was originally brought directly to the courts, involved a discussion of the issue of exhaustion of administrative remedies; and *Elizabeth*, since it was an appeal from the decision of the Commissioner, contained the question of which standard was to be applied by the court in reviewing the Commissioner's decision.

14 N.J. CONST. art. VIII, § 4, par. 1.

15 55 N.J. at 506, 262 A.2d at 883. The court reasoned that the legislature delegated the administration of its duty under art. VIII, § 4, par. 1 of the NEW JERSEY CONSTITUTION to the State Board of Education, N.J. STAT. ANN. § 18A:4-10 (1968), and since the Commissioner is the official agent of the State Board for all purposes, N.J. STAT. ANN. § 18A:4-22 (1968), it is his duty to see to it that each district complies with the mandate of providing a thorough and efficient school system.

16 Law of April 27, 1911, ch. 231, N.J. Laws 506-10 (1911); Law of March 21, 1867, ch. 179, N.J. Laws 360-81 (1867).

sioner may appeal from his determination to the state board."[17] To the courts has fallen the duty of interpreting the specific extent of the powers delegated, and while they have intermittently appeared to limit these powers,[18] the occurrence of such instances has diminished and previous limitations are being overshadowed by the judiciary's continuing confirmation of the legislature's grant of broad powers.[19]

The two major issues which the courts have had to deal with in determining the extent of the Commissioner's jurisdiction are the interpretation of the phrase "all controversies and disputes arising under the school laws," and the requirement of exhaustion of administrative remedies. A review of the various cases reveals that there is

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17 N.J. STAT. ANN. § 18A:6-27 (1968) (lines 1-2).

18 Matawan v. Monmouth Cty. Bd. of Taxation, 51 N.J. 291, 240 A.2d 8 (1968) (court refused to dismiss action for failure to exhaust administrative remedies, because case involved interpretation of a statute and constitutional question); Boult v. Board of Educ., 136 N.J.L. 521, 57 A.2d 12 (Ct. Err. & App. 1948) (Commissioner and State Board did not have power to overrule local board's decision to close school merely because that decision was based on erroneous factual material); Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 158 A.2d 842 (App. Div. 1960) (in reviewing an unsatisfactory rating given to a tenure teacher the only question for the Commissioner and State Board on review is whether there is a reasonable basis for the factual conclusion); Waldor v. Untermann, 7 N.J. Super. 605, 72 A.2d 342 (L. Div.), *aff'd*, 10 N.J. Super. 188, 76 A.2d 906 (App. Div. 1950) (action seeking ouster of school board member for failure to meet residence requirement could be brought directly to courts without exhaustion of administrative remedies); Reilly v. Board of Educ., 127 N.J.L. 490, 23 A.2d 285 (Sup. Ct. 1941) (matter of school janitor's pension did not come under Commissioner's jurisdiction); Koven v. Stanley, 84 N.J.L. 446, 87 A. 89 (Sup. Ct. 1913) (quo warranto proceeding to determine the title to office of members of local board was allowed without requiring exhaustion of administrative remedies).

19 Shepard v. Board of Educ., 207 F. Supp. 341 (D.N.J. 1962) (federal court dismissed school segregation suit, based on Civil Rights Act, because plaintiffs had not exhausted state's administrative remedies); Booker v. Board of Educ., 45 N.J. 161, 212 A.2d 1 (1965) (Commissioner erred in allowing local board to determine sufficiency of school integration plan); *In re* Masiello, 25 N.J. 590, 138 A.2d 393 (1958) (Commissioner has jurisdiction to review decision of board of examiners); Laba v. Newark Bd. of Educ., 23 N.J. 364, 129 A.2d 273 (1957) (Commissioner may determine if hearing accorded to teachers by local board was unfair, and if so, remand matter for further proceedings); Rankin v. Board of Educ., 135 N.J.L. 299, 51 A.2d 194 (Ct. Err. & App. 1947) (local board's adoption of rules governing, and contracts providing for, pupil transportation is subject to supervision and control of State Board); Board of Educ. v. State Bd. of Educ., 115 N.J.L. 364, 180 A. 430 (Sup. Ct. 1935) (contract dispute between teacher and local board falls within Commissioner's jurisdiction); Schwarzrock v. Board of Educ., 90 N.J.L. 370, 101 A. 394 (Sup. Ct. 1917) (Commissioner should hold de novo hearing in reviewing local board's decision to remove supervisor of buildings and repairs); Ridgway v. Upper Freehold Bd. of Educ., 88 N.J.L. 530, 96 A. 390 (Sup. Ct. 1916) (court dismissed suit brought to compel local board to call special meeting of voters, for failure to exhaust administrative remedies); Montclair v. Baxter, 76 N.J.L. 68, 68 A. 794 (Sup. Ct. 1908) (court dismissed action involving interpretation of a statute, for failure to exhaust administrative remedies).

no precise rule for establishing which controversies do, and which do not, arise under the school laws.[20] The general trend is toward a liberal interpretation of this phrase and a broadening of the Commissioner's scope of review. This is demonstrated in *Laba v. Newark Board of Education*,[21] which gave the local board and the State Department of Education the right to determine if a teacher has contumaciously or frivolously invoked the fifth amendment before a congressional subcommittee, *Booker v. Board of Education*,[22] which gave the State Department of Education the right to determine the standard and means of integrating the school system, and *Board of Education of Flemington v. State Board*,[23] which involved the interpretation of a teacher's contract and the effect of the division of a school district upon it.

East Brunswick and *Elizabeth*, following the general trend, have continued to enlarge the jurisdictional scope of the already powerful State Department of Education. Prior to *East Brunswick*, school budget disputes involving the sufficiency of the amount to be allocated were settled at the local level.[24] However, it is now clear that the Commissioner and the State Board have the authority and power to overrule the local officials' determination upon review.[25]

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[20] Typical of the statements made in determining this issue is that of the court in Ridgway v. Upper Freehold Bd. of Educ., 88 N.J.L. 530, 531, 96 A. 390, 390-91 (Sup. Ct. 1916):

> We consider that the matter is brought before us prematurely. It is manifestly a controversy arising under the school laws, and by the terms of the act, cognizable in the first instance by the state superintendent of public instruction, and on appeal from his decision, by the state board of education.

Another example is the reasoning used in *In re* Masiello, 25 N.J. 590, 604, 138 A.2d 393, 400 (1958):

> The statute does not in express terms direct that appeal from such decision be taken to the Commissioner. However, *N.J.S.A.* 18:3-14 says that he "shall decide without cost to the parties all controversies and disputes arising under the school laws, or under the rules and regulations of the state board or of the commissioner."
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> This enactment provides the basis for his review of the action of local boards of education. . . . And it is reasonable to suppose that the same avenue was meant to be followed in challenging an order of the Board of Examiners.

See also Shepard v. Board of Educ., 207 F. Supp. 341, 344 (D.N.J. 1962); Durgin v. Brown, 37 N.J. 189, 202, 180 A.2d 136, 142 (1962); Board of Educ. v. Township Council, 91 N.J. Super. 20, 24, 218 A.2d 896, 898 (App. Div. 1966).

[21] 23 N.J. 364, 129 A.2d 273 (1957).

[22] 45 N.J. 161, 212 A.2d 1 (1965).

[23] 81 N.J.L. 211, 81 A. 163 (Sup. Ct. 1911), *aff'd sub nom.* Glazer v. Flemington, 85 N.J.L. 384, 91 A. 1068 (Ct. Err. & App. 1913).

[24] 91 N.J. Super. 20, 22, 218 A.2d 896, 897 (App. Div. 1966) (by implication).

[25] *Elizabeth*, 55 N.J. 501, 262 A.2d 881 (1970); *East Brunswick*, 48 N.J. 94, 223 A.2d 481 (1966).

The important question, however, seems not to be the categorization of school law disputes and non-school law disputes, but rather the means of predicting when the courts will decide to take original jurisdiction over a particular case. During the incipience of school related disputes, the courts were notably conscious of the administrative-judicial dichotomy, and cautious not to usurp original jurisdiction from the school authorities.[26] This awareness led to a refusal to take jurisdiction even over matters whose final determination would be predicated upon a question of law.[27] Later, however, the courts became freer in assuming original jurisdiction even though the controversy arose under the school laws.[28]

The courts presently take original jurisdiction over various school related disputes by virtue of N.J.R. 4:69-5 which states:

> Except where it is manifest that the interest of justice requires otherwise, actions under R. 4:69 shall not be maintainable as long as there is available a right of review before an administrative agency which has not been exhausted.

Under the first clause of this rule the courts have taken original jurisdiction for various reasons which have recently been outlined and consolidated in *Borough of Matawan v. Monmouth County Board of Taxation*.[29] This case reiterated the proposition that "[o]rdinarily, administrative remedies must be exhausted before resort is had to the courts, but the exhaustion is neither jurisdictional nor absolute and may be departed from where, in the opinion of the court, the interest of justice so requires."[30] It was further stated that "[w]hen the issue to be decided is solely a matter of law" or where "further use of administrative expertise will be an idle gesture" the doctrine of exhaustion of administrative remedies is not applicable.[31] The court, quoting with approval the language used in *Roadway Express, Inc. v. Kingsley*,[32] stated:

> However, we are not particularly concerned with the label or description placed on the issue but are concerned with underlying

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26 *See* Ridgway v. Board of Educ., 88 N.J.L. 530, 96 A. 390 (Sup. Ct. 1916); Montclair v. Baxter, 76 N.J.L. 68, 68 A. 794 (Sup. Ct. 1908); Thompson v. Board of Educ., 57 N.J.L. 628, 31 A. 168 (Sup. Ct. 1895).

27 *See* Montclair v. Baxter, 76 N.J.L. 68, 68 A. 794 (Sup. Ct. 1908).

28 *See* Gualano v. Board of Estimate, 39 N.J. 300, 188 A.2d 569 (1963); Newark Teacher's Ass'n v. Board of Educ., 108 N.J. Super. 34, 259 A.2d 742 (L. Div. 1969); Barber v. Board of School Estimate, 71 N.J. Super. 556, 177 A.2d 600 (L. Div. 1962).

29 51 N.J. 291, 240 A.2d 8 (1968).

30 *Id.* at 296, 240 A.2d at 11.

31 *Id.* at 296-97, 240 A.2d at 11.

32 37 N.J. 136, 179 A.2d 729 (1962).

> consideration such as the relative delay and expense, the necessity for taking evidence and making factual determination thereon, the nature of the agency and the extent of judgment, discretion and expertise involved, and such other pertinent factors . . . as may fairly serve to aid in determining whether, on balance, the interests of justice dictate the extraordinary course of bypassing the administrative remedies made available by the Legislature.[33]

Although *Matawan* clarifies the position of the doctrine of exhaustion of administrative remedies, it still leaves the practical problem of overcoming the judiciary's inherent reluctance to intervene in administrative affairs. From the chronicle of school cases, the rule of thumb which can be induced seems to be almost in the form of a rebuttable presumption, *i.e.*, if a set of circumstances is substantially related to school affairs, whether concerned with a legal issue, a factual issue, an issue requiring expeditious determination, or an issue in which administrative policy and expertise is not involved, it arises under the State Department of Education's jurisdiction and exhaustion of administrative remedies is required.[34] In the area of budget disputes, recent cases show that the courts are willing to bypass administrative review when the controversy involves interpretation of a statute and requires expeditious determination,[35] but the reluctance to extend this to disputes involving fact finding or discretionary findings is seen in both *East Brunswick* and *Elizabeth*.

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Like the expansion of controversies held to fall within the Department's jurisdiction, *Elizabeth* and *East Brunswick* have further increased the Department's power by changing the standard the latter is to apply in determining the outcome of cases brought before it. *Elizabeth*, in commenting upon the standard, expressed the view that:

> Although the Commissioner specifically found that the governing body's determination was not arbitrary or capricious—which we

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33 51 N.J. at 297, 240 A.2d at 11.

34 The following language in *East Brunswick* is indicative of the courts' attitude:

> While there have been instances where the courts have entertained controversies under the school laws without prior exhaustion of the available administrative remedies, those instances have been isolated and exceptional ones . . . .

48 N.J. at 102, 223 A.2d at 485. *See* Shepard v. Board of Educ., 207 F. Supp. 341, 343-44 (D.N.J. 1962).

35 *See* Gualano v. Board of Estimate, 39 N.J. 300, 188 A.2d 569 (1963); Board of Educ. v. Board of Estimate, 95 N.J. Super. 284, 230 A.2d 895 (App. Div. 1967); Barber v. Board of School Estimate, 71 N.J. Super. 556, 177 A.2d 600 (L. Div. 1962).

> assume means in the present context that it was made in good faith and not irresponsibly—his scope of review and obligation goes much beyond that criterion. As *East Brunswick* pointed out, he "is charged with the overriding responsibility of seeing to it that the mandate for a thorough and efficient system of free public schools is being carried out."[36]

The transformation is illuminated when comparing the appellate division's comments in *East Brunswick* on this issue—"the council's action must be sustained unless the Commissioner finds the budget it fixed was so deficient as to constitute a purely arbitrary exercise of discretion devoid of any reasonable foundation."[37]

Although the controversies were held to be cognizable by the Commissioner under N.J. STAT. ANN. § 18A:6-9 (1968), a review statute, the actual effect of the decisions was the abrogation of the Commissioner's application of the appellate standard, and the substitution of his discretion in place of that of the municipal governing bodies.[38] This becomes apparent when considering that the municipal governing bodies of both a type I and type II district, and the Commissioner, have the same standard in fixing a budget, namely to establish a budget which would provide for a thorough and efficient system of public schools.[39] Since such a standard can only be applied through a person's or group's discretion, it is, in effect, the Commissioner's discretion which is controlling.

A brief summary of the law on this issue will indicate the extent of the metamorphosis which has taken place in approximately the last four decades. One of the earlier cases in which the court noted the standard to be applied in reviewing the actions of a local board was

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[36] 55 N.J. at 508, 262 A.2d at 884.

[37] 91 N.J. Super. at 26, 218 A.2d at 899.

[38] [T]he Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated "thorough and efficient" East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under *R.S.* 18:7-83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness.

48 N.J. at 107, 223 A.2d at 488.

[39] 55 N.J. at 506, 262 A.2d at 883. Although the standard applied by both a type I and type II district is the same, for a type I district it emanates from case law and for a type II district it originates from a statute, *see* N.J. STAT. ANN. § 18A:22-37 (1968).

Downs v. Board of Education of Hoboken,[40] which dealt with the propriety and legality of the transfer, and subsequent dismissal, of certain teachers to effect economy, and contained allegations of discrimination against married and nonresident female teachers. There the court stated: "The board appears to us to have acted within the authority conferred upon it by law, and its action involved the exercise of discretion, and, in the absence of clear abuse, its action ought not to be disturbed . . . . "[41]

Boult v. Board of Education of Passaic,[42] involving a local board's decision to close a school to effectuate savings, represented one of the broadest grants of discretionary power to a local board. The court, in discussing the provisions for review under the school laws, stated:

> Neither of the quoted statutory provisions was intended to vest in the appellate officer or body the authority to exercise originally the discretionary power vested in the local board. The review authorized of the local board's action here involved is judicial in nature. . . .
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> . . . The reviewing officer was not empowered to substitute his discretion for that of the local board. The offer of proof, as it is described in the Commissioner's opinion, amounted to nothing more than an offer to establish that the local board's determination was based upon erroneous factual material. Discretionary municipal action may not be judicially condemned on that basis.[43]

The first appreciable beginning of the deviation from the above standard is found in *Laba,* where the court recognized that, in reaching his determination, the Commissioner "must, of course, give due weight to the nature of the findings below, although his primary responsibility is to make certain that the terms and policies of the School Laws are being faithfully effectuated."[44] Following *Laba, In re Masiello*[45] supplied the mechanism for the destruction of the previous standard. In elaborating upon the above quotation, the court stated:

> More definitively, this means that the burden of the Commissioner is to weigh the evidence and to make an independent finding of fact on the record presented; and in the process of reaching that finding, he should give due regard to the opportunity of the hearer below to observe the witnesses and to evaluate their credibil-

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40 12 N.J. Misc. 345, 171 A. 528 (Sup. Ct.), *aff'd per curiam,* 113 N.J.L. 401, 174 A. 529 (Ct. Err. & App. 1934).

41 *Id.* at 349, 171 A. at 530.

42 136 N.J.L. 521, 57 A.2d 12 (Ct. Err. & App. 1948).

43 *Id.* at 523, 57 A.2d at 13-14.

44 23 N.J. at 382, 129 A.2d at 283.

45 25 N.J. 590, 138 A.2d 393 (1958).

> ity. . . . On the other hand, if, as in this case, the hearing demanded by principles of fair play is had before him for the first time, then the obligation to "decide" signifies a completely *de novo* and independent decision on the facts.[46]

Thereafter, in *Kopera v. West Orange Board of Education*,[47] the appellate division outlined a tripartite division of cases which were reviewable by the Commissioner. The court expressed the view that in cases involving questions of law, or questions of fact, the Commissioner's duty was that expressed by the court in *In re Masiello*, but where the issue was one of discretion, the Commissioner was only to determine if the lower body had a reasonable basis for its conclusions.[48]

The tripartite division concept did not last long before the court in *Booker v. Board of Education of Plainfield*[49] began its attack on the discretionary power of the lower bodies. *Booker*, which involved de facto segregation in public schools, immensely limited the scope of the local board's discretionary powers in matters of school integration. The case involved three plans which were proposed to effectuate the integration of the Plainfield school system. The local board had chosen what was called the Sixth Grade Plan. The court rejected the Commissioner's contention that on appeal he must keep within proper limits of judicial inquiry and not interfere with local management unless the board violated the law, acted in bad faith, or abused its discretion.[50] The court instead took the position that when the sufficiency of the local choice is brought before the Commissioner, "he must affirmatively determine whether the reasonably feasible steps towards desegregation are being taken in proper fulfillment of State policy; if not, he may remand the matter to the local board for further action or may prescribe a plan of his own . . . ."[51]

The movement away from adherence to the appellate standard and toward de novo determination by the Commissioner was greatly accelerated by the interpretation given the Tenure Employee's Hearing Act in *In re Fulcomer*.[52] In that case, the court construed the act to require that the Commissioner, and not the local board of education, render a decision in the first instance in teacher removal and

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46 *Id.* at 606, 138 A.2d at 401.
47 60 N.J. Super. 288, 158 A.2d 842 (App. Div. 1960).
48 *Id.* at 296, 158 A.2d at 846.
49 45 N.J. 161, 212 A.2d 1 (1965).
50 *Id.* at 177, 212 A.2d at 10.
51 *Id.* at 178, 212 A.2d at 10.
52 93 N.J. Super. 404, 226 A.2d 30 (App. Div. 1967).

disciplinary proceedings.[53] The court also reprimanded the Commissioner for referring the matter of imposition of a proper penalty back to the local officials.[54] Therefore, this case interpreted the Tenure Employee's Hearing Act as relieving the local board of all jurisdiction over these proceedings except for holding a simple preliminary hearing.[55]

3

The standard which the court applies in reviewing decisions of the State Department of Education is strikingly dissimilar to that applied by the Commissioner in reviewing decisions of the local bodies. As expressed by the court in *Elizabeth*:

> The nature of the judicial inquiry in reviewing administrative determinations is well settled: "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record,' considering 'the proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge their credibility * * *, and, in case of agency review, with due regard also to the agency's expertise where such expertise is a pertinent factor."[56]

The courts in reviewing discretionary or factual findings of the State Department of Education have consistently, with only a few exceptions,[57] accepted the Department's opinion.[58] An example of the homage rendered is expressed in *Thomas v. Board of Education of Morris Twp.*:[59]

> We are here concerned with a determination made by an administrative agency duly created and empowered by legislative fiat. When such a body acts within its authority, its decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious or unreasonable. The agency's factual determinations must be accepted if supported by substantial credible evidence.[60]

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53 *Id.* at 412, 226 A.2d at 35.

54 *Id.* at 416-18, 226 A.2d at 37-38.

55 *Id.* at 413, 226 A.2d at 35.

56 55 N.J. at 507-08, 262 A.2d at 884.

57 *See* Booker v. Board of Educ., 45 N.J. 161, 212 A.2d 1 (1965); *In re* Fulcomer, 93 N.J. Super. 404, 226 A.2d 30 (App. Div. 1967).

58 *See In re* Masiello, 25 N.J. 590, 138 A.2d 393 (1958); Rankin v. Board of Educ., 135 N.J.L. 299, 51 A.2d 194 (Ct. Err. & App. 1947); Schinck v. Board of Educ., 60 N.J. Super. 448, 159 A.2d 396 (App. Div. 1960); Kopera v. Board of Educ., 60 N.J. Super. 288, 158 A.2d 842 (App. Div. 1960); Redcay v. State Bd. of Educ., 130 N.J.L. 369, 33 A.2d 120 (Sup. Ct. 1943), *aff'd*, 131 N.J.L. 326, 36 A.2d 428 (Ct. Err. & App. 1944).

59 89 N.J. Super. 327, 215 A.2d 35 (App. Div. 1965).

60 *Id.* at 332, 215 A.2d at 37.

The instance in which the courts deviate from this standard is where the issue to be determined is a matter of law. In such a case, the standard applied is that of judicial review. The determination of which standard to be applied rests upon an evaluation of the degree of administrative expertise, policy making, and fact finding involved in the specific circumstances. In certain instances courts will give the State Department of Education wide range in the latter's determination of a legal issue,[61] whereas in other circumstances the courts may reverse what may have been a reasonable interpretation.[62]

Elizabeth has not modified nor changed the law in this area. It has followed the set policy of judicial review of administrative actions and voluntarily succumbed to the expertise of the administrative determination.

4

To complete the outline of the interrelationships of the different governmental divisions under the school laws, it is necessary to mention the position and power of the local electorate in this organizational structure in determining school budgets, and the attitude of the courts toward the electorate.

In *East Brunswick,* the local electorate had twice rejected the proposed budget at the polls. Thereafter, in accord with the statutory requirements, the budget came before the township council who, after consultation with the local board of education, had the duty of certifying to the county board of taxation an amount which the council considered necessary to provide for a thorough and efficient system of schools in the district. The court, commenting on this procedure, stated:

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61 *See In re* Masiello, 25 N.J. 590, 138 A.2d 393 (1958) (court, after stating that the Commissioner, in his written opinion, did not discuss and distinguish each cited precedent, affirmed the Commissioner's finding without stating the citations or facts of the precedents relied upon); Laba v. Newark Bd. of Educ., 23 N.J. 364, 129 A.2d 273 (1957) (court affirmed Commissioner's contention that teacher's dismissal is proper if local officials find that teacher contumaciously or frivolously invoked fifth amendment before House subcommittee); Canfield v. Board of Educ., 97 N.J. Super. 483, 235 A.2d 470 (App. Div. 1967), *rev'd per curiam,* 51 N.J. 400, 241 A.2d 233 (1968) (appellate division agreed with Commissioner that teacher had gained tenure status, even though she had been discharged before end of requisite statutory period).

62 *See* Booker v. Board of Educ., 45 N.J. 161, 212 A.2d 1 (1965) (Commissioner's determination that it was the responsibility of the local board to determine best integration plan and his finding that so-called Sixth Grade Plan was proper was held to be error); Seidel v. Board of Educ., 110 N.J.L. 31, 164 A. 901 (Sup. Ct.), *aff'd,* 111 N.J.L. 240, 168 A. 297 (Ct. Err. & App. 1933) (Commissioner's interpretation that teacher was employed under special contract was erroneous).

> Nothing in the letter or spirit of *R.S.* 18:7-82 precludes the Council from certifying the same amount as proposed in the Board of Education's budget; on the contrary, the Council would be obligated to certify that very amount whenever it considers it necessary to satisfy the statutory standard.[63]

In *Elizabeth* the court stated that what was said in *East Brunswick* should equally apply:

> The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step it must act conscientiously, reasonably and with full regard for the State's educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community.[64]

The result of these two cases was to severely curtail the effect of voter opinion with regard to the amount of the school budget to be certified. *East Brunswick* accomplished this by giving both the municipal governing body and the State Department of Education the power to overrule the decision of the voters. *Elizabeth* concurred by giving the Department of Education, an administrative agency, the power to overrule an elected body, the township council.

CONCLUSION

By discussing the issues involved in *Elizabeth* and *East Brunswick* separately, their effect upon the law governing education cannot be fully appreciated. The total composition of all the issues must be examined cumulatively. In summarizing each of the previous sections, it can be readily ascertained that the court did four things. First, it gave the Department of Education the power to overrule the municipal governing body in attacks upon the validity of the sufficiency of the school budget. Second, it changed the Department's scope of review, extending the Commissioner's power beyond a mere determination of arbitrariness, to a dubious standard somewhere more than merely determining whether the lower body had a substantial basis for its decision, but less than the authority to substitute his discretion for that of the lower body. Third, it adhered to the well established standard of judicial review of administrative actions. Fourth, it

63 48 N.J. at 98, 223 A.2d at 483.

64 55 N.J. at 506, 262 A.2d at 883 (quoting *East Brunswick*, 48 N.J. at 105-06, 223 A.2d at 487).

gave the municipal governing body and the Department of Education the right to overrule the electorate.

The court, by giving the Commissioner the power to overrule the municipal governing body when he felt that the budget did not meet the constitutional standard, and by applying the administrative review standard on appeal from the Department's decisions, has advanced the movement of centralization of power in the position of the Commissioner. It has taken another step toward central state control, and away from local control of the school system. This broadening of the Department's powers has been accomplished on the rationale that the Commissioner and the State Board are better qualified to determine these issues because of their expertise and knowledge in school affairs. This raises an important question concerning the court's logic. Do the Commissioner and State Board possess that degree of expertise necessary to validate the grant of jurisdiction over tenure disputes, contractual issues, controversies involving transportation of pupils, election and appointment of school personnel, salary disputes, local bond issues, discrimination, school integration, statutory interpretation, school construction guidelines and controversies over teachers pleading the fifth amendment? The argument may be made that there are sufficient safeguards, in that the Commissioner's determination is appealable to the State Board for a complete review. This contention possesses validity, but loses significance in that members of the State Board are not required to have any legal background, are not salaried, are not full-time,[65] and often completely acquiesce in the Commissioner's decision. The argument can also be made that the legal issues on appeal are submitted to a legal committee, comprised of attorneys, for hearing. However, it has been noted that the State Board as a whole, and not the legal committee, decides.[66]

The current law in relation to education is in a state of transformation. The power is shifting from the local community to the State Department of Education, resulting in the incongruous position of having voters vote on a school budget, yet allowing them to be overruled by an appointive body. The obvious question which arises is: By what authority can voters be overruled by an appointive body if in a democratic system all authority emanates from the people?

The discordance under the present school laws can be attributed to the generally quiet and gradual movement away from the tradi-

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[65] *See* N.J. STAT. ANN. §§ 18A:4-3, 6 (1968).

[66] *See* Redcay v. State Bd. of Educ., 128 N.J.L. 281, 25 A.2d 632 (Sup. Ct. 1942); Seidel v. Board of Educ., 110 N.J.L. 31, 164 A. 901 (Sup. Ct. 1933).

tional voter controlled local school system. This movement has caused inconsistencies because of the desire of the various governmental branches to take the power from the local electorate without a tumultuous voter outcry which a swift and overt transformation might bring about. To eliminate the inconsistencies there are basically three paths which the law can take. First, the legislature could completely centralize all public schools and have them totally supported by state revenue. Second, the control of the schools could be returned to the electorate and their local representative officials with minimal state interference. Third, the participation of the local electorate and municipal governing bodies in school affairs could be totally eliminated.[67]

The main issue involved in *Elizabeth* and *East Brunswick* is the issue of power. Should the Commissioner be given such a wide range of power? Should he virtually be able to control the entire public school system of the state, by promulgating rules and regulations, interpreting them, and reviewing the decisions of the local bodies? Should he be able to overrule the local bodies under the vague standard of *East Brunswick* and *Elizabeth?*

All these questions point to the issue of a centralized state public school system as opposed to a system governed by the local school districts. The current trend toward centralization is not being promulgated by the legislature but by the courts. The advantages and disadvantages of a centralized school system are not being discussed. The experiences of other states under both types of systems are not mentioned. Yet, centralization is occurring in a piecemeal fashion through interpretation of statutes which have traditionally supported a local school system, but are now being construed to mandate a centralized system. Should it be the duty of the courts, the legislature, or the people, to determine the type of system which is to govern our public schools?

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67 There is legislation currently pending in the senate, introduced by Senator Hiering on February 2, 1970, affecting this area of law. This bill, S. 525, would completely eliminate any participation of the voters and the municipal governing body in certification of school budgets. In a type II district the school budgets would be placed completely in the hands of the local board of education, whose members would have the duty of certifying the yearly budget to the county board of taxation.