

**Pursuant to Referral By the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire**

In the matter of:

**The Tenure Hearing of Lydia
Wilson**

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: Agency Docket No. 174-6/16

**State Operated School District
of The City of Newark, Essex County**

Decision

Appearances:

On behalf of the State Operated School District of The City of Newark:

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On behalf of Lydia Wilson:

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Introduction

This matter arises from tenure charges of conduct unbecoming a staff member against Lydia Wilson, (Respondent) by the State Operated School District of The City of Newark, Essex County (the District) alleging Respondent’s failure to supervise or monitor her classroom as to permit certain six and seven year old students in her class to engage in inappropriate sexual/genital contact and exposure. The tenure charges were referred to the

undersigned by the New Jersey Department of Education, Bureau of Controversies and Disputes pursuant to *N.J.S.A. 18A:6-16* as amended by P.L. 2012, c. 26 AND P.L. 2015, c. 109 by letter dated July 18, 2016.

The hearing in this matter was conducted in Newark, New Jersey on October 6, October 11, October 17, October 18 and November 7, 2016. All parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent Lydia Wilson was present for the entire hearing and testified on her own behalf. At the close of the hearing on November 7, 2016, the parties elected to submit written closing argument, upon the receipt of which by the arbitrator on December 30, 2016 the matter was deemed submitted.

This Decision is made following careful consideration of the entire record in the matter, including the undersigned's observations of the demeanor of all witnesses.

Issues

The issues presented in this matter may be accurately stated as follows:

Has the District met its burden of establishing the truth of its conduct unbecoming tenure charges against Respondent, and (a) if so, what is the appropriate penalty, if any, and (b) if not, what is the appropriate remedy?

The Tenure Charge

The tenure charges in this matter were certified by the State District Superintendent of the State Operated School District of the City of Newark, Christopher Cerf on June 20, 2016. The Notice of Tenure Charges presents various facts and findings

of the District and, among other things, bases its recommendations of tenure charges for termination on:

55. The internal investigation found that Ms. Wilson was in the classroom while 6 and 7-year-old students engaged in physical activity that included viewing and engaging in mouth to genitalia conduct.

56. The internal investigation found sufficient evidence of conduct unbecoming a teacher in that 6 and 7-year-olds were exposing their genitalia to each other, as well as touching one another's genitalia, in Ms. Wilson's classroom during her classroom instruction.

57. Respondent's actions are highly egregious.

58. The confirmed, repeated incidents of genital exposure and reported mouth to genitalia contact among Ms. Wilson's 1st grade students, that occurred in her classroom during classroom instruction, constitutes conduct unbecoming a teacher.

Evidence

Introduction

Respondent has worked as a teacher in the District for approximately 12 years, the last four of which as a first grade teacher. For the 2015-2016 school year Respondent was assigned to the District's Quitman Street Elementary School (Quitman). Prior to her working there, Respondent did not know any of the administrators nor any of the students at Quitman. Respondent had approximately 21 students in her class, all of whom were age 6 or 7. Her first day assigned to Quitman was September 1, 2015¹. Classes began on September 3. Respondent's students were scheduled for instruction outside of her classroom (such as music, gym and art) for a 50-minute period four times per week.

¹ All dates are 2015 unless otherwise indicated.

Respondent had a support teacher scheduled to be in her classroom every day from 9:00 a.m. to 11:00 a.m.

On Monday, September 21 - the twelfth day of school for students at Quitman - Respondent suffered an injury causing her to be out of school/work until November 2015.

Testimony of District Witnesses

Monterique Johnson

Monterique Johnson, who had substituted before at Quitman and another of the District's schools, was hired by the District to substitute teach for Respondent during her convalescence. Johnson began teaching on Tuesday, September 22, 2015. After the lunch/recess period on Friday, September 25 – Johnson's fourth day of teaching the class - Johnson held circle time for her students. Johnson was called by the District and testified at the arbitration hearing that:

...-when they came back from recess, we have a circle time when I have them sit in a circle where they tell me the activities they was doing outside in recess and some of the students was telling me what happened, what they were doing outside and they said "Ms. Johnson, you weren't there. Ms. Wilson was there so you wouldn't know. K.L.² and some of the other students was telling me she did such and such to this student, but they said I wasn't there, they said Ms. Wilson was there and I asked did she let parents know and they said no, so what I did, I brung it to my administrator's attention because I wanted to cover myself because I wasn't there and I let them know what happened.

When asked by District counsel what students said, Johnson testified:

L.W. said to her, K.L. wanted her to play The Nasty Game, Kissing Game during recess and she said "Ms. Johnson, I can't do that because I'll get in trouble and my mom will get in trouble and I told her I wasn't going to play that game" and that's when A.J. and A.G. said she

² For purposes of privacy, involved students are referred to herein by initials.

asked them to play the game with them as well and K.L. said to me ---

I said well, you know, you can't play the game, this is not appropriate.

K.L. said. "You wasn't here, Ms. Johnson. Ms. Wilson let my mom and them know and I was on punishment."

And I said okay, but I still wrote it up to let the administrators know what was going on. I wasn't there. I wanted to make sure I wrote it down in case anything happened while I was covering the classroom.

Counsel for the District then asked Johnson to describe with specificity what the students said, to which Johnson testified:

Well, I know they said K.L. went down on, I think it was A.J. I don't know if I'm saying his name right. They said she pulled his pants down and wanted to, you know, touch his private part and then she, A.J. she kissed him on the mouth. That's what they said K.L. did.

Q And that was L.W. who told you that?

A Yes

Q And then you also said that A.G. spoke with you?

A Yes. A.G. spoke with me too, because she was saying K.L. wanted her to play the game as well and she wanted her to, she wanted her to kiss A.J. – I don't know is I'm saying his name correctly – and that's when she said "Ms. Johnson, I didn't play because I didn't want to get in trouble."

Q And did A.J. describe any activity that the student's took part in, Ms. Wilson's students?

A Yes. He said he played the game, but he said he was saying he didn't touch them. He said, "I played the game, Ms. Johnson, but didn't do what K.L. did."

When asked if the children described the game, Johnson answered:

"Yes. It was called the Nasty Game...K.L. described it very good...She said when you kiss, you kiss a boy, you kiss a boy and then you touch a boy and that's when I, that's when I definitely wrote everything down and you know, I brung it to my administrator's attention because I felt that in the first grade that was very inappropriate and I didn't know what was going on with that situation before I got there.

Q Did any of the children describe where a boy was touched in the Nasty Game?

A Well, I know when they was outside in recess they played the game, but they also said they was in the classroom before I got there, they said they played the game and I wasn't there, but they said Ms. Wilson was there so I don't know, they said that they was in the classroom.

Q Did they describe the game that they played in the classroom when Ms. Wilson was there?

A They said K.L. touched - - I can't think of his name. It starts with a "J". I can't think of his name but they said they played that one in the classroom so, you know, they said, "Ms. Johnson, you wasn't there so you don't know about it, Ms. Wilson knew."

And I said, did anybody bring it to yawl's attention of your parents?

K.L. said, "Yes, I was just on punishment. I didn't get in trouble, I just got on punishment" and that was it.

Q Did the children say that this inappropriate touching took place in the classroom?

A Yes. They said it took place in the classroom and on recess.

Johnson further testified that after the children spoke to her she wrote down what was said and gave her writing to school Vice Principal Ebron, who told her to give a copy to school principal Glover. Johnson also testified that she orally told both Ebron and Glover what the children had told her.³

On cross examination Johnson testified repeatedly that all she asked the children at circle time – an activity involving the entire class – was "[name of student] how was your recess?" that she did not ask follow-up questions about the Nasty Game other than to ask, as they went on telling Johnson about it, "...does you parents know about it?"

Johnson further testified on cross that following circle time, her class went to gym and

³ The District did not offer any such writing into evidence and represented that no such writing could be located.

she had a 35 to 45-minute prep period; during which time she wrote down what each student had said; a note of a page in length. After she completed her note she went to vice principal Ebron and told Ebron what the students had said at circle time and Ebron made a copy of the note and asked Johnson to give it to principal Glover. Johnson had to get back to her class so waited until she dismissed her class at 2:55 to give her note to the principal.

Kimberley Ebron

Quitman Street School vice principal Kimberley Ebron testified that when she was in the hallway outside of Respondent's classroom on September 25 she was told by substitute teacher Johnson that students had reported to Johnson that there was inappropriate activity going on and that the activity had been going on in the classroom; that Johnson told her that the activity involved kissing and touching of genitalia. Ebron testified that Johnson identified six students who were involved in the activity. According to Ebron, she does not remember Johnson giving her a note describing the reports of the students. Ebron testified that she immediately reported Johnson's account to school principal Erskin Glover, and the two administrators decide to get school social worker CaMisha Steward involved.

Ebron testified that the school has a procedure when a student complains about actions of another student or teacher whereby the social worker speaks to the student to take information and then to decide a course of action. Ebron recalled that after Stewart interviewed the students identified by Johnson she reported back to Glover and Ebron and the two administrators decided they needed to contact the parents of the involved

students. Additionally, Ebron testified, she and Stewart completed an incident report and Stewart contacted the state Office of Institutional Abuse.

Ebron also testified that she was present, sometime in the end of September 2015, when principal Glover telephoned Respondent, asked her how she was doing after her injury, “briefly” told the teacher of the conduct her students had reported and that she would be contacted by the Office of Institutional Abuse. According to Ebron, Respondent stated that she did not know anything about the conduct reported.

Ebron testified that under the school’s policy the social worker’s interaction with students in circumstances as are presented here is neither an investigation nor an interview. Instead, Ebron explained, the interaction is more accurately described as “an asking about what happened.” Ebron also testified that she believes she was present for some of the time Stewart met with students, but she does not recall either if she was present for all of the meetings (she later recalled being present for meetings with L.W., K.L., A.J. and N.B) or the location of the meetings. She further testified that she did not ask any questions of the children, except perhaps asking the first two students they met with what had happened, and that she did not recall that the social worker had any written questions prepared for the meetings.

CaMisha Stewart

According to school social worker CaMisha Stewart, she was initially informed by the vice principal that Ebron had been told by Johnson that Johnson had been informed by her students that two students had kissed each other during lunch time, and that Ebron wanted Stewart to meet with the students and find out more information about

the incident. Stewart testified that she did not conduct an “investigation” but rather, per policy of the school involving incidents of disruptive or other problematic conduct by students, Stewart met with the students to “interview” them about what had been reported at recess.

Stewart testified that she first learned of the “Nasty Club” when she met with the first two students. In this regard, Stewart testified:

I met with, I don’t recall which student first, either N.B. or K.L. I asked them about the incident that was reported to me of them kissing. I asked the students what actually happened, where this occurred, who else this occurred with, if there was an adult that was present and how the adult responded if the adult was present. I also asked the student had this behavior occurred prior to, had they engaged in any of this before. And during that time, the student mentioned that there was a “nasty club” and that that had happened prior to in a classroom of exposing the genitals with other students, touching genitals, and a couple of students putting their mouths on genitals.

Stewart testified that upon learning of the details of the conduct and identity of students involved she immediately interviewed all six identified students; and that these six interviews occurred on September 25 between 2:30 p.m. and when students were excused for the day at 3:10 pm. Stewart testified that she met individually with each student on a couch in the back half of the library - a quiet area with privacy. Stewart initially testified that Ebron may have been present for one or more interviews, but on cross examination testified twice that Ebron was not present. She recalled that she pulled

the students from their classroom individually and returned them after their interview and that she asked each student the same set of questions she keeps in her head.⁴

According to Stewart,⁵ she began her meetings with, she believes, N.B. She testified that she started the meeting by introducing herself and letting N.B. know that she was informed he and another student reportedly kissed each other and asked if he could tell her what happened. The student answered that he was in the “cafetorium” standing next to K.L. near the tables and K.L. kissed him. Stewart asked the student if there were any adults around and the students responded that there were.⁶ When Stewart asked if that had happened before, the student said that K.L. had invited him to join the “nasty team.” Stewart testified that she asked N.B. what the nasty team was and that he explained it was a group of students “that did things to and with each other.” When Stewart asked what things, N.B. responded that: “they exposed their genitals. They touched genitals and some had put their mouths on each other.” According to Stewart, when she asked where this took place, N.B. said in the classroom. According to N.B., Stewart continued, K.L. invited him to the activity and that K.L. had put her mouth on him and had crawled under the table and put her mouth on A.J., another student. Stewart

⁴ As quoted above; “what actually happened, where this occurred, who else this occurred with, if there was an adult that was present and how the adult responded if the adult was present. I also asked the student had this behavior occurred prior to, had they engaged in any of this before.”

⁵ When testifying to the details of her talks with each student, Stewart referred to the student’s Social Worker Referral Form and relied upon the forms, rather than her independent recollection, for her testimony. The admissibility and reliability of (a) Stewart’s testimony as to what the six students said and (b) the content of these referral forms are potentially determinative herein and are discussed at length infra. The testimony of Stewart relating to her meetings with the six involved students is presented in detail here to aid in the understanding of my evaluation and rulings made later in this Decision.

⁶ Although Stewart repeatedly testified that it was her practice when a student indicated there was an adult present to ask about how the adult responded, the record fails to establish that Stewart ever asked such a follow-up question about the adults present during the kissing.

testified that she then asked N.B. if any adults were in the classroom when this happened and N.B. stated that Respondent was in the classroom, and that when she asked where in the classroom, N.B. said Respondent was at the whiteboard. N.B. then started to cry, Stewart testified.

Stewart then testified relating to her meeting with K.L. She again started by telling the student; “I was notified that she had engaged with a kissing act with another student. Asked if she could tell me what happened.” After reviewing her referral form on the student, Stewart testified that K.L. denied kissing N.B. Stewart then asked why people would identify her as having kissed N.B. and K.L. replied that she was standing next to him. According to Stewart:

I then asked had there been any other interactions or inappropriate engagements between her and other students...and she mentioned that N. B. asked to show, asked her to show him her private parts...she said she didn't show him anything...I asked were there any other students in the room that had engaged in any similar activity or touching, kissing, anything like that, and she reported that there was a nasty team or nasty game, and just gave a list of other students that participated in this activity. I asked where this occurred and she stated that it occurred in Ms. Wilson's classroom, and I asked if there were any adults in the classroom and she stated Ms. Wilson was in the classroom. I also asked her if Ms. Wilson did anything about whatever she was reporting, and she just stated that she was told to move her seat.

Steward was then asked by counsel if K.L. described what she was doing when she was asked to move her seat and Stewart testified: “I believe she said she was like under the table on the floor.”

As for her meeting with L.W., Stewart testified:

She shared with me that the nasty team was a game or a group that K.L. invited students to and they needed to show their genitals and touch or put their mouths on their genital area, she

said her private parts. I then asked her when did this happen. Who else was involved. She gave me a list of students who were involved. Where did this take place. If there were any adults in the room. ...

Q And when did she say it happened?

A It happened during her class time.

Q And did she identify what class?

A In Ms. Wilson's class.

Did she say how many times it happened?

A Off the top of my head. I don't remember. I just put it in my report whatever she mentions.

A And did you ask her if anyone was in the room other than children?

A Yes.

Q And what did she tell you?

A I believe she mentioned Ms. Wilson was in the room.

As for her meeting with A.G., Stewart testified:

I asked her, I asked her about if she was aware of what the nasty team was, that she was mentioned to have participated in the nasty team. I asked her what the nasty team was, what she did in her involvement with the nasty team, where this occurred, who the adult was, if there was an adult in the room, where was the adult and how the adult responded.

According to Stewart, A.G. told her that to be part of the nasty team she need to show her private parts; that she lifted up her dress, pulled her panties over to the side and exposed them to other students that were on the nasty team who would look under the table. Stewart further testified that A.G. said Respondent was in the room and that she had K.L. move her seat. When Stewart asked A.G. how often this occurred, A.G. first said she did not do it any times, then said she did not do it a lot of times and that when Stewart inquired; "was it one time? Was it maybe three or four times? Was it ten times" that the student responded it was "like three or four times." According to Stewart, AG stated that she saw K.L. expose herself to N.B. and put her mouth on N.B. and A.J.

Stewart continued by reviewing her social worker referral form relating to Q.L. and testified that when she met with Q.L. she began by introducing herself and:

...I informed him I was informed he participated in a group of students in his classroom called the nasty team. I asked him what the nasty team was, who was on the nasty team, what they did, where it occurred, who the adult was in the classroom and what the adult did.

According to Stewart, Q.L. told her that K.L. started the nasty team and you needed to expose your private parts; and that he had unzipped his pants and pulled out his penis and that he did it under the table in the Respondent's classroom and that Respondent was present but that he did not think Respondent saw him.

Stewart testified that she gave the same introduction to A.J. as she had to Q.L. and that A.J. responded that K.L. had a team and she wanted him to show her his private area, that if he showed his private area to her she would show him hers, so they both exposed themselves under the table; and that K.L. put her mouth on his penis. According to Stewart, A.J. stated that they would do this under the table when Respondent was at the white board. A.J. told her this happened a few times.

Stewart testified that she took notes during her interviews (no such notes were offered into evidence) and that after the interviews – still on September 25 – she reported what each student told her to Ebron and Glover and that the administrators determined that the state DCP&P (Division of Children and Families) should be notified. She made the call to the DCP&P with Glover being present and Ebron and Glover made calls to parents of the six students. Stewart testified that Tomeika Cherry was eventually sent from the DCP&P to the school to conduct an investigation.

Stewart confirmed that each of her six Social Work Referral Forms relating to her September 25 meetings with students references a note received by Ebron from Johnson. Stewart testified that she did not see the Johnson note nor ask what the note stated. She did not recall the amount of time she met with each student, testify the shortest was in the 5 to 10-minute range but that she did not know the length of her longest meeting. She did not video tape or audio tape her interviews with the students, nor did she take a verbatim record of her questions and the students answers, and that she asked the same set of questions of each student, a list of five or six questions she keeps in her head. Stewart testified that she did not interview Johnson, she did not interview any student who reported the matter to Johnson or any student not identified as participating in the nasty game and she did not interview any adults who were on the playground. She also testified that she did not make any assessments of the students she met with relating to their ability to know the difference between telling the truth and a lie, understanding the difference between reality and fantasy, understanding the concepts of numbers and time or the ability to sequence events.

Erskin Glover

Glover was principal of the Quitman Street School at all times relevant. He testified that he first learned of the student conduct relevant here on September 25 when he and vice principal Ebron were approached by substitute teacher Johnson in the hallway outside of Respondent's classroom. At that time, Glover testified, Johnson informed the two administrators of reports by students of inappropriate behavior such as

kissing, touching genitals and mouth to genital contact. According to Glover, Johnson identified two students as being involved; N.B and K.L.

Glover immediately got school social worker Stewart involved. Per school policy, Glover testified, Stewart's primary responsibility was to talk with the students and gather information. Stewart reported the content of her conversations with students to Glover late in the day of September 25. Upon hearing of the conduct described by Stewart, Glover directed Stewart to contact DCP&P. Glover testified that he believes he was present when Stewart telephoned and spoke to the DCP&P from his office.

Glover testified that he spoke with Respondent by telephone in late September or early October and asked her if she was aware of the conduct reported by students to have occurred in her classroom over a period of time. Glover described the conversation as follows:

A The beginning of the conversation was more about her health and how she was doing and the follow-up comment was that was she aware of or have any knowledge of students performing inappropriate acts in the classroom over the period of time I noted that these were the dates that it was brought to the attention, did she have any knowledge of that.

Q When did you use the term "inappropriate activities" or did you describe to her the activities?

A I actually described a couple of the – I described very vividly. It was stated that there was showing of genitalia to each other and there was mouth - - K.L.'s mouth was put on private parts.

Q And what was Ms. Wilson's response?

A Her statement was no, she wasn't.

The state IAIU completed an investigation⁷ and issued a report. Glover testified that he relied upon that IAIU report, Stewart’s referral forms and the District’s internal investigation when he certified the Tenure Charges and signed the Statement of Evidence in support of the charges.

Michelle Takyi

Takyi is the District’ Manager of Compliance and Tenure and conducted the District’s internal investigation of the matter. Takyi testified that she became aware of the potential issues concerning Respondent’s tenure sometime in January 2016 when she received the findings report relating to the “nasty team” conduct of the six students in Respondent’s class from the IAIU.⁸ She was assigned the internal tenure investigation of Respondent’s conduct. For purposes of her investigation, in addition to the IAIU report,

⁷ The school provided the IAIU investigator demographic and contact information for the six students involved, and whenever an investigator met with a student, a school administrator sat in on the interview.

⁸ The Institutional Investigation Unit report is dated January 7, 2016 and provides in its section entitled “Investigative Finding”:

Neglect/Inadequate Supervision is **Not** Established, in accordance with N.J.S.A. 9:6-8.21. No adjudicative findings have been made. IAIU’s review herein is solely investigative. Not Established findings are not disclosed in a Child Abuse Record Information check, but they are maintained in agency records.

(Emphasis in original)

And in its section entitled “Investigative Observations”:

The results of the investigation revealed that K.L., age 6 Q.L., age 6, L.W. age 6, A.G., age 6, N.B., age 7, were covertly playing a game dubbed ‘nasty team’ in the classroom that entailed consensual sexual/genital contact and exposure. However, there was no information obtained to conclusively determine that teacher, Ms. Lydia Wilson, who was in charge of the class, had knowledge of these incidents.

Takyi requested and reviewed an Incident Report initially submitted by Quitman Street School administration and the 6 Social Worker Referral forms completed by Stewart. She also spoke with the administrators of the Quitman Street School, met with two of the student's identified in the IAIU report and met with substitute teacher Johnson and Respondent. Takyi testified that the first student she met with completely shut down and the second student refused to answer any "nasty team" or inappropriate-conduct-related questions. As a consequence, Takyi testified, for purposes of her investigation, she relied upon the content of the six Social Worker Referral forms completed by Stewart. She further explained that when she met with Respondent, the teacher described the children in her class as normal students; playful and active, but nothing out of the ordinary.

Takyi's investigation culminated in an Internal Investigation Report dated March 22, 2016. Following a description of the background leading to the referral to the IAIU, the report provides, in part:

The incident was reported to the Institutional Abuse Investigation Unit (IAIU) and an investigation was conducted. The department returned a findings report to the District on September 25, 2015. This agency returned a finding of "Not Established." "Not Established" means that there existed the potential risk of harm and that due to staff

Based upon the information gathered and physical observations of the children, K.L., N.B., A.J. Q.L., L.W., and A.G. are not neglected children as defined by statutes.

As previously noted, the Institutional Abuse Investigation Unit's findings have not been adjudicated and should not be considered binding or conclusive. No determination as to the accuracy of the allegations, statements or accounts of the incidents has been made.

The report then went on to list remedial actions already taken by the District and further provided; "[t]he appropriate licensing or supervising authority may take additional action as a result of this investigation."

member's action or lack thereof, the student was placed in harm. The IAIU's investigation could not "*conclusively determine that Ms. Wilson, who was in charge of the class, had knowledge of these incidents.*"

Upon receipt of the IAIU findings the District conducted an investigation into the matter.

The report then goes on to describe the other documents reviewed, provided detailed recitations of the content of each of the six social worker referral forms, and summaries of interviews conducted of the two reluctant students, substitute teacher Johnson, social worker Stewart, principal Glover, vice principal Ebron and Respondent. After describing substitute teacher Johnson's initial report to Ebron, Takyi's report states:

After speaking to Ms. Johnson, Ms. Ebron began a school level investigation. To start, Ms. Ebron and social worker Ms. Camisha Stewart met with [N.B.] In this meeting he reported that he and [K.L] kissed during lunch time...that [K.L.] invited him to join the "*nasty team*" and play a "*nasty game*" which involved "*show[ing] their private parts to each other under the table...*" During the investigation led by Ms. Ebron, the students were asked whether Ms. Wilson was in the room or whether she was aware of what was happening and Ms. Ebron recalled that all students acknowledged that Ms. Wilson was in the classroom during the times the interactions occurred.⁹

⁹ The evidence submitted at arbitration establishes that Ebron did not conduct an investigation. Both Ebron and Stewart testified that the September 25 meetings of Stewart and the six students was not an "investigation." Ebron testified Stewart more accurately engaging in an "asking" of what happened. The Vice Principal initially testified that she could not recall being present during any interview of students by Stewart, but changed her testimony and stated that she believes she may have been present for four of the interviews. Stewart initially testified that Ebron may have been present for some of her interviews, but also testified that Ebron was not present when she met with students. All six of the Referral Forms completed by Stewart state that Ebron was present during the interviews. As a result, I find that Ebron was present during the interviews of at least four of the students by Stewart.

The report further provides that in her telephone interview of Glover, the principal opined that he believed Respondent should have had knowledge of the incidents, and that when he called Respondent to apprise her of the events that had unfolded, Respondent told the administrators that she had never heard of “nasty team” or nasty game”.

In its description of the interview of Respondent the report provides that Respondent:

indicated that *“the only time [I] heard of nasty team was when [I] was interviewed by [an IAIU] case worker.”* However, this statement conflicted with her statement made earlier in an interview with District representatives, Ms. Wilson stated that while on leave Principal Glover and vice principal Ebron called her on the day the incidents came to light and *“asked if [I] knew of students touching each other. I said no.”*

The report then concludes with a section entitled “Recommended Action” and therein provides:

Based on the findings, Ms. Wilson was in the classroom while male and female students engaged in inappropriate physical activity, which included looking at and touching one another’s genitalia. Although Ms. Wilson claims that she knew nothing about the incidents that took place in her classroom during instruction, students attested not only to her presence in the classroom, but that on some occasions she addressed students’ behavior and warned students about actions that were linked to nasty team and nasty game. As such, I recommend the District pursue tenure charges for termination against Ms. Lydia Wilson for neglect of duty that allowed students to engage in sexually explicit behavior.

Dr. Wayne Threlkeld

Dr. Threlkeld was called by the District as an expert on teacher classroom management. He testified that he reviewed all of the evidence contained in the

“Statement of Evidence Under Oath” submitted in support of the tenure charges, and that in reviewing the matter, he understood the facts to be those reported in the social worker referral forms and that Respondent’s classroom was accurately reflected in drawings and photographs presented to him by the District. Threlkeld further testified that he did not physically observe the classroom, does not know if the pictures of the classroom he reviewed accurately represented the state of the room at the time the nasty game conduct is alleged to have occurred, and does not know if the dimensions on the drawings he reviewed are accurate.¹⁰ Nor did he interview any of the individuals involved.

Threlkeld concluded that based upon his review of the materials presented to him and his education and years of experience as a teacher, school administrator and superintendent, that due to the proximity of Respondent to the student’s involved in the nasty game conduct under the table, it would have been “about impossible” for Respondent not to have seen the behavior; particularly when students went under the table. A teacher with 16 years of experience monitoring classroom activities would have seen the behavior reported by the students, Threlkeld stated. If Respondent did not see the conduct, Threlkeld continued, such would mean that she was in such a “parallel universe” as to be totally unaware of what was going on in the classroom; conduct contrary to one of the tenants of good teaching.

Respondent’s Witnesses

Respondent

¹⁰ Because his opinions are largely based upon his assumptions as to the accuracy of the contents of the Social Worker Referral Forms and photographs, I find the testimony of Threlkeld to be of little or no value to my resolution of the issue of Respondent’s presence during any sexual conduct by the students.

Respondent has taught in the District for 12 years, four years of which was first grade. She did not know the administrators or students at the Quitman school prior to her working there. Her first day of work at Quitman was September 1. She had approximately 21 students in her class. She testified that prior to her going out on leave on September 21 she did not observe any inappropriate conduct, any genital exposure or any mouth to genital contact by students. Nor did she receive any complaints from parents about such conduct occurring in her classroom and no students talked about any such conduct during her classroom circle times.

Respondent recalled that the first she learned of any inappropriate behavior of her students was when she was called by principal Glover during the time she was out on leave. Respondent testified that Glover asked her if she was aware of any children allegedly acting inappropriately in her classroom and she responded that she was not aware of any such conduct. She recalled that during that first conversation the principal informed her that she would be contacted by a state investigator. She further testified that Glover did not ask her specifically about the “nasty team.” During her time off she was called a second time by Glover on which occasion they discussed when Respondent would be returning to work. During that second conversation Respondent again told the principal she had nothing to do with the incident that happened.

Respondent returned November 9 and took over the teaching of another class (referred to as Ms. Wiley’s class). She was told by school administration that due to low enrollment, the school had reduced its first grade classes from four to three, and that her old class had been combined with Ms. Wiley’s class (Wiley having been sent to the “rubber room”) and some of the students from her original class were assigned to other

classrooms. Respondent recalled that she met with the state investigator soon after she returned and testified that following her November 9 return to work she taught for about two and a half months before she was informed that tenure charges were being brought against her and she was suspended without pay.

Susan Esquilin, Ph.D.

Esquilin was offered by Respondent as an expert in issues regarding child sexualized behavior and the interviewing of children engaging in, or allegedly engaging in, those activities. Following testimony on her education, professional body of work and related experience, Esquilin was accepted by the District and by the undersigned as an expert.

Esquilin reviewed all of the documents submitted by the District in support of its tenure charges and the evidence submitted in the District's case in chief at the hearing, including testimony of Ebron, Stewart, Glover, Johnson and Threlkeld, and offered the opinion that the statements by the students involved in this matter and the related content of the social worker referral forms are not reliable.

In this regard Esquiline testified, the first reports of conduct occurred, according to substitute teacher Johnson, after recess during circle time (or rug time), and such a circumstance is problematic as it sets the stage for "contamination." Instead of separating the students as soon as the subject was raised and thereby preserving the opportunity to independently interview each student, Johnson let the students go on about the conduct and allowed other students to hear what others had to say. At the age of these students, Esquilin explained, if this type of conduct (exposure and mouth to genital conduct)

“happened for real,” the children would be focused on the conduct itself and not the peripherals of what adult may or may not be present. According to Esquilin, when subject to questioning about such conduct by an adult, children want not to be blamed and can be influenced to answer questions in a way consistent with the agenda of the adult questioner. In Esquilin’s view, it was apparent from Johnson’s own testimony about the circle time conversation that Johnson was very concerned about clarifying which adult was present during the conduct, and it is likely that the subject of what adult may have been present at the time of the conduct was initially raised by Johnson. Thus, Esquilin testified:

...What one child says can be picked up by another one and then another one so you don’t know at that point you would have wanted to separate the children immediately and not continue that discussion in the classroom, but it apparently continued enough that she got all kinds of statements from a number of different children. It’s unclear who said what first that suggested a number of different kinds of sexualized behavior that has gone on for some period of time.

What was most apparent to me about what she said was – her questioning the children about who was present. It did seem that she was very concerned, from the testimony I read, that she not be held responsible.

Now, from my experience with children when they are engaged in sexual behavior with each other as alleged in this situation, they are focused on what’s going on between them, that’s the central issue that they are focused on, not what I would call or what’s called in the literature, peripheral detail; who is in the room, what so-and-so was wearing and so forth so – but Ms. Johnson’s, what seems to me from her statement, suggestions that there was questioning of the children before that, because the first report from the children before that, because the first report from the children was not who was present, the first report was that it actually happened outside on the playground and there’s no report of who was present there, but suddenly in this conversation in the classroom, that’s all this conversation is about, which adult was present and so it

seems to me that it's at least likely, I'm not going to say it happened, I wasn't there, but I'm saying it's at least likely that the question of who was present and not her and the previous teacher was introduced by Ms. Johnson, since that was clearly a major concern of hers and when children are being questioned about behavior that they know there's some problem with, they are eager to get out of getting in trouble so they are very vulnerable to being pushed in one direction or another in questioning, because most children by this age when they come into a situation where someone's questioning them about sexual behavior, feel like they are being blamed and in fact, what is being reported in the testimony is that some child is saying that child tried to get somebody else to do this so there's – and children being identified as having been involved in behavior that they would regard as something they shouldn't be doing and now you have an adult asking about it so that's a point at which children are very malleable to being pressured in one way or another to being what the agenda of the adult so that's why so much of the effort in training is about decreasing that anxiety level, creating rapport in general with a child trying to not have the child feel pressured whether by the adult or other children so that their account can emerge as spontaneously as possible and it seemed to me that scenario being described by Ms. Johnson, it seemed to me she was very anxious, and her anxiety is very understandable, but I think it could easily have impacted what the children said.

On the topic of Johnson, Esquilin was thereafter asked:

Q. Is it your opinion that that initial rug time incident with Ms. Johnson could have corrupted the statements thereafter given by those children?

A. Absolutely, its my impression that that could have happened.

Q. And is it your opinion that children engaged in sexual behavior – and I want to make sure I understand the peripheral issue – may not be able to tell which adult is in the class when they were engaged in that game?

A. It's my opinion that if that behavior were taking place as has been explained, if in fact, it was happening, they would have been preoccupied with what they were doing among each other and they might have checked, looked over to see who was

watching, but the focus was not on who was in the classroom. I think, unless that person then interacted with the child, the focus was on just making sure no adult is watching while we do whatever we are doing, which we are not supposed to be doing so it's my understanding there were a number of adults in that classroom from the beginning of the school year until that time in the Circle Time and it's my understanding from what allegedly was said, that this was an ongoing activity. Whatever it was, whatever had happened, its described by the kids as something that happened repeatedly so its my impression that if it was happening repeatedly, the focus was on the activity, not what adult was there and what that adult was doing at the time that they were doing, except, that person wasn't looking at them so to that extent, I believe they checked it out so I believe there were more than one persons said it happened at recess, that say there was no question that it was at recess, it's quite possible to me that this total focus on Ms. Wilson was really the result of Ms. Johnson's focus on her questioning them to make sure that they wouldn't say she was present.

Esquilin testified that the note written by Johnson the class period following the student's circle time and given to school administration is important because it is the first memorialization of what the children allegedly said and was written close in time to the event.

Esquilin noted that the testimony of District witnesses is confused as to whether or not Ebron was present for some or all of social worker Stewart's interviews of the six children. In this regard, Esquilin continued, it is not good practice to have two adults present during an interview with a young child about sexual conduct as such creates an intimidating atmosphere.

As for the questioning by social worker Stewart, Esquilin testified, although Stewart may have had her standard six or seven questions in her head, - questions that are not inappropriate questions in and of themselves - it is typically important to have some

form of contemporaneous record of what questions are asked when, and what answers were offered to each question. It is important not to ask leading questions and to spend enough time with the child to build a rapport. By using the “Finding Words” technique of interviewing children, the whole point is to not direct the child to a result, but to let the child become comfortable so the child can unload his or her burden. Reviewing the social worker’s testimony and the manner in which she completed her referral forms, Stewart did not use such a technique. In this regard, Esquilin testified, according to Stewart she pulled each of the six children from class individually between 2:30 and 3:10 p.m. on September 25. As a result, at most, Stewart spent no more than five minutes with each child, not enough time to bring the child to a comfortable place of conversation.

Typically, the time necessary to conduct an effective interview is at least fifteen to thirty minutes, according to Esquilin. Additionally, it is apparent that Stewart did not complete her referral forms at the time of her interviews; instead waiting until after they were all complete before attempting to memorialize the conversations. Such a practice results in forgetting the order in which questions were asked for each child and the answers each child offered.

In reviewing Stewart’s entries on the six social worker’s referral forms and manner in which the interviews were conducted as reflected by the content of those forms, Esquilin testified:

...Then you have to be able to, without leading, basically ask them about what has happened with those body parts and so there’s a sequence of things that you need to do in order to get some reliable information. The questions have to be asked, this is very important, in a non-suggestive, non-leading way. You can’t say to the child, and she testified in at least two situations, I think, that she said to the child, we know you were involved because so-and-so said you were involved.

That's like one of the biggest no-no's that we dealt with in those cases in the 80's. You can't tell a child, basically, somebody else has already identified you, now tell us what happened, because that puts the child in a position to having to say no, that's not true and now I'm either badmouthing my friend or telling you what you believe is wrong. It pressures children. You can't ask children questions, isn't this what happened. You can't suggest the series of events.

Now again there's no contemporaneous report. There's just the only report that's given is what the children allegedly said, not how they were asked and not their exact words so the reports by the social worker basically, are reporting over and over again and all six kids are saying the same thing. It's doubtful that if you interview six children individually in a non leading way that you would get identical statements so it strongly suggests that the way the kids were questioned and the short way that they were questioned, produced the same information over and over again and that's a problem.

Position of the School District

The District argued that Respondent was so disengaged from her class as to allow six and seven-year old students to repeatedly engage in inappropriate sexual behavior, including four instances of mouth-to-genital contact, in her presence over a twelve-day period. According to the District, the children's' statements are competent evidence of the activity occurring at the time Respondent was present. Although she was not found guilty by the IAIU of statutory neglect or inadequate supervision, the District argued, the IAIU found that inappropriate sexual behavior took place. Regardless, the District maintained, the District necessarily holds its teachers to a higher standard than merely not to violate criminal statutes in the classroom. According to the District, Respondent was found by the preponderance of evidence to have either harmed or placed these children in harm's way which constitutes conduct unbecoming.

The crux of the decision in this case, the District asserted, falls squarely upon the admissibility and weights ascribed to statements of first grade students to their school social worker, who then recorded them on Social Worker Referral Forms, stating that they participated in genital exposure and mouth-to-genital contact with each other in the classroom during a twelve-day period while Respondent was present. Under the AAA rules the arbitrator may consider evidence relevant and material to the dispute and although he need not following the rules of evidence, the rules may provide guidance. Here, the District maintained, New Jersey rule of evidence 803(c) 27 providing for the admission of statements of children relating to a sexual offense should be followed. Moreover, as held by the New Jersey Supreme Court, spontaneous out of court statements by children regarding sexual matters are highly credible because children lack sexual experience. The determining factor with respect to reliance on children's statements regarding sexual activity is whether the statements are trustworthy considering the totality of the circumstances. Circumstances including; the spontaneity of statements, consistency of repetition, lack of motive to fabricate, mental state of the child speaking, use of words unexpected of a child of a similar age, the interrogation and manipulation by adults. Here, the District asserted, the six children spontaneously told substitute teacher Johnson about students kissing and touching in response to her question; "How was recess?" In response to social workers Stewart's questions, the children consistently responded that they were subjected to peer pressure to join the nasty game and consistently described the process by which they exposed themselves and each stated that Respondent was in the classroom when the conduct was going on. Importantly, the

District continued, the children who engaged in mouth to genital contact self identified and identified the others who engaged in such conduct.

Nor did any of the students have reason to fabricate; as no witness identified any outstanding problem between Respondent and any of the children. There was no “interrogation” of the children by Stewart. Rather, the evidence establishes that Stewart used the same procedure approved by Respondent’s expert witness. In this regard, Stewart used the same set of non-leading questions she always uses when interviewing students; questions the Respondent’s expert testified were all appropriate. Stewart has a Masters degree in Social Work with a concentration in Children and Family and a sub-concentration in School Settings and has been interviewing students at the school for five years. Moreover, the District pointed out, the investigator who completed the IAIU Report, Tamika Cherry, is trained in the “Finding Words” technique endorsed by the Respondent’s expert, and she found that mouth to genital contact occurred in the classroom when Respondent was present.

Importantly, the IAIU finding of “Not Established” includes a finding that the children were harmed or placed at risk of harm in Respondent’s class. Considering all of the circumstances, the District argued, the Social Worker Referral Forms satisfy the standard of trustworthiness and are admissible for their truth.

In regard to the Respondent’s assertion the “Residuum Rule” prevents the introduction of the social worker referral forms, - a rule that requires that notwithstanding the admission of hearsay evidence, some legally competent evidence must also exist sufficient to provide assurance of reliability – the District argued that the argument must fail. In this regard, the District asserted, the student statements are not hearsay as they

constitute competent and admissible evidence in their own right. As a result, on their own, the statements offer the assurance of reliability and avoidance of arbitrariness sought by the residuum rule and are, of their own accord, admissible pursuant to exceptions to the hearsay rule.

The student statements establish that students engaged in sexual activity in the classroom when Respondent was present and Respondent testified that she was not aware of any such conduct. Such constitutes competent and compelling evidence of Respondent's unbecoming conduct.

In regard, to Respondent's claim she has a right to confront the student witnesses, the District argued, the Sixth Amendment right to confrontation does not apply to a non criminal case such as this.

Finally, the District asserted, the conclusions of Respondent's witness that statements of students are unreliable should not be given weight. Dr. Esquilin testified that it is possible that students could have spontaneously provided information about the nasty game in response to Johnsons' question; "How was recess?" And Johnson repeatedly and consistently testified that that is all she asked the students other than eventually asking; "do your parents know?" Moreover, Esquilin confirmed that the questions asked the students by Stewart were proper and there is nothing in the record to suggest that the subject of mouth to genital contact was discussed by the students other than in the one-on-one interviews with Stewart. In this latter regard, the District noted, even Dr. Esquilin testified that if any child was interviewed individually without any group discussion beforehand and raised such a subject, "it is likely to have happened."

The District has shown that Respondent's disengagement from her students resulted in repeated sexual activities by students in her presence and with her knowledge. Such constitutes conduct unbecoming warranting dismissal.

Position of Respondent

Respondent argued that although the arbitrator has a wide latitude in determining the admissibility and relevance of evidence, the arbitrator's decision in such regard must be made based upon considerations of fundamental fairness. Here, Respondent asserted, the District's case is based upon; (1) the alleged statements of six students made to the school social worker and the social worker's completion of Social Worker Referral Forms, (2) a report on the results of an IAIU investigation and (3) an internal investigation including the interviews of only two of the students allegedly involved wherein the students either denied knowledge of the incidents or were non-responsive during the interview. The District failed to call any of the six students involved, or the IAIU investigator and made no showing that the students or investigator were not available. Under such circumstances, Respondent maintained, the District's case consists entirely of inadmissible hearsay and denied Respondent the opportunity to cross examine the students or state investigator; a denial of fundamental fairness.

Here, Respondent continued, the District offered only hearsay evidence and even if the residuum rule is applied, the District offered no residuum of competent evidence to support the admission of the District's hearsay evidence. As for the District's reliance upon New Jersey Rule of Evidence 803(c)27 to support its claim that the Social Worker

Referral Forms are admissible as an exception to the hearsay rule, Respondent argued, that rule of evidence is limited to cases of alleged sexual abuse and there is no such allegation here. Moreover, even if the rule was applicable to the issues raised in this arbitration, the District failed to comply with the requirements of the Rule. In this regard, Respondent explained, the District failed to provide Respondent the means to contact the students involved in a timely manner; the District did not call the students to testify at the hearing, the District did not show that the students were unavailable and – like the requirement of the residuum rule - the District failed to offer admissible evidence corroborating the act of sexual abuse. In this latter regard, Respondent argued, the District’s claim that corroboration is shown in the consistency of the statements of the students as reported by the social worker on the Social Worker Referral Forms must fail. As established by the testimony of Respondent’s expert witness, the very consistency of the student statements reflects the unreliability of the statements and likelihood that the reports of students were contaminated.

Even if the Social Worker Referral Forms were admissible as an exception to the hearsay rule, Respondent continued, the Forms are unreliable. In this regard, Respondent asserted, the statements reported by students on the forms were the result of contamination that began with Ms. Johnson at circle time. As explained by expert witness Esquilin, it is wholly unlikely that children of ages 6 and 7 would have “spontaneously” provided the identities of which children were involved, the detailed descriptions of conduct engaged in, or the presence and location of Respondent at the times the students engaged in the conduct described under the tables. Instead, Respondent asserted, the fact that Johnson claimed more than ten times in her testimony that the children assured her –

without her even asking questions – that Respondent and not Johnson was present during the conduct, must be considered alarming.

Similarly, Respondent argued, the Social Worker Referral Forms are also unreliable. The forms do not reflect the actual questions asked each student in the order the questions were asked and do not memorialize the actual words offered by students in their answers. The Forms do not contain the unedited statements made by the children. Instead the forms use words of adults, not six year olds and are likely summaries containing embellishments. Additionally, the record establishes that there was no way the social worker could conduct effective, individual interviews of the students in the short period of 40 minutes the District claims; particularly where social worker Stewart testified that she walked back and forth from the library to the classroom to get each student. Nor is there evidence that Stewart made any assessments of the students to determine if they were capable of distinguishing between the truth and a lie or their ability to sequence events and the social worker did not ask the students any questions relating to any efforts made to keep the reported conduct secret.

The District's internal investigation should be given no weight, Respondent argued. The investigation was predisposed. The investigator spoke with only two students and received no information from the students implicating Respondent, and the investigator failed to interview any of the other students in the class or any of the many adults who were in the classroom or in the cafeteria or on the playground. As reflected by the testimony of the District's investigator Takyi, the internal investigation was a rehash of the District's incident report, the Social Worker Referral Forms and the IAIU findings.

The District also failed to establish that the charges, if proven, warranted the dismissal of Respondent. Thus, the Respondent argued, the District returned Respondent to the classroom notwithstanding that all of the allegations here were raised and investigated. Finally, Respondent asserted, after the District returned Respondent to work and assigned her to the “Rubber Room” just prior to the last day of hearing in the matter, the District marked her as AWOL for the days she attended the tenure hearing while she was on payroll and was notified that she may use her personal days for such missed days if she has them. Such is retaliation and denies Respondent the right to assist in her defense at the hearing.

Discussion

Introduction

The District’s charges here are narrow; that Respondent engaged in conduct unbecoming by failing to observe her students engaging in certain sexual-related behavior (student genital exposure and student mouth to genital contact) and failed to appropriately respond to such behavior. The District did not offer the students as witnesses at the hearing, did not show that the students were unavailable to testify and did not offer any other statements of the students that would be considered otherwise reliable evidence. Nor did the District offer any other form of competent or trustworthy evidence that the student conduct took place when Respondent was present.

The primary “evidence” offered and relied upon by the District to show that sexual behavior may have taken place in Respondent’s classroom *when Respondent was present*, is: (1) the testimony of substitute teacher Johnson about statements made to

Johnson during “circle time” after recess on September 25; (2) the testimony of school social worker Stewart about statements allegedly uttered by students later in the afternoon of September 25 during interviews and (3) the Social Worker Referral Forms completed by the social worker documenting her September 25 interviews of students. I find that such testimony of Johnson and Stewart, as well as the Social Worker Referral Forms completed by Stewart are; (a) hearsay and (b) that even treating such proffers as admissible, are otherwise unreliable for purposes of establishing the presence of Respondent during any conduct that may or may not have occurred in classroom.

As for the District’s reliance upon the IAIU Investigation Report and its own internal investigation, I find in regard to the former that the District reliance is unsound and as to the latter, the internal report is largely based upon the content of the unreliable Social Worker Referral Forms and additionally does not reflect a full and fair investigation of the issues raised by the tenure charges.

Considering such, I find the record evidence is insufficient to establish by a preponderance of the evidence that any incident took place in the classroom when Respondent was present.

The Testimony of Johnson

Johnson’s testimony about what students told her is hearsay. Even if considered as admissible, her testimony was not reliable as to the determinative issue of whether student “nasty game” conduct took place when Respondent was present.

Based upon her demeanor and the content of her testimony, I find that on both; (a) September 25, 2015 in regard to her own interaction with her students and (b) the day she

testified in the instant matter about such, Johnson's primary concern was that she not be found to have been present at the time the students engaged in the nasty game. I do not credit the testimony of Johnson that she did not ask students questions about the nasty game conduct during the September 25 circle time, or that students repeatedly and "spontaneously" stated that Johnson was not present and that Respondent was present during the nasty game conduct without Johnson either overtly or subtly leading them toward such statements.

I found Johnson's testimony to be contrived. Considering: (1) that September 25 was the fourth day Johnson had been teaching the class – amounting to a full 25% of the student days in the school year to that point - and there was ample opportunity for students to have engaged in the conduct described when Johnson was present; (2) that the initial report of the students to Johnson was of two students kissing earlier that day during recess and it is not believable that the students transitioned into describing the under-the-table conduct and then further transitioned into making assurances that (a) Johnson was not present and (b) that Respondent was present - the issue upon which the tenure charges focus - without some influence being exercised by Johnson; (3) Johnson's insistent repetition of unsolicited testimony at the hearing that students stated she was not there when the "nasty game" conduct occurred and (4) the credible testimony of the Respondent's expert witness as to the suggestibility of children of the age involved, I am persuaded that Johnson embellished her testimony in an effort to place herself in a positive light. I further find that any statements made by students to Johnson or later to social worker Stewart about the presence of Respondent during the conduct at issue was

to a significant extent the product of intended or unintended influence on the students by Johnson and are not reliable accounts of fact.

Stewart

I find both the testimony of Stewart and the Social Worker Referral Forms drafted by Stewart are hearsay, (the Forms being double hearsay) and neither are admissible for the truth of the matters stated on their own or under any exception to the hearsay rule. Even if considered under a more relaxed standard for admission recognized on occasion in arbitration, I find that neither Stewart's testimony nor the Forms she completed reflect the degree of reliability necessary to evidence that Respondent was present during any "nasty game" or other sexual conduct of the students.

The manner in which Stewart interviewed the six students involved may very well have been appropriate for her and the school's initial purpose. One cannot fault the school for wanting to get on this matter promptly and promote the best interests of the children as quickly as possible. However, one size does not fit all when it comes to interviews of children, and conversation that may be adequate for the school to determine if psychological or medical aid is recommended for a student or for purposes of making an initial determination that further investigation is warranted, is a far cry from the fairly and competently conducted interviews that would be necessary as part of a full and fair investigation required for purposes of supporting the dismissal of a tenured teacher. Thus, the initial non-investigation, non-interrogation, non-interview "asking" of students what happened by social worker Stewart may have served an important function at the time, however such an "asking" is not, and does not become, an effective and adequate

“investigation” by default simply because the District needs an investigation at a later time. It is plain from the record here that the District applied such a default process by relying upon the quick and truncated “asking” by Stewart as the basis of its referral to the state and, importantly, as primary support; (a) for the finding in the District’s internal investigation that Respondent was present when students engaged in the nasty game and (b) for the District’s tenure charges. The results of Stewart’s process of asking are not reliable bases for a finding that Respondent was present in the classroom when the nasty game was ongoing.

In addition to her testimony being hearsay, Stewart did not reflect any significant independent recollection of her interviews of students. Instead, her testimony was largely a recitation of what was written on her Referral Forms. Also, Stewart could not clearly explain when she conducted her interviews, what information she had been provided prior to conducting the interviews, or if any other adult was present with her during her interviews of students. In this latter regard, Stewart testified variously that Ebron may have been present for the interviews, that Ebron may have been present for some of the interviews and that Stewart conducted the interviews alone. However, the Social Worker’s statement on all six of her Referral Forms provides in the “Actions Taken...” section “SW, Mr. Glover, and Ms. Ebron discussed the matter in detail sharing conversations SW and Ms. Ebron held with students.”¹¹

¹¹ Considering all of the evidence on the question, including Ebron’s testimony that she was present during at least four of the interviews, I find that Ebron was present for Stewart’s interviews of at least four of the students. I also find, consistent with the testimony of the Respondent’s expert witness, that such presence of another adult during the social worker’s questioning of students increased the likelihood that the students would be more interested in getting the meeting over with than providing accurate and reliable responses to questions.

As for the completed Referral Forms authored by Stewart themselves, they do not reflect specific questions to each student and verbatim answers individually offered, but rather largely consist of summaries of what was reported collectively by the students. Thus, the narrative provides; “[a]fter further exploration students shared that K invited other students to play the ‘Nasty Game,’” (emphasis added) and, the narratives are so similar to one another as to reflect a compilation of information and do not reflect the variety of descriptions that one would expect from six individual first-grade students. Additionally, Stewart’s testimony about her interviews reflect that she began some of them by stating that the student being interviewed had been identified as having been kissing another student and began others of them by telling the student being interviewed that Stewart had been informed the student was part of the nasty team and then asking the student what the team was. I find, again consistent with the credited testimony of Dr. Esquilin, that such preliminary statements by the adult interviewer in such a context would not create the non-threatening, open rapport necessary for students to accurately and reliably describe events.

Finally, in regard to the content of the referral forms, as reflected in my discussion of the testimony of Johnson above, by the time Stewart met with these students, their impressions on whether or not Respondent – as opposed to Johnson – was present during any “nasty game” conduct had already been subjected to adult influence, and, I find, was more likely than not corrupted by the students’ circle time conversation with Johnson.

Based upon these considerations, I do not find either the testimony of Stewart, or the Referral Forms she completed, to be reliable evidence on the issue of Respondent’s presence in the classroom at the time of any “nasty game” conduct.

The Students did not Spontaneously Report the Presence of Respondent

The District argued that the testimony of Stewart and the Referral Forms she completed were not hearsay, but that even if they were hearsay they would be admissible because the reported statements of the students that Respondent was present for the “nasty game” conduct were spontaneous, not made prior to their meeting with Stewart, and were made independently of one another. I am not persuaded by the District’s argument. What is made plain from the testimony of Johnson is; (a) that the students told her about something and what they told her was of such a nature that Johnson did not want to be found to have been present at the time of its occurrence, and (b) that there was significant and detailed discussion by the students about the nasty game in the presence of one another during circle time immediately after recess and before any interviews of the students conducted by Stewart. Contrary to the argument of the District, I do not find that during their subsequent discussions with the social worker the students autonomously reported genital exposure and mouth to genital conduct in Respondent’s classroom. Rather than being the result of students independently engaging in or witnessing such conduct, I find that it is more likely than not that any details of genital exposure and mouth to genital contact that may have been expressed to the social worker were the result of the students’ shared experience of the circle-time conversation that took place only an hour to two hours prior to meeting with the social worker.

In finding that the full description and detail of the “nasty game” and not just details of students kissing in the playground were openly discussed at circle time prior to the social worker meetings, I rely upon the testimony of principal Glover who testified that Johnson provided Ebron and himself such details when Johnson initially reported the

matter to Glover and Ebron in the hallway outside of the classroom on September 25, the testimony of Ebron that she was told by Johnson in the hallway of the details of the nasty game and identity of the six students involved, and the testimony of Johnson who testified that during circle-time the students talked about a student “going down on” another student and a student kissing a boy and touching a boy and the rules of the nasty game.

Based upon such considerations, I find that the record fails to support the District’s claim that the students “spontaneously” reported that conduct took place while Respondent was in the classroom, or the District’s claim that the children “independently” reported to Stewart that sexual conduct took place when Respondent was present. As a consequence, I am not persuaded by the District’s argument that independent reporting by students be found reliable and separately admissible, non-hearsay evidence that Respondent was present in the classroom when the nasty game was going on.

The IAIU Report

The District’s Internal Investigation Report states (and the District repeatedly implied throughout the instant matter) that the IAIU finding of “‘Not Established’ means that there existed the potential risk of harm and that due to staff member’s action or lack thereof, the student was placed in harm” and suggested that the IAIU report reflects that Respondent was found by a preponderance of the evidence to have either harmed or placed children in harms way. I find that the IAIU report concludes neither. First, as explained by the New Jersey Department of Children and Families;

An allegation shall be “Not Established” if there is **NOT a preponderance of the evidence** that a child is an abused or neglected child (i.e., child abused or neglect did NOT occur), BUT evidence **indicates** that the child was harmed or was placed at risk of harm.

(Emphasis added)

Thus, contrary to the argument of the District and the finding of the District’s internal investigation, the IAIU report did not find a preponderance of the evidence establishing anything relating to Respondent, and whatever evidence may have been disclosed of child harm or placement at risk reflected in the IAIU report was limited to the level of “indicates.” Considering context, where the Department had previously used the term “preponderance of the evidence” in the very same sentence, I read the Department’s use of the word “indicates” to mean “suggest” – as in; the results of the investigation suggests, but was insufficient to prove by a preponderance of the evidence, that children were harmed or placed in harm.

Second, and most importantly in this regard, the January 7, 2016 report states that the:

Institutional Abuse Investigation Unit’s findings have not been adjudicated and should not be considered binding or conclusive. No determination as to the accuracy of the allegations, statements or accounts of the incidents has been made.

Rather than heed the admonitions by the state, the District inappropriately treated the IAIU report – as it did the Social Worker Referral Forms – as conclusive evidence that the conduct of the six children at issue took place in the presence of Respondent.

The District's Internal Investigation

The District's Internal Investigation Findings Report relies heavily upon the content of the Social Workers Referral Forms. The only direct evidence of the narrow issues raised in the tenure charges disclosed during the District's own investigation were statements by two students, KL and AJ that provided no evidence to support the tenure charges and Respondent's statement that she witnessed no such conduct in her classroom. In regard to the two students, the Report provides:

D. KL, Student, Age 6

KL acknowledges that Ms. Wilson was her teacher but she did not know if Ms. Wilson knew about the "nasty team." KL also denied ever hearing about nasty team. She indicated she forgot who may have known about the nasty team.

E. AJ, Student, Age 7

AJ stated that Ms. Wilson was his teacher. AJ refused to talk about "nasty team" and when asked whether he had heard of the team before, he responded "*Are we still talking about that?*" and covered his face with his hands.

In addition, the internal investigation included interviews of school administrators Ebron and Glover, social worker Stewart and substitute teacher Johnson. Johnson stated that when she was initially told of the "kissing game" conduct, the students told her it had been going on by KL "on a regular basis during lunch time," and that the students explained other events that had taken place, including that "KL pulled her pants down." But the District's did not investigate such reported lunch-time conduct. As for the others interviewed by the District investigator, a review of the investigation report reflects that the statements of Stewart and the two school administrators were primarily derived from the content of the Social Worker Referral Forms.

The District's investigation was otherwise inadequate as a basis to show the truth of the District's tenure charges. The investigator made no effort to interview other students about what may have been said or not said during the September 25 circle time, or other of the numerous adults who were in the classroom on a regular basis, or other adults who were supervising children during their lunch time or recess.

Based upon such considerations, I agree with the assertion of Respondent that the outcome of the District's internal investigation was to a significant degree predetermined. In any event, I find that the District investigation disclosed no reliable evidence showing that Respondent was present during student "nasty game" conduct, and the internal report's conclusion that Respondent was in the classroom when students played the "nasty game" is based primarily upon non admissible evidence that even when considered by the undersigned is unreliable.

Findings

An initially unreliable body of evidence, such as the Social Worker Referral Forms here, does not gain reliability from its mere repetition. No matter that the Forms were cited by Stewart as true, subsequently relied upon by Ebron and Glover as being true and taken by the District's internal investigator and expert at trial as being true; the initial evidentiary failings of Stewart's "askings" of the students and the failings of her completed Referral Forms, remain.

Considering the full record in this matter including all testimony, evidence and argument of the parties, I find that the District has failed to establish either the truth of its unbecoming conduct charge against Respondent, or that Respondent engaged in any

conduct that otherwise warrants her termination, suspension or reduction in salary¹² and as remedy hereby:

ORDER

The subject tenure charges against Respondent Lydia Wilson are dismissed.

The District is ORDERED to:

1. Rescind its Suspension and/or discharge of Respondent and promptly offer Respondent reinstatement to her former position.
2. Make Respondent whole for any and all losses of pay, seniority and other benefits she may have suffered as a result of her suspension and discharge from the date of her suspension to the date of her reinstatement by the District.
3. Expunge all record of her suspension and/or discharge from the District's files.

Dated: February 1, 2017



Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Decision in Agency Docket Case No. 174-6/16 relating to tenure charges against Lydia Wilson on Wednesday, February 1, 2017.



Timothy J Brown

¹² Respondent's attendance at the tenure hearing amounts to school District business in the same way that the attendance at the hearing of teachers, social workers, school and district administrators is school business. As a consequence, I also find that any requirement by the District that Respondent use personal days or other leave for her attendance at the hearings in this matter is inappropriate and Order the District to reinstate any and all leave she may have taken as the result of any such requirement by the District.