

**NEW JERSEY DEPARTMENT OF EDUCATION**

Agency Docket No.: 254-9/16  
Ralph H. Colflesh, Jr., Esq.  
Arbitrator

**IN THE MATTER of TENURE  
CHARGES AGAINST  
DALE BROWN**

**by**

**THE STATE OPERATED SCHOOL DISTRICT  
OF NEWARK, in the COUNTY OF ESSEX  
NEW JERSEY**

Appearances

For the District:

*Teresa L. Moore, Esq.*

*and with her on the brief,*

*Ashley Higginson*

*Riker Danzig Scherer Hyland & Perretti LLP*

*Morristown, New Jersey*

For Dale Brown:

*Colin M. Lynch, Esq.*

*and with him on the brief*

*Kaitlyn E. Murphy, Esq.*

*Zazzali, Flagella, Nowak, Kleinbaum & Friedman*

*Newark, New Jersey*

**DECISION AND AWARD**

Pursuant to the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ"), P. L. 2012, c. 26, NJSA 18A:6-115 *et seq.* and regulations adopted thereunder by the New Jersey Department of Education, the undersigned Arbitrator was appointed to hear and determine the above captioned matter which was appealed to arbitration by

Dale Brown (“Brown”) after the Commissioner of Education did not find that the evaluation process that resulted in Brown having been evaluated as less than “effective” for two consecutive years had not followed the standards for such evaluations set forth in the TEACHNJ Act and its attendant regulations.<sup>1</sup>

Hearings were conducted on December 1, 8, and 20, 2016, February 2, 2017 and March 3, 13, 22, and 28, 2017 in the offices of Brown’s counsel in Newark, New Jersey. At those times and in that place, both parties had an opportunity to call and confront such witnesses and produce such evidence as is authorized under New Jersey law and regulations. There being no procedural objections material to the decision herein<sup>2</sup>, this matter is ready for adjudication on its merits.

**Background:**

Dale Brown was hired as a teacher by the District in 2002 and became a tenured professional staff member three years later. He eventually worked in various schools in the District, including three different buildings within the last three years of his employment.

Until 2014-2015, Brown’s annual evaluations were all satisfactory or, under the latest system. “effective.” (NT 1034; RX 4).<sup>3 4</sup>

At the beginning of his work in Newark, Brown worked at the Gladys Hillman Jones School in an alternative education program designed for troubled and disruptive pupils. (NT 1022). After five years, during which he earned tenure, Brown moved to Newark’s Luis Munoz Martin School when the District’s alternative education program was re-located there. (NT 1023). Five years later, the District disbanded that program and Brown was designated a

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<sup>1</sup> Prior to the Commissioner’s involvement, the District Superintendent, having reviewed the charges and the evaluation process used in Brown’s last two years of teaching, found that there was probable cause to credit the evidence underlying the charge and that the charge merited dismissal or reduction in salary. The District Superintendent certified the charge to the Commissioner as required by NJSA 18A:6-11 and NJSA 18A:6-17.3.

<sup>2</sup> The District in its post-hearing brief at page 34 did object to Brown complaint’s that he had not been provided with a Student Growth Percentile (“SGP”) score because that defense was not raised prior to submission of Brown’s post-hearing brief. That issue is not material to my decision here.

<sup>3</sup> At hearing, the District produced an unsigned document purporting to be an evaluation of Brown as “partially ineffective” in 2012-2013. Brown denied ever having seen the document previously, and the documents was not admitted, nor was its assertion credited by the undersigned. (NT 1213-1214).

<sup>4</sup> Exhibits admitted at hearing and referenced herein are designated as DX for Joint Exhibits, DX for District Exhibits, and RX for Respondent Exhibits.

“teacher without placement” until assigned for the 2012-2013 year to the Maple Avenue School. He stayed in that building until it closed at the end of the 2013-2014 year. (NT 1024-25). In nearly all of the aforementioned years, Brown taught mathematics, except for a brief stint in language arts and literacy.<sup>5</sup> (NT 1024).

As a teacher without placement, Brown was invited by the former Vice Principal at Maple Avenue, Hillary Dow, to join the staff at the Belmont Runyon School where she was once again a Vice Principal. He was both interviewed and selected for a position there and started as an 8<sup>th</sup> Grade Math teacher 2014-2015 school year. For reasons that were only explained to him at hearing in this matter (NT 1039-1040)<sup>6</sup>, Brown was abruptly removed from that assignment after a few weeks and told he would be a 5<sup>th</sup> Grade Science teacher. Brown had never before taught 5<sup>th</sup> Graders and had never before taught science. (NT 1033).

As with all New Jersey teachers who have not received an unsatisfactory, i.e., “Partially Effective” or “Ineffective” evaluation under the TEACHNJ Act, Brown had an Individual Professional Development Plan (“IDPD”) for 2014-2015. He was first observed on October 9, 2014 and again on December 11, 2014 prior to a mid-year evaluation—all done by Dow. His next documented observation was not until the end of the 2014-2015 school year and was reported to him on June 3, 2015. Shortly thereafter—but prior to the end of school year—he was given his summative evaluation, in which he was rated “Partially Effective.” A fuller description of these 2014-2015 observations and evaluations is set forth below.

Entering the 2015-2016 school year with a “Partially Effective” rating from the prior year, Brown was issued a Corrective Action Plan (“CAP”) as required by law at his new school, Miller Street.<sup>7</sup>

He was given a formal “long” observation around October 28, 2015, in which he was rated Partially Effective. His next observation was on February 3, 2016 when he was rated again Partially Effective. His mid-year evaluation followed 2 days later, and he was again rated Partially Effective. His third observation occurred on April 6, 2016, and on April 18 he was informed he had been rated again Partially Effective. A final observation was done on May 3,

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<sup>5</sup> In the first half of the 2012-2013 year Brown was a facilitator working with other teachers.

<sup>6</sup> According to Karla (nee Rahner) Venezia (hereinafter “Rahner”), who was the Math Coach at Belmont Runyon, she determined that Brown had classroom management problems with the 8<sup>th</sup> Graders he was teaching and was removed from his initial position for that reason. (NT 853-54).

<sup>7</sup> Brown was never apprised of his assignment at Miller Street School until after the 2015 summer vacation when he reported on the first day to Belmont-Runyon. (NT 1077, 1249-50).

2016. That observation resulted in a rating of Ineffective, Brown's lowest rating on any evaluative observation. Ten days later, on May 13, 2016, Brown was issued his summative or annual evaluation which rated him Ineffective.

That rating sealed Brown's fate in that the District was bound by law to move for his dismissal, which it did. As with the 2014-2015 observations and evaluations, a fuller description is set forth below.

### **The District's Evaluation System:**

In 2014-2015 and 2015-2016, the District used a teacher evaluation system which it calls the "Framework for Effective Teaching" ("the Framework"). (DX 26, 27). The Framework is the District's version of an evaluation regime promulgated by the New Jersey Department of Education. Unless given a waiver, a State evaluation process or "rubric" is mandatory in New Jersey public schools, but sometime prior to the events material to this case the District applied for and secured a waiver allowing use of the Framework. (DX 30). As explained in the District's nearly 50-page Handbook on the Framework used in 2014-2015 and for 2015-2016<sup>8</sup>, the Framework focuses on five Competencies which the District believes "can help teachers get great results for their students" while at the same time being "aligned to the Common Core State Standards adopted by the State."

The first of the Competencies is "**Lesson Design and Focus.**"

As with all competencies, the "Lesson Design and Focus" Competency has subparts called "Indicators." The District describes these as "specific components or behaviors of the Competencies," and they are used to indicate whether or not a Competency is being met. For the first Competency, the Indicators that can be observed in a single observed lesson are:

Lesson Sequence, which is concerned with the sequence of prior, the present, and future lessons.

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<sup>8</sup> The latter version varies editorially from the former, but in all material respects they are the same.

Lesson Components, which is described as “standards-aligned and [*sic*] and move students toward mastery of an objective...aligned to essential understandings [*sic*] in the standards.

Pacing and Momentum, described as, “Teacher maximizes learning time.”

Clarity, described as, “Teacher clearly and accurately communicates content and instructions”

Two other Indicators—“Coherent Planning” and “Progression of Instruction”—are also included in the Lesson Design and Focus Competency, but are to be examined over the course of the school year. The former demands that lesson plans be “Standards-based, grade-level appropriate and reflect work toward annual student achievement goals.” The latter examines whether “Lesson objectives fit into a larger, coherent sequence that leads to student mastery of the appropriate standards.” Unlike the previous four Indicators, which are supposed to be reviewable in one observation, these latter two are to manifest themselves over the school year.

The second Competency is “**Rigor and Inclusiveness.**” This Competency’s Indicators observable in a single lesson include:

Tailored Instruction, requiring that a teacher tailors instruction to move all students toward mastery.

Questions & Tasks, which demands that a teacher provides “questions and tasks [to] ensure student comprehension and asks for application, analysis and/or synthesis.”

Responsiveness, described as a teacher’s anticipation and response “to student reactions and misunderstands by adjusting instructional strategies.”

Precision & Evidence, an Indicator that looks to whether both “teacher and students require precision and evidence in tasks and responses.”

All these Indicators of the competency are reviewable in one observation. Two others are reviewable over the course of the school year. They are:

Revisions, a reference to student which is to reveal “revisions based on teacher and peer feedback, especially revised explanations and justifications to demonstrate student movement toward mastery.

Depth of Knowledge, shown by “lesson objectives, tasks and materials [that] require students to demonstrate the following skills: Recall and Reproduction; Basic Application of Concepts; Strategic Thinking; and Extended Thinking.”<sup>9</sup>

The third Competency is entitled **Culture of Achievement**. Its indicators seen in a single lesson are:

Enthusiasm for learning, which is to be demonstrated by “students express[ing] satisfaction in solving problems and mastering new material.”

Persistence, seen when students “show persistence in confronting demanding concepts and tasks.”

Community, revealed when “Classroom norms promote positive and productive teacher-student and student-student relationships.”

Attention, disclosed when a “teacher’s strategies and routines capture and maintain student attention on learning.”

Indicators under the 3rd Competency that are reviewable over a school year are:

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<sup>9</sup> The Framework explains that the latter phrase refers to the undertaking of “an investigation or application to real world; [that] requires time to research, problem solve, and process multiple conditions of the problem or task; [and/or] requires non-routine manipulation across disciplines/content area/ multiple sources.” (2014-2015 Framework at A2).

High Expectations, which are demonstrated when a “teacher fosters a classroom culture that is consistently one of high expectations and hard work and the teacher models excellence.”

Peer Accountability, an indicator showing that “students hold themselves and their peers accountable for learning and supporting the culture of the classroom.”

The fourth Competency is **Student Progress Towards Mastery**. In this competency, there are three indicators observable in a single lesson:

Checks for Understanding, simply described as a teacher consistently checking his or her students for understanding.

Feedback, manifest when a “teacher and students give and receive timely, specific, and constructive feedback.”

Demonstration of Learning, an indicator that “students know more at the end of the lesson than they did at the start.”

Indicators of the Competency that can be seen over the school year are:

Using Data, indicated when a teacher “tracks assessment data to understand each student’s progress toward mastery and uses results to guide planning and instruction.”

Understanding of Growth, seen when a teacher “can articulate specifically (and with evidence) whether or not each student has internalized grade-level standards and, if not what s/he still needs to learn.”

Progress toward Goals, perceived when “data reflect that students are mastering the objectives of the focus area, leading toward mastery of grade-level standards.”

The fifth and final Competency is **Commitment to Personal and Collective Excellence**. Unlike the first four Competencies, the fifth is only evaluated over the school year with a rating given in the Mid-Year and Annual (Summative) evaluations. This Competency has four indicators:

Commitment to Continuous Improvement, measured by a teacher accurately self-assessing “strengths and substantive growth areas, seeks and incorporates feedback from other, and pursues his or her own growth and development.”

Collaboration, obvious when a teacher “contributes ideas and expertise to further colleagues’ and the school’s growth and incorporates productive insights into his or her own instruction.”

Communication of Student Progress, demonstrated when a teacher “communicates student progress clearly and consistently to students, families, and school leaders.”

Attendance and Promptness, which can be seen when a teacher is present and on time and has attendance that reflects a focus on student learning as a priority.

### **Ratings on the Competencies:**

As explained under the Framework each single- observation within the first four Competencies is “described”, (rated) at one of four levels: “Highly Effective”; “Effective”; “Partially Effective,” and “Ineffective”. Indicators within the first four Competencies that are only evaluated over an entire school year or half year are described (rated) as: “Always,” “Frequently,” “Sometimes,” and “Rarely.”

For the fifth Competency, which is only evaluated at middle and end of each school year, the ratings are “Exceeds Expectations,” “Meets Expectations,” “Slightly Below Expectations” and “Significantly Below Expectations.”



The Competencies and their indicators are largely evaluated on the basis of classroom observations. Under the State’s Administrative Code, all teachers generally must have three total observations. However, teachers under a CAP—as Brown was in 2015-2016—must have four. And, while, generally, tenured teachers like Brown must have at least three “short” or “long” observations, tenured teachers under a CAP must have at least 2 short observations which may be replaced by one long observation and two long observations for a total of four. Observations for all teachers may be announced in advance or unannounced, but at least one of them must be announced and at least one of them unannounced.

“Long observations’, *i.e.* those taking 40 minutes or more, result in observer ratings of all four Competencies that can be evaluated in a single lesson. “Short observations,” *i.e.*, those taking from 20-39 minutes, do not necessarily result in all Competencies being rated.

### **Scoring:**

The Evaluation Form used by the District under the Framework provides space for every indicator of every competency evaluated in a single lesson to be rated as Highly Effective, Effective, Partially Effective and Ineffective, and an overall score for each competency. The overall ratings on a given Competency are the same as for the individual indicators, that is Highly Effective, Effective, Partially Effective, and Ineffective, and each overall rating is assessed a number of points, ranging from 4 for a Highly Effective rating down to 1 for an Ineffective rating. The same scoring system is used on mid-year and summative (annual) evaluations, except the fourth Competency, which is rated 6, 5, 2, 1 for Highly Effective, Effective, Partially Effective, and Ineffective, respectively at the mid-year and end of year.

The sum of the Competencies’ overall ratings *for single class observations* yield points as follows: 15-16 points equal a Highly Effective rating; 11-14 points equal an Effective rating; 6-10 points equal a Partially Effective Rating; and 4-5 points equal an Ineffective Rating.

*Mid-year and summative evaluations* yield a maximum rating of Highly Effective with 17-19 points, an Effective rating with 13-16 points, a Partially Effective rating at 8-12 points, and an Ineffective rating at 0-7 points.<sup>10</sup> The greater number of rating points for these evaluations is due to the weight of the fifth Competency, which is rated with 1 point for Exceeds

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<sup>10</sup> Although negative overall scores are possible on a mid-year and annual evaluation, they are rounded up to 0.

Expectations, 0 points for Meeting Expectations, negative 2 points for a Slightly Below Expectations, and a negative 6 points for a Significantly Below Expectations. In addition, two additional points are given on Competency 4 for a “Highly Effective” and “Effective” rating in the mid-year and annual evaluation.

### **Brown’s Evaluation 2014-2015**

#### **Individualized Professional Development Plan**

As indicted above, all New Jersey teachers who are not under a Corrective Action Plan must have an Individualized Professional Development Plan (“IPDP”) at the start of each school year. According to the District’s form, the purpose of the IPDP is to “map out (1) goals and focus areas for the students (otherwise known as Student Growth Objectives); and (2) development area and opportunities for the teacher.” (DX 2).

Brown’s IPDP for 2014-2015 was signed by both him and Dow on September 29, 2014, shortly after Brown had been removed without explanation from his 8<sup>th</sup> Grade mathematics classes and directed to teach 5<sup>th</sup> Grade science. (NT 1039-1040).

The IPDP contained two “Student Learning Goals.” (DX 2, pp. 1-2). The first was that students would demonstrate growth in their ability to meet targeted science state standards in four critical areas by demonstrating proficiency on: science STC unit assessments, i.e. tests that accompany a published science instructional kit; district interim assessment; weekly extended constructed responses; and, bi-weekly science labs.

Although percentages of *4th grade* students were listed as having scored Partially Proficient, Proficient, and Advanced Proficient from standardized testing<sup>11</sup> (*Id.*, p. 2, 3), no actual test scores were referenced in the IPDP for Brown’s *5th Grade* students for 2014-2015. Thus, for this Goal, there was no specific growth measurement specified as a target for any of the above assessments for Brown’s students, nor did the IPDP define the degree of “proficiency” that was to be demonstrated.

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<sup>11</sup> The test was the NJASK, and the IPDP states that on the basis of scores there, 47 of the Fourth Graders scored partially proficient; 36% scored proficient; and 17% scored advanced proficient.

The Second Student Learning Goal (*Id.*, pp. 2-3), despite its nomenclature, only references “general information about the courses and students you are setting a goal for this year.” (*Id.*). The “goal” itself is not defined, although reference is made to various standards and assessment metrics to be used. Similar to Goal 1, Goal 2 lists percentages of 4<sup>th</sup> Grade students who achieved “Partial Proficiency, Proficiency, and “Advanced Proficiency” in the prior year. Notably, no specific growth measurement is specified for any of the assessments mentioned in Goal (2). Rather, the IPDP simply states the “Students will demonstrate growth in their ability to meet targeted science state standards... by demonstrating proficiency on...” Science STC unit assessments; District interim assessment-ANET; Weekly Extended Constructed Responses- (ECR); and, bi-weekly science labs.” (*Id.*, p. 2). No specific, objective scores or measurements are listed for any of these assessments, nor is there a specific, objective standard by which “proficiency,” is measured, much less “growth in their [students’] ability to meet” the state science standards.

In addition to Student Learning Goals, the IPDP briefly contained two goals for Brown as an educator. The first was that he maximize student learning time; the second was that he increase student “persistence,” *i.e.*, tendency to stay on task. (*Id.*, p. 4) No testing instruments or standards were mentioned to measure Brown’s success in meeting these goals.

#### October 9, 2014 Long Observation

Less than two weeks after completion of his 2014-2015 IPDP, Brown was given an announced, long observation by Dow. (NT 52-66; DX 3) The observation, which lasted 43 minutes, followed a pre-observation conference on October 2, 2014. Dow rated Brown on the first four Competencies, grading each of the indicators that can be evaluated over a single lesson. On three of the four Competencies, Dow rated him Effective overall, although his ratings on the various Indicators within the Competencies varied. On Competency 2 she rated him Partially Effective overall. However, her final rating for the entire observation was Effective. (DX 3).

### December 11, 2014 Short Observation

Dow was more critical when she next visited Brown's classroom on December 11, 2014 for a short observation. (DX 4; NT69-72). On that date she conducted a 23 minute unannounced visit. This time, Dow only chose to evaluate Brown on Competency 4, Student Progress Towards Mastery, and only rated the first two of the Indicators of that Competency: "Checks for Understanding," and "Feedback." She found Brown wanting in both areas, with "no evidence of teacher analysis of the assessment" under the first Indicator, and found that Brown did not provide students "with copies of their corrected assessments." (DX 4., p. 2). Instead, he attempted to assess the success of his lesson by oral responses from his students. Her overall evaluation, provided to Brown on December 22, 2014, was that he was Ineffective. (*Id.*, p. 3)

At hearing, Brown defended his performance on Competency 4 during that lesson by asserting he always checks for understanding and always provides students with feedback. (NT 1059).

### February 12, 2015 Mid-Year Review

At his mid-year review, Brown was rated only Partially Effective by Dow. (DX 5; NT 73-75). On that review Dow rated Brown on all five Competencies, notwithstanding the fact that she had not rated him on the first three Competencies since her observation of him on four months earlier on October 9, 2014. This time she found him only Partially Effective in Competencies 1 and 2, Ineffective in Competency 3, and Effective in Competency 5.<sup>12</sup> These ratings resulted in an overall numerical score of 8, amounting to an overall Mid-Year rating of Partially Effective. (DX 5, p. 5). Dow explained at hearing that part of her evaluation was based on "walk throughs," *i.e.*, short "views" of a classroom for which there is no documentation. (NT 75, 79). She also claimed that Brown did not provide evidence of "student work, notebooks, folders, things like that, which was [*sic*] not provided." (NT 77, 83). Finally, Dow testified that there were more disciplinary issues in Brown's classroom than normal for the school, including student fights and suspensions. (NT 86-87).

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<sup>12</sup> Dow's rating of Brown on this Competency in the Mid-Year Summary Review form lists the rating as "Exceeds Expectations."

The Mid-Year Review makes no mention of specific, objective, standardized measures of pupil progress. Instead, in evaluating Competency 4, Student Progress Towards Mastery, Dow speaks to deficiencies in Brown's "word wall" (bulletin board); a lack of evidence of student folders and journals; a lack of maintenance of student portfolios and "little or no evidence of mastery to students, families and school leaders." (*Id.*, p. 2). Dow also criticized Brown's feedback as not being academically focused and not tailored to students, if it exists at all and then noted that "feedback may be inappropriate." (*Id.*, pp. 2-3).

The closest the evaluation comes to specific, objective, standardized measures is Dow's answer on the form to the question "Is the teacher on track to meet the goals that were set?" Her answer was:

Students who have tested proficient and/or advanced proficient on the previous year's state standardized test (NJASK) appear to be on track to meet this year's goals. However, those students who tested on the borderline or below proficiency on last year's standardized test have been targeted in order to help them perform better in-class and on state standardized test (PARCC).

Mr. Brown must ensure teacher and student knowledge of NGSS and background information of the specific science strand to reinforce hands-on lab experience and content knowledge. (*Id.* p. 3)

In rebuttal, Brown testified that there was no post-evaluation conference following the Mid-Year evaluation and said he had "no idea" of how Dow concluded that his pupils had made "minimal progress toward meeting targeted objective as outlined in the IPDP." (NT 1061-1062). As for Dow's judgment that students were not proficient in 5<sup>th</sup> Grade Science at mid-year, Brown stated:

I would not expect students who were below proficient to be proficient by the mid-year. I think it would take a little longer along the school year continuum. (NT 1063).

He further added:

"...she's not picking up on what the students are doing and what I'm doing. (NT 1063-64).

### April 6, 2015 Long Observation

This evaluation (NT 102-106; DX 7) was done by Gina Wells, a retired educator who was never an employee of the District (NT 105-106,1245) but who was represented by the District to have been trained in the Framework and was contracted as a “peer,” *i.e.*, non-administrative, evaluator. Wells spent 45 minutes observing Brown’s classroom. She found him Partially Effective in Competency1 and Ineffective in Competencies 2 and 3. Although she did not give an overall rating for Competency 4, she noted her view of him as only Partially Effective as to the Indicators denominated “Checks for Understanding” and “Demonstration of Learning.”

Wells’ overall rating for her observation was Ineffective, and her summary comments centered on classroom behavior and activities:

The lesson was ineffective as the teacher failed to control the class, which resulted in a loss of instructional time. Although [the lesson] was a planned assessment and this resulted [in a rating of] partial effective for design and focus, there was no rigor and this became an issues as students failed to master any new learning. The assessment serves as an exit ticket, but feedback to students was minimal and there was no clear measurable objective. (DX 8, p. 3).

There is no evidence of record supporting Wells’ qualifications as an evaluator or whether she had been trained on use of the District’s Framework. However, it should be noted that Dow testified she did not rely on Wells’ observation when evaluating Brown for the year. (NT 219).

### Brown’s June 3, 2015 Short Observation

Brown’s next classroom observation was on June 3, 2015, nearly six months after his last observation by a state certified administrator employed by the District. (DX 9). This one was also completed by Dow and was based on the 27 minutes she spent in an unannounced format.

This time Dow passed on evaluating Competency 1, Lesson Design and Focus, and Competency 4, Student Progress Towards Mastery. Instead, she focused on Competencies 2 and 3.

She graded Brown as Ineffective on Competency 2, Rigor and Inclusiveness, finding him meritless (Ineffective) in each of the 4 Indicators suitable for single observation assessment in this Competency. Dow further found Brown Ineffective in Competency 3, Culture of Achievement, and graded him as Ineffective on each of the 4 Indicators that can be rated in one classroom visit under this Competency. (DX 8, p. 3). Her overall rating for the observation was Ineffective. (*Id.*, p. 4).

At hearing, Brown disagreed with Dow's claim that he was wrong to stop students from working on laptop computers as he did at the beginning of the observation, saying that that interruption was in his lesson plan and had been provided to Dow as per District policy. (NT 1066-1068).

#### Brown's 2014-2015 Annual (Summative) Evaluation

Brown's annual evaluation for the 2014-2015 school year, performed by Dow, rated him as Partially Effective. (DX 9, NT 117-122). On Competency 1, Lesson Design and Focus, he was rated Effective overall, having been judged Effective on each of the Competency 1 Indicators. However, Dow rated him only Partially Effective on Competency 2, Rigor and Inclusiveness, with each of the 6 Indicators evaluated at either Partially Effective or Ineffective. The same was true with Competency 3, Culture of Achievement, with 4 of the 6 Indicators seen by Dow as Partially Effective and 2 as Ineffective. Competency 4, Student Progress Towards Mastery, Dow evaluated as Ineffective with 4 of the Indicators rated Ineffective and only 2 rated a Partially Effective. Competency 5 was rated as Effective. (DX 9, pp. 1-4).

Dow's summary comments stated:

**Mr. Brown attempted to implement the district's science curriculum; however, several factors impeded progress with instruction: lack of classroom management techniques, lack of active implementation of planned lesson, consistent student discipline issues<sup>13</sup>,**

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<sup>13</sup> Despite observations in various observations about classroom management, only one classroom management issue was documented in 2014-2015, and that involved a single parent who complained in late October, 2014 about Mr. Brown's failure to notify him about his son's behavior in a timely fashion and further complained that Mr. Brown had not taken action about an older, female student—not in his son's grade—who allegedly harassed his son

lack of implementation of instructional strategies. Mr. Brown was compliant with submission of lesson plans and [his] attendance met the district policy. (*Id.*, p. 4).

As with the observations and ratings that preceded it, the Annual Evaluation, made no reference to specific, objective, standardized measures of achievement. The Annual Evaluation noted under Competency 4, Student Progress Towards Mastery, commented only as follows:

Limited or no feedback on student work. Feedback on work limited to “Good,” “Excellent,” etc. Authentic student work is not displayed...The lack of maintenance of comprehensive Student Portfolios prohibits the guidance of student progress and provides little or no evidence of mastery to students, families and school leaders. Students are unable to articulate what they are learning and its importance. (DX 9, p. 2).

Indeed, even comments directly addressing goals spoke only of student activities:

Most students made attempts to maximize learning time and self-monitor themselves and display self-control, still in too many cases became easily distracted by other more disruptive students. However, not all students gave in to the distractions and many were persistent and maintained their composure to show resolve in surpassing either goals or the goals set for them by the curriculum. (*Id.*, p. 3).

Such comments are somewhat at odds with the impression conveyed in classroom observations that Mr. Brown lacked control and the ability to manage his students. (NT 86-87; 110-111). Moreover, Brown testified at hearing that his students

were, pretty much, engaged most of the time. There were moments, as in all classes, but for the most part, my students were engaged and if you look in the [school wide compilation of student activities and performance] the grades proved it. (NT 1071).

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in Mr. Brown’s room continuously without Mr. Brown taking action. The parent further contended that Mr. Brown’s classroom was uncontrolled. Dow conferred with Brown on November 10, 2014 about these issues and gave advice as to management techniques and disciplinary actions.



He also disputed Dow's view that he did not use small group instruction and that his teaching was "primarily teacher directed." (See, DX 9, p. 2). In response to that last criticism, Brown maintained that otherwise students would lose focus. (NT 1072-73). He also declared that he gave homework every night and exhibited good student work on a bulletin board. (NT 1073-74).

#### Brown's Corrective Action Plan for 2015-2016

Brown's Partially Effective rating for 2014-2015 meant that as a matter of law he had to be placed on a Corrective Action Plan ("CAP") for 2015-2016. By this time he had been transferred to the Miller Street School, a move that took place without prior notice to him and only after he had reported to Belmont-Runyon on the first work day for teachers in 2015-2016 school year. He was also re-assigned to teach mathematics in both Grades 6 and 8, a change from his year at Belmont-Runyon where he taught 5<sup>th</sup> Grade Science.

The CAP (DX 10), which was signed by Brown and Miller Street School principal Armando Cepero on October 8, 2015, had two sets of Student Learning Goals for the full year.

Under the first Student Learning Goal, the CAP advised Brown that as a teacher he "should consider using performance-based assessments from the first quarter as well as results from previous year's culminating assignments and summative assessments (PARCC) and any rigorous diagnostic available for the targeted areas..." (*Id.*, p. 2). The CAP then recites that for the 15 students chosen for measurement of progress on the first Goal, their *last test* results indicated that 2 of the 15 met proficiency, 7 out of the 15 approached or were near proficiency, and 6 of the 15 were below proficient. (*Id.*, p. 3) No actual scores were indicated on the CAP so there was no way of knowing by how much each of the 15 had reached, exceeded, or fallen short of proficiency. Moreover, "proficiency" itself was undefined and was without any corresponding specific, objective, standardized score. The CAP also stated that for these 15 students various assessments or metrics could be used to demonstrate proficiency, but again neither proficiency nor the score corresponding to proficiency was stated. (*Id.*, p. 3).

The CAP's stated "goal" for these 15 students was thus:

Goal for 15 students: 12 out of 15 (Meets/Proficient); 3 out of 15 (Approaching/ near Proficient).

Goal of 75% Proficiency for 15 students. (*Id.*, p. 2-3).

The CAP does not indicate on which of the more than half dozen tests mentioned proficiency would be demonstrated. Moreover, notwithstanding that 75% of a group of 15 students (11.25) would result in a fractionalized student, there is no indication in this goal as to what score on what assessment would constitute proficiency or what range of scores would define “approaching” proficiency.

The CAP also contains a second Student Learning Goal, this one also for 8<sup>th</sup> Graders. (DX 10, pp. 3- 4). The specific mathematical skills addressed in this goal are the same as the specific mathematical skills addressed in the first Goal,<sup>14</sup> and the same baseline assessments and in-year and end-of year “assessments/metric[s]” are referenced. (*Id.*) The only difference is that this Goal, which at first stipulates only 15 students, is set at 10 out of 17 students meeting proficiency, 4 of 17 “approaching” or “near” proficient, and that there should be “an average of 75% percent proficiency for 17 students. (*Id.*, p. 5). There is no explanation for the disparity in the second Goal between 15 students, as originally stipulated, and 17 as later stipulated. And, as with the first Goal there is no definition of proficiency. Nor is there any specific, objective, standardized test for determining proficiency or the range of “approaching or near proficient.” Rather, there is the same array of tests as was listed for Goal 1 but with no one test chosen for objective measures of student growth. Finally, there is no explanation of what is meant by an “average of 75%” unless the Goal contemplates the use of more than one of the tests<sup>15</sup> referenced in the CAP and an averaging of “percents” of proficiency from each, assuming a “proficient”

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<sup>14</sup> The specific skills contained in both Goals were “Expressions and equations Work with radicals and integer exponents...Know and apply the properties of integer exponents to generate equivalent numerical expressions. For example,  $32 \times 3^{-5} = 3^{-3} = 1/33 = 1/127$ ...use square root and cube root symbols to represent solutions to equations of the form  $x^2=p$  and  $x^3=p$  where  $p$  is a positive rational number...evaluate square roots of small perfect squares and cube roots of small perfect cubes. Know that [unreadable] is irrational.”

<sup>15</sup> The tests, deemed “assessments” or “metrics,” are the same for each of the two Goals: Math in Focus unit assessments; Measured Progress Interim Assessment; Weekly Extended Constructed-Responses-(ECR); Bi-weekly math labs; MIF; Chapter Assessments; Unit Plans; Year Long Instructional Plans; Unit Assessments; Pre-tests; Mid-Year; End of Year; ACT. No specific, objective, standards are prescribed for determining student growth or the degree of student growth in any of these measurements.

score on each test is even designated. And, the problem of a fractionalized student persists from Goal One, since 75% of 17 (12.75) is not a whole number.

The CAP also sets growth areas and assessments for Brown as a teacher in all five Competencies and lists various assessments for measuring Brown's growth or lack thereof for the year in each. (*Id.*, pp. 6-8).

In testimony, Cepero explained that he treated Student Growth Objectives as about 10% of a teacher's annual evaluation (NT 371) and that "75 percent is always a standard that we used." (NT 373)<sup>16</sup>. When asked what 75 percent of students were supposed to achieve, Cepero explained it meant "grade level." (*Id.*). Cepero did not define "grade level" in terms of specific scores on any test and did not specify a particular test or tests in which a certain score meant a child had reached "grade level." Later in his testimony, he said there were various assessments on which baseline could be assessed (NT 382) but did not specify any particular one. Still later he referenced a Baseline Assessment test, inferring that it was a particular test (NT 388) but says that end of year progress would be based on "data" to determine if grade level proficiency had been met. Again, no specific test or collection of data is mentioned and no specific achievement score on that test or data was defined as indicating proficiency.

Testifying at hearing, Brown said that he had no or only a vague idea what the Baseline Assessment was. (NT 1081-1082, 1086). He further said that the metric that was to be used to determine if 12 of 15 students met proficiency (NT 1084) was unclear or where the origin of that particular goal could be found. (NT 1085). Brown repeated the same ignorance as to where the goal of 75% proficiency for 17 students came from. (NT 1088-89). Moreover, Brown said he had no idea of what the acronym ACT, presumably another testing instrument, meant. (NT 1091).

#### October 28, 2015 Long Observation

Brown's first observation during the 2015-2016 school year came about 3 weeks after his CAP had been formalized. (DX 11). This was a 50 minute announced visit by Cepero who

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<sup>16</sup> This testimony was corroborated by Carla Rahner Venezia. (NT 939).

testified he had told Brown beforehand what he would be looking for. (NT 423). Cepero's comments on the observation form itself were alternately descriptive, critical, and exhortative. In fact, Brown alleged at hearing that Cepero told him, "you are almost there, you are at a partial, but you are almost there as far as becoming effective." Brown said he thought he had done "great" during the observation period. (NT 1098, 1099).

Under the observation form's section entitled "Assessing Teacher's Progress Moving Forward," Cepero listed the following areas of measurement:

Measured Progress Interim Assessment Results; Unit Assessments: Pre-tests, Mid-Year, End of Year; Implementation of Standards for Mathematical Practice; Utilization of CPA (Concrete, Pictorial, Abstract); Bi-weekly Performance Based Assessments PLC<sup>17</sup> Meetings; Grade Level Meeting' Implementation of Restorative Practices with focus on Restorative circle. Affective question/statements, impromptu conversations, improving time on task; Instructional Rounds; Informal/Formal Observations; Implementation of Modeled learning labs during (PLC) vertical; Participation in Critical Friends Consultancy providing dilemma for feedback and support. (Id., p. 5).

Whichever of these are actual objectively scored assessments, *e.g.* "pre-tests", rather than activities such as "Participation in Critical Friends Consultancy," none has a specific, objective standard by which student learning is assayed.

The observation form was signed November 13, 2015 by both Cepero and Brown and was accompanied by the District's form for evaluating the Framework Competencies. On the form, Cepero marked Brown's performance in Competencies 1 (Lesson Design and Focus) and 3 (Culture of Achievement) as Effective overall, but graded Competencies 2 (Rigor and Inclusiveness) and 4 (Student Progress Towards Mastery) as only Partially Effective. On the basis of that assessment, Cepero rated Brown's performance as Partially Effective<sup>18</sup>.

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<sup>17</sup> Professional Learning Communities, *i.e.* groups of teachers of the same or similar subjects within the Miller Street School

<sup>18</sup> Consistent with one of Cepero's recommendations in this evaluation, Brown later observed Miller School Math coach Michelle Albruzzese model "work stations" and small group instruction twice sometime after the Christmas-New Year's break in 2016. (*See*, DX 20, 2/26/16 Memo of Albruzzese to Brown). Also, consistent with a recommendation from Cepero, Brown visited a middle school math teacher to observe a model lesson and best practices on February 19, 2016. (NT 1103-1104; DX 20, 2/19/16 memo of Albruzzese to Brown).

Explaining that he disagreed with the overall rating of Partially Effective, Brown maintained that of the 26 students in the class observed only one or two were unclear as to how to complete the lesson. (NT 1099). He also said that contrary to Cepero's comments, he works personally with students, averred that he had evidence of the lesson's effectiveness through a handout which he distributed (NT 1100), and claimed to have tailored instruction to student needs. (NT 1101).

It should be noted that prior to the October 28, 2015 observation, Cepero had drawn negative conclusions about Brown's work. At hearing Cepero testified that he wrote a memorandum and an email to Brown about his concern with Brown's bulletin board outside his room and Brown's use of YouTube for whole group instruction. (DX 20, pp. 3, 4). (NT 409-410, 412, 415). Cepero also testified that parents had complained to him about not receiving notices that their children were failing in Mr. Brown's room. (DX 20, p. 7; NT 415).

#### January 27, 2016 Short Observation

Brown was next observed in late January 2016 by Miller Street School Vice Principal Karla Rahner Venezia ("Rayner") in an unannounced<sup>19</sup> session of 20 minutes. (DX 12). In the observation form's section "Assessing Teacher's Progress Moving Forward," Rahner repeated the same things Cepero had listed under that section in his October 28, 2015 observation report. Like Cepero, Rahner made no reference to any specific, objective measures by which Brown's progress could be quantified. Both Rahner and Brown signed the evaluation form on February 3, 2016.

On the Framework form attached to her observation form, Rahner graded Brown as only Partially Effective in Competencies 1 (Lesson Design and Focus) and 2 (Rigor and Inclusiveness), and did not rate him at all in any of the other Competencies. Given that, her overall rating of Brown for this observation was an unsurprising Partially Effective.

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<sup>19</sup> In her hearing testimony, Rahner said that she usually gives teachers a "heads up" regarding even unannounced observations, in that she will tell them she will be in their classrooms sometime soon. (NT 950).

Testifying about her visit, Rahner elaborated on her written judgments (NT 865-870, 872-877) and specifically commented that she did not see work stations (NT 872), the utilization of Classdojo (NT 874-857) and the MyHRW program (NT 873).

In rebuttal at hearing, Brown stated that he did not have access to the MyHRW program Rahner noted he should be using. (NT 1109). He also claimed to have many classroom activities and stations that Rahner implied he did not have or—in the case of Classdojo—he had not been trained on them. (NT 1110-1113, 1119-1120).

#### February 9, 2016 Mid-Year Evaluation

Brown and Cepero had a mid-year evaluation conference on February 5, 2016, four days before they signed Brown's Mid-Year Evaluation. (DX 13) Cepero's overall rating of Brown at the mid-year point was Partially Effective. This result stemmed from Cepero's Mid-Year ratings of Partially Effective for Competencies 1 (Lesson Design and Focus), 2 (Rigor and Inclusiveness), and 4 (Student Progress Towards Mastery), and Effective Ratings for Competencies 3 (Culture of Achievement) and 5 (Commitment to Continuous Improvement). The Partially Effective rating in Competency 1 (Lesson Design and Focus) differed from the rating Cepero had given Brown on that Competency when he evaluated him in October 2015. It did, however, agree with Rahner's rating in her February 9, 2016 20-minute observation. As to the Partially Effective rating on Competency 4 (Student Growth Towards Mastery), Cepero's mid-year evaluation cited no more actual data from objective testing than his October long observation rating did. That is—zero.

Nevertheless, Cepero testified that Brown's mid-year evaluation presaged his annual rating. Cepero testified that at the time he evaluated Brown for the Mid-Year he did see strengths in some of the Competencies:

I thought that at that time with the evidence that's being reviewed, that he was in danger of receiving a partially effective through the year..." (NT 436).

Cepero went on to state:

It again goes back to lesson design and focus, planning, the clarity of instruction again and then moving into rigor, into rigor and inclusiveness, looking at tailored, the tailored instruction, the task, the questions. I mean this really embodies what was being seen, what was being demonstrated by Mr. Brown, provisions in evidence, revisions, depth of knowledge. (NT 436).

Brown took exception at hearing to many of Cepero's Mid-Year evaluation statements, claiming that he did have various activities and centers (stations) in his classroom (NT 1119-20, 1121-22) and that he did communicate pupil progress regularly to both pupils and parents through grades and warning notices which were on a computer system called Power School that was available to parents. (NT 1123-24, 1126, 1131, 1138).

#### April 6, 2016 Long Observation<sup>20</sup>

Two months after his Mid-Year Evaluation, Brown was observed by Rahner for 40 minutes teaching while he taught 6<sup>th</sup> Grade mathematics. (DX 14). That observation was unannounced. A day earlier, Cepero had sent Brown a memo about a meeting they had concerning tailored instruction, in which Cepero criticized Brown for "your inability to provide strategies that reflect knowledge of students" and for the lack of "rigor" in Brown's teaching. (DX 20, 4/7/16 memo from Cepero to Brown.)

Rahner's observation was unannounced, involved a class of 14 pupils, and the resulting evaluation was discussed by Rahner and Brown on April 18, 2016. On this visit, Rahner rated Competencies 1 through 4. On the first Competency (Lesson Design and Focus) Rahner judged Brown to be Partially Effective, in part because in her view he only partly connected the lesson she observed with previous learning, unit objectives, or long term goals. Specifically she found, "Mr. Brown does not connect the lesson to unit objectives, or long term goals." She also criticized him for allowing students too much time (20 minutes) on a "Do Now," a segment of the lesson designed to review and reinforce previous material as a warm up for the present lesson which the District believed should only last up to 10 minutes. Brown was viewed as only

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<sup>20</sup> This observation is variously referred to occurring on April 6, 2016 (NT 1258) and April 7, 2016 (DX 14, p. 1). The former date is probably correct because the record reflects an observation by Bonnie Pachesa on April 7, 2016. (DX 17).

Partially Effective on the first Indicator under Competency 1 and “Partially Effective” on the other three.

On Competency 2 (Rigor and Inclusiveness), Rahner evaluated him again as “Partially Effective,” having rated him as such on each of the four Indicators for that Competency.

On Competency 3, Rahner again saw Brown as only Partially Effective, although she did rate him as Effective on the third Indicator (Community) of the four rated indicators under that Competency. The three others were evaluated as only Partially Effective.

Once more, Brown was rated Partially Effective on Competency 4 (Student Progress Towards Mastery) without any reference to specific, objective, or standardized testing or any measurement at all. Rather, Rahner merely criticized Brown for only checking on student understanding by moving around the room, and noted that he did no whole class checks. She also made observations, criticisms, and offered advice in the Competency. In summary, Rahner was focused on actions Brown did, or should have done, or could do in the future rather than on evaluating whether his pupils were actually gaining in knowledge and skills as demonstrated by objective testing. Ironically, as in his other observations and evaluations done by the District, Rahner lists such testing. Under a direction in her summary notes that asks for a description of “how a teacher’s progress and growth in these identified areas will be measured,” Rahner lists “Measured Progress Interim Assessment Results; Unit Assessments: Pre-test; Mid-Year; End of Year; and, Bi-weekly Performance Based Assessments. As in the District’s other evaluations, no levels of performance on these assessments are defined as satisfying the goal of “Student Growth Towards Mastery” nor are any such levels, *e. g.*, “proficiency,” precisely prescribed by the District. (DX 14, p. 5).

At hearing, Rahner said that Brown had not followed up with her January 2016 suggestion to use work stations (NT 883) and did not use a structured “mini-lesson” to assist students. (NT 884). She also expressed dissatisfaction with the late start of the lesson, which commenced some 20 minutes after the official start of the class period. (NT 881).

Rebutting those criticisms, Brown testified that he had students who were “running behind,” that some of the students arrived late for the class, that the class started about 15 minutes late, and that he did have an appropriate reference chart on a wall in his classroom that, while designed for 8<sup>th</sup> Grade pupils, had material germane to the Sixth Grade class he was teaching during the observation. (NT 1142-44, 1258, 1260). Once again, he said, he did not use



Classdojo (for which Rahner had criticized him) because he still had not been trained on that program. (NT 1142-45).<sup>21</sup>

#### April 7, 2016 Long Observation

Only one day after Rahner’s long-term observation, Brown was again observed, this time by Bonnie Pachesa, a “Peer Evaluator” who is or was employed in the New Haven, Connecticut school system. (DX 17; NT 441, 444, 446). Pachesa made three visits to the District relevant to this case: one for a pre-conference, one to observe Mr. Brown, and one for a post-conference which was attended by Cepero and Mr. Brown. Although not certified to evaluate professional educators in New Jersey public schools and at no time employed as a teacher or administrator in the District (NT 444, 446, 448), she observed an 8<sup>th</sup> Grade math class consisting of 10 students over a 40-minute interval. In an unsigned summary of her observations, Pachesa stated: “The lesson lacked focus and the components necessary to support and challenge student [*sic*] to think at a high level.” (*Id.* p. 5). Pachesa rated all 4 Competencies that she examined as less than Effective, with Competencies 1 (Lesson Design and Focus) and 4 (Student Growth Towards Mastery) as Ineffective and Competencies 2 (Rigor and Inclusiveness) and 3 (Culture of Achievement) as Partially Effective. She did not rate any of the Indicators for any of the 4 Competencies above Partially Effective. As to Competency 4, Pachesa, as with each of her co-evaluators, noted no data whatsoever. Instead, she criticized Brown for not checking student understanding and further contended that “[w]ithout a clear objective it is difficult to assess whether or not students acquired new learning during this lesson.” (*Id.* p. 3-4). At the same time, Pachesa stated “an objective was posted” for the lesson,” but found fault that Brown’s mini-lesson, apparently offered at the beginning of the period, was focused on something different. (*Id.*).

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<sup>21</sup> Brown explained he had been attending a model lesson at a Middle School when instruction in the Classdojo program was given. (NT 1144).

1149). Brown complained that Rahner took the incident “out of context.” (*Id.*). He also contended that he did use some of the teaching tools Rahner said he should be using, although he agreed he did not use them in that particular lesson. (NT 1149-1150).

#### May 10, 2016 Annual Evaluation

Brown’s Annual Evaluation for the 2015-2016 school year was completed by Cepero, who had observed Brown for exactly 50 minutes more than six months earlier. Using all 5 of the Competencies, Cepero gave Brown a Partially Effective on all.

On Competency 4, Cepero stated:

Mr. Brown’s 8<sup>th</sup> Grade math scores for interim 1 demonstrated 0% (0/26) students scored Acceptable; 34.6% (9/26) students scored Needs Review; and 65.4%...scored Unacceptable.

Mr. Brown’s 8<sup>th</sup> grade math scores for Interim 2 demonstrated 9.4% (3/32) students scored Acceptable; 31.3% (10/32) students scored Needs Review; and 59.4% (19/32) students scored Unacceptable.

Interim 3 demonstrated 0% growth.

Cepero contrasted those results with Brown’s CAP Goal for Student Performance which, as stated above, called for 12 of 15 students to meet Proficiency and 3 of 15 students to approach or be near proficiency. There is no explanation as to the difference between the number of students to be measured in the CAP and the number actually measured on the Interims cited in the Annual Evaluation. And, just as in the CAP, there is no explanation as to how the number of students to be measured was chosen. Clearly, in 2015-2016 Brown taught more than 26 pupils used in the Annual Evaluation and the 15 cited in the CAP.

In any event, Cepero testified at hearing that Brown himself “was not able to demonstrate or internalize growth for his eight grade students. He presented goals for his sixth grade class based on *last year’s* evidence and was not able to present evidence on identified goals in his

CAP for his eight grade classrooms.” (Emphasis supplied). (NT 457) Cepero testified that the evidence Brown gave to him “had no relevance” to his 2015-2016 growth goals. (NT 458).

Cepero was just as critical of Brown in the Annual Evaluation on Competencies 1-3 and 5. As to the first, Cepero wrote that “observations and walkthrough<sup>22</sup> evidence does not reflect that ‘today’s learning builds on previous learning and prepares students for future learning.’” He also faulted Brown for having lesson objectives that did not “fit into a larger, coherent sequence that leads to student master of the appropriate standards.” (DX 16, p. 2).

Turning to Competency 2 (Rigor and Inclusiveness), Cepero found Brown wanting in regard to rigor and tailored instruction and further blamed him for not requiring students to demonstrate...skills to meet or exceed grade-level mastery.” (DX 16, p. 2). In Competency 3 (Culture of Achievement), Cepero determined that Brown did not use a classroom management website known as Classdojo, which bills itself as an assist to “happy classrooms” and claims use in about 90% of school classrooms. Cepero criticized Brown for this and for not utilizing “restorative circles” properly, despite Pachesa’s note in her April 7, 2016 observation that Brown had used a restorative circle successfully to quell an argument between two boys. (*Id.*, p. 2; DX 17, p.3).

As to Competency 5 (Commitment to Personal and Collective Excellence), Cepero only rated Brown as Partially Effective, despite Brown’s outstanding attendance record of missing only 2 days in the 2015-2016 school year for illness and being tardy on two occasions. Brown reached this rating because of his conviction that Brown did not “accurately self-assess strengths and substantive growth areas, and [did] not [seek] and/or incorporate feedback from others, and [did] not pursue his...own growth and development.” (DX 16, p. 4). Similarly, Cepero found that Brown did not “communicate student progress clearly and consistently to students, families, and school leaders...students that [were] below and/or approaching grade level expectation did not receive adequate tailored, differential instruction in work stations. (*Id.*, p. 4.)

Brown and Cepero met to discuss the Annual Evaluation, and in his testimony Brown claimed Cepero offered him a chance to supply more information and promised to change the overall rating from Ineffective to Partially Effective. (NT 1155). That additional material,

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<sup>22</sup> Evidently, brief observations of Brown’s teaching that did not qualify as “short” or “long” observations. No documentation of the walkthrough observations was provided at hearing.

according to Brown, was to supplement Competency 5, and according to Brown Cepero told him, “I want you to fix Competency 5, and if you fix [it] then you’ll be all right for the annual.” (NT 1265). Brown said that he then prepared a supplement in conjunction with Albruzzese. (NT 1266; RX 1). Brown further alleged that he provided that information to Cepero by placing it on Cepero’s chair when he was away from his office. (NT 1156, 1266-67).

Brown additionally testified that Cepero had data on student progress for Brown’s 8<sup>th</sup> Grade students, as required in the CAP. Brown, while maintaining that he “supplied it,” averred that Cepero had it available for himself through the Power Teacher computer program where the data was filed and to which Cepero, as Principal, had access. (NT 1270-1272).<sup>23</sup>

Cepero, however denied that he ever promised to change the rating. (NT 463). Instead, he testified, he returned questions that Brown needed to answer with data that he needed to complete as to Competency 5. (NT 463-464). Cepero said that if he had the data, he would be able to justify giving Brown 2 additional points on his overall annual evaluation which would have moved him from an Ineffective rating to a Partially Effective Rating. That enhancement, in turn, would have given the District the option not file tenure charges under the TEACHNJ Act. (NT 465, 467).

Unfortunately, Cepero testified, the additional material Brown supplied to him was insufficient to change his mind. In Cepero’s view Brown did not put in the effort that was needed. (*Id.*) Cepero further said that although Brown claimed to him that all of his students had achieved the necessary benchmark, Cepero rejected the claim because despite getting two chances to prove that assertion “[Brown] wasn’t able to articulate with evidence.” (NT 471).

Focusing on Competency 4, Student Progress Towards Mastery, Brown testified to his doubts about whether all of the testing material for his students was finalized by the time of his Annual Evaluation (NT 1151-1152). He also denied having knowledge of what Cepero meant when he found that many of Brown’s students did not achieve constituted “acceptable” test results. (NT 1152, 1174). In response to Cepero’s accusation that Brown had not provided data about his students’ achievements, Brown said that all assessments scores were available to

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<sup>23</sup> Brown additionally supplied data for his 6<sup>th</sup> Grade students. (NT 1275).

Cepero on the Power School program, to which Cepero had access and that had Cepero asked him to personally supply data he would have. (NT 1153-1154).

**Recommendation for Termination:**

As a result of being rated Partially Effective two consecutive years, Brown was recommended for termination to the Superintendent of Schools, Christopher D. Cerf. That recommendation, in the form of a memorandum dated June 17, 2016 from Cepero to Cerf, stated that based on the observations, Mid-Year, and Annual ratings, “the evidence shows a consistent pattern of partial and ineffective teaching” across all competency areas. The recommendation was accepted and approved by the District and the evidence was found by the Commissioner of Education to be proper and sufficient enough to sustain Brown’s discharge.

**Opinion:**

**Arbitral Authority Under TEACHNJ**

Although governed by the rules of the Labor Arbitration Rules American Arbitration Association, NJSA18A:6-17.1, arbitrations of disputes over the sufficiency of tenure removal charges are restricted under NJSA18A:6-17.2 to determining *only* whether:

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

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

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

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

Even where one of the four conditions listed above exists, an arbitrator can only overturn the District's decision if that condition "materially affected the outcome of the evaluation." (NJSA 18A 17.2 b).

Thus the standard labor arbitration principle that an arbitrator reviews a case *de novo* with full authority to find whether a discharged employee was in fact delinquent and then (unless restricted under the relevant labor contract) whether the delinquency merited the punishment imposed does not apply here. Instead, an arbitrator acting under TEACHNJ is reviewing the tenure dismissal process, giving discretion to the findings of the teacher's evaluators as to their determination of the quality of his or her classroom performance. (NJSA 18A:6-17.2 c).

### Brown's Classroom Observations

Although Brown was judged on his overall performance as seen by administrators, his two Annual Evaluations were obviously largely influenced by his observed classroom performance both in formal long or short evaluations and by quick administrative observations of his classroom, known as "walk throughs." Although Arbitrators are not empowered to second-guess evaluators about the "quality of an employee's classroom performance," the legislature clearly intended the exercise of arbitral judgment over whether "the District's actions were arbitrary or capricious" in the overall evaluative process. NJSA 18A:6-17.2 a (4).

To some extent that would seem to include conclusions about classroom performance where an arbitrator finds positive evidence that a District's evaluations were so far from an accurate reflection of reality they amount to an arbitrary and/or capricious assessment. The same would be true were an arbitrator to find the observers' judgments were factually accurate but the inferences they drew from those findings were patently illogical.

That is not the case here. Nothing in the record persuades me that Brown's classroom observers were wrong, let alone blatantly wrong, in their observations of his performance or formed irrational conclusions from their observations.. Although Brown attempted to rebut their findings by claiming the observers simply missed certain aspects of his teaching, or that circumstances militated against a good performance when he was observed, or that he lacked training on some programs and equipment that evaluators thought he should use, I am unpersuaded that any of the observations were capriciously or arbitrarily graded.

The District's observers all credibly elaborated and explained the findings they had recorded on their observation forms directly following each and every one of the classroom monitoring sessions such that, even were I to doubt their conclusions and wrongfully exercise my own judgment over Brown's observed performances, the evaluations themselves would fall far short of the arbitrary and capricious standard. Indeed, at hearing I was impressed with the thorough knowledge the observers demonstrated about the Framework, the Competencies, the Indicators, and the evaluators' adroit ability to tie what they credibly said they found in Brown's classroom performance to the evaluation system. Moreover, a careful review of the evaluations, including the two mid-year and annual evaluations do not disclose any material mistakes of fact.

However, that does not mean that the "arbitrary and capricious" standard has no more bearing on this case. It certainly does if the District violated any of the statutory criteria for reversal.

#### Applying the Statutory Criteria

##### Unlawful considerations, NJSA 18A:6-17.2 a 3:

An analysis of NJSA 18A:6-17.2 a 3 turns up not a whiff of nepotism or an illicit political, racial, ethnic, anti-union or other unlawful ground as the motive in evaluating Brown. Indeed, the record discloses that Dow, the first administrator of record to rate him, actually invited Brown to come and work with her at Belmont-Runyon, the school where he served in 2014-2015 after the building at which he and Dow had worked the previous year (Maple Avenue) closed. She did so, even though she believed there were things "he needed to work on" and areas in which she thought he was "deficient." (NT 253). As for Rahner, it is true she had been instrumental in removing Brown from his 8<sup>th</sup> Grade Math duties at Belmont-Runyon, but there is no evidence she had objections to his joining the faculty at the Miller Street School in 2015-2016 where she was serving as Vice Principal.

Nor is there any evidence that Cepero, Brown's other antagonist in this matter, was prejudiced against him. To the contrary, the record is clear that Cepero, beside his other duties as Principal at Miller Street School, secured additional help for Brown by having Math Coach

Abruzzese work with him, having him attend a model lesson at another school, and encouraging him to provide more positive material that might help boost his 2015-2016 annual evaluation rating from Ineffective to Partially Effective—a change that could justify deferring tenure charges against Brown for another school year. In sum, I find no evidence of any type of unlawful animus against Brown at either building in either year.

Mistake of Fact in the Evaluation, NJSA 18A:6-17.2 a 2:

As stated above, I am without jurisdiction generally to judge the evaluators' quality of Brown's classroom instruction. (NJSA 18A:6-17.2 c). Therefore I am restricted in my authority to find there is a "mistake of fact" (NJSA 18 A:6-17.2 a (2)) in the evaluations themselves even were I convinced mistakes were made.

That is not to say, however, that the evaluations do not contain errors in their design or implementation, a point that will be explored below. If there are, and those errors amount to a substantial lack of adherence to the legislatively mandated evaluation process under NJSA 18A:6-17.2 a (1), the District's tenure charges must be dismissed. Further, a patently faulty design or implementation of the evaluation process opens the matter to a finding that the process itself was "arbitrary and capricious" under NJSA 18A:6-17.2 a (4).

Substantial adherence, NJSA 18A:6-17.2 a (3);

and

Arbitrary and Capricious, NJSA 18A:6-17.2 a (4)

New Jersey legislation mandates that teacher evaluations "incorporate(s) analysis of multiple measures of student progress and multiple data sources." NJSA 18A:6-119 3. In the Framework, the District posits these measurements, called Student Growth Objectives ("SGO's"), under Competency 4, Student Growth Towards Mastery. Larisa Shambaugh, Chief Talent (Personnel) Officer for the District, explained at hearing that an SGO is to be "specific and measurable," consistent with the requirement of NJAC 6A:10-4(a) (2). Logically, this can only mean that test scores from a student's or designated group of students' immediately prior school year in the subject at hand are measured against test scores for the same student or



students in that subject from the year of the evaluation. (NT 308-310; 332-333). According to Shambaugh, each teacher is required to have two SGO's in his or her IPDP or CAP (NT 281-283) and each SGO should include a goal that aligns with where the students should progress.

She further averred that an SGO is to be specific and measurable and is ascertained when a standardized test score or scores is or are taken from the previous school year and compared to the same test outcome or outcomes in the year of the teacher's evaluation. (NT 308-310; 332-338). Shambough testified that the District's Framework had been approved by the New Jersey Department of Education for all years material herein. (NT 293-298). Under the approved Framework, the District is permitted to incorporate the SGO's in the Framework instead of maintaining them separately. However, the SGO requirement for teachers was not waived for either IPDP's or CAP's.

#### SGO's and Brown's 2014-2015 IPDP and Annual Evaluation

For 2014-2015, Brown's IPDP references two Goals for Student Performance. The first calls for students to demonstrate growth in their ability to meet targeted science state standards in four critical areas and lists what appear to be four testing sources. The second Goal appears to be for students to be able to "describe how one population of organisms may affect other plants and/or animals in an ecosystem." The assessment metric for this goal appears to be the NJASK test but in the 2014—not the 2015 version. Moreover, the IPDP does not specify how the attainment of growth is to be ascertained. Whether all assessments listed are to demonstrate growth, or growth need only be demonstrated on some of them, no degree of growth is specified. Nor is it clear what the specific reference or starting point for growth is on the 4<sup>th</sup> Grade NJASK test which was given to pupils in the preceding school year. Still more vexing is which or how many of Brown's 5<sup>th</sup> Grade students in the 2014-2015 are expected to achieve whatever the designated growth is. All of them? A random sampling? The IPDP simply does not say.

The IPDP's ambiguity is reflected in Brown's annual evaluation for 2014-2015 on which he was found to be only Partially Effective. The evaluation poses the question of what student learning goals were set during the creation of the IPDP. It does not ask what growth was shown on specific objective measurements. The answer given in the evaluation is through descriptions

of goals for student behaviors: “students will consistently maximize time and self-monitor to meet or surpass objective....students persist confronting demanding concepts and tasks without reliance on the teacher.” These responses do not remotely relate to actual achievement measured through some objective assessment of what students actually know or have learned.

Moreover, the annual evaluation inquires “what progress did students demonstrate specifically around the learning these [*sic*] student learning goals. Please describe what metrics were used to assess progress of these goals?” Here is Dow’s answer:

Most students made attempts to try to maximize learning time and self-monitor themselves and display self-control, still in too many cases became easily distracted by other more disruptive students. However, not all students gave in to the distractions and many were persistent and maintained their composure to show resolve in accomplishing or surpassing their goals or the goals set for them by the curriculum. (DX 9, p. 3).

With all respect to Dow and the District, the above does not remotely address actual progress toward student growth on either of the Goals, let alone student growth as determined by specific and measureable data. Instead, it reflects repeated characteristics of the District’s evaluative efforts in which teacher and student *activities* are surrogates for student *achievement* and vague and variegated criteria, subjectively evaluated by administrators, are relied upon instead of hard data. Such ambiguity in growth objectives and irrelevancy in evaluations is directly counter to the legislature’s objectives of improving student growth in knowledge and of evaluating teachers through that growth.

This fault in the rubric the District applied to Brown substantively and materially affected the outcome of Brown’s annual evaluation for 2014-2015 and obstructs any finding that the District has met the statutory criteria for tenure charges, as required by NJSA 18A:6-17.2 d; NJSA 18A:6-119 3 (definition of “evaluation” includes “analysis of multiple measures of student progress and multiple data sources”). On that ground, the District’s decision to revoke Brown’s tenure and termination must be reversed because he did not have a valid annual evaluation for 2014-2015 and therefore cannot be found to have been rated less than Effective in two consecutive school years.

### SGO's in Brown's 2015-2016 CAP and Annual Evaluation

To a great extent, the above conclusions about Brown's 2014-2015 annual evaluation apply to his 2015-2016 evaluation.

Unlike the previous year's IPDP, Brown's CAP for 2015-2016 attempts to establish data by which student growth on the two purportedly Student Goals can be determined. (DX 10, pp. 2-3) The CAP, prepared by Cepero with what I find to be Brown's consent, sets those goals for Brown's 8<sup>th</sup> Grade mathematics students. The goals are not different in that both of them set a mark of 75% of a group of students achieving "proficiency" with the remainder "approaching or near proficiency." Although it is clear from the CAP and testimony by both Brown and Cepero that Brown's 2 sections of 8<sup>th</sup> Grade math pupils made up the pools of student subjects to be judged, it is not clear what constitutes "proficiency." Several tests (as well as non-tests such "Year Long Instructional Plans" and "Unit Plans") are listed for the "assessments" or "metrics" of both goals, but the CAP does not specify what score on any of them would constitute proficiency or whether whatever tests were to be used define a certain score as representing proficiency. The same is true for the standards "approaching proficiency" and "near proficiency." And, although the baseline test instrument for both goals is identified in the CAP as the "PBA" post-test parts 1 and 2," there is no stated nexus between the baseline results and results achieved on the "metrics" or "assessments." In other words, there is no designation of growth other than various degrees of "proficiency," and—as mentioned above—no indication of what actual score on any test would constitute proficiency or proximity to it or that it was being "approached."

The CAP also has a purported "goal for student performance" (DX 10, p. 5) which also implies a result. As such, it is different from "student growth objectives," which imply on-going, dynamic vectors of improvement. The CAP's goal for student performance is identical to the Student Goals in terms of percentages of students who achieve some degree of proficiency.<sup>24</sup> For "student performance" that mark is set at 75% for a group of 15 students, and 75% for the second group of 17 students. (DX 10, p. 5).

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<sup>24</sup> In effect there was really one—not two—student growth goals in the CAP. This is contrary to Shambaugh's testimony that each teacher in the District is to have two student goals in his or her IPDP or CAP each year.

Besides not being a student *growth* goal, this goal of degrees of proficiency is not linked to any specific, objective score on any given test. That requirement for an annual evaluation is clear from NJSA 18A:6-123 (2) which requires that a district's evaluation rubric must be based, at least in part, "on multiple objective measures of student learning that use student growth from one year's measure to the next year's measure."

Further, there is no specification as to (a) which of Brown's students were to be included in the pool or 15 or 17 students; (b) how those students were to be selected; and (c) whether the students selected were to come from both of Brown's two sections of 8<sup>th</sup> Graders or only one. Even if it is assumed that Cepero or Brown himself could, at the end of the year, cherry pick which students would be included for measurement, such an assay could in no way be considered an "objective measure of student growth" which is an avowed goal of the TEACHNJ Act. (NJSA 18A:6-118 b).

In Brown's Annual Evaluation under Competency 4 (DX 16), Cepero refers to Brown not meeting growth standards because according to Cepero's credible testimony, on Interim 1 testing during the 2015-2016 year Brown's scores showed that none of his 8<sup>th</sup> Grade students scored "Acceptable," 9 of 26 scored "Needs Review," and 7 scored "Unacceptable." Scores on Interim 2 testing showed 3 of 32 students at Acceptable; 10/32 students scoring Needs Review; and 19 of 32 scored Unacceptable. (DX 16, p. 3).

Absolutely no explanation is offered for why (a) end of year (Interim 3) scores were not included in the evaluation; (b) the number of students scored was the sum of the 15 students and 17 students Cepero had set in the CAP for testing; (c) how the categories of achievement changed from a standard of "proficiency" on the CAP to a standard of "acceptability" on the annual evaluation; or, (d) how the two standards are related. Further, whether the 75 % "proficiency" standard or 75% "acceptability" standard is used, that percentage was universally applied throughout the District, contrary to the State Department of Education caveat found at <http://www.state.nj.us/education/genfo/faq/faq-eval.shtml#sgo> which states that

the target that each teacher sets for his or her students and the scoring plan associated with this should be tailored to each particular set of students. This is because it is important to set goals that are appropriate for a teacher's particular group of students.

In summary, Brown's 2015-2016 annual evaluation is not based in any way on rational standards that reflect specific objective standards of student growth. Just as with the IPDP and annual evaluation for 2014-2015 evaluation, ambiguities and the absence of SGO's abound in both the CAP and the annual rating in the 2015-2016 evaluation as to student growth. These constitute a substantial and material effect impacting the outcome of the evaluations NJSA 18A:6-17.2 a (1) and render them arbitrary and capricious contrary to the intent and letter of the TEACHNJ Act. NJSA 18A-6-17.2 a (4). For those reasons, I find that both the 2014-2015 and the 2015-2016 evaluation must be overturned and the District's grounds for tenure charges against Brown have not been met.

I note that I am not the first arbitrator to have found the District did not carry its burden in teacher tenure cases under TEACHNJ by not having valid measurements of student achievement or growth in an annual evaluation. Arbitrator Stephen M. Bluth in Dkt. No. 277-9/15, in *In re: Joel Dawkins* (October 21, 2016, *vacated on other grounds*, May 4, 2017, Superior Court Chancery Division, Docket No. ESX-C-12-17) reached the same conclusion. He wrote in that case

The requirement for [an assessment of student growth or achievement] requires the evaluator to consider the SGO based on available student data and on growth and/or achievement....the District...failed to properly compute a separate score for [Dawkins] based on student growth and, therefore could not have factored this into his Annual Summative Evaluation. Accordingly, I find that evaluation bears no weight in [Dawkins'] evaluation process. It also constitutes a material error. I determine...without valid SGO's and Annual Summative Evaluations there can be no statutory basis for charges against [Dawkins]. (<http://www.nj.gov/education/legal/teachnj/2016/oct/367-16.pdf>).

Similarly, Robert Simmilkjaer, a fellow member of the National Academy of Arbitrators, found in *In re Danielle Carroll* (December 30, 2016) that without a Student Growth Objective score, there was not a valid annual summative evaluation under TEACHNJ and the District thereby had "failed to substantially adhere to the evaluation process," resulting in the reversal of the evaluation and the dismissal of charges against the teacher. (Carrol, p. 46). <http://www.nj.gov/education/legal/teachnj/2016/dec/537-16.pdf>).


There is no doubt that the District's evaluative effort for Brown was well-intended with its emphasis on pedagogically beneficial teacher and student activities. However the TEACHNJ Act was not passed to merely improve what teachers and students *do*. Its primary purpose is to improve what students *achieve*. The absence of SGO's undermines the latter purpose and bars a finding that an educator should be stripped of tenure.

**Award:**


Based on the foregoing, I find that the tenure charge of inefficiency against Brown must be dismissed because Brown's evaluations for both 2014-2015 and 2015-2016 failed to adhere substantially to the legislatively and administratively mandated evaluation process and were so substantially and materially out of compliance with the TEACHNJ Act as to be arbitrary and capricious.

The District's decision to bring tenure charges against him for inefficiency must be overturned, and Brown must be restored to employment with the District with full back pay, benefits, and seniority.

5/24/17  
Date

  
Ralph H. Colflesh, Jr., Esq.  
Arbitrator

State of New Jersey  
County of Burlington

  
Notary Public

