

437-16

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION
TRENTON, NEW JERSEY

IN THE MATTER OF THE TENURE CHARGE)
OF INEFFICIENCY)
)
- against -)
)
DANIELLE CARROLL,)
Respondent-Teacher)
- filed by -)
)
STATE- OPERATED SCHOOL DISTRICT OF)
THE CITY OF NEWARK,)
District-Petitioner)
)
AGENCY DOCKET NO. 261-9/15)

OPINION
AND
DECISION

Before: Prof. Robert T. Simmelkjaer, Esq.
Arbitrator

APPEARANCES

FOR THE SCHOOL DISTRICT

Teresa L. Moore, Esq., Counsel,
Riker Danzig Scherer Hyland Perretti, LLP

FOR THE RESPONDENT

Colin M. Lynch, Esq.,
Zazzali Fagella Nowak Kleinbaum & Friedman, P.C.

BACKGROUND

Notice of Tenure Charges of Inefficiency were served on the Respondent, Danielle Carroll, ("District"), a tenured teacher pursuant to N.J.S.A. 18A:6-11 and N.J.S.A. 18A:6-17.3.¹, by the State-Operated School District of the City of Newark on or about August 7, 2015. The Charges were certified by the District and referred to arbitration.

The bases for the tenure charge was that "Respondent has been rated Partially Effective and Ineffective in two consecutive annual summative evaluations as follows:

- 1) Respondent was rated Partially Effective in her 2013-14 annual summative evaluation;
- 2) Respondent was rated Ineffective in her 2014-15 annual summative evaluation."

Section 25 or N.J.S.A. 18A:6-17.3 of the TEACHNJ Act requires that in order to bring charges of inefficiency against a tenured teacher, he or she must have had two consecutive annual summative evaluation ratings of either "ineffective," "partially effective," or a combination thereof.

On November 15, 2015, the Respondent filed a Motion to Dismiss the Inefficiency Charge because "Carroll's summative evaluation is fatally flawed and, as a matter of law, may not form the basis of the instant charges."

The Motion was denied without prejudice. In his decision, the Arbitrator wrote:

¹ By letter dated October 14, 2015, the District indicated that it "is willing to proceed at hearing as if the charge had been brought solely on the basis of N.J.S.A. 18A:6-17.3."

“Since both the District’s ultimate burden of proving that the tenure charges against Carroll for inefficiency brought, pursuant to Section 25 of the Act based on two consecutive years (2013-14 and 2014-15) of either partially effective or ineffective annual summative ratings were made in accordance with law and the implementing regulations, and the four statutory defenses to the tenure charges as set forth in N.J.S.A. 18A:6-17.2 can only be determined ‘on the merits after a hearing and not procedurally without a hearing,’ the District’s Motion to dismiss must be denied.” See *I/M/O Tenure Charge of Leonard Yarborough*, (Dkt. No. 259-9/15)(Jan. 6, 2016)(Arbitrator Arthur A. Riegel).

“In the event the District either fails to meet its burden or the Respondent establishes that either statutory defense (1) or (4) or both are applicable in the instant case, evidence that the Respondent’s ‘evaluation failed to adhere substantially to the evaluation process’ as a result of the District’s omission of a quantitative SGO score, or that such omission constitutes ‘arbitrary and capricious’ conduct on the District’s part, the Arbitrator would be required to determine ‘if that fact materially affected the outcome of the evaluation.’ N.J.S.A. 18A:16-17.2. A related issue is whether a finding that a deficient SGO score ‘materially affected the outcome’ of the Respondent’s ‘evaluation process’ is tantamount to a finding that but for her deficient SGO score she would have been rated effective?”

“Considering the remedy proposed by the Respondent of dismissing the tenure charge of inefficiency filed against her by the District based on a partially effective’ rating for 2013-14 and an ‘ineffective’ rating for 2014-15 and ‘restoring

the Respondent to employment with full back pay, benefits, seniority, and all other emoluments of her position,' the Arbitrator finds that a factual inquiry is necessary to ascertain whether the District substantially complied with the evaluation process.”

PROCEDURAL HISTORY

Upon referral of the charges, Carroll was on worker’s compensation disability leave related to an on-duty injury sustained by her during the course of her employment with the District and was recovering from back surgery.

“Carroll took the position that the hearing could not commence until such time she was cleared to return to work. Ultimately, she was cleared to return to part-time work and Carroll agreed to participate in the hearing which was scheduled for August 15, 2016.” (Resp. brief @ 1).

Hearings were conducted on August 15th, August 23rd, August 31st, September 19th, September 27th and October 5th, 2016. The record was closed upon submission of requested documentation by Carroll on October 31, 2016. Over the objection of the Respondent, the District submitted the Certification of Quetzy Rivera dated November 29, 2016. The parties submitted post-hearing briefs dated December 5, 2016.

RESPONDENT’S EMPLOYMENT HISTORY

Respondent has been employed as a teacher by the School District since 2004, and earned tenure in 2007. She holds a standard New Jersey certification as an elementary school teacher. (Tr. @ 968).

For the first seven years that Respondent taught in the Newark Public Schools, she was assigned to Mt. Vernon, Ivy Hill and Speedway Elementary Schools, and she worked full school years. (Tr. @969-970, 982). During the next two years, Respondent taught for only two months. In the 2011-12 school year, she taught at First Avenue School, but in November 2011 she took a leave of absence that lasted for the balance of the school year. Thereafter, she was designated as having "Employee without Placement Status," known as EWPS. EWPS teachers do not occupy a budgeted role at a school; their salaries are budgeted through the School District's central office. (Tr. @504 -505). With EWPS status, Respondent was eligible to apply for open positions and be interviewed for them in the School District. (Tr. @508) In the 2012-13 school year, however, she did not obtain a teaching position; therefore, she reported to the School District's central office (and was paid).

Respondent's Teaching Performance 2013-2014 School Year

For the 2013-14 school year, the District assigned Respondent to Park Elementary School which serves approximately 900 students in pre-Kindergarten through Grade 8. She was assigned during approximately the third week of September 2013, having previously been EWPS and assigned to Human Resources in the District's Main Office.

At first, she worked as "support staff" where she could be used to serve as a substitute teacher or work in the office. When a vacancy opened up, she was assigned as a 2nd grade classroom teacher. (Tr. @ 619, 622). At some point in the fall, prior to November 27, 2013, the Respondent was designated as the

permanent teacher. (Tr. @ 10002, 11138). Prior to her designation, the teacher of the class was Nataly Farias. Prior to December 7th, Carroll had conducted instruction in Ms. Farias' class on or about four occasions, three of which as a substitute teacher following Ms. Farias' substitute lesson plans. (Testimony of Respondent). Respondent attended 1-2 grade staff meetings beginning on October 10, 2013. Farias' last day on the payroll was December 6, 2013.

Once a permanent teacher, Carroll developed an Individual Professional Development Plan ("IPDP") for the 2013-14 school years. It was dated December 16, 2013. (D. Ex. #2). Every teacher in NPS is required to have an IPDP that sets forth both student learning and teacher improvement goals for the school year. (D. Ex. #38). Her professional growth plan consisted of the following two areas for improvement, both taken from the framework:

3b, "Persistence: ('Students show persistence in confronting demanding concepts and tasks...')."

2a, "Tailored Instruction: ('I will tailor instruction to move all students toward mastery')." (Ex. 2, pp. 4-5.)²

On or about November 27, 2013, Carroll was observed for evaluation purposes by Chief Information Officer, Terry Emperio. (D. Ex. #3). On the first observation, her teaching performance was rated as "partially effective," but her performance on the other three observations was rated as "effective." However, she did receive a "partially effective" mid-year evaluation, due predominantly to her record of excessive absences and lateness, not her classroom teaching. As

² Principal Esteves testified that IPDPs are usually developed approximately six weeks after a teacher begins teaching. (Tr. @630) Respondent's IPDP was signed on December 16, 2013, approximately six weeks after she had been assigned as a second grade classroom teacher, approximately late October-early November.

of February 2014, she had been late 48 times and absent on twelve days. (D. Ex. #5 @ 4).

When Respondent's tardiness and absence did not improve after February 2014, she was given several written warnings by Principal Esteves (D. Exs. #20, 21, 22) in accordance with the District's Attendance Improvement Plan ("AIP"). (D. Ex. #44). By May 28, 2014, Carroll had amassed 85 days tardy and 16 days absent. (D. Exs. #8, 39). In total, Respondent took 23 sick and personal days off, and was tardy 95 times in the 2013-14 school year. (D. Ex. 43). As a result, of the 190 teaching days that year, Respondent was present and on time for only 72 of them. (D. Ex. # 43) (Tr. @683).

Eventually, Ms. Esteves referred Carroll to the District's Labor Relations Department for a discipline hearing. (D. Ex. #24). Carroll was disciplined through the imposition of a fine of approximately \$1,300.00.

On June 14, 2014, an educator not employed by the School District, known as a "peer validator," observed Respondent teaching an ELA lesson, and provided feedback to Respondent. (Tr. @873). Peer validators are additional forms of support provided to the School District's teachers. Their use has been negotiated in the collective bargaining agreement between Respondent's union and the School District. (Tr. @783-85).

In January 2014, the Respondent sought intermittent Family Medical Leave due to her children's medical conditions, which was approved by the District. (D. Ex. #49).

By the time of Respondent's summative performance evaluation in June 2014, she had only "partially met" the student learning goals that she had set for the year in her IPDP. (D. Ex. #8 @ 6). Her overall performance was rated as "partially effective." Notably, she received an "ineffective" rating on Indicator 5d "attendance and promptness," which resulted in six points being deducted from her overall score. Respondent and Ms. Empiro met on June 2, 2014 to discuss her summative evaluation. The Respondent did not submit a written rebuttal to her summative evaluation, although the framework permits one. Despite that rating, Carroll's subsequent principal testified that Principal Esteves informed him that Carroll was an effective teacher and the only issue involved the tardiness. (Tr. @ 58, 69, 207).

Respondent's Teaching Performance in the 2014-2015 School Year

Following the 2013-14 school year, Carroll was not reassigned to Park, but to the District's Main Office. At first, she had no placement.

Respondent interviewed with the Principal of Miller Street School, Armando Cepero, for a teaching position. Respondent was assigned to Miller Street School by mid-September 2015 and again taught second grade. Miller Street School, like Park Elementary, served students in pre-Kindergarten through Grade 8. There were approximately 540 students, including a significant Spanish-speaking population.

As of October 29, 2013, the Respondent had received a 504 ADA Accommodation, which included a restriction that she be able to use the elevator. (D. Ex. #19). The Respondent discussed her accommodation with

Principal Cepero. (Tr. @ 1039). Respondent's 504 Plan for Park Elementary expired at the end of the 2013-14 school year. She may have presented the expired 504 Plan approval letter to Principal Cepero. (Tr. @ 146, 1159-1160). By March 2015, Miller Street School had not received an approved 504 Plan for Respondent. On April 6, Carroll received a 504 Plan approval. (R. Ex. #1). She advised Cepero of her need to use the elevator, which he permitted, and gave her an elevator key.

On several occasions, staff, such as Ms. Peterson, assisted Carroll in escorting her students up and down stairs. On several occasions, her students were left unattended by an adult, for which she received written warnings on March 12th and March 13, 2015. (D. Exs. #26, #27).

At Miller School, Respondent and Principal Cepero developed a Corrective Action Plan ("CAP") to address areas in which the Respondent wanted to improve. (D. Ex. #9).

Notwithstanding Respondent's Third Affirmative Defense to the Inefficiency Charges, namely, "a CAP was developed by the District and imposed upon Carroll without her input, was not tailored to Carroll's deficiencies, contained inadequate steps for Administration to assist in the improvement of her teaching performance, and failed to contain any timeframes or deadlines, among other deficiencies, as mandated by applicable law," Principal Cepero testified that he engaged Carroll in a collaborative goal setting process. He testified that "as the teacher is entering the information and the administrator is entering information (on the Bloomboard computer system where the documents

are housed) a minimum of probably three conferences [were held] around this document right here to develop it.” (Tr. @ 46) (D. Ex. #9).

She identified as her growth areas “Persistence and Tailored Instruction,” the same growth areas she had included in her IPDP the year before at Park Elementary. As in the previous year, she set two learning goals for the 2014-15 school year, one each in English Language Arts (“ELA”) and Math. (D. Ex. #9 @ 1-2). The initial goal setting conference on the CAP was held on October 8, 2014. (Tr. @ 46-48). The Respondent did not create the “action steps for administrator” section of the CAP.

Since Carroll taught Second Grade, instructing in both Math and English, her SGOs contained objective data-driven measures of student growth in both of those subject areas.

For Math, on page 2 of Carroll’s five-page CAP, the students were given a “baseline” assessment. The baseline assessment was the MIF Pre-Test Numbers to 1,000 which is the district’s recommended baseline assessment. Based on this assessment 9 students (60%) performed at or above grade level; 6 students performed below grade level.” (D. Ex. #9). Predicated on that baseline assessment, Carroll’s Math SGO was specifically established as follows:

The student growth objective for the above students is for 9 students to maintain mastery and an additional three students to perform at or above grade level. By the mid year (sic) assessment 80% of students will be performing at or above grade level. By the May (sic) 14 students (93%) will be performing at or above grade level in mathematics.

Respondent identified several metrics in her CAP, by which she would measure whether her students met their learning goals in Math, as follows:

- o Interim Assessment
- o Unit Assessment
- o PARCC

In her mid-year review, the metric that would be used to measure student progress in Math was changed and listed as follows: “Math in Focus Assessments.”

Respondent identified several metrics in her CAP by which she would measure whether her students met their learning goals in ELA as follows:

- o DRA2 [“Diagnostic Reading Assessment”]
- o KLA Unit Assessments [“Core Knowledge Language Assessment”]
- o Weekly Writing Assessment

“In addition to the Math SGO, the CAP also established an SGO for ELA. Here too, the CAP identifies the students’ baseline assessment for measuring growth:

‘At the time that the DRA 2 assessment was administered 10 students (59%) performed at the suggested DRA2 performance level of a 16 or above for students entering grade 2. 7 students (41%) fell below the suggested benchmark and therefore are performing below grade level.’ (See Exhibit ‘A’).”

Predicated on that baseline assessment, Carroll’s ELA SGO was specifically established as follows:

By June the student growth objective is for the 10 students (59%) that are performing at or above grade level to maintain mastery of their fluency skill in reading. An additional 5 students will join their classmates and be performing on a second grade reading level. This will increase the fall projection of 10 students (59%) to 15 students (88%) of students performing on grade level by the mid year (sic) assessment. The remaining two students who are significantly below grade level will move from a 6 DRA level to a

level 12 demonstrating 33% growth from October to January. At the time of reevaluation I can project that these students will leave second grade performing on second grade level with an improvement rate of 67% from January doubling their growth objective for the year.

According to the Respondent, the foregoing SGOs met the legal requirement under NJTEACH to objectively measure student growth. Section (d) of N.J.S.A. 18A:6-17.3 states that tenure charges filed against an employee alleging inefficiency may only be based on “those evaluations conducted in accordance with the rubric adopted by the board and approved by the commissioner pursuant to N.J.S.A. 18A:6-16 et al. The evaluation rubric is governed by another section of the TEACHNJ Act, N.J.S.A. 18A:6-123, which specifies the minimum requirements for its approval. Among other things, the evaluation rubric ‘shall’ include:

- 1) four defined annual rating categories for teachers, principals, assistant principals, and vice-principals: ineffective, partially effective, effective, and highly effective;
- 2) a provision requiring that the rubric be partially based on multiple objective measures of student learning that use student growth from one year’s measure to the next year’s measure;
- 3) a provision that allows the district, in grades in which a standardized test is not required, to determine the methods for measuring student growth;
- 4) a provision that multiple measures of practice and student learning be used in conjunction with professional standards of practice using a comprehensive evaluation process in rating effectiveness with specific measures and implementation processes. Standardized assessments shall be used as a measure of student progress but shall not be the predominant factor in the overall evaluation of a teacher.” [emphasis added].

“Evaluation rubrics for all teachers shall include the requirements described in N.J.S.A. 18A:6-123, including, but not limited to... (1) Measures of student achievement pursuant to N.J.A.C. 6A:10-4.2”; (2) Measures of teacher practice pursuant to N.J.A.C. 6A:10-4.3 and 4.4. N.J.A.C. 6A:10-4.2 outlines detail the student achievement components, which includes the SGOs, that must be considered as part of a teacher’s annual summative evaluations, as was set forth in N.J.A.C. 6A:10-4.1 as follows:

The student achievement measure shall include the following components... Student growth objective(s), which shall be specific and measurable, based on available student learning data, aligned to Core Curriculum Content Standards, and based on growth and/or achievement... (i) For teachers who teach subjects or grades not covered by the Core Curriculum Content Standards, student growth objectives shall align to standards adopted or endorsed, as applicable, by the State Board. (emphasis added).

Evaluations underlying inefficiency charges brought pursuant to the Act must be at least partially based on objective measures of student performance, commonly referred to as SGOs.

The District’s Framework for Effective Teaching policy manual, specifically the “Overview of Evaluation Components” section, instructs teachers and administrators to “start the yearly evaluation process with a goal setting conference which will focus on setting both specific learning goals (sometimes called Student Growth Objectives or SGOs) and professional development goals for the teachers...[which] are captured in the teacher’s Individualized Professional Development Plan (‘IPDP’) or Corrective Action Plan (‘CAP’). The policy goes on to define a student learning goal as a ‘long-term objective on which the teacher will focus for his/her classes or groups of students. Each

objective or focus area should be a skill or behavior critical to the students' success in the course and be aligned to the standards and/or curricular objectives. The goals should be measurable and based on available student learning data." (Id. at p. A11) (emphasis added).

Each teacher without a student growth percentile ("SGP") (such as Carroll) shall have at least two (2) SGOs developed by the teacher in conjunction with his or her supervisor or a principal's designee. SGOs "and the criteria for assessing teacher performance based on the objectives shall be determined, recorded and retained by the teacher and his/her supervisor by October 31 of each academic year." N.J.A.C. 6A:10-4.2(e)(4). In calculating Carroll's summative evaluation for the 2014-15 school year, the Respondent asserts that the District was required to include scores from Respondent's SGOs based on specific, measurable and available student learning data.

At the required "mid-year review" of Carroll's CAP, the evaluator, Dr. Kar, found that she had made "significant progress" toward her goals and was "effective" in making progress toward her SGOs. (Resp. brief, Ex. #B).

On page 5 of 10 of Carroll's summative evaluation, the Principal listed only her ELA SGO.

Respondent's summative evaluation for 2014-15 included a rating as to whether her student learning goals/student growth objectives were met. In a section called "Competency 4: Reflecting on the Student Learning Plan," the summative noted that "the finding from this section should relate to the ratings that you assigned to the teacher for Indicator(s) 4d, 4e and 4f." (Petitioner's

Statement of Evidence, Ex. #15 @ 4-5). The Evaluator rated Ms. Carroll on Indicators 4d, 4e and 4f, which are subsections of Competency 4, “Student Progress Toward Mastery” as follows:

- 4d. Partially Effective
- 4e. Partially Effective
- 4f. Ineffective

“In addition, the 2014-15 summative includes three questions about student learning goals, and the evaluator gave the following answers to those questions:”

Q. What were the student learning goals set during the creation of the IPDP/CAP, including any revisions made at the mid-year review or after observations?

A. By June the student growth objective is for the 10 students (59%) that are performing at or above grade level to maintain mastery of their fluency skills in reading. An additional 5 students will join their classmates and be performing on a second grade reading level. By the fall 15 students (88%) of students performing on grade level by the mid-year assessment. The remaining two students who are significantly below grade level will move from a 6 DRA to a level 12 demonstrating 33% growth from October to January. At the time of reevaluation I can project that these students will leave second grade performing on second grade level with an improvement rate of 67% from January doubling their growth objective for the year. [This goal was not revised during the course of the school year.]

Q. What progress did students demonstrate specifically around the earning [stet] these student learning goals? Please describe what metrics were used to assess progress of these goals.

A. As demonstrated by formal and informal observations, Ms. Carroll has not met students’ learning goals. Below is list:

AIP, PLC’s, implementation of professional development, lesson plans, unit plans and yearlong plans, quality of student work samples, gradebook, MIF [Math in Focus] training, CLI training and students responses and feedback.

Q. Overall, did the teacher meet the goals?

A. Did Not Meet Goals.

The mid-year review provides the following clarification regarding the “Math in Focus Assessment” metric:

Yes. Ms. Carroll is on track to meet the goals that were set. Yes. For the DRA, students demonstrated 38% growth from September to January. Math in Focus Mid-Year Assessment: 72% or 16 students received 70% or above on the math mid-year assessment. Additional work with word problems through modeling and guided practice is necessary, as well as continual review of calendar routines to practice value, rounding, etc.

The Respondent received four formal observations at the Miller Street School: two long announced observations, respectively by Mr. Cepero and Vice Principal Kar on October 22nd and December 8, 2014. (D. Exs. #10, #11). Two short unannounced observations were conducted by Mr. Cepero on March 18th and April 7, 2015. (D. Exs. #13 and #14). For the announced observations, both administrators held pre-and post-observation conferences with Respondent to discuss the lesson that Respondent would teach and what they had observed. (Tr. @ 80-81; 838-40). After the unannounced observations, they conducted post-observation conferences.

Respondent’s performance was rated “effective” in one announced observation, “partially effective” in another announced observation, and “ineffective” in two unannounced observations. In addition to formal classroom observations, Miller Street administrators also conducted numerous brief “walkthroughs” to observe her teaching and met with her to coach her. (Tr. @ 83, 93, 833). In addition to coaching, Carroll attended grade level meetings with

colleagues. A peer validator observed Respondent teach an ELA lesson and provided feedback. (Tr. @ 871-73).

She received a rating on her 2014-15 midyear evaluation (2/2/2015) of “partially effective.” (D. Ex. #12). In the Summary section, Dr. Kar noted, inter alia, that “Ms. Carroll is a second grade teacher with abundant potential to move all her students toward mastery in almost all content areas...In implementing her instructional program, Ms. Carroll needs to be consistent. She needs to ensure that her instructional program is actively implemented daily in all content areas. She should be able to motivate her students and not discourage them about any particular content areas, especially mathematics.” In addition to her problems regarding “attendance and promptness” discussed above, Dr. Kar wrote under competency SD: “Ms. Carroll has consistently not been punctual in submitting requested documentation and requirements as they related to student progress. Lesson plans as well as unit plans were delayed or not submitted.”

Respondent was rated “ineffective” for her annual summative evaluation dated April 14, 2015. Principal Cepero, relied on non-metrics to assess progress toward the Respondent’s student learning goals as set forth in the IPDP/CAP such as “AIP, PLC’s implementation of professional development, lesson plans, unit plans, MIF training...” determined that the Respondent “Did not meet goals.” (D. Ex. #15).

The Respondent has relied on an undated document showing “Text Level Reading/DRA-2” scores for the fall and mid-year she testified were submitted to Dr. Kar. (R. Ex. #59). “For math, she used the MIF end-of-year assessment. For

ELA, the DRA-2 results are provided to the District on a District generated form and recorded by the District for data assessment. (Tr. @ 1061-1065). Carroll testified that there is no comparable form for Math in Focus (“MIF”) to the DRA form. According to Carroll, the District collected the year-end MIF assessment. Dr. Kar and Ms. Quetzy Rivera came with a cart and collected the results.³ (Tr. @ 1077-78). The District has contested this assertion. See Certification of Quetzy Rivera.

The Tenure Charge of Inefficiency

Based on the Respondent’s summative evaluations of “partially effective” and “ineffective” for two consecutive years, in June 2015, Principal Cepero recommended to the State District Superintendent that a tenure charge of inefficiency be filed against the Respondent. (D. Ex. #1).

The State District Superintendent reviewed the charge and Respondent’s opposition, and determined that the School District had complied with the evaluation process in all respects in the 2013-14 and 2014-15 school years.⁴ He also determined that there was probable cause to credit the evidence in support of the charge, and that the charge, if credited, was sufficient to warrant dismissal or reduction in salary. Accordingly, the State District Superintendent certified the charge to the Commissioner of Education pursuant to N.J.S.A. 18A:6-17.3 and

³ These materials were produced after the hearing at the request of the Arbitrator. The District submitted the Certification of Ms. Quetzy Rivera, which is opposed by the Respondent.

⁴ The State District Superintendent’s Determination and Certification were enclosed with the School District’s letter to the Commissioner of Education dated September 10, 2015 certifying the charge to the Commissioner of Education.

N.J.S.A. 18A:6-11. Respondent filed an Answer with the Commissioner of Education denying the charge and asserting thirteen “affirmative defenses.”

By letter dated October 13, 2015, the Commissioner of Education referred the matter to arbitration, stating:

[T]he ... tenure charges [stet] have been reviewed pursuant to N.J.S.A. 18A:6-17.3c. Upon review, the Commissioner is unable to determine that the evaluation process has not been followed. The arbitrator’s decision with regard to those charges [stet] shall be made pursuant to N.J.S.A. 18A:6-17.2, subject to determination by the arbitrator of respondent’s defenses and any motions which may be filed with the arbitrator.

The balance of the charges [stet] have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary, subject to determination by the arbitrator of respondent’s defenses and any motions which may be filed with the arbitrator The arbitrator shall review those charges brought pursuant to N.J.S.A. 18A:6-16 – which are not dismissed as the result of a motion – under the preponderance of the evidence standard.

In an email sent to the parties’ counsel on October 23, 2015, the Arbitrator directed the School District “to begin its case...pursuant to §25 of TEACHNJ, N.J.S.A. 18A:6-17.3.” He was “disinclined to permit the District to proceed on alternative grounds [as stated in the Notice of Charge and in the 10/13/15 letter of the Commissioner designee Kathleen Duncan.]

On November 15, 2015 Respondent moved before the arbitrator for summary decision to dismiss the charge, claiming that her two annual summative evaluations failed to include measures of student academic growth as required by N.J.A.C. 6A:10-4.1 and -4.2, and, thus, the charge was unsupportable. The School District vigorously opposed dismissal by demonstrating how its state-approved performance evaluation rubric included in

the NPS Framework incorporated measures of annual student learning goals. In a decision dated March 28, 2016, Arbitrator Robert Simmelkjaer denied the motion without prejudice.

At the request of Respondent, arbitration was delayed almost a year due to her health, during which time she received temporary disability benefits through workers compensation.

CONTENTIONS OF THE PARTIES

District Position

The District, which has the “ultimate burden” of proving the tenure charge of inefficiency against Carroll brought pursuant to Section 25 of the Act, argues that “the tenure charge of inefficiency should be upheld.” Considering the Respondent’s two annual summative performance evaluations of “partially effective” and then “ineffective” for the 2013-14 and 2014-15 school years respectively, the District delineates the “four limited defenses” available to the Arbitrator pursuant to “this deferential standard of review under TEACHNJ.” Assuming arguendo that “the employee demonstrates the existence of any of these four facts, a second analytical step is necessary. The Act requires the arbitrator to determine whether those facts ‘materially affected’ the outcome of the employee’s evaluation. N.J.S.A. 18A:6-17.2(b). If the arbitrator determines that the facts had no such ‘material’ effect, the arbitrator is required to render a decision in favor of the School District and the employee must be dismissed. The evidence at the hearing demonstrated no factual basis for any of the four defenses in N.J.S.A. 18A:6-17.2(a).”

The District asserts that “[t]he evidence demonstrated that the School District adhered substantially to the evaluation process.” In response to “several separate affirmative defenses that amount to a defense that the School District ‘failed to adhere substantially’ to the evaluation process,” the District addressed the claim of “whether the District incorporated measures of student achievement in Respondent’s evaluations.” TEACHNJ requires that measures of student achievement be used as part of the performance rating of teachers. N.J.S.A. 18A:6-118 N.J.S.A. 18A:6-123(b). See also N.J.A.C. 6A:10-4.2.

The District relies on the testimony of Larisa Shambaugh, Chief Talent Officer for the District, that Competency 4 called “Student Progress Toward Mastery” addresses the student growth/achievement component in Respondent’s summative evaluations. The District further argues: “The School District obtained approval from the New Jersey Department of Education to increase the weighting of Competency 4, in the form of approval of an ‘equivalency’ application that demonstrated how its scoring system complies with the state’s requirements for weighting the student achievement component of a teacher’s evaluation.” (T496-503).

“The overwhelming evidence at hearing demonstrated that the School District did, indeed, incorporate student achievement in Respondent’s summative evaluations. At the beginning of each school year at issue, Respondent set student learning goals in math and ELA (English Language Arts) for her second grade students to achieve during the course of the year. (D. Ex. 2@ 2 [IPDP] and D. Ex. 9@ 2 & 4 [CAP]) (Tr. @187). The student learning goals are

assessed midyear to determine whether the students are on track to achieve the goals that the teacher set. (D. Ex. 5@ 4 and D. Ex. 12 @ 4). At the end of each school year, part of her summative evaluation included a measure of the extent to which she had met those goals. (D. Ex. 8@6) ["partially met goals"] and D. Ex. 15 @ 5 of 10 ["has not met students' learning goals"]. Whether her student learning goals were met was determined by assessment data that she was advised to provide to her administrators. Her administrators confirmed that they considered student achievement when Respondent's annual summative evaluations were prepared. (Tr. @612,458,489-490, 240; Tr. @ 516-517).

"In support of her position that student learning goals were not part of her evaluations, Respondent may rely in her post-hearing brief on statements of the New Jersey Department of Education that are not statutes or regulations, but that demonstrate one method of setting and measuring student learning goals, or 'student growth objectives.' The Department's statements about measuring student growth objectives look different than the method in the School District's Framework for Effective Teaching. Department of Education statements have no legal authority, and should not be used in lieu of the Department's own approvals of the School District's method of evaluating teachers, including its measures of student academic growth." (D. Exs. 40 & 41.)

With respect to the Respondent's defense that the District "failed to adhere substantially to the evaluation process" because it did not provide Respondent "adequate professional support to improve her teaching at the Park Elementary and Miller Street Schools," the District argues that it "provided

numerous forms of support to her, particularly when she was on a corrective action plan in the 2014-15 school year.” According to the District, “Carroll was trained in the MIF curriculum, which is highly scripted, and contains all of the materials necessary for a teacher.”

“After teaching that curriculum for a year, she received coaching from several math specialists in the following school year at Miller Street School to address her aversion to teaching math. Her administrators walked through her classrooms throughout the year, and from those they gave her informal feedback on her teaching. She had pre-conferences before announced observations in which she and an administrator discussed what she would teach and how, and post-conferences to further discuss the lesson and any improvements needed. While at Miller Street School, she had the opportunity to observe a highly-performing colleague. (Tr. @ 417-418). Grade-level meetings and vertical meetings were held regularly throughout the school year in which ongoing training was provided in effective teaching practice.” (Tr. @ 135-136; 414-416; 436-438).

The District further asserts that the Respondent was assisted by the School Improvement Panel, consisting of the principal, vice principal and a teacher. Both Miller Street and Park Elementary Schools had such panels when Respondent taught there. Respondent presented no evidence whatsoever that the panels did not operate as required.

The District refutes the Respondent’s third affirmative defense, namely, that the CAP was “imposed on her without her input, was not tailored to her

deficiencies, contained inadequate action steps for the administration to assist her and contained no timeliness or deadlines.”

“By its terms, the CAP itself refutes her claims: it states that there was a ‘goal-setting conference’ on October 8, 2014; it was intended for a ‘full year’; it contains student learning goals and teacher goals that the Respondent herself chose; and it identifies supports that the administration would provide to her. Respondent signed off on her CAP without reservation.” (D. Ex. #9).

The District notes that Respondent was “observed in accordance with regulatory requirements, participated in pre-and post-observation conferences, received coaching from her administrators and informal walkthroughs to provide feedback; and she was provided on-going professional development opportunities to help improve her performance. In both Park Elementary and Miller Street Schools, she received additional feedback from peer validators who were independent of the School District.”

The District discerns “No Mistake of Fact that materially affected the outcome of Respondent’s two consecutive summative evaluations. Rather, the evidence demonstrated that Respondent’s summative evaluation scores in 2013-14 and 2014-15 were based on formal observations of her teachers as well as her professionalism, all scored in accordance with the School District’s Framework for Effective Teaching.”

“The evidence at the hearing did not show any mistakes of fact, much less any supposed mistakes of fact that ‘materially affected’ the outcome of the Respondent’s summative evaluations.

The District disputes the Respondent's Tenth and Eleventh Affirmative Defenses alleging that the charge was brought because of 'considerations of political affiliation, nepotism, union activity, discrimination as prohibited by state or federal law, or other conduct prohibited by state or federal law, and said retaliation materially affected the outcome of the evaluations.' The Eleventh Affirmative Defense claims that the charge is retaliation for Respondent filing workers' compensation claims using FMLA leave, sought and received reasonable accommodations for her disability, and for participating as a witness in a child welfare investigation of another teacher. None of these asserted bases for dismissing the charge were proven."

With respect to the claim of improper motive due to her participation as a witness in a child welfare investigation of another teacher, "[t]here is no evidence whatsoever that her evaluation was adversely affected because she gave an interview to a child welfare official in an investigation of another Miller Street School Teacher."

Also disputed is the Respondent's claim that the District failed to accommodate her disability. No improper motive was proven, given the Respondent's failure to renew her 504 Plan at Miller Street School until April 2015. The District maintains that from Respondent's delayed approval for a new 504 Plan – particularly in view of the principal's reasonable expectation that she escort her students to and from the cafeteria as part of her job responsibilities, his discovery of her students left unattended (Ex. 26, 27 and 29), her unwillingness to rest on stair landings when escorting them (T1146), and the

controversy that resulted from her reliance on other staff to escort her students (T310-313) – that she really did not need an accommodation or that she was neglectful in securing a 504 Plan and preferred to act on her own instead.

The Respondent's Fifth Affirmative Defense, alleging that her "observations and/or evaluations are arbitrary or capricious" is similarly rejected. More specifically, in her answers to interrogatories Respondent contended that the School District failed to provide her with an SGO score as required by applicable law. SGOs, or student growth objectives, are components of teacher's overall performance evaluation. N.J.A.C. 6A: 10-4.2. As discussed fully in Section B above, the School District included in its summative evaluations measures of student achievement, particularly in Competencies 4d, 4e and 4f, and the state Department of Education has approved its method of doing so. Therefore, the School District's method of measuring student academic achievement as part of a teacher's performance rating cannot be found to be arbitrary or capricious."

"As the evidence clearly showed, the charge against Respondent was based on thorough and rational assessments of Respondent's teaching performance by multiple evaluators. The evidence presented at the hearing showed that Respondent's evaluations were, in fact, scored properly according to the School District's State-approved Framework and that they included measures of student learning growth or SGO's."⁵

⁵ The District addressed the scoring of Competencies 1 and 3 in the observation of November 27, 2013. For both Competencies 1 and 3 she received two scores of "partially effective" and two scores of "effective" on individual subparts. The framework states that if there is a "tie" in scoring of an even number of indicators,

Finally, the Arbitrator is urged to reject the Respondent's Sixth Affirmative Defense of Failure to apply the Doctrine of Progressive Discipline. This doctrine has no bearing on a tenure charge of inefficiency since "it originated from and is applied in, an entirely different context-jurisprudence involving discipline for an employee whose employment is subject to New Jersey's Civil Service Act, N.J.S.A. 11A-1 et seq. A tenure charge of inefficiency is not a form of discipline; such a charge is the mechanism for removing a teacher from the classroom whose performance has been unsatisfactory, and who has failed to improve their performance...Furthermore, TEACHNJ provides for only one consequence for a proven tenure charge of inefficiency: dismissal of the teacher."

The District concludes that "[s]ince Respondent has not demonstrated a statutory defense to the tenure charge of inefficiency, the tenure charge of inefficiency against her should be upheld, and Respondent should be dismissed from her employment with the State-Operated School District of the City of Newark."

Respondent Position

In its initial point, the Respondent contends that "her summative annual evaluations are legally void for the lack of statutorily mandated student growth

the evaluator should use the "preponderance of low-inference evidence" to arrive at a score. (Ex. 38, p. 20; see also definition of "low-inference evidence," (D. Ex. 38 @ 19). Principal Esteves testified that the evaluator must use their judgment, based on the evidence observed, to determine the "preponderance of the evidence" that supports an overall score for a Competency. (Tr. @725). Her testimony was consistent with that of Chief Talent Officer Larisa Shambaugh (Tr. @476,479-483). This policy was applied throughout the School District to reduce discretionary judgments and, thus, cannot be said to be arbitrary and capricious.

objectives and/or scores, and therefore, cannot serve as a basis for inefficiency charges.”

The Respondent asserts that her “summative annual evaluation ratings for both 2013-14 and 2014-15 school years contain no SGO scores at all, or if they do, they are not based upon multiple objective measures of student progress as mandated by both statute and regulation.”

Referring to the Arbitrator’s Interim Decision with respect to “Respondent’s Motion to Dismiss,” finding that these evaluations are not “objective measures of student growth,” the District bore the burden of proving that “it met the statutory mandate to generate a SGO score for a tenured teacher charged with inefficiency.”

Considering the evidentiary record adduced at the hearing, the Respondent asserts that “there can be no doubt that for the 2013-14 school year, the District failed to demonstrate that it even understood what an SGO score was, much less demonstrate the existence of any SGOs established at the beginning of the year or any score for Carroll on her progress in meeting her SGOs in her annual summation. With respect to the 2014-15 school year, there is also no doubt that Carroll, with the approval of her Principal established clearly delineated SGOs in both Math and ELA and that they were simply ignored by the District in lieu of apparently subjective criteria or, at best, vague uncorroborated and factually unsupported representations of student progress absent any factual or objective support whatsoever. As such, Carroll’s 2013-14 and 2014-15 annual evaluations are substantively and legally deficient and cannot be utilized

in support of the instant Charges. Put differently, they are legally void and rendered a nullity such that they cannot be utilized by the District in connection with the instant Charges, requiring their dismissal.”

With respect to the 2013-14 school year, the Respondent, in addition to her claim that the IPDP was imposed on her without any input from her, maintains that “it plainly contains no SGOs.” (D. Ex. #2 @ 3). The IPDP does seek to establish ‘student starting points,’ but does not state or articulate what they are. It merely suggests a means of determining such starting points. Likewise, the IPDP asks for ‘student end point,’ but, again, does not establish what the end points (or ‘objectives’) are. (Dist. Ex. 2, at p. 3). Perhaps the SGOs are set forth on some other document or form? Not according to Carroll’s Principal that year, Esteves. According to her – that year SGOs were not so ‘specific.” (Tr. @ 713). From Principal Esteves’ testimony, the Respondent concludes that it corroborates her testimony that “she made no SGOs that year and no input into her IPDP.”

Similarly, Carroll maintains that her annual summative evaluation “confirms the absence of any SGOs.” (D. Ex. #8). The evaluation inquires, “What student learning goals were set?” (D. Ex. 8, @ 5 of 8). No “goals” as such, however, are described, only a description of those assessments which may potentially be utilized to track student progress. Likewise, the evaluation inquires, “What was the outcome of these goals? Please describe what metrics were used to assess completion of these goals.(Id.). What follows is a recitation of assessments purportedly utilized by Carroll, but no explanation of any

outcome. In fact, the evaluation references indicator 4(f), which is ostensibly the section of the evaluation relating to scoring of SGOs, but instead refers to such non-objective, non-student progress centered matters, such as teacher/parent communications, etc.”

Notwithstanding the “waiver” obtained by the District for 2014-15 school year, the Respondent notes that the “waiver” was not retroactive to 2013-14 as confirmed by Shambaugh. (Tr. @ 529). Moreover, the “waiver” did not waive the mandates of the law and regulations with respect to the incorporation of objective measures of student growth into summative evaluations.”

The Respondent further maintains that “[t]here is no SGO score in Carroll’s Summative Annual Evaluation.” Contrary to the testimony of Principal Cepero and documents submitted by him, the Respondent rejects the claim that “MIF training” and the District’s “attendance improvement plan” (AIP) were somehow objective measures of student growth.

“In any event, the testimony at hearing was undisputed that Carroll established specific measurable SGO’s for both Math and ELA in her CAP. It was also undisputed that her SGOs were established utilizing District approved standardized assessments, the MIF assessments for Math and the DRA-2 for ELA. It is undisputed that as of her mid-year evaluation, Carroll was meeting her SGOs and that she presented the available data necessary to demonstrate that she had done so. Even her Vice Principal, Kar, acknowledged as much during his mid-year evaluation, as well as in his testimony at hearing. So what

happened at the end of the year? Did Carroll meet her SGOs? Carroll not only testified that she did so, but provided documentary support for same.”

From the Respondent’s perspective, “Principal Cepero was, at best, ambivalent about Carroll’s SGOs. Kar never reviewed the results of the DRA-2 and MIF assessments upon which Carroll’s SGOs were based. Neither did Cepero.”

Despite notice of its obligations to produce evidence that Carroll did not meet her SGOs, “[i]nstead what we got was vague subjective innuendo from both Kar and Cepero – that the students did not appear to be progressing, that progress did not align with the assessments, or that they didn’t trust the assessments.”

Whereas Cepero and Kar, in Respondent’s view, “had ample opportunity to validate Carroll’s MIF and DRA-2 assessment data if they had any concerns,” particularly since “Kar trusted Carroll sufficiently that he had Carroll assess the students of other teachers and provide demonstrations on the subject, at one point describing it as one of her strengths,” they did not review her data, which was “openly available at all times on Carroll’s data wall.” (R. Ex. #73) (Tr. @ 938-939).

According to the Respondent, “[t]he lack of SGO scores render Carroll’s Summative Annual substantially void as a matter of law and require dismissal of the charges against her.”

In support of its position, the Respondent cites the Legislature’s findings regarding the TEACHNJ Act as follows:

- a. The goal of this legislation is to raise student achievement by improving instruction through the adoption of evaluations that provide specific feedback to educators, inform the provision of aligned professional development, and inform personnel decisions;
- b. The New Jersey Supreme Court has found that a multitude of factors play a vital role in the quality of a child's education, including effectiveness in teaching methods and evaluations. Changing the current evaluation system to focus on improved student outcomes, including objective measures of student growth, is critical to improving teacher effectiveness, raising student achievement, and meeting the objectives of the federal "No Child Left Behind Act of 2001"; and
- c. Existing resources from federal, State, and local sources should be used in ways consistent with this law. N.J.S.A. 18A:6-118.

The importance of goals is set forth in N.J.S.A. 18A:6-17.3, noting that tenure charges brought pursuant to Section 25 of the Act must be based on lawfully conducted evaluations as follows:

- d. The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012, c. 26 (C.18A:6-117 et al.).

The Act mandates that evaluation rubrics be "partially based on multiple objective measures of student learning that use student growth from one year's measure to the next year's measure." N.J.S.A. 18A:6-123.

In turn, the DOE's implementing regulations mandate that teacher evaluations include student achievement components:

- (a) The components of the teacher evaluation rubric described in this section shall apply to teaching staff members holding the position of teacher and holding a valid and effective standard, provisional, or emergency instructional certificate.
- (b) Evaluation rubrics for all teachers shall include the requirements described in N.J.S.A. 18A:6-123, including, but not limited to:

1. Measures of student achievement pursuant to N.J.A.C. 6A:10-4.2; and
 2. Measures of teacher practice pursuant to N.J.A.C. 6A:10-4.3 and 4.4.
- (c) To earn a summative rating, a teacher shall have a student achievement score, including median student growth percentile and/or student growth objective(s) scores, and a teacher practice score pursuant to N.J.A.C. 6A:10-4.4.(emphasis added).

Alluding to N.J.A.C. 6A:10-4.1(c), the Respondent notes that “a teacher cannot even earn a summative evaluation rating in the absence of a score...Without an evaluation rating, the District simply does not have the required two years of ‘inefficient’ or ‘partially effective’ performance evaluations to pursue charges under Section 25 of the Act. Indeed, N.J.S.A. 18A:6-17.2(d) places the ‘ultimate burden’ squarely on the District of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.”

Referring to the defenses set forth in N.J.S.A. 18A:6-17.2, the Respondent argues that “defenses (1) and (4) would easily apply to the absence of SGOs. There plainly was no compliance with the ‘evaluation process.’ Of course, the District’s actions were and are also ‘arbitrary and capricious.’ The substitution of subjective non-metric considerations in allegedly analyzing whether or not Carroll met her SGO’s is the very height of arbitrary and capricious conduct – i.e., the District did not like the metrics establish in Carroll’s CAP, so it simply thinks it can pick a new one, or none at all. That is not the way the evaluation process is designed to work under the Act and its implementing regulations, and the District knows, or should know, better.”

Since “one core purpose of the Act was to infuse teacher evaluation with objective data driven measures of student growth,” as noted by the Legislature, the Respondent poses the question: “How could the absence of a SGO score not materially affect the outcome of the evaluation.”

The Opinion and Award of Arbitrator Stephen Bluth, Dkt. No. 277-9/15

I/M/O Joel Dawkins (October 21, 2016) is deemed relevant to the instant case as follows:

As for the CAP itself, I see it did not provide a process for assessing student growth. The requirement for this area requires the evaluator to consider the SGO based on available student data and on growth and/or achievement. However, in this instance I find Principal Williams’ testimony unconvincing, as she failed to provide a numerical score for the SGO and did not provide any evidence she factored the SGO into Respondent’s score. Accordingly, I determine, during the school year 2014-15, the District committed the same error as did the administration in a different building the previous year; that is, it failed to properly compute a separate score for Respondent 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 Respondent’s 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 Respondent. (emphasis added).

In its second point, the Respondent argues that “[t]he District’s evaluation of Carroll was arbitrary and capricious in that it is undisputed that Carroll was a de facto effective teacher during the course of the 2013-14 school year.” In support of this claim, the Respondent considers the four (4) observations Carroll received during 2013-14, with only the first observation on November 27, 2013 rated “partially effective.” According to the Respondent, the November 27, 2013 observation should be “discarded as arbitrary” because “Carroll did not even

arrive at Park until approximately the end of September 2013” when she was assigned as “support staff.”

The 11/27/13 observation is deemed arbitrary because Carroll was “not assigned to teach the class in which she was observed, she had little to no familiarity with the class, except as a substitute and was not permanently assigned to teach the class until approximately December 7, 2013.” Given the absence of any documentation showing when Carroll was actually assigned to teach the class, evidence that Farias was the teacher of record during the period circa October-November 2013 when she gave her 60-day notice of resignation ending December 6, 2013, and dubious reliance by the District on a sign-in sheet dated October 10, 2013 showing that Carroll attended a 2nd grade PLC meeting, the Respondent argues that the November 27, 2013 observation was atypical as “aptly borne out by her three other ‘effective’ observations occurring during the remainder of the year after she had the opportunity to know her students.” Respondent contends that “[p]rior to formally taking over Farias’ class on or about December 7th, she had very limited contact with the students, mostly acting as a substitute for other absent teachers, or providing cover for teachers while away from class at PLC meetings.”

The Respondent cites arbitration decisions where the observation of teachers have been found to be arbitrary, such as *I/M/O Jodi Thompson* (Newark), Dkt. Nos. 240-8/14 and 16-1/15 (June 19, 2015) where Arbitrator Brent found the “charges arbitrary, in part, where one of the observations

considered occurred on teacher's first day of student contact in the new assignment, undermining the validity of the 2013-14 summative evaluation.

The Respondent also challenges the methodology utilized by the District in weighting her observations, as illustrated by the following chart:

Competency	11/13 Observation	12/13 Observation	Mid-year Evaluation	3/14 Observation	5/6 Observation	Final Evaluation
16	PE		E	E	E	PE
2	PE	E	PE	E		PE
3	E		PE	E	E	E
4	PE	E	PE	E		PE
5			PE			PE
			PE			PE

“As the above table makes clear, in her final evaluation, Carroll received a partially effective in Competency 1, despite being rated effective in that Competency since her initial observation. She received a partially effective in Competency 2, despite being effective in observations for that Competency since her first observation. She was rated effective for Competency 3. She received a partially effective on Competency 4 but the central component of that Competency, the SGO scores, were never established or scored. And on Competency 5, she received a partially effective.”

“Based on her observations, Carroll should have received an effective rating in Competencies 1, 2 and 3. This would give her 9 points. We should also credit her with a highly effective for Competency 4, since she should not be punished for the District's failure to grant an SGO. That would give her 13 points. Even if we leave Competency 5 as partially effective in light of the tardiness issues, and we deduct 2 points for the partially effective, she would still have 11 points necessary for an effective evaluation.”

The Respondent claims that she should not have lost 2 points for Competency 5 notwithstanding her tardies. “If we look at her ratings for that Competency in her final evaluation, we can see that she was scored as follows: “5(c) partially effective; 5(b) effective; 5(c) effective; and 5(d) partially effective.” Although Respondent concedes the partially effective for 5(d) based on her absences and tardies, she maintains that the 5(a) “commitment to continuous improvement” is erroneous because the narrative of the evaluation contains the following positive assessment:

As per the Mid-year review, Mrs. Carroll has attended Math & Focus and Literacy workshops and concepts, strategies and techniques to be integrated into second grade students learning in order for students to demonstrate engaged and interest and develop meaning in their learning. She continues to be involved with professional readings, each utilizing various strategies to help students to learn how to read and write. She continues to read strategic segments of *The Skillful Teacher* and *Teach Like a Champion*, discussing findings with colleagues at PLC meetings. She collaborates with her colleagues on lesson planning, sharing and creating new strategies to improve students understanding towards mastery. Mrs. Carroll keeps her mind open to new teaching methods by visiting colleague’s lessons. (D. Ex. #8 @ 6).

Given this example of “effective” commitment to continuous improvement, which is also listed as an area of strength in the evaluation, Respondent argues that she should have been rated effective for 5(a) and as a result “would have been rated effective in all Indicators except 5(d) and that should have earned her a ‘meets expectations,’ with no points deducted off her overall score. In that event, she would have far more than enough points to have been deemed ‘effective.’”

The Respondent argues that “tenure charges based upon Carroll’s tardies and absences during the 2013-14 school year would constitute quadruple-jeopardy and are arbitrary as based solely on the number of absences or tardies” Respondent reviews three mitigating factors that caused Carroll’s absences and tardies, namely: illnesses of her children, her father-in-law had become sick with cancer, and a lack of financial resources due to the loss of her home the prior year in the 2012 Hurricane Sandy.

Moreover, the Respondent notes that she received three separate penalties for her tardies and absences: withholding of her salary increment; non-payment or docking for the time she was tardy; and a disciplinary fine of \$1,300 on June 13, 2014. (D. Ex. #47). The Respondent cites various cases such as *I/M/O Nikita Clarke-Huff (Elizabeth)* Dkt. No. 290-9/15 (Nov. 16, 2015) (Arbitrator Moscovitch) (“finding school board could not raise issue of absenteeism where teacher previously disciplined via increment withholding and settlement for the same conduct.”)

In its third point, the Respondent argues that “[t]he charges would not have been brought but for considerations of discrimination prohibited by State and federal law or other conduct prohibited by State or federal law.”

The Respondent contends that Principal Cepero discriminated against her because she participated in an interview during a DYFS investigation of child abuse and neglect. As a mandated reporter, Carroll was engaged in protected activity either under New Jersey Department of Education regulations or under the Conscientious Employee Protection Act (“CEPA”) when she “informed the

DYFS investigator that she brought her concerns regarding the teacher, Lynderia Mansfield, to the attention of Cepero, who did not act upon it...Ultimately, the allegations led to the removal of the teacher at issue and Cepero was a witness in that case.” See, I/M/O Lynderia Mansfield (Newark), Dkt. No. 64-2/16 (Sept. 26, 2016).

The Respondent further contends that Cepero discriminated against her with respect to “seeking and obtaining a reasonable accommodation for her disability.” Referring to the ADA and NJ Law Against Discrimination (“LAD”), Respondent claims that Cepero discriminated and retaliated against her when “she exercised her accommodation – by having other school employees escort her students down and up the stairs to and from lunch, and did so without incident for nearly six months.”

According to Respondent, prior to the DYFS interview, she had a positive relationship with Cepero, although rated “partially effective” in her mid-year evaluation in February 2015 by Dr. Kar.. Following the interview, “Cepero began a course of harassment against Carroll for her use of the 504 Accommodation she had obtained from the District and which he had allowed, without any complaint, up to that point.” She received several disciplinary memoranda beginning on March 12, 2015 and continuing on March 13, 2015 and March 18, 2015. She obtained an updated 504 Accommodation on April 6, 2015.

The Respondent discerns a nexus between her receipt of an updated accommodation and Cepero’s short formal observation on April 7, 2015 wherein she received another rating of “ineffective” in all competencies observed.

Cepero had previously conducted a formal short observation on March 18, 2015 where Carroll was rated “ineffective” on all competencies observed. Given this sequence of events, Respondent poses the query: “How could Carroll’s performance have declined so precipitously in the space of just over a single month, since the end of February 2015. Cepero’s response on direct examination to this question confirms Respondent’s view that her “lawful right to use a reasonable accommodation for her disability” accounted for the transformation as follows:

What took place was that between her not being in the classroom to attend to students, not walking students to their classes, all those type of things, lunch period, all those kind of things that were her requirements, it wasn’t happening. (Tr. @ 125-126).

Since Cepero, based on Respondent’s testimony, was aware of her 504 Accommodation from the previous year, fully accepted it and did not request that she review it, the change in attitude “out of the blue – on March 12th, without any prior warning, a situation which had existed without complaint for nearly six months became so intolerable that immediate, aggressive and repeated disciplinary memorandum was necessary. Not so.”

“The answer is simple and obvious. His final two observations and his final evaluation of Carroll were a hit job. One was conducted on March 18, 2016, a day his disciplined Carroll in writing for her use of her accommodation. The second was on April 7, the very morning after he received a copy of Carroll’s updated and renewed grant of a 504 Accommodation from Homere Breton. That is not a coincidence. The observations were a metaphorical slap in the face. No wonder Carroll may have ‘shut down’ as he indicated she did in his testimony.

Plainly, Cepero had determined as of March 2015 he was going to terminate Carroll, whether out of anger over her testimony to DYFS during her investigatory interview at the end of February 2015, or for simply abiding by or having the nerve to insist on using her grant of an approved accommodation. Indeed, Cepero notably completed his final summative evaluation of Carroll extremely early in the school year (in April 2015), when over two months remained in the year contrary to the District's Framework and guidance provided by the DOE guidelines."

"Of course, it goes without saying that the discrimination and retaliation evidence by Cepero materially affected the results of her evaluation ... Accordingly, because Carroll's summative evaluation for the 2014-15 school year is at best arbitrary, and at worst, discriminatory and unlawful, the District simply cannot meet its burden of proof necessary to sustain the instant charges."

In its fourth point, the Respondent argues that "Carroll's evaluations for the 2013-14 and 2014-15 school years failed to adhere substantially to the evaluation process." Carroll's 2012-13 IPDP was purportedly "untimely and unilaterally imposed on her without her input and was not individualized to her circumstances." According to Respondent, the IPDP neither created a "goal setting" conference nor was collaborative. The IPDP was untimely issued over 3 months into the school year on December 16th (after Carroll's first observation), was not part of a collaborative process and included no individualized SGOs."

The CAP was also allegedly "imposed on Carroll for the 2014-15 school year, was not individualized to her purported deficiencies and contained no

meaningful 'action steps' for administration to assist in the improvement of her performance, nor any timeframes within which they would occur." Respondent's CAP addresses "persistence" and "tailored instruction," rather than issues from the 2013-2014 school year, which entailed "attendance and tardies." The CAP's generic reference to "lesson plans, unit plans, etc." as well as PD and PLCs are deemed insufficient and contrary to the District's Framework which states the "CAP should explicitly articulate actions the administrator will take to directly support the teacher." (D. Ex. #38).

Finally, on this point, Respondent argues that her 2014-15 Annual Summative Evaluation was issued prematurely on April 14, 2015. "Less than a month passed between Carroll's third formal observation on March 18, 2015 and her final observation on April 7, 2015. This schedule is at odds with the District's own Framework which provides for a third observation in January or February and the fourth observation in March. (D. 38 @ A17). With two months left in the school year ending June 30th, the Respondent did not have meaningful time to improve her performance after her fourth observation. Moreover, this annual evaluation ran counter "to guidance developed by the State Board of Education" wherein "a principal is directed to review and evaluate SGO scores (which obviously did not happen here) between May and June of a given school year."

In point five, Respondent refutes Vice Principal Kar's claim that "she informed a classroom of students that she does not like math, or that they do not need to learn math." Carroll also disputes Kar's claim that she spitefully stripped down her room at some point after the mid-year. Kar's later testimony that it may

have been toward the end of the year is deemed inconsistent and lacking credibility. “The fact is, it was at the end of the year and Carroll was simply cleaning out her room with the assistance of her husband in light of her back condition.” (Tr. @ 1081-85).

Lastly, she takes issue with Kar’s March 16, 2015 memo describing her as crying in her room on March 13, 2015. She denies children were present “because they were at lunch.” Although she was upset because “Cepero was attacking her for her use of her accommodation, upset and contacting her physician,” she denies crying in the classroom. “Carroll cannot fully defend the allegations, because (other than the March 16, 2015 Memorandum) they were not referred to in the charges, the discovery, or referenced in any document, observation or evaluation.”

Remedy

As a remedy, the Respondent seeks the dismissal of the Tenure Charges, reinstatement with “appropriate back pay, benefits and seniority. Since Carroll was “only cleared to return to limited part-time duty,” but “may be available for full-time duty by the time this award is issued,” she maintains that “back pay would include compensation for a part-time position” in accordance with “the District’s obligation to accommodate her work-related disability.” The Arbitrator could retain jurisdiction over that sole issue, if the parties could not work out a settlement. She also should “receive full benefits” (medical, pension credits and contributions) retroactive to the date of the Certification of the charges.”

DISCUSSION

I. Respondent's Summative Evaluation for 2013-14 and 2014-15 are deficient because they lack Statutorily Mandated Student Growth Objectives ("SGOs").

Considering the evidence in its entirety, the Arbitrator is persuaded that the Respondent's 2013-14 and 2014-15 Annual Summative Evaluations are deficient because they either contain no SGO scores at all (2013-14), and to the extent they do contain SGOs (2014-15), they are not based upon multiple objectives measures of student progress as mandated by statute and regulation, including the District's Framework.

In reaching this determination, the Arbitrator reiterates his opinion set forth pursuant to Respondent's Motion to Dismiss based on her 2014-15 Annual Summative Evaluation that the District's "references to metrics used to formulate a SGO are devoid of data or measurable objective information such as standardized tests. Clearly, neither the MIF/ CLI training nor the lesson plans and student work samples measure student growth."

It is undisputed that SGO scores are a mandated and indispensable component of a teacher's Annual Summative Evaluation. As correctly noted by Respondent, a core objective of the TEACHNJ Act was "to focus on improved student outcomes, including objective measures of student growth..."

Since Section (d) of N.J.S.A. 18A:6-17.3 (Section 25) states that tenure charges filed against an employee alleging inefficiency may only be based on "those evaluations conducted in accordance with the rubric adopted by the board and approved by the Commissioner pursuant to N.J.S.A. 18A:6-16 et al." and N.J.S.A. 18A:-123, which specifies the minimum requirements for approval, states that the rubric (must) be "partially based on multiple measures of student

learning that use student growth from one year's measure to the next year's measure," an annual summative evaluation lacking metrics or SGO scores is fatally flawed.

In addition, the implementing regulations delineate the student achievement components, including SGOs, "which shall be specific and measurable, based on available student learning data...and based on growth and/or achievement." N.J.A.C. 6A:10-4.1.

The District's Framework for Effective Teaching policy manual, specifically the "Overview of Evaluation Components" section, instructs teachers and administrators to "start the yearly evaluation process with a goal setting conference which will focus on setting both specific learning goals (sometimes called Student Growth Objectives or SGOs) and professional development goals for the teachers...[which] are captured in the teacher's Individualized Professional Development Plan ('IPDP') or Corrective Action Plan ('CAP')." The policy goes on to define a student learning goal as a "long-term objective on which the teacher will focus for his/her classes or groups of students. Each objective or focus area should be a skill or behavior critical to the students' success in the course and be aligned to the standards and/or curricular objectives. The goals should be measurable and based on available student learning data." (Id. at p. 11).

Moreover, the DOE's implementing regulations mandate that "[t]o earn a summative rating, a teacher shall have a student achievement score, including

median student growth percentile and/or student growth objective(s) scores, and a teacher practice score pursuant to N.J.A.C. 6A:10-4.4.”

The regulations further state that “an evaluation rating may not be provided at all to a teacher in the absence of an SGO score. “[i]f any scores for a teaching staff member’s evaluation rubric are not available at the time of the annual summary conference due to pending assessment results, the annual summative rating shall be calculated once all components are available.”, See, N.J.A.C. 6A:10-2.4(4)(d).

Given this context, the Arbitrator not only finds that without an SGO Score, Carroll cannot have a valid 2013-14 or 2014-15 Annual Summative Evaluation but also the absence of SGO scores constitutes clear and convincing evidence that the Respondent’s evaluation “failed to substantially adhere to the evaluation process.” In other words, Annual Summative Evaluations devoid of data-based SGOs in either school year preclude the District from establishing the two consecutive years of “ineffective” or “partially effective” performance evaluations necessary to pursue charges under Section 25 of the Act.

The IPDP for 2013-14 delineates “student starting points” such as “DRA2, ongoing records to show growth, pre and post tests and math in Focus First Grade assessment.” The IPDP also indicates “student end points,” including the DRA2, Benchmark Assessments and MIF end of the year assessments.” Conceivably, some of these points such as the DRA2 and MIF subsume or contain parameters amenable to measurement; however, the objective, measureable elements necessary to establish SGOs lack clarity and specificity.

The testimony of Principal Esteves illustrates the difficulty of identifying the SGOs in the Respondent's 2013-14 IPDP. She testified as follows:

Q. And does this IPDP identify what Miss Carroll's Student Growth Objectives were for her students in the 13/14 school year?

A. In 13/14, the Student Growth Objectives were less specific than they are in today's current – ...

Q. Are they, Miss Carroll's Student Growth Objectives identified in the IPDP?

THE WITNESS: To my estimation, yes, they're – it's the vehicle that we will be using to assess them is there.

Q. Can you identify – can you point out where they are in that document?

A. Again, so the students would take the DRA. They would establish their starting point. And then at the end of the year, they would end the year with a DRA assessment and we'd have their point.

Q. Do you know what the start points were and the end points were for Mrs. Carroll's students on, say, the DRA for 2013/2014?

A. Miss Carroll and her supervisor at that point would have those documents and would be able to review how the students begin and how they end. (Tr. @ 714)

According to Esteves, “[w]e necessarily in 2013/14 did not write the actual student scores the way we do more recently as we’ve come to know based on TEACHNJ and Achieve. More specificity is given to SGOs now than [it] was at the time when that was first introduced this year.” (Tr. @ 715). Although the District may have been evolving its practice with respect to SGOs shortly after TEACHNJ was enacted, there is no evidence that the District was excused, for example, from producing pre and post scores for the DRA2 or measurable student growth targets to be included in the Respondent's Summative Evaluation

Form. Principal Esteves testified that “Ms. Carroll herself would be producing the scores on the DRA in the beginning of the year and then her assessment at the end of the end. And we’d look for students growth of one year.” However, there is no evidence that such assessment took place. (Tr. @ 719).

For its part, the District notes that the “Respondent’s IPDP contained student learning goals in English Language Arts and Math. Her professional growth plan consisted of the following two areas for improvement, both taken from the Framework: 3b, “Persistence”; 2a, “Tailored Instruction.”

Given this documentation and testimony, the Arbitrator is compelled to find that the Respondent’s SGOs – a statutorily mandated component of her annual summative rating for 2013-14 – is deficient for the purpose of sustaining inefficiency charges.

Similarly found defective are the Respondent’s SGOs for the 2014-15 school year. As noted in the Arbitrator’s decision on the Respondent’s Motion to Dismiss the Charges, “MIF training” and the District’s “AIP” do not constitute objective measures of student growth. Given evidence that Carroll not only established specific measurable SGOs for both Math and ELA in her CAP, namely MIF assessments for Math and the DRA2 for ELA, but also these measures were acknowledged by Vice Principal Kar in his mid-year evaluation and testimony at the hearing, the District’s terse statement in Carroll’s Annual Summative Evaluation that “Ms. Carroll has not met student learning goals” is both incomplete and dubious.

Inasmuch as Dr. Kar testified that Respondent in her CAP had set MIF baseline assessment data for her students (i.e., 9 students (60%) performed at or above grade level, 6 students (40%) performed below grade level) and utilized the MIF pre-assessment, post-assessment and unit tests/assessments, and similarly used the DRA-2 assessment to measure ELA progress (i.e., 10 students (59%) performed at the DRA-2 performance level of 16 or above...), the Arbitrator is persuaded that the Miller Street administrators had the means to validate Carroll's MIF and DRA-2 assessment data for her annual summative evaluation. Kar also wrote in the mid-year evaluation that "Yes, Ms. Carroll is on track to meet the goals that were set. Yes, for the DRA students demonstrated 38 percent growth from September to January." (Tr. @ 272).

By accepting Carroll's DRA results and crediting her with making progress toward meeting her SGOs in the mid-year evaluation as delineated in Competency 4f, Kar had the means to follow-up for her summative evaluation. Kar rated Respondent on the DRA measure of student growth (4f) for her mid-year evaluation. Although Kar accepted both her ELA and math assessments at the mid-year for her students as well as had her test the students of other teachers at his request because she was "skilled" in this area, he was uncertain whether Carroll or some other teacher tested Carroll's students in math and reading at the end of the year. (Tr. @ 953-954).

Principal Cepero placed the onus on Carroll for determining whether her students were performing above grade level at the end of the year by using an unidentified standard different from MIF. (Tr. @ 231-232). In the summative

evaluation, Cepero found no growth in student performance since the mid-year, and accorded “low inference” to Kar’s report.

According to Cepero, the Respondent’s DRA data is missing from her summative evaluation because “Ms. Carroll failed to share her DRA results and therefore I could not determine whether her students met their performance goals. (Tr. @ 350). She established the DRA in the system, but she never provided that information to me.” (Tr. @ 354). Despite Cepero’s acknowledgement that as Principal he was responsible for “making sure teachers record the data they are supposed to record,” she did not provide him with the data for math and he was uncertain as to whether she recorded it in the District’s computer system. (Tr. @ 361).

It is noteworthy that since Principal Cepero issued the Respondent’s Annual Summative Evaluation in April 2015 – at least one month earlier than the Framework recommends -- without the requisite SGO data, an inference can be drawn that he did not intend to include SGOs in the Respondent’s premature summative rating. Given the regulation that “an evaluation rating may not be provided at all to a teacher in the absence of an SGO score,” this action is deemed arbitrary and capricious. See, N.J.A.C. 6A:10-2.4(4)(d).

In the Arbitrator’s opinion, the Miller School Administration, having confirmed Carroll’s SGOs for both Math and ELA in her CAP, namely MIF assessments for Math and the DRA-2 for ELA, and having reinforced those SGOs during her mid-year evaluation in February 2015 via Competency 4(f) as “making significant progress” and “reflect[ing] growth,” had an affirmative

obligation to document any deficiencies Carroll had in meeting her SGOs since the mid-year evaluation. Rather than provide a perfunctory statement that Carroll “Did not meet goals” and refer to teacher programs/activities that did not constitute the requisite “metrics,” the Miller School Administration had an obligation to confirm or reject her SGO results. Instead, they circumvented their Statutory and Framework responsibility to review the results of the DRA-2 and MIF assessments upon which Carroll’s SGOs, and ultimately her summative evaluation, would be based.

Before rating the Respondent as “ineffective” on her SGOS and “ineffective” overall on her summative evaluation, Miller School administrators had an obligation to assess her students’ growth using the metrics she had initially provided, Vice Principal Kar had deemed satisfactory, and the Respondent had made available in her classroom rather than wait for her to submit the documentation to Cepero, Kar or Rivera. Had Principal Cepero established a procedure for submitting SGO data that placed the onus for delivery on the Respondent, her non-compliance should have been documented or even subject to discipline.

Notwithstanding the testimony of the District’s Chief Talent Officer, Larisa Shambaugh, that the District had obtained a waiver approving its “equivalency application” for the 2014-15 school year that enabled it to place student growth objectives or student learning objectives in competencies 4d, 4e and particularly 4f, there is no evidence that the District’s mandate to incorporate SGOs in the summative evaluation were also waived. As Shambaugh testified: “An

administrator must utilize the evidence specifically around the teacher's progress in meeting the student learning goals that were set in the IPDP or CAP" and factor this evidence into the "mid-year evaluation as well as the summative." She further testified that "4d, 4e and 4f reflect both the process for setting SGOs" and "the progress that they set goals, which is in 4f." (Tr. @ 488-489).

In the Arbitrator's opinion, the District's omission of measurable objective SGOs for the 2013-14 and 2014-15 school years rendered its summative evaluations of the Respondent void as a matter of law and provided a preponderance of evidence in support of her statutory defense that the Respondent's evaluation "failed to adhere substantially to the evaluation process."

The Arbitrator further finds that the absence of Carroll's SGO scores materially affected the outcome of her evaluations, particularly the 2014-15 evaluation where she received an overall score of seven (7) points placing her in the ineffective category. Conceivably, the Respondent could have been rated partially ineffective for 2013-14 anyway because six (6) points were deducted from her overall score on Indicator 5d "attendance and promptness," although she was otherwise rated effective on her teacher performance. However, the deduction of six (6) points on Competency 4f for 2014-15, with the SGOs calculated at 20% of the teachers' overall score, adversely impacted the Respondent's annual rating. Since the meeting or exceeding of the teachers' SGOs as measures on Competency 4 is inextricably connected to the summative rating and, in turn, constitutes a 20% factor in determining their

summative score, the District's failure to properly evaluate the Respondent's SGOs invalidated the annual summative evaluation.

The Arbitrator further finds that the deficiency in determining the Respondent's SGOs was arbitrary and capricious. The substitution of non-metric considerations in the 2013-14 summative evaluation and the omission of any SGO score for 2014-15 was arbitrary. As noted above, the factors utilized by the District in 2014-15 such as AIP and MIF training deviated from the metrics set forth in the Respondent's CAP, namely the MIF and DRA-2, that were validated during the mid-year but not addressed in the summative. The failure of the District to review the Respondent's metrics yet rate her ineffective with respect to her SGOs was not only a material error that failed to adhere substantially to the evaluation process, it was also constituted arbitrary and capricious action on the District's part.

The Arbitrator, having found that the District failed to incorporate multiple objective measures of student growth or SGOs into either the Respondent's 2013-14 or 2014-15 summative evaluations, further finds that the District not only did not meet its statutory obligation to include SGOs as part of the Respondent's annual summative evaluations as required by N.J.A.C. 6A:10-4.1, *supra*, but it also failed to meet its "ultimate burden of demonstrating to the Arbitrator that the statutory criteria for tenure charges have been met."

Accordingly, the District, in the absence of two lawfully conducted summative evaluations, cannot sustain its charges of inefficiency pursuant to Section 25 of

the TEACHNJ Act, N.J.S.A. 18A:6-17.3 based on two consecutive years of “ineffective” and/or “partially effective” performance.

II. Respondent’s Claim that the District’s Evaluation of her was arbitrary and capricious because she purportedly was a *defacto* effective teacher for the 2013-14 school year

The crux of the Respondent’s claim is that her first observation on November 27, 2013 where she was rated as “partially effective” should be disregarded as arbitrary. While the Arbitrator concurs with the Respondent that her first observation in the 2013-14 school year was premature and probably unfair because she had recently been assigned to the class, was unfamiliar with the students except as an occasional substitute, and had not taught in the 2012-13 school year, her “partially effective” rating was due in large part to her excessive absences and tardiness.

Unlike the cases cited by the Respondent where observations have been found to be arbitrary after teachers have returned from extended leave, the Respondent’s absences and tardiness, even excluding her November 27, 2013 observation, rendered her “ineffective” as an instructor who provided a continuous quality educational experience for her students. Clearly, her attendance as of May 28, 2014, 85 days tardy and 16 days absent, negate any reasonable claim to effective performance. Although Respondent was rated “effective” on three subsequent observations, her record of excess absence/tardiness disrupted her teaching practice and warranted the “partially effective” rating.

Moreover, the Arbitrator rejects the Respondent's claim of quadruple jeopardy predicated on the Respondent's attendance. There is no evidence that the District brought the Section 25 inefficiency charge because of the Respondent's absence/tardiness, but rather in assessing her entire two-year record of performance properly considered her "attendance and promptness," which is specifically identified as a competency in 5(d) of the 2013-14 summative evaluation. As the District correctly notes, had it had intended to bring inefficiency charges based on excessive absence/tardiness alone, it had the capacity to do this at the end of the 2013-14 school year.

The Arbitrator dismisses the Respondent's claim that her observation performances in 2013-14 were not properly weighted. The Respondent has recalculated the Respondent's observations for all five (5) competencies, changed the deduction for attendance in Competency 5 from 6 points to 2 points, and concluded that, based on her favorable revisions, she should have been rated effective. As the District correctly notes, "TEACHNJ expressly prohibits the arbitrator from second-guessing the evaluator's determination regarding the quality of a teacher's classroom performance." N.J.S.A. 18A:6-17.2(c). This prohibition extends to the evaluator's judgment regarding the scoring of ties between the sub-parts of a competency. As Principal Esteves, corroborated by Chief Talent Officer Shambaugh, testified, the evaluator has the discretion to determine the "preponderance of the evidence" that supports an overall score for a competency (i.e., "What is going to be driving the most amount of student learning across those competencies?") (Tr. @ 480, 725).

III. The Respondent's claims of discrimination

The Respondent alleged but did not prove that her participation in a February 2014 DYFS interview in Cepero's presence concerning allegations of abuse or neglect of students by another teacher was the impetus for her subsequent negative classroom observations. She reported to the interviewer that she had brought the situation to Cepero's attention, yet he had nothing. According to Carroll, harassment concerning her use of the 504 Accommodation, specifically the disciplinary memoranda of March 12, 13 and 18, 2015 began after and resulted from the DYFS interview.

In the Arbitrator's opinion, the Respondent failed to establish a nexus between the DYFS interview and her 504 Accommodation issue. Inasmuch as the Respondent did not have a valid 504 Accommodation renewal as of February 2014 and did not obtain one until April 7th, she cannot reasonably claim that Principal Cepero discriminated against her. While the evidence indicates that prior to March 2015 she was provided the functional equivalent of her 2013-14 504 Accommodation, which entailed relief from walking down the stairs, the use of the school's elevator, and assistance from other school employees in escorting her students up and down stairs and to lunch, this support exceeded the letter of her 504 Accommodation, which was limited to elevator access and was "provided to you as long as it does not interfere with your assignment."

Clearly, the Respondent, notwithstanding voluntary assistance she had received from other teachers in transporting her students, was not permitted to leave them unescorted – a subject that the April 23, 2015 memo addressed (i.e.

“You continue, daily, to not escort your students to and from the cafeteria”). (D. Ex. #30). The principal had an obligation to ensure the safety of the students in Respondent’s class and avoid an undue burden on the staff.

On this record, the Arbitrator cannot sustain the Respondent’s claim of discrimination based on her 504 Accommodation. There is no evidence that the charges would not have been brought but for considerations of discrimination because the Respondent was rated “partially effective” in 2013-14 and “ineffective” in 2014-15 and pursuant to TEACHNJ Section 25, the District was required to file inefficiency charges.

IV. 2013-14 IPDP

The Arbitrator does not sustain the Respondent’s claim that her 2013-14 was unilaterally imposed on her without her input. Since the Respondent was not assigned as a permanent teacher until after approximately six weeks of the semester had elapsed, her IPDP was developed on December 16, 2013. She signed off on two areas of improvement for her professional growth plan, namely “persistence” and “tailored instruction.” The record indicates that Carroll and her supervisor, Ms. Empirio, collaborated on her student growth objectives designated, “start points/end points” for 2013-14 using, inter alia, the DRA – albeit lacking specificity with respect to SGOs. The Arbitrator discerns no reason to infer that the Respondent lacked the opportunity to revise her IPDP.

On her Mid-Year Review, specifically in the section “Revisiting the Student Learning Plan,” she is reported to be making progress toward meeting the targeted objectives outlined in her IPDP “centered around writing,” with a

focus on math. (D. Ex. #5). Here again, the Respondent signed off without any additions or subtractions. The Respondent's vague recollection about her role in developing the IPDP cannot suffice as preponderant evidence in support of this claim. (Tr. @ 1010-1013).

Accordingly, Respondent's IPDP claim is dismissed.

V. 2014-2015 CAP

The evidentiary record indicates that the same teacher growth areas set forth in the Respondent's IPDP, namely 3b, "persistence" and 4a "tailored instruction" were also incorporated into her CAP. Principal Cepero recalled "dialoguing" with Carroll regarding these teacher growth areas. A goal setting conference was held on October 8, 2014, at which time Cepero and Carroll were expected to collaborate on developing a CAP "tailored for teachers who require additional support."

In addition to her SGOs, which she admittedly prepared, the Respondent maintains that her CAP was not individualized for her deficiencies. This aspect of the CAP was problematic because, but for the Respondent's absences and tardies in 2013-14, she would have been rated effective. The Arbitrator concurs with Respondent in finding that the "action steps" for administration to assist were generic as opposed to indicating the specific help that the administration would provide. Given evidence that Carroll provided the student learning goals, the assessment metrics for ELA and Math as well as reiterated (or at least did not object to) the teacher growth objectives, the Arbitrator is not persuaded that she passively conceded to a CAP developed exclusively by the administration.

Since the action steps for the teacher growth are virtually identical in the IPDP (i.e., “I will use the first weeks of school to teach routines, procedures and expectation of how to work independently and use resources in the classroom to help them complete their assignment”), it strains credulity to propose that Carroll was an inactive bystander during the entire CAP development process. (D. Ex. #2 @ 4; D. Ex. #9 @ 4).

Inasmuch as her retention as a tenured teacher depended upon fulfillment of the goals and objectives, student and teacher, set forth in the CAP and she knew or should have known that she could make changes to meet her individual needs, the Arbitrator is disinclined to place the sole burden on the administration in a “collaborative process.” On balance, the Arbitrator finds that, despite some procedural irregularities, the District substantially complied with the CAP protocol.

Accordingly, the Respondent’s CAP claim is dismissed.

Finally, the Arbitrator concurs with Respondent that Carroll’s 2014-15 Summative Evaluation was issued prematurely on April 14, 2015 – at least a month earlier than the State and District guidelines suggest. In contrast, Carroll’s 2013-14 Annual Summative Evaluation was issued on May 28, 2014. However, there is no evidence that one (1) additional observation would have changed the outcome. Therefore, this technical deviation from practice does not rise to the level of a statutory material error in the evaluation process.

VI. Other Claims

With respect to other allegations made by the District and disputed by the Respondent, the Arbitrator expresses no opinion as they were not the subject of the inefficiency charge.

VII. Conclusion

For the reasons set forth above, the Respondent's Summative Annual Evaluations for 2013-14 and 2014-15 are legally void due to their lack of statutorily mandated student growth objectives (SGOs). The District's evaluation of the Respondent "failed to adhere substantially to the evaluation process" and this deviation from the statutorily mandated procedures and regulations materially affected the outcome of her evaluation pursuant to N.J.S.A. 18A:6-17.2(b). As such, these evaluations cannot serve as the basis for inefficiency charges pursuant to Section 25 of the TEACHNJ Act, N.J.S.A. 18A:6-17.3.

Accordingly, the tenure charge of inefficiency filed by the State-Operated School District of the City of Newark, County of Essex, Dkt. No. 261-9/15, is dismissed.

Remedy

As a remedy, the Respondent, Danielle Carroll, shall be reinstated to her position as an elementary school teacher with the State-Operated School District of the City of Newark, effective immediately. She is further awarded appropriate back pay for the period she was medically able to return to work on a full-time basis – less Worker's Compensation payments. She shall also receive commensurate benefits (medical, pension credits and contributions) retroactive to the date of the Certification of the Charges.

The Arbitrator will retain jurisdiction *sine die* to address any issues that may arise in the interpretation or implementation of the remedy portion of this award, including the compensatory effect of the Respondent's current availability on a limited part-time basis until such time that she is medically cleared to return to full duty.

NOW THEREFORE, as the duly selected Arbitrator, having heard the evidence presented, I hereby issue the following:

AWARD

- (1) The District failed to adhere substantially to the evaluation process and engaged in actions that were arbitrary and capricious, which

materially affected the outcome of the Respondent’s summative annual evaluation, when it did not include statutorily mandated student growth objectives (SGOs) based on multiple objective measures of student progress in either Respondent’s 2013-14 or 2014-15 summative annual evaluation.

- (2) Pursuant to the TEACHNJ Statute, the Respondent, Danielle Carroll, shall be reinstated to her position as a teacher with the State-Operated School District of the City of Newark.
- (3) The Respondent shall be reinstated with appropriate back pay for the period she was medically able to return to work as a full-time teacher – less Workers’ Compensation payments.
- (4) Carroll shall also receive commensurate benefits (e.g., medical, pension credits and contributions) retroactive to the date of the Certification of Charges.
- (5) The Arbitrator will retain jurisdiction *sine die* to address any issues that may arise in the interpretation or implementation of the remedy portion of this award, including the compensatory effect of the Respondent’s current availability on a limited part-time basis until such time she is medically is cleared for full-duty.

December 30, 2016

Robert T. Simmelkjaer
Robert T. Simmelkjaer
Arbitrator

STATE OF NEW JERSEY}
COUNTY OF BERGEN}

On the 30th day of December 2016, before me came Robert T. Simmelkjaer to me known as the person who executed the foregoing instrument and he acknowledged to me that he executed his Award in Agency Docket Case No. 261-9/15 dismissing tenure charges as set forth above.

December 30, 2016

Notary Public