

**NEW JERSEY DEPARTMENT OF EDUCATION  
BUREAU OF. CONTROVERSIES AND DISPUTES**

In the Matter of the Tenure Hearing of Mary Mackenzie

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Agency Dkt. No. 219-9/17

**HILLSBOROUGH TOWNSHIP  
BOARD OF EDUCATION**

“Petitioner”

**OPINION  
AND  
AWARD**

--and--

**MARY MACKENZIE**

“Respondent”

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**Before Peter Adomeit, Esq. Arbitrator**

**Appearances:**

**For the Petitioner:**

Fogarty & Hara, Esqs.  
By: Vittorio S. LaPira, Esq.  
On the Brief: Robert D. Lorfink, Esq.

**For the Respondent:**

Mellk O’Neill  
By: Edward A. Cridge, Esq.

## OPINION

### Procedural Background

This dispute arose when a tenured teacher, Mary Mackenzie (“the Teacher”)<sup>1</sup> employed by the Petitioner Board of Education (“the Board” or the District”), received “partially effective” evaluations in two consecutive years, 2015-2016 and 2016-2017. On August 30, 2017, the Superintendent of Schools filed Tenure Charges, along with supporting documents, with the Board. September 11, 2017, the Board considered the Charges and evidence and passed a resolution determining that the Charges be sent to the Commissioner of Education, and suspending the Teacher with pay Accordingly, acting pursuant to *N.J.S.A. 18A:6-17.3*, the Petitioner’s Superintendent of Schools, Dr. Jordan Schiff, filed “Tenure Charges”, with the State of New Jersey, Department of Education, Bureau of Controversies and Disputes, received by the Bureau on September 18, 2017. On September 28 2017, the Teacher filed an answer. On October 6, 2017, the Department of Education assigned undersigned arbitrator to hear and decide the dispute. After a procedural hearing by telephone, we held hearings on December 11, 2017, December 20, 2017, January 16, 2018, and January 23, 2018. Both parties were present and represented by counsel at all hearings. Each counsel presented extensive written evidence, the testimony of witnesses under oath, and cross-examined opposing witnesses. A court reporter, present during all testimony, provided transcripts to counsel and the arbitrator. By agreement, counsel filed simultaneous electronic briefs on February 23, 2018. After an extension of time, the undersigned filed this Opinion and Award on April 9, 2018.

The Arbitrator has carefully studied and analyzed the entire record, as it relates to the charge and the statutory protection for tenured teachers. *N.J.S.A. 18A: 28-5*, as amended by the TEACHNJ ACT, P.L. 2012, c. 26, which states in

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<sup>1</sup> To be consistent with my discussion, I have changed all references in the positions of the parties from “Mackenzie” or “The Teacher” to “the Teacher.”

operative language:

The services of all teaching staff members employed prior to the effective date of P.L. 2012, c.26, in the position of teacher serving in any school district or under the board of education shall be under tenure in good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause....

The arbitrator has also considered the evidence in light of the statutory requirements requiring help and assistance to teachers who are deemed ineffective or partially effective, and the procedures Boards much follow before filing Tenure Charges.

The Board asserts the ground for dismissal is "inefficiency." As to whether such grounds exist, the Board bears the burden of proof.

### **The Tenure Charges**

The Tenure Charges allege, generally and in addition to specific detailed charges, that The Teacher "consistently demonstrated inefficiencies and ineffectiveness in her teaching skills throughout the 2015-2016 and 2016-2017 school years and, as a result of the significant negative impact that her poor teaching performance has upon the quality of education of her students, she must be dismissed from her position." The Charges are included in the "Board Position" set forth below.

For two consecutive school years, 2015-2016 and 2016-2017, the Teacher's performance was rated "partially effective" on her summative evaluations, thereby necessitating the filing of the Tenure Charges for "inefficiency."

Steven Kerrigan ("Kerrigan") is the Principal of the Woodfern Elementary School and one of the Teacher's supervisors. As such, Kerrigan, along with

other members of the school improvement panel, is responsible for observing and evaluating the Teacher in her position as the special education teacher.

The Teacher had a relatively poor performance in the 2014-2015 school year. With a composite score of 2.66, as noted on her *Composite Score Report*, the Teacher barely met the criteria for an effective teacher. On a four-point scale,<sup>2</sup> with a score of one being the lowest rating, and four the highest, the Teacher earned an "ineffective rating" (a one) in the area of "Instructional Planning," and "partially effective" (a two) in the areas of "Instructional Delivery" and "Learning Environment."

As a result of her poor performance, the Board provided the Teacher with a *Professional Improvement Plan*, specifically to address the following deficiencies:

a) In "Instructional Planning," they included "lack of consistent lesson plan availability, lack of consistent detailed content, lack of evidence of consistent differentiation of instruction, and inconsistent pacing in math";

b) In "Instructional Delivery," there was a "lack of consistent evidence of differentiated instruction<sup>3</sup> to meet individual student needs;

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<sup>2</sup> A score of one is considered ineffective; two, partially effective; three, effective; and four, highly effective. [Footnote in original]

<sup>3</sup> "Differentiated instruction and assessment ... is a framework or philosophy for effective teaching that involves providing different students with different avenues to learning (often in the same classroom) in terms of: acquiring content; processing, constructing, or making sense of ideas; and developing teaching materials and assessment measures so that all students within a classroom can learn effectively, regardless of differences in ability." See [https://en.wikipedia.org/wiki/Differentiated\\_instruction](https://en.wikipedia.org/wiki/Differentiated_instruction), citing Tomlinson, Carol (2001). "How to Differentiate Instruction in Mixed-Ability Classrooms" provides access for all students to the general education curriculum. The method of assessment may look different for each child, however the skill or concepts

c) and in "Learning Environment," the Teacher demonstrated "inconsistent use of classroom procedures, organization of materials, etc. which results in lost instructional time." She was required, among other things, to invite Kerrigan to see a lesson where she would differentiate instruction for math students in her classroom, and to meet every two weeks with her Kerrigan and a math content specialist to ensure that she used appropriate lesson pacing and progress.

The Teacher's inability to submit lesson plans on a timely basis continued early on in the school year. Even though it was clear that she was required, like all other staff members, to submit her lesson plans no later than 8:30 am every Monday morning, Kerrigan had to remind her via email at 12:21 pm on Monday, September 21, 2015, that she had not yet submitted her lesson plans for the week. The Teacher's response was that she would get them to him, but that the "internet wasn't cooperative this morning." She ultimately uploaded them around 3:42 pm that afternoon. This continued to happen on at least five other occasions throughout the year, including on January 4, 2016- when she would have had ample time over the holiday break to have those ready (she emailed Kerrigan at 8:38 am to advise him that her "plans are almost done" and that she was taking a half day).

The Teacher also struggled with getting to school on time, including for reasons such as oversleeping because her cell phone was not charging and as a result, her alarm did not sound, and another time because of traffic and school buses which impacted her as a result of her responsibilities as a dog sitter/walker. As of February 4, 2016, she had three instances where she was significantly late to school.

During the 2015-2016 school year, Kerrigan observed and evaluated the Teacher on two separate occasions, on November 2, 2015 and January 21, 2016. The first observation was announced and was a "long" observation (40

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taught is the same." *Classrooms (2 ed.)*. Alexandria, VA: Association for Supervision and Curriculum Development

minutes), while the second observation was even longer-60 minutes (the full period). That observation was essentially an "announced" observation, insofar as the Teacher invited Kerrigan to see that lesson in particular, consistent with the requirements of her Professional Improvement Plan for that year.

For the November 2, 2015 observation, the Teacher and Kerrigan completed a *Pre-Observation Conference Record* on October 29, 2015, where the Teacher described what would be observed, what she wanted to highlight, and her area of concerns. The class (a special education mathematics class) was comprised of five 4th grade girls.

As detailed in his *Formal Classroom Observation Report* dated November 3, 2015, Kerrigan did not observe much differentiation of instruction, especially because all five students struggled with the lesson. Kerrigan offered advice as to better teaching techniques and strategies, such as having various activities and incorporating real world connections to determine if students can apply knowledge, and also offered to discuss other ideas at the post-observation conference.

When the Teacher had her students complete a survey in November of 2015 - as all teachers do - when asked if "my teacher is prepared and ready for teaching every day," two out of the five students responded, "sometimes." The Teacher noted in her *Student Survey Analysis* dated November 16, 2015, that she felt "much more prepared than last year, but there always is room for improvement."

The teacher asked Kerrigan to observe a class. When Kerrigan observed the Teacher in this class January 2016 the observation was not positive. Kerrigan noted in his *Formal Classroom Observation Report* dated January 28, 2016, there was "very little evidence of the use of differentiated instruction techniques," and to that end, Kerrigan provided her with various articles on the topic. This was the lesson that, as per Mackenzie's Professional Improvement Plan, she would invite Kerrigan to *observe her use of* differentiated instruction. Kerrigan also noted other issues with the Teacher 's instruction and offered

further suggestions. In particular, he noted that "all activities in this lesson were teacher directed with very little student exploration."

Kerrigan and the Teacher met and discussed the observation at a post-observation conference held on February 1, 2016. They discussed the importance of differentiating instruction to students on different levels, and arranged to have the Teacher observe a classroom where differentiated instruction was being utilized.

The Teacher's *Teacher Summative Performance Report*, where the Teacher earned "partially effective" ratings (a two) in the areas of "Professional Knowledge" and "Instructional Delivery." She earned "ineffective ratings" (a one) in both "Assessment of and for Learning" and "Professionalism." Her *Composite Score Report* revealed a total score of 2.20, which falls within the "partially effective" category. That score was among the lowest in the District. In the area of "Professional Knowledge," Kerrigan noted that the Teacher was unable to demonstrate consistent evidence of her ability to differentiate instruction, which was one of the primary focuses of her *Professional Improvement Plan* for that year. Kerrigan determined that the Teacher "inconsistently demonstrate[ed] understanding of the curriculum, content and student development or lack[ed] fluidity in using the knowledge in practice," which is the standard for a "partially effective" rating in that domain.

Although Kerrigan rated the Teacher as effective in the domain of "Instructional Planning," he noted that while she was required to turn in lesson plans on a timely basis each week-and this was specifically addressed in her *Professional Improvement Plan*. The Teacher failed to do so no less than six occasions. Notwithstanding the fact that the plans should not have been late once all year, especially given her need to focus on this area, that was still considered "a significant improvement from the previous school year," aided by her bi-monthly meetings with Kerrigan, who noted that she "must abide by policies for regular timely submission of lesson plans.

The Teacher also earned a "partially effective" summative rating in

her "Instructional Delivery." Kerrigan specifically noted that her *Professional Improvement Plan* provided her with "an opportunity to invite administration to observe a lesson in which the Teacher could highlight the use of differentiated instruction." Although the Teacher did invite Kerrigan to see a lesson, she did not perform well. In completing the *Summative Performance Report*, Kerrigan noted that Mackenzie could not consistently provide evidence of differentiated instruction, either through the documents<sup>4</sup> that Mackenzie uploaded to the system as proof of the same, or during the lessons Kerrigan observed. In particular, he noted that the evidence instead showed "an inconsistent use of instructional strategies to meet individual student needs."

The Teacher was rated as ineffective in the areas of "Assessment of and for Student Learning," as Kerrigan noted that "the artifacts and accompanying teacher narrative included here provide little to no information regarding variety of assessment, frequency of assessment, and use of data to inform overall instruction. Further, no artifacts displaying assessment in any other academic discipline are present." Kerrigan also noted that there were concerns, as memorialized in emails to the Teacher, about her timely reporting of academic progress/assessment data.

In the area of "Professionalism," the Teacher also earned an "ineffective" rating. Kerrigan highlighted a number of issues in this area, namely several instances of lateness to school (20minutes late, 30 minutes late, and another where she was 50 minutes late), which were discussed at bimonthly meetings and memorialized in emails and memoranda, as well as an issue pertaining to appropriate conduct when interacting with a student (as memorialized in another memorandum).

As a result of the Teacher's "partially effective" summative rating for the 2015-2016 school year, the Board developed and implemented an individualized and comprehensive *Corrective Action Plan* ("CAP") to address the areas noted

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[Footnote in original]

<sup>4</sup> The staff members refer to these documents in the various reports as "artifacts."



for improvement, which the Teacher and Kerrigan discussed and signed on September 15, 2016. The *CAP* included multiple demonstrable goals intended to assist Mackenzie and facilitate professional development.

The *CAP* sought to improve the Teacher deficits in differentiating instruction through her review of the book *Differentiating Math Instruction: Strategies that Work for K-8 Classrooms*, and through bimonthly meetings with the administration; providing her with the opportunity to visit the classroom of a math mentor two to three times per marking period to observe strategies that enhance meaningful student engagement and differentiation of instruction; and allowed her to arrange for the administration's observation of a lesson where she would showcase differentiation of instruction.

The *CAP* also sought to have the Teacher systematically gather formative data on student learning and utilize such data to guide instruction, through the use of formative assessments (such as an "exit ticket") for each lesson and maintaining a journal to demonstrate how she utilized the data.

The *CAP* required the Teacher to adhere to all District policies, in particular regarding timeliness of her attendance to school and the timely submission of lesson plans and assessment data.

Kerrigan arranged to meet with the Teacher bimonthly during the 2016-2017 school year to review her progress toward her *CAP* goals and to provide her with assistance.

Notwithstanding Kerrigan's assistance, the Teacher was still unable to earn an effective rating for the 2016-2017 school year. The Teacher continued to struggle with her timely submission of lesson plans. Kerrigan sent her an *email* on Tuesday, October 4, noting that as of 10:21 am, her lesson plans for the week (which are to be submitted Monday morning) were still not posted electronically, nor had she provided him with a hard copy as per her *CAP* requirements. In response, the Teacher explained that she had neglected to "click post" on *Monday night* (which was, obviously, already late). Kerrigan reminded her that lesson plans are due *the beginning of the day on Monday*,

each week (which was not new). Ultimately, the Teacher indicated that she understood, and had a "reminder note taped to [her] computer to click submit when done with plans online."

The Teacher also began the year with some issues in one of her In-Class Resource classrooms (where she would be a second teacher, along with a general education teacher, and was responsible for the special education students integrated in the mainstream classroom). For example, the Kindergarten teacher, Katherine Goldman, advised Kerrigan that on October 11, 2016, the Teacher failed to follow a prescribed format when instructing the students. That was surprising, because Kerrigan had just met with the Teacher a few days before, as part of their bi-monthly *CAP* meetings, and directed her to follow the prescribed format for the alphabet program. As a result, Kerrigan sent the Teacher an email that date directing her "to follow the program as it is prescribed" and stated "Do not deviate from this."

District administrative staff evaluated the Teacher on four occasions during the 2016-2017 school year. Kerrigan observed her twice, both during announced observations, while Michael Volpe, Director of Human Resources, and Suzan Radwan, Director of Special Services, observed Kerrigan in unannounced observations.

For the November 3, 2016 observation, the Teacher and Kerrigan completed a *Pre-Observation Conference Record* on November 2, 2016, where the Teacher described what would be observed, the instructional strategies she would use to help her students learn the intended learning target, and what she would do for each student if they achieved the objective (or struggled). The classroom was a 3<sup>rd</sup> grade resource room class with two students.

As detailed in his *Formal Classroom Observation Report* dated November 4, 2016, Kerrigan noted that this lesson demonstrated advanced preparation, which was good: the Teacher had arranged teacher stations with different content and skill requirements, appropriate materials, and her lesson

plans aligned with learning standards. Kerrigan asked the Teacher to discuss how she would utilize assessment data to target instruction at their post-observation conference. It was, in other words, what one would expect from an announced observation.

Unfortunately, the next two observations-both of which were unannounced-revealed that the Teacher did not consistently perform up to expectations.

Volpe observed the Teacher on December 7, 2016, for forty minutes, also in a resource room math setting with two students. Although the Teacher noted in her lesson plans that she would differentiate instruction, as Volpe detailed in the *Formal Classroom Observation Report* dated December 12, 2016, she did not implement that in the actual lesson. Moreover, while the Teacher's lesson plans indicated that she would use multiple methodologies, she did not do that either. Volpe observed that Mackenzie used the same methodology throughout the lesson, which was teacher direction, student performance on the teacher-directed task, and the asking of follow-up questions. Mackenzie also had to do a great deal of redirection to address student behaviors - in a class of two - and Volpe indicated that "positive reinforcement was not evident as often and may have engaged students further into the lesson." He offered strategies and asked the Teacher to reflect on her approach.

Volpe met with the Teacher on December 21, 2016, at which time he discussed his observation and progress towards her *CAP* (as well as any additional supports she would need to be successful). the Teacher advised that she did not need any additional supports.

Radwan observed the Teacher in an in-class resource writing lesson on January 25, 2017, and had a co-observer present as well: Donna Landon, the Supervisor of Special Services for the Elementary schools. Radwan noted, in her *Formal Observation Report*, that the Teacher "did not consistently demonstrate an understanding of the intellectual needs of her students," inasmuch as she "did not adjust the pace of instruction when working with a student with a

learning disability." In addition, Radwan did not observe the Teacher use accommodations for diverse learners. There was also little evidence of planning for differentiating instruction. She also noted that the Teacher did not clearly communicate with students and check for understanding; after "helping" a student, that student instead sought assistance from the general education teacher. Radwan observed that the Teacher did not use a variety of instructional strategies to support the students when they were editing their writing. She "just told the student what needed to be edited rather than using questioning techniques to facilitate student editing." Finally, Radwan noted that the Teacher did not provide a student with appropriate wait time after asking a question-essentially failing to assess for student understanding. The Teacher met with Radwan for a post-observation conference on that same day to discuss the observation.

The administrators were not the only individuals to notice the Teacher's poor performance. Indeed, other teachers had brought their concerns regarding the Teacher's performance to Kerrigan's attention. Kerrigan sent an *email* to the Teacher on February 6, 2017 to let her know that he wanted to meet with her to discuss concerns that have been raised about her work performance during her in-class resource/push-in assignments.

On February 13, 2017, Kerrigan met with the Teacher and her union representatives to address, as he memorialized in a February 17, 2017 email summarizing the February 13, 2017 meeting, "concerns that had been voiced to the administration by other Woodfern staff members regarding The Teacher's performance and work during her in-Class Resource responsibilities." During that meeting, Kerrigan explained the specific concerns voiced by staff, which included:

- a. The Teacher's failure to perform her duties consistently, where the classroom teacher modeled the manner in which the Teacher should complete tasks, and the Teacher subsequently altered those procedures;
- b. The Teacher's failure to consistently engage with students during

work time, as Radwan observed in her January 25 observation;

c. The Teacher's spending significant amounts of time on her computer during class, which her fellow teachers perceived as the Teacher use of her computer for non-work purposes.

The Teacher offered various excuses for the issues raised above none of which were particularly compelling - but her initial response was telling: she felt teachers should have come to her first before bringing these issues to the administration. Kerrigan advised the Teacher, however, that at least one teacher said she *had* met with the Teacher on multiple occasions, and was frustrated about having to revisit the topic with the Teacher again.

Kerrigan also met with the Teacher that day to perform her midyear evaluation, as memorialized in a *CAP Progress Summary* dated February 13, 2017, which the Teacher signed that day. Kerrigan noted that he expected the Teacher to "Document differentiation during in-class resource services in grade 3 literacy, science, and social studies - based upon 1/25/17 lesson observation"

Notwithstanding the meeting where Kerrigan reviewed her colleagues' concerns with her performance, on March 7, 2017, the Kindergarten teacher (Goldman), sent an email to the Teacher, with a copy to Kerrigan, about her performance on that date. Goldman memorialized the Teacher's failure to instruct the students in the areas where they needed instruction the most, and indicated that she *left the classroom twenty minutes early*. Goldman also provided the Teacher with times when she could meet with her, including after school, to make sure that students had "a schedule that will ensure a full 40 minutes of intervention." There was some back and forth about what the Teacher felt she should or could do in the classroom, which led Goldman to respond, "I do not mind if you touch base as far as where a student is or what I am teaching, but I do not have time each day to tell you what to do." She also indicated while the Teacher's plan to introduce Rapid Words to students on Mondays was extremely helpful, that "should not take the whole 40 minute

intervention time ... there are other great things you can be doing as well."

Kerrigan sent an *email* to the Teacher that same day, addressing both her decision to leave the classroom early - which was not permitted or justified in any way - and the fact that her lesson plans were, once again, significantly late (as of 10:36 am on Tuesday).

The Teacher, once again, indicated that she "forgot to press post" when submitting the online lesson plans (apparently the note she put on her computer in October was not the "cure all" as she had hoped). Kerrigan explained that this was not a valid excuse, as she had ample experience with working with the online lesson plan program, and that with regard to leaving class early, he wrote that "it is not up to you to decide to leave a class if you are scheduled to be there. You are to follow your class schedule. This is not up to individual interpretation." The Teacher ultimately apologized for the lesson plan submission, and indicated that with regard to the Kindergarten class, she "will stay the full amount" and that the teacher had "given [her] more things to do."

Kerrigan also had to address the Teacher's professionalism at this time. In an *email* dated March 10, 2017, he noted that she had, to date, been absent 12 days (or 10% of the school year to date). Moreover, he noted that more than half of those absences occurred on Fridays, and that two were on a Tuesday and Wednesday following a Monday holiday (President's Day). He advised that she also notified the District of her sick days relatively late in the morning on several occasions, which led to the school being unable to secure a substitute teacher on three of those days. Kerrigan stressed the importance of timely reporting of her absences.

On March 21, 2017, Kerrigan performed another announced observation - one where the Teacher invited him to see the lesson, as per her *CAP* requirements, in a 3rd grade literacy class with a general education teacher. He stayed for the full sixty minutes of the lesson. The observation revealed, among other things, that the Teacher's lesson plans provided few details of

differentiation for the special education students she teaches, as they were basically copies of the general education teacher's lesson plans with a statement added that said, "Miss Mack: read w/ HA; fact/opinion; Key words for fact/opinion file folder game."

The Teacher's performance seemed appropriate in several domains, but Kerrigan noted that in terms of assessing students to drive instruction, he had concerns about the reading level used for a particular student, and questioned why she took no anecdotal written records - how would she further differentiate for this student without any data?

Kerrigan met with the Teacher on April 3, 2017 for her post observation conference, and Mackenzie indicated that she would follow up on his suggestions.

The Teacher and Kerrigan reviewed her *CAP* progress on May 9, 2017. Kerrigan found that she met expectations on her *CAP*, insofar as performing certain tasks (reading a book, observing mentor teachers, etc.) was concerned. However, that ultimately did not translate into effective classroom teaching, as demonstrated in the various observations and Kerrigan's summative evaluation of her overall performance.

Kerrigan prepared the *Teacher Summative Performance Report* ~ dated May 31, 2017 and evaluated the Teacher's job performance as a special education/resource center teacher for the District. Once again, the Teacher earned partially effective ratings in four performance areas and ineffective in one (Assessment of and for Learning). In the six educator practice domains, she only obtained one effective rating (in "Learning Environment"). Kerrigan noted a significant difference between her performance in the announced observations and the unannounced observations, and indicated that even though she read articles and a book on differentiated instruction, "content from these articles should have been evident in lesson observations by the administration." She did not consistently detail differentiation in her lesson plans (which were late several times, again), and inconsistently demonstrated actual

differentiation of instruction. On the whole, her performance in most areas was quite inconsistent. She failed to provide evidence that her instruction was data-driven, which was a key element of her *CAP*.

The *Composite Score Report* for the 2016-2017 year reflected a rating of 2.30-tied for the second lowest rating in the entire district, and, once again, a “partially effective” rating.

#### Position of the Board

The Board introduced evidence to substantiate the Tenure Charges.

The Board demonstrated that it substantially adhered to the evaluation process as mandated by TEACHNJ, and the Teacher did not offer any evidence to the contrary

The arbitrator is only empowered to consider, among other things, whether or not “the employee’s evaluation failed to adhere substantially to the evaluation process, including but not limited to, providing a corrective action plan” and the employee is only entitled to a reprieve if such failure “materially affected the outcome of the evaluation.” N.J.S.A. 18A:6-17.2 (a), (b). “Material” is defined as “having real importance or great consequences,” citing Merriam Webster dictionary.

The Board adhered to the Stronge Evaluation Model 4. A review of recent arbitrator decisions reveals that the District substantially adhered to the evaluation process and, assuming for the sake of argument that the District failed to do so, the Teacher did not meet her burden to demonstrate that such actions or inaction materially affected the outcome of the evaluation

The Teacher did not demonstrate by a preponderance of credible evidence any “mistakes of fact” in either her 2015-2016 or 2016-2017 evaluations, let along any that materially affected her evaluations.

The Teacher produced no evidence that the tenure charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination prohibited by law, or other conduct prohibited by law.



The Teacher failed to demonstrate through a preponderance of credible evidence that the District's actions were arbitrary and capricious in any way or that any such actions materially affected the outcome of her evaluation.

So long as the Board complied with the process for the most part, it has met its burden of proof. Even if a board fails to adhere substantially to the evaluation process, the arbitrator is still required to dismiss the teacher unless the failure was critically important to the outcome of the evaluation. The Board substantially complied with the evaluation process, giving the Teacher and opportunity to improve her performance and save her job – which she failed to do.

The Teacher failed to show through a preponderance of credible evidence that the District's actions were arbitrary and capricious in any way or that any such actions materially affected the outcome of her evaluation.

The Teacher entered the 2015-2016 school year after barely achieving a rating of effective during the prior school year, scoring a 2.66 where she needed a 2.65 to be scored "effective."

Her low rating indicated she had "issues": An "ineffective" rating for instructional planning, a "partially effective" rating for instructional delivery and a "partially effective" rating for instructional delivery, and a "partially effective" rating for learning environment. Given these low scores, the Stronge Model required the administration to initiate a Professional Improvement Plan, which is "designed to support a teacher in addressing areas of concern through targeted supervision and additional resources.

The targeted issues were not having lesson plans available, lack of detail in the lesson plans that were available, and differentiation of instruction.

Her summative evaluation for instruction planning was "effective". During 2015-2016 school year, she taught pull-out resource math and push-in resource for science, social studies and literacy. Her math class had four or five students.

During the 2015-2016 school year, the District observed the Teacher

twice, pursuant to a waiver it obtained from the New Jersey Department of Education of the requirement that it conduct three observations of tenured teachers. The waiver allowed the District to perform, and it did perform, one long observation of 40 minutes and one short observation of 20 minutes in lieu of three short observations.

As explained by Michael Volpe, Director of Human Resources, the change made administrators “more available” for informal observations, giving feedback and handling discipline situations.

No waiver is necessary from the creators of the Stronge Model.

The evaluators who observed the Teacher were trained on the Stronge Model.

The District’s position on the content of the first and second observations of 2015-2016 observation is already stated above and need not be repeated.

The Teacher did not introduce any documentary or testimonial evidence that would support a finding that her first observation of the 2015-2016 school year failed to comply with the evaluation process.

The Teacher commented on the second observation report but did not object to it, and wrote that she “say [Kerrigan’s point about [the instruction] not appearing different.” She wrote she would “begin to incorporate” a suggestion that “partner work may provide [her] with more information about their actual abilities.”

The Teacher introduced no evidence that the second evaluation report was not in compliance with the evaluation process.

The second observation for the 2015-2016 school year was the last for that school year, as the Teacher took a leave of absence from mid-March to the end of the 2015-2016 school year, and did not receive the third observation contemplated by the Professional Improvement Plan.

A third observation is not required by the Stronge model or by law, given the waiver, but even if it were a substantial deviation from the evaluation process, the Teacher provided no evidence that it materially impacted her

evaluation.

During the school year 2015-2016, the Teacher continued to be unable to provide timely lesson plans and the plans that were submitted did not have an appropriate level of detail. She had issues with being late for work, sometimes significantly late. These are detailed above in the findings of fact and need not be repeated.

The Teacher's annual Summative Evaluation for 2015-2016 were as follows: Performance Standard One – “partially effective.” The evaluator, Kerrigan, did not see sufficient evidence of effective performance, but “inconsistencies.” Performance Standard Two - “effective”. Kerrigan found she still submitted lesson plans late a number of times but had improved from the previous year. Performance Standard Three - “ineffective.” Kerrigan explained that the artifacts Mackenzie uploaded and the observations showed an “inconsistent use of instructional strategies.” Performance Standard Four (assessment of student learning) – “ineffective”. Kerrigan explained she uploaded few artifacts, the ones she did related only to her math class. Kerrigan had discussed this with teachers previously that if they have a literary class, they must upload literacy assignment information, and it showed Mackenzie's “inability to report on student progress in a timely manner.” Performance Standard Five (learning environment) – “effective.” Her PIP focused on this standard and Kerrigan found she improved and wrote she “should continue to perform at this expected level.” Performance Standard Six (professionalism) – “ineffective.” Kerrigan found she continued to be late to school, sometimes significantly late, continuing after they met to discuss this. Kerrigan concluded she demonstrated “inflexibility, a reluctance and/or disregard toward school policy, and rarely takes advantage of professional growth opportunities.” Performance Standard Seven (student academic progress) – effective. Kerrigan testified this standard is calculated separately and based on the student grown objectives the Teacher created.

The Teacher's annual Summative evaluation showed a rating of 2.2 –

“partially effective.”

Kerrigan notified the Teacher that a Corrective Action Plan would be necessary.

The Teacher at no point provided evidence supporting a conclusion that the Summative Evaluation failed to comply with the evaluation process.

In summary, the Board substantially adhere to the evaluation process. The administration observed the Teacher twice, consistent with the District’s waiver from the Department of Education. Both were announced observations (the regulations only require one announced observation), one of which was preceded by an electronic pre-observation conference, as permitted by the regulations. Two of the observations were long with one lasting 20 minutes longer than a standard long observation. Kerrigan recalled one post-observation conference with the timeframe, and the Teacher provided no evidence that there was no post-observation conference for the other observation or that it occurred outside of the required time frame. The Board substantially adhered to the evaluation process. At the year’s end the Teacher did not exercise her right to file written objections to the evaluations or summative evaluation. The arbitrator cannot conclude that she disagreed with the evaluation process.

The Board’s argument for the second year show a similar pattern – a development of a Corrective Action Plan; the first, second and third observations; her mid-year evaluation; her fourth observation. The Teacher continued to have issues with her lesson plans being late; she did not conform her teaching with the regular classroom teacher but deviated from the alphabet arch, despite being told not to deviate. After the Teacher deviated again a week later, Kerrigan sent her an email stating, “You are hereby directed to follow the program as it is prescribed. Do not deviate from this.”

The corrective action plan progress review indicated she showed some improvement over the prior year and Kerrigan concluded she met expectations. The CAP is not the summative evaluation; it measures progress.

Kerrigan's Summative Evaluation for 2016-2017 concludes she was "partially effective." Standard One (professional knowledge) – "partially effective" because she was "inconsistent in demonstrating an understanding of the curriculum, content, and student development or lacks fluidity in using the knowledge I practice." Standard Two (instructional planning) - "partially effective." The Teacher was "inconsistent in the use of State standards, the school's curriculum, data, or strategies, so that's why it's partially effective." Standard Three (instructional delivery) – "partially effective." Kerrigan found her inconsistent. Too much direct instruction and little use of other instructional strategies. Standard Four (assessment of and for student learning) – "ineffective". Kerrigan found she only uploaded math artifacts after being told he wanted assessments of all of her classes, and she did this one year after being rated "ineffective" in this standard for precisely the same issue. Standard Five (learning environment) – "effective" because she effectively used "resources, routines, and procedures to provide a respectful, positive, safe student centered environment that is conducive to learning." Standard Six (professionalism) – "partially effective." Kerrigan testified she struggled throughout the year, requiring meetings regarding other teachers' concerns about her, lack of lesson plans, directives about not leaving the room. It indicated an "inconsistent display of professional judgment...." Standard Seven (student academic progress) – "'highly effective" based on the data the Teacher's entered data. Kerrigan explained it does not reflect growth of all of her students and it was specifically directed to math, not literacy (which she also taught).

The Teacher's annual summative evaluation was a rating of 2.3, or "partially effective."

Kerrigan reviewed the evaluation reviewed with Madwan, the Teacher, and Henry Goodhue, who along with with the Teacher expressed dissatisfaction with the evaluation. Goodhue recommended that she write a rebuttal, but none was submitted. Superintendent Schiff reviewed the documents, spoke with

Radwan, Volpe and Kerrigan, and concluded there were no exceptional circumstances warranting giving the Teacher another year.

The District demonstrated that it substantially adhered to the evaluation process.

Recent arbitration decisions support the Board's decision, showing that they have consistently dismissed teachers in similar situations.

The Teacher failed to demonstrate through a preponderance of credible evidence that the District's actions were arbitrary and capricious or that any such actions materially affected the outcome of her evaluation.

Board's Conclusion: TEACHNJ ensures that students are not required to have a partially ineffective or ineffective teacher for three years. If a teacher cannot demonstrate effective teaching in two consecutive years, he or she must be dismissed as long as the school district fulfilled its responsibilities. The district substantially complied with the evaluation process. Its actions are not arbitrary or capricious, but based on the good faith judgment of her teaching performance. The Teacher minimally complied with the clear expectations of the Corrective Action Plan, which was designed to help her improve her teaching. She made no serious effort to improve her performance. Accordingly, the Board submits that she should be dismissed from her tenured employment in the District.

#### The Teacher's Position

Tenure laws are meant to protect teachers from dismissal for unfounded, flimsy, or political reasons.

Pursuant to N.J.S.A. 18A:6-17.2, the Board has the "ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met." If the District meets this burden, the Arbitrator may then consider whether or not: **(1)** the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan; **(2)** there is a mistake of fact in the evaluation; or **(3)** the district's actions

were arbitrary and capricious.

In New Jersey, it is axiomatic that in an administrative proceeding, the petitioner has the burden of proving its case by a preponderance of the competent, credible evidence. The law governing the process is detailed. N.J.A.C. 6A:9C-4.4, Requirements for and implementation of teachers' individual professional development plans; N.J.A.C. 6A:10-2.1, Evaluation of teaching staff members; N.J.A.C. 6A:10-2.2 Duties of district boards of education; N.J.A.C. 6A:10-2.4 Evaluation procedures for all teaching staff; N.J.A.C. 6A:10-2.5 Corrective action plans for all teaching staff; N.J.A.C. 6A:10-4.4 Teacher observations.

The Board's evaluation of the Teacher was arbitrary and capricious. The phrase means "having no rational basis." That "acts of government be grounded on established legal principals." It means that administrative bodies cannot take "willful and unreasoning action, without consideration and in disregard of circumstances." [Citations omitted.]

From the 1991-1992 School Year through the 2012-2013 School Year<sup>5</sup>, the Teacher was evaluated as "Successful" in every single category, on every single one of her annual evaluations, a total of 252 "Successful" performance ratings.

The Board did not evaluate the Teacher's performance, but, rather, her use of the Stronge computer system. The Board: evaluated the Teacher based solely upon her uploads to the Stronge software system, and not on her actual performance; did not compile or review information necessary to properly observe and evaluate the Teacher; evaluated the Teacher against no

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cts."

[Footnote in original]

<sup>5</sup> The Teacher's annual evaluations for the 1997-1998 through 2000-2001 school years were not contained in the personnel file provided by the Board in discovery an

measurable or definable standards; and evaluated her in a manner contrary to her admitted level of teaching performance. As a result of these arbitrary actions, the Teacher did not receive the rating of Effective, which she would have otherwise achieved. Accordingly, the tenure charges should be Dismissed.

Despite this, during the 2016-2017 school year, Principal Kerrigan did not evaluate the Teacher based upon her overall teaching record. Rather, he evaluated her solely based upon the information which she uploaded into the Stronge software system. Because of this, his evaluation of the Teacher as "partially ineffective" in several areas was arbitrary and capricious, and had a substantial effect upon her overall evaluation score. Had Principal Kerrigan not arbitrarily evaluated the Teacher in this matter, she would have received a summative score of "Effective" for the 2016-2017 school year, in which case, the Board would not have been empowered to bring inefficiency tenure charges against her seeking her removal.

An examination of Principal Kerrigan's misevaluation of the Teacher begins with her 2016-2017 Corrective Action Plan ("CAP") Summative Review. The CAP had set several "Demonstrable Goals" specifically:

- 1: More differentiated instructional techniques, especially in math
- 2: Incorporation of differentiated instructional strategies to enhance EveryDay Math lessons.
- 3: Formative assessment data entry and use
- 4: Adherence to all district policies, specifically attendance / arrival to school, lesson plan submission, data inputting, etc.

Principal Kerrigan, who had developed and administered the CAP, found that the Teacher had "Met Expectations" in each of these four categories, citing several "Sources of Evidence" supporting his determination. With respect to each "Demonstrable Goal," those sources of evidence were:

- 1: Lesson plans  
Discussion at bi-monthly CAP progress meetings with administration
- 2: Lesson plans



Discussion at bi-monthly CAP progress meetings with  
administration

3: Data base information is current

4: Digital and hard copy lesson plan submission

Arrival time to school noted by administration / attendance

book sign-in

Time stamps on data entry

Mr. Kerrigan also acknowledged that there was voluminous documentation generated by the Teacher in the form of, *inter alia*, lesson plans and a grade book, which was not uploaded into the Stronge system. He was aware of this all of this documentation, as it was provided to him on a regular basis during the 2016-2017 school year.

Principal Kerrigan testified that there was not sufficient detail in the Stronge documentation log in order for him to rate The Teacher as effective or highly effective. He "did not see enough evidence" uploaded to the Stronge document log to show that the Teacher, was effective in the area of *Performance Standard 1, Professional Knowledge*. Similarly, in her 2016-2107 Summative Evaluation under *Performance Standard 2, Instructional Planning*, Principal Kerrigan wrote: The artifacts<sup>6</sup> and the narrative included by The Teacher do not evidence consistently detailed lesson plans.

This is directly contradictory, however, to Principal Kerrigan's findings on the Teacher's CAP Summative Review wherein he determined that the Teacher's lesson plans had, in fact, met the expected performance level: Effective.

Principal Kerrigan evaluated the Teacher based upon her document uploads. For the 2016-217 school year, the Teacher was rated as "ineffective" *Performance Standard 4, Assessment of/for Learning*. When he assigned this

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d are not part of the record.

<sup>6</sup> The term "artifacts" refers to documents uploaded into the

rating, Principal Kerrigan admitted that he ignored the fact that the Teacher's special education students would also have been assessed by the regular classroom teacher. As a resource teacher, the Teacher's role was to support the delivery of the lesson by the main classroom teacher to the subset of special-needs students to whom she was assigned. Principal Kerrigan did not take the regular classroom teacher's assessment of the Teacher's students into account because "[I]t was not included in the documentation log." He admitted that her rating of ineffectiveness was not based upon actual student assessments, but rather, upon the Teacher's documentation log. As the Teacher's CAP Summary made clear, however, she did achieve an Effective performance level in the area of "formative assessment data entry and use."

It is clear from her CAP Summary and the evidence referenced therein that, for the 2016-2017 school year, the Teacher was, at minimum, Effective in the areas of *Performance Standard 2, Instructional Planning, Performance Standard 3, Instructional Delivery, Performance Standard 4, Assessment of /for Learning and Performance Standard 6, Professionalism*. It is also clear that all of the materials referenced in the CAP summary were not uploaded into the Stronge documentation log system. Taken together with Principal Kerrigan's own testimony, one is led ineluctably to the conclusion that Principal Kerrigan did not evaluate the Teacher based upon the entirety of her work performance, but rather, solely upon the work reflected in her Stronge document log.

Teachers were given no guidelines or direction as to "how much" needed to be uploaded to the document log. A teacher would expect that materials submitted to and reviewed by her Principal on a regular basis, such as lesson plans and grade books, would be taken into consideration in connection with her evaluation. Here, that did not happen.

Since the Teacher's rating is based not upon her performance, but instead upon the manner in which that performance was recorded, Principal Kerrigan's rating of the Teacher as Partially Effective for the 2016-2017 school year was arbitrary and capricious. Since, had he appropriately rated her as

Effective under the aforesaid Performance Standards, she would have received a final summative score of Effective for the 2016-2017 school year, the tenure charges should be Dismissed.

The Board did not Compile or Review Information Necessary to Properly Observe and Evaluate the Teacher.

During their testimony, the Board's witnesses—particularly Principal Kerrigan—focused extensively upon the concept of "differentiation," and the Teacher's purported failure to sufficiently utilize same. The Teacher did, in fact, meet Principal Kerrigan's requirements to utilize differentiation for the 2016-2017 school year, as per her CAP summary. It is clear that the Board's evaluators acted arbitrarily and capriciously in faulting the Teacher for not using differentiated instructional techniques. The Board's evaluators did not review or compile the information necessary to make such determinations.

Principal Kerrigan defined differentiation, generally speaking, as providing content, process, or materials varied ways to address the different learning needs of students. He acknowledged that the purpose of differentiation is to "meet student needs." He admitted that he has no background in Special Education and that there is no Board policy, procedure, or other directive which sets forth a requirement that teachers utilize differentiated instructional techniques.

Principal Kerrigan provided the Teacher with a poor evaluation based upon his observation of January 21, 2016. The basis of this poor evaluation was that "[t]he lesson [was] not a good example of differentiation." Principal Kerrigan was unable, however to testify that the needs of any student had not been met by the lesson—differentiated or not—delivered by the Teacher.

Principal Kerrigan had not reviewed any student materials, grades, papers, Individualized Education Plans ("IEPs") or other materials prior to the observation, not did he speak with any students after the lesson. He claimed that "students were struggling" with the lesson, but could not identify the

struggling students or any student whose needs were not met based upon the Teacher's November 2, 2015 observation.

Principal Kerrigan observed the Teacher again on March 21, 2017. In the area of instructional planning, he complained that the Teacher's lesson plan contained "few details of differentiation." Prior to this observation, however, he had reviewed no documents. Notably, he did not review the lesson plan of the regular classroom teacher (the Teacher was in the room as a special education teacher) and could not know whether or not it would have been appropriate for her to utilize differentiation in the classroom that day. Rather, he seemed fixated, not upon the effectiveness of the lesson delivered to students, but rather, on the fact that the Teacher was supposed to show him differentiation that day. Finally, in the summative evaluation Kerrigan opined that "[c]ontent from these articles should have been evident in lesson observations by administration." He admitted, however, that he had never even read the documents that he was referring to. Accordingly, he had no idea whether content from the articles was presented in her observed lessons.

The Teacher was observed by Donna Landon and Suzan Radwan on January 25, 2017. During her entire career, Dr. Radwan had never served as a classroom teacher. Prior to the observation, she did not review the main classroom teacher's<sup>7</sup> lesson plans, nor the IEPs of any students to whom the Teacher was assigned. Similarly, Ms. Landon had not been a classroom teacher for more than 20 years, and did not recall reviewing any student IEP in preparation for her observation of the Teacher. Despite having no information about the student, however, faulted the Teacher for not using a "variety of instructional strategies" to support the student.

The Teacher was observed by Michael Volpe on December 7, 2016. Prior to that observation, he reviewed no documents other than her CAP plan. He

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e Stronge documentation log.

<sup>7</sup> As an in-class support teacher, The Teacher's role was to provide academic support to the students in the class who had I

looked at her lesson plan during the observation. He did not know the names of the students in the class, nor had he ever had any previous interactions with them. He had never reviewed the IEPs of the students, and had no idea whether or not they suffered from attention deficit disorder, or any other learning disabilities. Notwithstanding this, in his observation, he faulted the Teacher for failing to utilize "differentiation."

He was unable to say whether the needs of the Teacher's students had been met, or not met. He also criticized the Teacher for the "methodologies" which she utilized to implement her lesson; however, he had no factual basis upon which to make this criticism. Effectively, Mr. Volpe acknowledged that a student's getting "off task" could be the result of an insufficiently engaging lesson, or, in the alternative, due to the student's own behavioral issues. He admitted, however, that he had no idea whether the Teacher's students had behavioral issues or not. As such, he negatively evaluated the Teacher based upon his uninformed assumption that her lesson, and not the students' issues, caused them to require redirection.

The prerequisite to faulting a teacher for failing to use differentiated instruction, or any other instructional method, is knowledge or information that such differentiation or method will be helpful to meeting the needs of the specific students involved in the observed lesson. Absent this, there is no rational relationship between a teacher's performance, and the use or non-use of differentiation or any other instructional technique. Since that prerequisite was not present here, the Board's negative evaluation of The Teacher based upon its claim that the Teacher did not utilize differentiation or other instructional techniques. was arbitrary and capricious.

The Board evaluated the Teacher against no measurable or definable standards. As the testimony of Principal Kerrigan made clear, his determination that the Teacher was Partially Effective and/or Ineffective in several performance standard areas was not merely subjective—it was wholly untethered to any standard whatsoever. An evaluation which is unbound by any measurable

standard, let alone any standard which has been communicated to the employee, is arbitrary and capricious.

As discussed, *supra*, there were no guidelines lines or directives governing the quantity or quality of materials which teachers were supposed to upload to their document logs. There was also no policy, procedure, or guideline promulgated by the Board setting forth a requirement for differentiated instruction.

Additionally, there was no measurable guideline governing *Performance Standard 4, Assessment of / for Learning*. The Teacher was rated as "Ineffective" under this standard, during both the 2015-2016 and 2016-2017 school years, despite the fact that there was no policy, procedure, guideline or directive governing the type or frequency of student assessments. This was the case despite the fact that, during the 2015-2016 school year, Principal Kerrigan never notified the Teacher that there was any problem with her grade book, which she was required to keep, and he was required to monitor.

Principal Kerrigan was inconsistent in his assessment of the Teacher. Testifying regarding her March 2017 observation, he admitted that her demonstration of professional knowledge was appropriate. In her 2016-2017 summative evaluation, however, he claimed that she was only Partially Effective, and that her lesson observed in was "not a strong example of it [Professional Knowledge]." Thus, while when she was first observed, her performance was appropriate; at the end of the day, it was not Effective. Throughout his testimony, Principal Kerrigan repeatedly resisted any attempt to characterize any discrete portion of the Teacher's performance under the Stronge Rubric (i.e., as Highly Effective, Effective, Partially Effective, or Ineffective). The fact that he could simultaneously find a teacher's performance in an instance to be "appropriate," yet not "Effective, when the expected level of performance under the Stronge Model is "Effective" demonstrates the arbitrariness and unfairness of Principal Kerrigan's summation.

Principal Kerrigan found The Teacher to be ineffective and partially effective for the 2015-2016 and 2016-2017 school years, respectively, in the area of *Performance Standard 6, Professionalism*, based largely upon purported attendance / tardiness concerns. During the 2015-2016 school year, Principal Kerrigan documented 3 occasions (out of approximately 180 school days) when The Teacher was late. He had no idea why she was late for work those three days. He admitted that being late under circumstances outside a teacher's control would not evidence a lack of professionalism. He also admitted that there was no policy, procedure, or guideline whatsoever addressing how many times a teacher could be late before receiving an ineffective or partially effective rating under this standard. When pressed, Principal Kerrigan stated that "the guideline is the preponderance of the evidence of what is contained in this section of the summative." This is nonsensical. Principal Kerrigan had inadequate evidence upon which to determine that The Teacher's lateness on 3 occasions evidenced any lack of professionalism. Additionally, under his unintelligible standard, one teacher could be deemed ineffective for a single lateness, while another teacher could be late many times, and still receive an effective rating. This is subjective to the point of arbitrariness.

For the 2016-2017 school year, Principal Kerrigan faulted the Teacher in the area of Professionalism for taking sick days and for missing a professional development day due to illness, despite his acknowledgement that he had no reason to doubt the sincerity of her illnesses on the days in question. "I never thought she was faking it or trying to get away with something", he testified, and that coming into work sick was a bad idea. He also admitted that, pursuant to their Collective Bargaining Agreement, teachers were entitled to take approximately 12 sick days per year, and that The Teacher had not exceeded that number. Faulting a teacher for legitimately taking a sick day to which she is contractually entitled is irrational, arbitrary, and capricious.

Principal Kerrigan faulted The Teacher in the area of Professionalism for the 2016-2017 school year based upon the fact that there had been a meeting

to discuss "concerns" voiced by The Teacher's co-workers. The purported "concern" was that The Teacher was misusing her computer during class time (i.e., going on Facebook, etc.); however, there was no evidence that this actually took place. Reducing a teacher's evaluation score based upon an unsubstantiated "concern" is beyond arbitrary and capricious—it violates the teacher's right to Due Process.

The Board evaluation the Teacher in a manner contrary to her admitted level of teaching performance. For the 2016-2017 School Year, The Teacher improved her rating in that Performance Standard to "Highly Effective." Principal Kerrigan testified that the benchmarks set for student growth by way of the Student Growth Objectives were subject to his review and approval. This being the case, neither The Teacher, nor any other teacher, could "skew" her evaluation in her favor by setting low student achievement benchmarks.

Hence, this case presents a quandary. If a teacher's purpose is to cause student achievement, and the teacher, in fact, is the cause of a "high level" of student achievement, how can the teacher be considered "partially effective" in achieving her purpose? Logically, she cannot. The Board, clearly, quibbles with The Teacher's methodologies, yet it does not deny their high level of effectiveness.

An evaluation which is wholly unconnected, and in fact contrary to, an intended and achieved level of outcome is, *per se*, arbitrary and capricious.

The Teacher, by the Board's own admission, got the job done. That should be the end of this matter.

The Board failed to prove that it followed the regulatory requirements of the TEACHNJ Act. During the 2015-2016 School Year, pursuant to N.J.A.C. 6A:10-4.4, school districts were required to observe tenured teachers three times. Likewise, the Stronge Model, itself, stated that tenured teachers were required to be observed "at least three times.

Despite this, during the 2015-2016 School Year, The Teacher was only observed two times. The Board's Superintendent claimed that the Board they



had received a "waiver" from the Department of Education, excusing it from this requirement. No such "waiver," however, was actually introduced into evidence, which would have been necessary for the Board to demonstrate that it had actually complied with all of the requirements of same. Additionally, notwithstanding any purported "waiver" obtained from the Department of Education, the Stronge Model itself, which expressly requires "at least" three observations, does not provide that this requirement may be "waived" by a School District.

Likewise, for the 2015-2016 school year, Principal Kerrigan never conducted a mid-year review the Teacher's document log with her, despite the fact that the Stronge Model provided that such a review must take place. Had he conducted such a review, she would have been aware that her document log was, at least according to Mr. Kerrigan, insufficient.

A school district that does not follow the requirements of the administrative code, nor of the Stronge Model, is entitled to no presumption of correctness in its evaluations of a teaching staff member. Consequently, for this and all the aforesaid reasons, the Board's tenure charges should be dismissed.

The Board did not follow the Teacher's Professional Improvement or Corrective Action Plans. For the 2015-2016 school year, the Teacher's Professional Improvement Plan ("PIP"), under a section titled *Resources / Assistance Provided, Activities to be Completed by the Employee*, provided that the following would occur:

- D. Meeting once every two weeks with principal and math content specialist to verify appropriate lesson pacing and progress; Ms. Mackenzie to write summaries of the content of these meetings and attach these summaries to hard copy lesson plans submitted to principal.
- B. At least one additional formal observation to be completed during the 2015-2016 school year. Ms.

Mackenzie to invite observer into classroom for a lesson which highlights differentiated instruction.

Principal Kerrigan prepared this document. Despite this, he was unable to recall whether these meetings ever took place. He also admitted that the "extra observation" of the Teacher called for by the PIP simply never took place. Linda DeFrancesco, the "math supervisor" referred to in the PIP, testified that she never attended any such meetings with the Teacher and Principal Kerrigan, nor did she ever discuss the referenced summaries with her.

Similarly, the Teacher's Corrective Action Plan ("CAP", provided for certain "Supervisor Responsibilities." These included the following:

- Meet with The Teacher twice per month ("CAP progress meetings").
- Arrange for math mentor.
- Provide a substitute for overages as needed.
- Review record / journal
- Conduct additional observation (of a lesson selected by The Teacher), as well as additional unannounced walk-through observations.

Principal Kerrigan testified that administrator prepares the CAP Plan; he developed the Teacher's. He was unable to testify that all of the meetings provided by the CAP Plan took place. He also did not recall whether he had reviewed the Teacher's record / journal with her, as provided in the "Supervisor Responsibilities" on the CAP.

Principal Kerrigan did not know whether the Teacher was provided with any in-service special education training during the 2015-2016 or 2016-2017 school years. He also claimed that a "co-teaching" model was the preferred special education teaching method, but had no knowledge that this had ever been communicated to The Teacher.

The purpose of the PIP and CAP are to assist the teacher in achieving effective performance. The assistance to be provided is not gratuitous—rather, it is required by law. See Administrative Code, *supra*. Having failed to hold up its

"end of the bargain" with respect to assisting the Teacher, the Board has, consequently, failed to meet the statutory prerequisites for her removal. The tenure charges should therefore be Dismissed.

### Discussion and Analysis

The District employed the Teacher since September 1, 1991. She was assigned as a special education teacher in 2015-16 and 2016-17 at Woodfern Elementary School. She taught special education subjects in math and literacy. At times she taught small numbers of only special education students in a separate room. At other times she entered the classroom to assist the regular teacher with the special education students who were mainstreamed into that classroom. The tenure charge of "inefficiency" is based on her rating of "partially effective" in the annual summative evaluations for two consecutive years, 2015-2016 and 2016-2017.

According to N.J.S.A. 18A:6-17.2, an arbitrator hearing these cases "shall only consider whether or not: (1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to, providing a corrective action plan; (2) there is a mistake of fact in the evaluation; (3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or (4) the district's actions were arbitrary and capricious." The statute then states that "[i]n the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed. " N.J.S.A.

18:6-17.(a). The statute also provides that “the evaluator’s determination as to the quality of an employee’s classroom performance shall not be subject to an arbitrator’s review.” NJ.S.A. 18A:6-17.2(C).

The summative evaluation for 2015-2016 was based on a mathematical average of seven standards plus a score for Student Growth Objectives. The administration conducted two evaluations during 2015-2016. The Teacher took a leave of absence from mid-March to the end of the 2015-2016 school year, and did not receive the third observation contemplated by the Professional Improvement Plan. This leave made the third observation impossible. The credible evidence shows the District had earlier asked for and received from the New Jersey Department of Education a waiver of the requirement of three observations in all instances, not just this Teacher’s. The written waiver was not shared during discovery and for that reason the document was not admissible. Credible oral evidence showed that the waiver in fact was requested and received. After careful consideration of the facts and law, I conclude 1) That the absence of the third evaluation was caused by the teacher taking a leave of absence; 2) That a teacher who is under an corrective action plan so requests and is granted a leave of absence two months before school ends for the year presents the Board with this choice: Either wash out the plan and its two completed observations for the entire year and start over the following year; or base the summative evaluation on the evidence available. That evidence consisted of all but two months of the entire school year, and two evaluations, a sufficient time for the Teacher to have created a record through observations and the corrective action plan sufficient to create a viable summative evaluation. I conclude that the Board’s decision to have two evaluations instead of three did not materially affect the outcome of the evaluations. Indeed, the Department of Education issues waivers to allow Boards to have two evaluations instead of three, including this Board. I further conclude that the failure to have three observations in a District where it was widely known that the District had asked

for and received a waiver of the three observations is an affirmative defense which the teacher must raise, with the burden then shifting to the Board to prove by a preponderance of the evidence that the Department of Education issued a waiver. The Board fulfilled that burden through oral testimony.

Kerrigan's observation of November 1, 2015 was balanced and credible. He found that the "teacher effectively engages students in learning." She understood the content of the lesson – geometry. She had submitted lesson plans in advance. He found the pacing appropriate. Kerrigan's testimony about what he observed was likewise balanced. I found him credible. He also found that "as all 5 students struggled with the lesson, there was not much opportunity for extensive differentiation – when this concept arises again, it would be advisable to seek to have various activities incorporate real-world connections to determine if students can apply knowledge (we can discuss some ideas at the post-observation conference.)" He makes the point that because all the students were struggling, there was no opportunity to differentiate the instruction according to the needs of each student, but tells her they will discuss differentiation later.

On January 12, 2016, Kerrigan sent an email to the Teacher listing the dates her lesson plans were untimely 9/15, 9/21, 10/19, 10/26, 11/12 and 1/4. The reasons for lesson plans in advance are obvious. First, they establish that the teacher has prepared lesson plans in advance, as required. It is based on the twin premise that planning is good, not planning is bad. Planning doesn't guarantee a good result, but it goes a long way. Second, the lesson plan filed in advance is available to the substitute if the teacher is absent. Without the regular teacher's lesson plan, the substitute is at a significant disadvantage. And that happened on March 18, 2016, when the Teacher was absent and left no lesson plans for the substitute.

Kerrigan's observation on January 21, 2017 was critical of what he saw. In his report, he wrote: "All activities in this lesson were teacher directed with very little student exploration." He wrote, "During this lesson, there was little

evidence of differentiated instruction: all students completed the same tasks in the same way at the same materials; this was a lecture-style lesson.”

He also wrote that she should make the evidence of her “standards evident to the observer.” Where she does not have a “great deal of observable evidence” she was to “include high quality examples in your documentation log.” There is no “mistake of fact” in this evaluation, or is it “arbitrary and capricious.” The message is clear: 1) You spent the time lecturing the same material to all students; and 2) Don’t. Differentiate.

For 2015-2017, there is no evidence that a second observer did an interview. Kerrigan did both interviews. I have discussed above that her leave of absence made a third interview impossible. The considerations are the same: The Board had a choice – throw out the year and start over; or conclude the year with the information available. Her Summative Rating for 2015-2-16 is a 2.2, or “partially effective”. Even if she scored a 2.6 in the third (but missing) evaluation, a score significantly higher than she had achieved in 2014-2015 and higher than her 2.2 average for 2015-2016, her average for the year 2015-2016 would not reach the next level of “effective” (2.65 to 3.49) which she needed to forestall two consecutive years of “partially effective.” It would only be 2.47.<sup>8</sup> I conclude that the failure to have a third evaluator by a different evaluator under these facts would not have “materially affected the outcome” of the Summative Rating.

Michael Volpe’s Summative Performance Report for 2015-2016 is supported by credible evidence. He noted her absence towards the end of the year as making a third observation impossible. He recommended she again be placed again on a Corrective Action Plan. Professional Knowledge: Partially Effective Instructional Planning: Effective (It notes the six dates her plans were

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<sup>8</sup> The average of the first two evaluations for 2015-2016 was 2.2. Adding a third evaluation of 3.0, which would have been significantly above her score for 2014-2015 or 2015-2016, she would still be “partially effective.” Her final average of the three evaluations would 2.47. (2.2 plus 2.2 plus 3.0 divided by 3 equals 2.47.) She would need 2.65 to reach the “effective” range.

late). It states that she must be timely with her lesson plans. Instructional Delivery: Partially Effective. It refers to the 1/21/16 observation. She selected the date. "All activities in this lesson were teacher directed with very little student exploration." It cites the recent PIP and repeats the need for multiplication chart and other charts. "Little evidence of differentiated instruction." Her performance was "inconsistent." Assessment of and for Student Learning: "Ineffective." It reflects her failure to timely upload math students beginning of the year assessment data, after having been asked to do so by email of 9/22/15 she failed to respond and received a second reminder a month later on 10/28/15. Learning Environment: Effective. The note states that "should continue to perform at this expected level. Professionalism: Ineffective. It notes a meeting with Union representative and the Teacher to "discuss appropriate conduct when interaction with students." It notes the approximate times she was late to work: 30 minutes, 20 minutes, and 50 minutes, resulting in a meeting with the Teacher and her Union representative. Mr. Volpe's notes reflect it was the cumulative effect of being late three times and having to meet with her and her Union representative two times within 6.5 month of service.

Under Commendations" the document states she "showed improvement" in areas of Learning Environment and Instructional Planning, it states that because of improvement in planning, "pacing was appropriate" and she "was able to cover more material." The report is balanced and credible. It contains no errors. It is not arbitrary and capricious. The content is not otherwise reviewable.

Her Corrective Action Plan is quite specific. It lists the areas that needed improvement, the sources of information behind each issue, the goals, staff member responsibilities, supervisor responsibilities, and completion date. One goal: The Teacher "will demonstrate more consistent use of differentiated instruction techniques, specifically in math." It states under "Staff Member Responsibility" that she will be provide with a specific named book, she will incorporate "strategies from the book within her weekly lesson plans"; For each strategy used from the book, she "will write a description of the strategy and a

reflection on its use in the classroom.” She will “implement varied instructional strategies that engage students....” She will “incorporate differentiated instruction to enhance Everyday Math lessons....” She will “invite an administrator to observe a lesson which highlights the use of differentiated instructional strategies. She will “visit the classroom of a math mentor 2-3 times per marking period” and “maintain a record/journal of math mentor classroom visits, observations of strategies utilized, etc.” She will meet with administrators twice each month to discuss CAP progress, lesson planning, consistent incorporation of differential instructional strategies, use of assessment data to drive instruction, and professionalism.” She “will prepare a formative assessment for each lesson.” She will “keep all required assessment data....”

The results of this effort was not as hoped. Her observations for 2016-2017 and her summative evaluations resulted in a score of “partially effective”, not enough to stay employed if she were get two in a row.

The old issues continued. On October 4, 2016 Kerrigan reminded her by email that her lesson plans were neither given to him in hard form or uploaded into the Genesis computer system. Her response was she forgot to hit “send.”

She continued to fail conform her work to the system within which she worked. On October 6, 2016, a kindergarten teacher with whom she worked that she was using the alphabet arch improperly, and gave detailed instructions.

On October 10, 2016, she attended a documented CAP meeting, which discussed the alphabet arch. The next day, October 11, 2016, Kerrigan sent her a stiff email stating that she was not doing what she said she would do at the October 10, 2016 CAP meeting. The Teacher had again changed “the delivery of the program.” Kerrigan’s email closes with these words: “You are hereby directed to follow the program as it is prescribed. Do not deviate from this.”

Kerrigan’s formal observation on 11/3/16 was positive. Kerrigan testified that each part contained no problems He wrote observation comments such as “advanced preparation is evident” and “having students trace the same objects



but possibly get different answers was a good way to generate further discussion about area.” And “the teacher has good rapport with students.” When asked at a CAP meeting on 11/4/16, she said, among other things, that “she adjusts the differentiation based upon student need in individual lessons. It was agreed that Ms. Mackenzie would go back into her lesson plans to explain the differentiation she provided in the general education setting.

I find Kerrigan’s assessment fair and objective. He is able to distinguish acceptable from unacceptable work and report accurately what he observes.

On December 5, 2016, the Teacher attended another CAP meeting. It states that her pacing “seem appropriate at this time” and he was “inputting student scores into Genesis. Mr. Michael Volpe’s observation of 12/7/16 is mixed. She posted lesson plans, which contained differentiation, but she did not implement differentiation in the lesson. She used the “same methodology” when teaching “throughout most of the lesson...” The lesson was “teacher direction, student performance on the teacher’s directed task, then follow up questions were asked.” Mr. Volpe writes she should “use more than one methodology” and “incorporate differentiation as you have noted in your plans.”

Suzan Radwan’s observation of 1/25/17 was mixed. She wrote the Teacher did not adjust the pace of instruction when working with a student with learning disabilities. She did not accommodate diverse learners. The Teacher did not use a variety of instructional strategies. So “rather than using questioning technique to facilitate editing,” the Teacher “just told the student what needed to be edited.” The Teacher “did not provide the student with appropriate wait time after asking a question. She didn’t pace property, and did not access for student understanding. After the Teacher gave instructions to the students, the students asked the general education teacher to repeat the instructions. The bottom of the evaluation contains identical language found in earlier ones. It states the teacher should “include high quality examples showing consistency over tie in your documentation log.”

February 21 2017, Kerrigan emailed the Teacher, who had been absent, about her lesson plans for the substitute. The document the Teacher attached said the course was "Grade 4 Math" but the lesson plans said LLD kindergarten.

On March 7 2017, Kerrigan admonished the Teacher by email for leaving Kate Goldman's class 20 minutes early, writing it was not up to her to decide when to leave a class.

On 3/7/27, Kerrigan emailed the Teacher at 10:36 am, that her lesson plans were not yet posted and would memorialized for her summative evaluation. Kerrigan replied her reason was not valid, as she had ample experience using Genesis. She responded an hour later that she "forgot to press post." She apologized in a 1:16 pm email the same day. As for leaving the class early, she denied leaving 20 minutes early, writing it more like 5 to 10 minutes. The Teacher emailed, "As for Kate's class, I will stay the full amount."

On March 10, 2017, Kerrigan wrote the Teacher that she had been absent 12 days, including 6.5 Fridays. Kerrigan wrote that on 8 of the days, she logged in too late to find substitutes. The arbitrator will discuss this when turning to the teacher's defenses. Kerrigan backtracked on cross-examination, during the arbitration, and said he was not saying she was being dishonest.

Kerrigan wrote up his formal announced evaluation. The teacher had invited him in to observe a calls. Her CAP required her to invite an administrator.

Kerrigan wrote a descriptive report. He wrote that her lesson plans "contain few details for differentiation... The plans were copies of the classroom teacher's lesson plans with words added: Miss Mack: Read w/HA, fact/opinion; Key words for fact/opinion file folder game." During the class, the Teacher circulated, meeting with several students on their Reading Logs, met with a special education student to read *Calvin and Hobbs*, worked with vocabulary with a student, and assisted others. Kerrigan questioned on his Observation Report how the activity would be assessed to address individual student needs.

On May 9, 2017, Kerrigan filled out a Summative Review of CAP Progress.

The review had two choices for four goals: Expectations met: Yes, or No. All goals were “Y”, for “Yes.” The goals were: 1) “More differentiated instructional techniques specifically in math.” 2) “Incorporation of differential instructional strategies to enhance Everyday Math lessons.” 3) Formative assessment data entry and use.” 4) “Adherence to all district policies, specifically attendance/arrival to school, lesson plan submission, data inputting, etc.” Kerrigan testified that the reason he scored the Teacher at “Y” was because the teacher improved. “Improvement” is not the same standard as used for the Summative Evaluation. When asked whether this means the teacher was “effective” in these categories, Kerrigan agreed.

He was actually being asked a legal question of whether the CAP grades override the Summative Evaluation. I conclude they do not.

Kerrigan’s Summative Performance Report considers the entire year, not just the last month or two. The standards for the Summative Evaluation are not the same for a CAP report. They are not whether the teacher showed improvement, which is what Kerrigan said the CAP ratings meant, but how would categorize the full sweep of the entire year. Kerrigan made it clear that he was not saying the Teacher’s Summative Evaluation had to be the same as the CAP report. They are different documents serving different purposes. The Summative Evaluation is based on established, fixed categories. The CAP report is based on whatever the parties agreed to focus on. The Summative Evaluation has four grades, from lowest to highest: “Ineffective”; “Partially Effective”; “Effective”; and “Highly Effective.” The CAP report has two grades: “Y” for “Yes”, “N” for “No.”

I conclude that teach of the Summative Evaluations referred to below, are supported by substantial evidence relating to 2016-2017, including credible testimony from the witnesses, from the content of documents, and inferences drawn therefrom, and the statutes, and prior arbitration decisions, and are not based on mistakes of fact, and are not arbitrary and capricious. I will discuss

separately the inappropriate use of 12 absences as part of the Professionalism Standard score, but I have concluded their inclusion would not have affected the score for Professionalism, and did not materially affect the outcome of the evaluation, and may be disregarded.

The Summative Evaluation, dated 5/31/17, states as follows:

Standard 1 – “Professional Knowledge” – “Partially Effective” (“The teacher is inconsistent in demonstrating an understanding of the curriculum, content and student development or lacks fluidity in using knowledge in practice.”

Standard 2 – “Instructional Planning” – “Partially Effective” (“The teacher is inconsistent in his/her use of the state standards, school’s curriculum, data, or strategies and resources to meet the needs of all students.”

Standard 3: “Instructional Discovery Evidence”- “Partially Effective.” (“The teacher is inconsistent in his/her use of relevant instructional strategies or in engaging students in active learning, promoting key skills, or meeting individual learning needs”)

Standard 4. “Assessment of/for Student Learning” – “Ineffective” (“The teacher uses an inadequate variety of assessment sources, assesses infrequently, does not use baseline or feedback data to make instructional decisions, or fails to provide student feedback in a timely manner.”) The “Comments” state in part: “[The] only math is referenced in this section of the documentation log, while Ms. Mackenzie’s teaching responsibilities include literacy, science, social studies, and work with kindergarten LLD students.” The “Comments” also state: “The preponderance of evidence indicated an inadequate variety of assessment source, a lack of inclusion of assessment data beyond math, and incomplete evidence of assessment data analysis and use.”

Standard 5. “Learning Environment Evidence” – “Effective”- (“The teacher uses resources, routines, and procedures to provide a respectful, positive, safe,

student-centered environment that is conducive to learning.”) The “Comment” indicates that “Effective” is supported by substantial evidence

Standard 6 – “Professionalism” - “Partially Effective.” (“The teacher is inconsistent in displaying professional judgment, collaborating or communicating with relevant stakeholders, participating in professional growth opportunities, or applying learning from growth opportunities in the classroom.”) Comments include: “Administrative emails and an email from a colleague to Ms. Mackenzie memorialize lateness of lesson plans, a directive to leave a scheduled classroom concerns (including missing a district-organized professional development day), a meeting with administration and union representation to address multiple concerns voiced by Ms. Mackenzie’s colleagues, etc.”

Standard 7 – “Student Progress” – “Highly Effective.” (“The teacher is a role model in that his/her work results in an exceptional level of student progress with all populations of learners.” This relates to the Student Growth Objective. The “Comments” state that the Teacher “is to be commended for the following: highly effective achievement in the SGOs [and] attention to limited school resources and a willingness to explore ways to utilize technology....” The Teacher obviously does not contest this score

The Teacher’s argument that the final CAP report controls the Summative Evaluation has been discussed above and is rejected.

The Teacher argues that the Board’s evaluation of the Teacher was arbitrary and capricious among the grounds listed are her evaluations from 1991 through 2013 were “successful” in every category, for a total of 252 “successful” ratings. The argument is not persuasive. The finding of two successive years of Summative Evaluation scores at “partially effective” or “ineffective” defines “ineffective” teaching and requires termination. The statute does not consider prior successes in days long past relevant.

The Teacher’s argument that the Board did not evaluate the Teacher’s performance but rather, her use of the Stronge computer system is not

persuasive. A major part of the evidence in this case was the teacher's behavior, in the classroom, with her peers, in the school, in the form of eyewitness testimony and observations. Her failure to provide timely lesson plans on numerous occasions was, except the one time she failed to hit "send", not based on the computer system. The evaluation system relies on the teacher to provide information to the reviewer. It is the responsibility of the teacher to provide the information. It is not the responsibility of the administrators to go seek it out. The method of providing the information is by computer. She was aware and was reminded by language in the bottom of the Observation reports that if you want the evaluator to have more information provide it.

The Teacher's argument that there were no guidelines about "how much" needed to be uploaded to the document log is not persuasive. The uploads add to the overall picture of the teacher. The teacher, by the uploads, is given control of how her or she will be perceived. The Board can only provide the means to the teacher to upload information. If the teacher decides not to provide information, or to provide little information, the Board is not responsible. With hundreds of teachers in the system, the Board can rightly place the responsibility to provide information on the teacher.

The argument that the Teacher's rating is based not on performance but on manner in which that performance was recorded is not persuasive. The evaluation system relies on the written word. A teacher does something. It is observed, either by the teacher or someone else. The observer produces a document, maybe on a computer, or on an email. The documents are reviewed by administrators. Something happens because of those records. There is an objective reality, but that reality must be captured and documented. The event is instantaneous and disappears. The record preserves it.

The argument that the Board did not review information necessary to properly observe and evaluate the teacher is not persuasive, particularly with differentiation. The evidence does not show she never used differentiation. She frequently did not. The CAP shows she received extensive training in its use. She

practiced it. She was supposed to write it into her lesson plans. She was supposed to then use it. And sometimes she did, but often she did not. The evidence shows that she **inconsistent** in the use of it. Therefore, her Summative Evaluation Score of “Partially Effective” accurately stated what was observed and recorded on the observations.

The argument that the Board never adopted a policy to use differentiated instruction is not persuasive. It is the responsibility of the Superintendent and Principals and Teachers to perform the important work of education, and that includes education of the teachers as well. The administration trains teachers to try to deliver a product that is not the same for all, but recognizes that students have different learning styles and speeds, and adjust for that difference. The administrators who required the Teacher to adjust her teaching to the needs of individual students and not to lecture to them as a group had complete authority to make that decision.

The argument that Kerrigan’s written observation of the Teacher, stating that the Teacher did not meet the needs of the students, and the students were struggling, while Kerrigan could not identify which needs were not met or which students were struggling, is not persuasive. As Yogi Berra once said, “You can observe a lot just by watching.” Administrators can separate out good from poor teaching, effective from ineffective teaching, by watching and listening to the interaction of teacher with the students. That is how the evaluation process works. The evaluators look, record and leave. They do not record student names, a process what would be intrusive, counterproductive, and irrelevant.

The argument that Kerrigan on March 21, 2017 had not read the documents he provided to the Teacher on differentiated learning is not persuasive. He knew what differentiated learning is, of course, and he knows it when he sees, and knows its absence as well. and he knew the material would be helpful.

The argument that he did not read the lesson plans of the primary teacher on the March 21, 2017 observation, and therefore didn't know if differentiation would be proper, is not persuasive. Having read Ms. Mackenzie's lesson plan, he wrote in his evaluation that the Teacher's lesson plan had "few details of differentiation." By this time, Kerrigan had been working with the Teacher for months as part her CAP, and he knew she was supposed to be writing differentiation into her lesson plans as part of her CAP training. She didn't. He saw the lesson plans, noticed no differentiation mentioned, and wrote it into the evaluation.

The argument that the observation of Donna Landon and Suzane Radwan on January 25, 2017 was somehow deficient because Dr. Radwan never taught and Dr. Landon was 20 years removed the classroom is not persuasive. Both were experienced supervisors capable of performing an objective evaluation. The argument that both had not reviewed any students IEP and therefore their observation that the Teacher did not use a variety of educational strategies is somehow deficient is not persuasive. An observation is not disqualified if the observers do not review IEPs. That is left to the individual choice of the observer.

The Teacher argues that Michael Volpe's observation of December 7, 2016 is deficient for procedural reasons because Volpe didn't review documents other than her CAP plan ahead of time; he looked at her lesson plan during the observation; he didn't know the students and never interacted with them; never reviewed the students' IEPs; didn't know if they had learning disabilities – and therefore his finding that the teacher had failed to utilize "differentiation" is invalid.

The argument is not persuasive. Whether and to what extent the evaluator knows much or little about the students is within the evaluator's discretion to determine, not the teachers, neither before nor after the evaluation.



The Teacher's CAP, which Volpe read ahead of time, required her to put differentiation into her lesson plans. She knew this was an important Observation. She knew from the CAP that she was supposed to include differentiation in her lesson plans. And she didn't include differentiation, and she didn't use it. And she offered no explanation as to why she did not. The evaluation is not arbitrary or capricious. The Teacher's argument is not persuasive.

The argument against the "ineffective" score for Standard 4, Assessment of Learning, is not persuasive. Her score involved her assessment of students in her responses to their questions; her making informal assessments without recording them; her artifacts show no adequate evidence of systematic gathering of relevant data. She was faulted for "an inadequate variety of assessment sources, a lack of inclusion of assessment data beyond math; incomplete evidence of assessment data analysis and use."

The argument that Kerrigan's conclusion of "ineffective" on the 2015-2016 and 2016-2017 Performance Standard 6, is arbitrary and capricious, and based largely upon alleged attendance/tardiness concerns, is not persuasive for either year.

For 2015-2016, the Summative evaluation mentions tardiness but does not mention attendance. It mentions a conference to discuss appropriate conduct when interacting with students. She was late 3 times: 30 minutes, 20 minutes and 50 minutes. The evidence shows it is disruptive when a teacher fails to show up, because her students need to be watched. The evaluation mentions another meeting to discuss tardiness. The 50-minute incident was caused when she failed to set her alarm. While not mentioned on the form but in evidence, she walks dogs in the morning. Reasonable minds can differ about the number of times a teacher be late to work without consequence. When you add to that the problems with her interaction with students, two disciplinary meetings within 6.5 months, the "ineffective" score does not rise to the level of being "arbitrary and capricious."

For 2016-2017, the absences are mentioned in the “Notes” of the Summative Evaluation of “Ineffective” for Professionalism. The Teacher argues that she should not have been punished for 12 absences. I agree. Students and teachers get sick, especially in the winter. Teachers by contract receive paid sick leave. Some teachers are more often sick than others. The contention that 6.5 days of sick leave occurred on a Friday creates the need for discipline is not persuasive. At the hearing, Kerrigan acknowledged that they were not claiming she had done anything wrong. To use the absences is arbitrary and capricious.

Having so determined, I now turn to the statutory requirement to consider whether the materially affected the outcome. Here is what remains on the “Notes” for Professionalism”: “lateness of lesson plans”; a directive not to leave a scheduled classroom duty early; a meeting with administration and union representation to address multiple concerns voiced by Ms. Mackenzie’s colleagues.” Additionally, the Teacher refused to follow the classroom teacher’s request not to deviate from the planned activity, and when formally asked to stop, she did it again, resulting in a scathing email: ““You are hereby directed to follow the program as it is prescribed. Do not deviate from this.”

I conclude more likely than not, her Professionalism evaluation would have not changed by removing the 12 absences from the mixture, and it did not materially affect the outcome.

The same is true of her interactions with other teachers. That she was observed using her computer during class time was not the only concern her co-workers were having. Even eliminating the computer use issue, the remaining conduct could reasonably support the same evaluation, and therefore did not materially affect the outcome.

The Teacher contends that because her score on “Performance Standard 7: Student Progress, was “Highly Effective” means that the Board quibbles with her methodologies, yet it does not deny their high level of effectiveness. The argument is not persuasive. The legislature structure provides for weighted score. Her total score was “ineffective.”

The Teacher contends the Board did not follow the statutory requirements of three observations. That is earlier considered above and rejected.

The Teacher contends that for 2015-2016, Kerrigan never conducted a mid year review of her document log, as required by law; that the Board did not follow the Professional Improvement Plan for 2016-2017, including meeting every two weeks with principal and math content specialist.

The arbitrator is not persuaded by the argument. The plan states that this is an activity to be “completed by the employee.” She bears some of responsibility of making sure these meetings occur.

The Teacher contends that Kerrigan could not recall of all the meetings required by the PIP plan, and all the activities, occurred. The argument is not persuasive. Even if this were a material deviation, it would not have affected the outcome. The Teacher had two years of PIP and CAP. After those two years, her Summative scores were still “partially effective.” Tellingly, after being coached on the meaning of differentiated instruction, how to apply it, and given exercises to write differentiated instruction into her lesson plans, in an observation by Mr. Volpe, which was announced, her lesson plans contained no differentiation. After being told not to deviate from the regular teacher’s approach to teaching math, she failed to heed the teacher, who had to go to Kerrigan, and then, after agreeing not to do it, did it again a week later, resulting in the scathing email.

I have carefully reviewed the Teacher’s brief, and arguments not directly responded to in this award were considered and rejected.

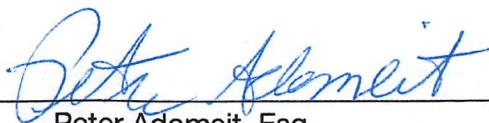
For the above reasons, I conclude that The Board has met its burden of

proof and has established sufficient grounds for termination of the Teacher as alleged in the Charges.

**AWARD**

The arbitrator renders a decision in favor of the Board and in accordance with the law, the Teacher shall be dismissed.

Dated: April 10, 2018



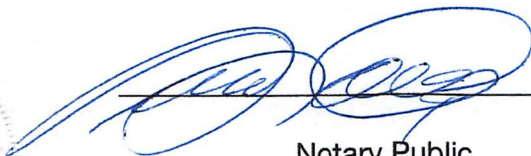
Peter Adomeit, Esq.  
Arbitrator

State of Connecticut )

SS: West Hartford

County of Hartford )

On this 10<sup>th</sup> day of April, 2018, before me personally came Peter Adomeit, Esq., to be known and known to me to be the individual described herein, and who executed the foregoing instrument and acknowledged to me that he executed same.



Notary Public

My Commission expires on December 31, 2020  
*My Commission Expires*