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In the Matter of the Tenure Hearing of Pablo Olivera, State Operated  
School District of the City of Newark, Essex County,  
Agency Dkt. No. 287-12/17

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OPINION  
AND  
AWARD

Before  
Robert C. Gifford, Esq.  
Arbitrator

**Appearances:**

**For the School District:**

Christina M. Abreu, Esq.  
Weber Gallagher

**For Pablo Olivera:**

Nicholas Poberezhsky, Esq.  
Paul W. Tyshchenko, Esq.  
Caruso Smith Picini

The State Operated School District of the City of Newark ["District" or "Petitioner"], pursuant to N.J.S.A. 18A:6-10 *et. seq.*, certified tenure charges with the Commissioner of Education alleging that the Teacher Pablo Olivera ["Respondent"] committed acts of conduct unbecoming and/or other just cause. The District seeks to remove the Respondent from his tenured teaching position based upon the charges that were sworn to by Principal Margarita Hernandez:

**CHARGE ONE: CONDUCT UNBECOMING**

During the period from September 1, 2015 to the present, Respondent has demonstrated an inability to completely and responsibly execute his duties as a teacher in the following manner:

1. In May of 2016, the Respondent was verbally and physically abusive towards student in his class.
2. The Respondent used profanity towards his students and threatened to physically harm them.
3. The Respondent told his students that he was going to "f\*\*\* them up."
4. The Respondent improperly used physical force against his students:
  - i. The Respondent grabbed a student (B.L.) by the head and slammed it into a wooden table.
  - ii. The Respondent grabbed a student (A.F.) by her arms, pushed her to the side and pushed her into a wall.
  - iii. The Respondent violently slammed a book on a student's (D.G.) hand and caused injury to the student's fingers
  - iv. The Respondent pushed a desk into a student (A.F.) and tried pushing her into a wall.
  - v. The Respondent grabbed his students by their shirts and pulled them off of their chairs.

5. The District conducted an internal investigation and found sufficient evidence of conduct unbecoming a teacher.
6. The students' allegations against the Respondent were corroborated.
7. The Respondent's actions were highly egregious.
8. The Respondent was removed from the classroom due to his inappropriate behavior and violations of the District's policies.
9. The Respondent has failed to create an environment of respect and rapport.
10. The Respondent has failed to manage student behavior.
11. The Respondent has failed to engage students in learning.
12. The Respondent has failed to contribute to the School and District.
13. The Respondent has failed to implement curricular goals and objective(s).
14. The Respondent has failed to manage classroom procedures.
15. The Respondent has failed to establish a culture of learning.
16. The Respondent has failed to contribute to the School and District.

### **CHARGE TWO: OTHER JUST CAUSE**

During the period from September 1, 2015 to the present, Respondent has demonstrated unbecoming conduct in the following manner:

1. The District restates the allegations contained in Charge One and re-alleges and incorporates them by reference as if fully set forth at length herein.
2. The Respondent has failed to properly adhere to the District's policy for overseeing students and improving students and classroom management.
3. The Respondent has consistently failed to follow instructions and violated the District's policies and procedures.
4. The Respondent has engaged in corporal punishment and/or physical contact in violation of the District's policies and N.J.S.A. 18A:6-1.



5. The cumulative effect of Respondent's misconduct and inappropriate actions against his students as set forth above constitutes other sufficient cause to warrant dismissal. [Ex. SD-1].

By letter dated January 12, 2018, I received notice from M. Kathleen Duncan, the Director of the Bureau of Controversies and Disputes, New Jersey Department of Education, that this matter was referred to me pursuant to *N.J.S.A. 18A:6-16* as amended by *P.L. 2012, c. 26* and *P.L. 2015 c. 109*. On January 15, 2018, the District provided discovery documents to the Respondent notwithstanding the fact that it had yet to receive Director Duncan's letter in the regular mail. The District's discovery comprised of documents Bates-stamped 1-94 that included the Notice of Tenure Charges, the Statement of Evidence that accompanied the Notice of Tenure Charges (including a May 6, 2016 Incident Report from Principal Margarita Hernandez, correspondence from four (4) students, and a letter from Compliance Manager Rene Henderson dated July 14, 2017), the Respondent's mid-year review ratings and review summary form for 2015-2016, the Respondent's teacher short observation ratings for 2015-2016, the Respondent's teacher long observation ratings and summary form for 2015-2016, the Respondent's IPDP individualized professional development plan for 2015-2016, a letter from Principal Margarida Carrasco dated March 13, 2001, a letter from Principal Margarida Carrasco dated March 12, 2001, an internal investigation findings report from Compliance Manager Henderson dated July 14, 2017, a letter from the Respondent dated August 26, 2016, and the District's



rules and code of conduct. In addition to the above, the District provided the Respondent with a witness list on January 15, 2018 that included Principal Hernandez, Assistant Superintendent Roger Leone, Vice Principal Kenneth Amparbin, Compliance Manager Henderson, Michelle Takyi – Senior Manager of Compliance and former Compliance Manager, Miguel Robles – Investigator to Child Protection, Institutional Abuse Investigations Unit, and Peter Nzekwu – Assistant Regional Supervisor for Investigative Authority Child Protection.<sup>1</sup>

On January 15, 2018, I notified the parties that an informal settlement conference was scheduled for January 17, 2018. Settlement/pre-hearing conferences were held on January 17, January 19 and March 6, 2018. Although the conferences were productive, the parties were unable to reach a resolution to this matter.

The evidentiary proceedings were held at the State Board of Mediation in Newark, New Jersey on March 19, March 23, April 30, May 15, June 6 and August 14, 2018.<sup>2</sup> A stenographic recording of the proceedings was taken. During the proceedings, the parties were given the opportunity to argue orally, examine and cross-examine witnesses and submit documentary evidence into the

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<sup>1</sup> On January 17, 2018, the District supplemented its discovery with a September 1, 2015 memorandum from Principal Hernandez entitled "Law Refresher". Counsel for the District notified Respondent's Counsel that she had yet to receive the Director's referral letter. The Law Refresher was Bates-stamped 95-99.

<sup>2</sup> The transcripts for the hearing dates shall be referred to in chronological order as T1 through T6.

record.<sup>3</sup> Testimony was received from several witnesses during the tenure proceedings. Testifying on behalf of the District were Principal Hernandez; Compliance Manager Henderson; Compliance Manager Takyi; Ken Amparbin – Vice-Principal; Miguel Robles – Investigator to Child Protection, Institutional Abuse Investigations Unit; Peter Nzekwu – Assistant Regional Supervisor for Investigative Authority Child Protection; and Student DG who testified on rebuttal.<sup>4</sup> Respondent Olivera testified on his own behalf. Time extensions to hear and decide this matter were timely requested and granted. The parties submitted post-hearing briefs on September 25, 2018, whereupon the record was declared closed.

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<sup>3</sup> Respondent's motion for summary dismissal was denied. [T1:5]. Respondent's motion for directed verdict was denied. [T5:381].

<sup>4</sup> Hernandez's testimony is located at T1:5-136; Henderson's at T2:141-209; Takyi's at T3:215-292; Amparbin's at T4:297-331; Robles's at T4:331-366; Nzekwu's at T4:366-376; Respondent Olivera's at T5:382-407; and Student DG's at T6:417-445.

## RELEVANT PROVISIONS OF THE NEW JERSEY STATUTES

### **N.J.S.A. 18A:6-10. Dismissal and reduction in compensation of persons under tenure in public school system**

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or

(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner;

except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges, of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.

Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law.



N.J.S.A. 18A:6-17.1. **Panel of arbitrators**

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22. b. (3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

**ISSUE**

I have framed the issue as follows:

Whether the State Operated School District of the City of Newark has proven that Pablo Olivera, a tenured teaching staff member, is guilty of conduct unbecoming and other just cause sufficient to warrant his dismissal from employment by the District? If not what shall be the appropriate remedy?

Respondent Olivera is a tenured teaching staff member who has been employed by the District for approximately 18 years. During the 2015-2016 school year, the Respondent was assigned to the Wilson Avenue School as a 6<sup>th</sup> Grade Math and Science Teacher. In April 2016, Respondent was reassigned to teach special education students at the Wilson Avenue School because he was having classroom management issues. [T4:312]. During the 2015-2016 school year, the Principal at Wilson Avenue School was Margarita Hernandez and the Respondent's immediate supervisor was Vice-Principal Kenneth Amparbin. Hernandez and Amparbin testified that the Respondent has difficulties with classroom management, but the record lacks sufficient supportive evidence to suggest or show that Respondent has been disciplined in the past beyond a letter back in 2001 that the District described as a written reprimand.<sup>5</sup> [Ex. SD-18].

On May 6, 2016 Principal Hernandez filed an incident report with the District based upon written complaints she received from four (4) of the Respondent's students:

On Friday, May 6, 2015 I received several written complaints from 6<sup>th</sup> grade students who alleged that Mr. Olivera was verbally and physically abusive towards them on Wednesday,

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<sup>5</sup> Amparbin testified to an incident earlier in the 2015-2016 in which a student alleged that the Respondent grabbed a student's arm to move him out of a doorway. Amparbin testified that the Respondent did not leave a mark on the student's arm. Amparbin told the Respondent to avoid putting his hands on students. [T4:313:316].

May 4, 2016, when he covered their class in the absence of their teacher, Mrs. Mitchell. They stated that he cursed at them, grabbed them by the arm and one child indicated that he slammed a History book on her hand. Another student, [AF] stated "that the teacher pushed a desk into her, smashing her against the wall". Students also informed Mr. Amparbin of what had occurred. Principal Hernandez, informed Mr. Leon of the incident and NJ DCPD was called. [Ex. SD-2].

Attached to the incident report are the written complaints Hernandez received from Students "AF", "DG", "RG" and "BL". [Exs. SD-3 through 6]. Student DG was only student who testified during the evidentiary proceedings. Student DG's written complaint provides:

This letter is in regards to Mr. Oliveira's unacceptable behavior in the classroom. Mr. Oliveira slammed a large book down onto my hands, but my hands were visibly on the desk so I don't understand how it could have been a mistake. He was also looking down at my hands, while doing this.

After he slammed the book down on my hands, I began to bleed, nothing serious just a bit of blood. I raised my [hand] to go rinse off the blood. When I asked him if I could go to the bathroom, he replied with no. I told him I was bleeding and he acted as if it was my fault.

Another incident was with my friend [ ] was passing by a desk. She was between a wall and the desk. Mr. Oliveira pushed the desk towards her, pushing her against the wall, almost getting hit on her side

Mr. Oliveira also grabs children by their shirts, pulling them off the chair. The student could have either been asking to sharpen their pencils or sharing a book with someone who doesn't have one. I don't believe a teacher should be able to put their hands on a student. [Ex. SD-5].



Hernandez testified that she commenced an investigation into the May 4<sup>th</sup> incident by interviewing the four (4) students who filed the written complaints:

[Hernandez, On Direct]

Q. [By District Counsel Abreu] What was your investigation?

A. Asking the students. I brought them down to my office. I wanted to know what transpired in the class and why this occurred. They couldn't tell me why it occurred. They just told me it happened, the teacher was very aggressive. He was angry, he was yelling, and they were just frightened and scared.

They said that they didn't want him in the classroom as a teacher, that they were afraid to go back, and I also knew that putting their hands on a student is against board policy, against district policy. [T1:32].

Hernandez testified that rather than interviewing the entire class (the average class size at the school being between 28 and 30 students) she only interviewed the students who submitted written complaints. [T1:53-54].

The District reported the incident to the State of New Jersey Department of Children and Families Institutional Abuse Investigation Unit ["IAIU"]. There are four (4) levels of finding determinations for allegations of child abuse or neglect: substantiated, established, not established and unfounded. [T4:369]. A finding determination of "unfounded" is the most favorable outcome for the accused. IAIU Investigator Miguel Robles conducted an investigation into potential child physical abuse and neglect. By letter dated August 4, 2016, IAIU notified the

District that the allegations were unfounded. During the evidentiary proceedings, Robles testified that he interviewed some of the students who were in the Respondent's classroom on May 4, 2016:

[Robles, On Direct]

Q. [By District Counsel Abreu] Did you meet with other students in the class other than those that had made allegations of physical contact with Mr. Olivera?

A. Yes. I interviewed random witnesses and I believe some direct witnesses, given like a total of ten kids including the victims I spoke with.

Q. Why did you meet with only ten kids and not the entire classroom?

A. Usually the number is five and I went ahead and spoke with another five because of the inconsistencies that were being said.

Q. And based on your conversations with the additional witnesses in the classroom, what determination did you make?

A. You mean at the end of the investigation or?

Q. Well, I guess let me back track, what were some of the statements that these other witnesses made to you regarding the incident that occurred in the classroom that day?

A. Well, some didn't see, they said they did not witness the desk being pushed at one of the children. Others said they did not hear Mr. Olivera using profanity, others said that they - what was the other ones they didn't hear the other kids complaining to go to the nurse or something like that. It was just a lot of inconsistencies going on with their statements.

Q. There's no corroboration from any other witnesses concerning the incident that took place?

A. From the witnesses, right, and just in general there was a few inconsistencies. [T4:340-341].

Robles testified that when he interviewed to Student "AF" her account differed from her written complaint:

[Robles, On Direct]

Q. [By District Counsel Abreu] Can you please describe what student AF told you about the incident between the student and Mr. Olivera?

A. Right, that is the report that after reading it because it was so well written I asked the child if she can because what she was explaining to me wasn't exactly what she wrote. So then I said can you please describe to me what occurred. So she stood up and described what occurred and made the motion but it wasn't the same as what she wrote.

Q. How did she describe it to you differently?

A. She said that when she came into throw something away at the trash can Mr. Olivera was going through to get to another child and at the same time pushed a desk, pushing the desk away but not to hit her intentionally, so she moved back so that the desk wouldn't hit her and she hit the wall and I believe she said here it was a bookcase or something, no, she did say wall. But she made the gesture that she hit the wall. I said, well, did you hit the wall, tap the wall or smash the wall, she said I went like this and I touched the wall (indicating). I said that's not what you wrote here, you said you were smashed against the wall.

Q. And so what did she say to that?

A. She just looked at me and looked at the principal.

Q. But she remained - - she did describe that she moved out of the way?



A. Right.

Q. To not be hit by Mr. Olivera's desk; is that true?

A. Yes, she did say that, she said that Mr. Olivera did not notice when the desk went towards because his back was turned. So he couldn't tell whether the desk hit her or not. [T4:338-339].

Robles also testified to his recollection of his interview with Student "DG":

[Robles, On Direct]

Q. [By District Counsel Abreu] What do you recall from your interview with DG?

A. She said that Mr. Olivera had grabbed her book from her table, her desk, went through it to see what assignments they were going to work on and after that closed the book and went, instead of placing it down, he dropped the book, according to her and that it hit her, her finger. And then she said that her cuticle started to bleed, she asked to go to the bathroom, she did not ask to go to the nurse and that she was told that she had to wait because other students were using the restroom. [T4:339-340].

Robles testified that he also interviewed the Respondent who denied the students' allegations. Robles indicated that the Respondent denied using the words "narcos" and "stupid", but he admitted that he sometimes used the word "knucklehead". [T4:342, 354-355]. Robles concluded that the allegations were unfounded but he had concerns about the Respondent's behavior:

[Robles, On Direct]

Q. [By District Counsel Abreu] And why did you feel it important to address these issues with the administrator?

A. Based on the statements of the children, even the witnesses that there was some kind of - - how do I put it, classroom management skills going on that wasn't really effective because the kids were - - the way they described everything everybody was all over the place. There was no control of the room, even after he had asked them several times to stop and listen to him, stop and listen and they wouldn't because he was serving as a substitute teacher that day, he wasn't their teacher, so the kids took advantage of that basically. [T4:346].

In or around October 2016, the District commenced an internal investigation into the allegations against the Respondent. Michelle Takyi, the District's Compliance Manager at that time, was responsible for conducting the investigation.<sup>6</sup> Takyi reviewed the IAU report and Hernandez's incident report. Then, similar to Hernandez, Takyi interviewed only the students who submitted the written complaints. Takyi took notes of the interviews.<sup>7</sup> Takyi's testimony concerning the information that the students provided her during their interviews was relatively consistent with the contents of the students' written complaints. Takyi acknowledged that there was a discrepancy between DG's written complaint where DG indicated that she asked to go to the bathroom and RG's written complaint where RG indicated that DG asked to go to the nurse.

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<sup>6</sup> Takyi is now the Senior Manager of Compliance in the Office of Student Support Services.

<sup>7</sup> Takyi's notes were not included in the Bates-stamped documents that the District provided to the Respondent upon the referral of the case for arbitration.

[T3:248-251]. Takyi testified that she did not attempt to reconcile the difference between the students' accounts. [T3:251].

Takyi testified that she attempted to meet with the Respondent after she completed the student interviews but they were never able to meet due to scheduling conflicts. Takyi then transferred to a new position with the District in November 2016. Takyi testified that the investigation file was transferred to Rene Henderson who succeeded Takyi as the Compliance Manager.

Henderson testified that subsequent to receiving the investigation file she reviewed Takyi's notes, the IAIU report, Hernandez's incident report, and the student's written complaints. Then on May 31, 2017, Henderson interviewed the Respondent in the presence of his attorney, Eugene Liss, and Eric Frazier who served as counsel for the District. Henderson indicated that the Respondent admitted that he placed a book on a student's desk, but he denied all of the other claims asserted by the students in their written complaints. [Ex. SD-7].

Henderson testified that she did not re-interview the students "because [Takyi] had already done the interviews and it was decided that we would read the report in conjunction with her notes and my interview with Mr. Olivera." [T2:147]. On July 14, 2017, Henderson completed an Internal Investigation



Findings Report that included a summary of the investigation. Henderson's report summarized her interview with the Respondent:

Mr. Olivera was temporarily assigned to cover Ms. Mitchell's class in her absence. Mr. Olivera described the classroom atmosphere as *"disruptive, not conducive to learning"*, the students were *"talking very loud, laughing, joking getting out of their seats."* He explained this was the behavior he encountered the three days he covered Ms. Mitchell's class. When questioned on his classroom management techniques he stated, *"the student were told several time to sit down, I told them that he was going to call their parents."* When asked if he called security, he stated *"No, it wasn't to that point."* When asked if he notified any parents or the child study team he replied that he had not. Mr. Olivera did say that he spoke to VP Amparbin on two separate occasions during lunch to explain his concerns with Ms. Mitchell's class. He said the VP told him that he stopped by the class (while in session with a different teacher) to address the class's behavior. At one point Mr. Olivera stated, *"I had a difficult year because of the behavior problems."*

When asked if he recalls an incident where a student had a bloody finger, he replied that he read about it in IAU but *"that never happened, I would never harm a student."* When asked if he dropped a book onto a student's hand he recalled that *"he placed a book on a desk"* but doesn't recall who the student was. In regards to the allegations that he pushed a student's head onto a desk, he claimed that he *"never made any physical contact with a student's head."* When asked if he has ever physically redirected students, he stated that he would only ever physically touch students to break up a fight.

When asked if he had ever had any interactions with these students before he was assigned to their classroom as a substitute, he said, *"No, never any interaction with the students before that day."* When questioned as to why students would make up these allegations he said *"someone pushed them to do this, maybe the teacher"* (Ms. Mitchell). When asked why he believed that Ms. Mitchell would

encourage the student to concoct allegations about him, he provided no explanation. Another explanation that Mr. Olivera offered to explain the students allegations was as a "way to cover themselves" and "children tend to make up stories and pass the blame" so they don't get in trouble. Lastly he stated that the students were afraid he would call their parents about their behavior because "they know I would do home visits, they know I have done them in the past." When asked how the students would know this information being he is a temporary substitute he said "because children talk."

When questioned if he was ever accused of inappropriate physical contact with any student, initially he denied ever being accused of any similar allegations. However, after being probed by his lawyer he admitted to one written reprimand, seventeen years ago, due to him physically redirecting a student back into her seat.

Additionally, Mr. Olivera disputed the IAIU investigators report in which the investigator wrote that Mr. Olivera "conceded to referring to the students as stupid or knuckleheads", claiming that he never admitted that to the IAIU investigator. Mr. Olivera claimed that he never called a student stupid in Spanish, saying that he doesn't even know what the work "naco" or "naca" means. [Ex. SD-7].

Based upon the internal investigation, Henderson recommended that the District pursue the termination of the Respondent's employment for unbecoming conduct. Henderson wrote the following letter to the Respondent on July 14, 2017:

On or about May 6, 2016, an allegation of inappropriate conduct was made against you.

You were interviewed by Compliance Manager, Rene Henderson. Based on the evidence collected, the District



finds that there was inappropriate conduct between you and students and exhibited conduct unbecoming a teacher while in the classroom.

You will receive a separate communication which outlines any disciplinary measure taken by the District regarding this matter. [Ex. SD-1].

During the tenure dismissal proceedings, Respondent Olivera denied the specification allegations against him. [T5:382-384, 405]. Olivera also denied receiving one-on-one coaching or mentoring during the 2015-2016 school year. [T5:386]. Olivera confirmed that he is familiar with the District's policy on using physical force on students. [T5:388]. Olivera denied admitting to Robles that he referred to the students as "stupid" or "knuckleheads". [T5:401, 403].

Student DG testified as a rebuttal witness for the District. DG was in sixth grade at the time of the May 4, 2016 incident. During direct examination, DG provided her account of the incident:

[DG, On Direct]

Q. [By District Counsel Abreu] And do you recall an incident that occurred in May of 2016 in Mr. Olivera's classroom?

A. Yes.

Q. And what do you remember happening that day?

A. Okay, for me he - - my hands were on top of a desk and he had a thick book. I think it was a history book and he



just either he let go of it and fell on top of my hand or he slammed it onto my hand. I am not sure because I wasn't looking at him, which made me bleed a little bit. It wasn't serious or anything and I raised my hand to go to the nurse but he said, no, and that it was my fault that I was bleeding.

Q. Now when Mr. Olivera dropped the book on your hands, did it hit both your hands?

A. Yes.

Q. And which hand was bleeding?

A. I'm not sure.

Q. Do you not remember which hand was bleeding?

A. Huh-huh.

Q. Was it both hands that were bleeding?

A. No, just one.

Q. Were you bleeding at your nail and your cuticle?

A. Uh-huh.

\* \* \*

Q. Do you remember what the classroom was like that day in Mr. Olivera's class?

A. It was loud and chaotic.

Q. Was Mr. Olivera raising his voice at the students?

A. Uh-huh, yes.

Q. Did you witness Mr. Olivera being violent towards any of the students that day?

A. Only one of them.

Q. What did you witness?

A. I witnessed my friend she was in between a desk and a bookshelf and he pushed the desk towards her which made her be pushed against the bookshelf. I don't believe she got hit. I know she was like upset.

Q. When you say you don't believe she got hit, what don't you believe she got hit with?

A. The desk, like being pressed against the desk and the bookshelf, I don't think it was fully forceful.

Q. Do you recall if she hit the bookshelf?

A. Yes.

Q. Do you recall if Mr. Olivera used the term knucklehead, Narco or Norca that day?

A. Yes. [T6:417-419].

DG testified that she wrote her written complaint at the direction of her teacher, Ms. Mitchell, but she not receive any assistance. [T6:420, 425-426].

During cross-examination, DG testified that some of the students in the classroom may have exaggerated their accounts:

[DG, On Cross]

Q. [By Respondent Counsel Poberezhsky] Now which are the things that you can remember that you think may have been exaggerated?

A. Him pulling out a student from a chair and lifting them up by their shirt. I don't remember seeing that.

Q. Do you remember who made that allegation?

A. His name was AA. [T6:427].

DG also indicated that she asked to go to the bathroom rather than to see the nurse "because it wasn't serious, so I wanted to wash it off". [T6:428, 434, 438]. DG admitted that she was not certain if the Respondent intentionally slammed or dropped the book on her because she "wasn't looking directly at him, my friends were". [T6:429]. DG testified that she "wasn't paying attention". [T6:429]. DG also clarified that the book did not hit her hand directly, but rather a paperclip that she was holding. [T6:431].

DG then conceded that she did not directly observe the Respondent push a desk towards AF or pull a student out of a seat by his shirt. [T6:435, 438, 444-445]. DG acknowledged that she was simply repeating the accounts of other students. [T6:437-438]. DG indicated that the only direct observation she had was that a book held by the Respondent hit her paperclip that caused her finger to bleed. [T6:435-436, 445].

The parties presented the following arguments in support of their respective positions.



## The District's Position

The District provides the following legal argument in its post-hearing brief:

### POINT I

#### **THE RESPONDENT HAS DEMONSTRATED CONDUCT UNBECOMING WHICH IS JUST CAUSE FOR DISMISSAL**

##### **A. Standard for Conduct Unbecoming**

"Unbecoming conduct," one of the grounds listed in N.J.S.A. 18A:6-10 on which a tenured employee may be dismissed or reduced in compensation, need not be heinous, unlawful, or even willful conduct. As the New Jersey Supreme Court explained, "unbecoming conduct" "need not 'be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct.'" Bound Brook Bd. Of Educ. v. Ciripompa, 228 N.J. 4, 13-14 (2017), quoting Karins v. City of Atlantic City, 152 N.J. 523, 555 (1996). The Court in Ciripompa stated:

A charge of unbecoming conduct requires only evidence of inappropriate conduct by teaching professionals. It focuses on the morale, efficiency, and public perception of an entity, and how those concerns are harmed by allowing teachers to behave inappropriately while holding public employment.

Id. at 13-15.

In other words, the standard of conduct required of a tenured employee is "fitness to discharge the duties and functions of one's office or position." In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974), certif. den. 65 N.J. 292 (1974). Thus, a charge of unbecoming conduct focuses which is inappropriate in any way, which harms morale or distracts from the image of the school in the eyes of the public.

Tenure charges are to be evaluated under the long-established standard of a preponderance of the credible evidence. In Re Polk, 90 N.J. 550 (1982). The

tenure charge of "unbecoming conduct," is a broadly defined, elastic concept, encompassing any conduct that has a tendency to destroy public respect for government employees and competence in the operation of public services. Karins v. Atlantic City, 152 N.J. 532, 554 (1998). A finding of unbecoming conduct does not require a violation of any specific rule or regulation, but rather may be based on an implicit standard of good behavior, "which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960). Public school educators are professional employees:

to whom the people have entrusted to care and custody of... school children with the hope that this trust will result in the maximum educational growth and development for each child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment.

In re Sammons, 1972 S.L.D. 302.

It has long been understood that the charge of unbecoming conduct relates to a teacher's fitness to discharge his or her duties and functions. Laba v. Newark Bd. of Educ., 23 N.J. 364, 384 (1957). Tenure protections may be evoked based upon a single incident of poor behavior or of a pattern of such conduct. In re Tenure Hearing of Castro, No. A-4875-10T3, 2012 N.J. Super. Unpub. LEXIS 923, (App. Div. Apr. 25, 2012). There the Appellate Division reviewed tenure charges brought under the New Jersey Education laws reasoning that:

The tenure of education personnel is authorized by the Education Tenure Act N.J.S.A. 18A:28-1 to-18. Pursuant to N.J.S.A. 18A:6-10, no person under tenure of office, position, or employment shall be dismissed or reduced in compensation except for inefficiency, incapacity, unbecoming conduct, or other just cause...

While tenure was designed to protect education personnel "from dismissal for 'unfounded, flimsy or political reasons,'" Wright v. Bd. of Educ. of East Orange, 99 N.J. 112, 118, 491 A.2d 644 (1985) (quoting Zimmerman v. Newark Bd. of Educ., 38 N.J. 65, 72, 183 A.2d 25 (1962)), tenured employees must act in a professional manner and serve the welfare of the students in their care. Tenure charges may be sustained based on a pattern of unprofessional conduct, In re Riddick, 93 N.J.A.R.2d (EDU) 345 (1993), or on a single



incident, if found to be "sufficiently flagrant." In re Fulcomer, 93 N.J. Super. 404, 421,226 A.2d 30 (App. Div. 1967).

Id. at 9.

The Court went on to state that:

Unbecoming conduct" is an elastic phrase encompassing conduct that adversely affects the morale or efficiency of a governmental unit or that has a tendency to destroy public respect in the delivery of governmental services. Karins v. City of Atl City, 152 N.J. 532, 554, 706 A.2d 706 (1998); see also In re Emmons, 63 N.J. Super. 136, 140, 164 A.2d 184 (App. Div. 1960). "It is sufficient that the complained-of conduct and its attending circumstances be such as to offend publicly accepted standards of decency." Karins, supra, 152 N.J. at 555 (internal quotations omitted).

Such misconduct need not necessarily "be predicated upon the violation of any particular rule or regulation, but may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct." Hartmann Police Dep't of Ridgewood, 258 N.J. Super. 32, 40, 609 A.2d 61 (App. Div. 1992) (quoting Asbury Park v. Dep't of Civil Serv., 17 N.J. 419, 429, 111 A.2d 625 (1955)).

In the context of school tenure cases, "the touchstone is the fitness to discharge the duties and functions of one's office or position." In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 29, 316 A.2d 39 (App. Div.), certif. denied. 65 N.J. 292, 321 A.2d 253 (1974).

Id. at 10-11.

This is an arbitration proceeding where the question before the arbitrator is: did the District produce credible evidence that would lead a reasonably prudent person to conclude that the statements were true. I/M/O Zinznewski, School District of Tw, of Edison, Middlesex County, OAL Dkt. No. EDU 4727-08 (May 5, 2010). The rules of evidence are not applicable to arbitration proceedings. Local Union 560 v. Eazor Express, Inc., 95 N.J. Super. 219, 227 (App.



Div. 1967); and Livingston v. Combs, 1 N.J.L. 50 (Sup. Ct. 1790). Evidence that might otherwise be considered hearsay is admitted in arbitration proceedings in this state. See Grover v. Universal Underwriters Ins. Co., 151 N.J. Super. 403, 409 (App. Div. 1977).

Here, the District's Tenure Charges for Conduct Unbecoming and Other Just cause are based on the Respondent's actions for the entire school year while he was assigned to Wilson Avenue School. Count 1 for Conduct Unbecoming contains several allegations against the Respondent that regard his failure to create environment of respect and rapport; he to manage student behavior; to engage students in learning; to contribute to the School and District; to implement curricular goals and objective(s); to manage classroom procedures, to establish a culture of learning; and to contribute to the School and District. Count 1 also contains specifically allegations to the incident that occurred on May 4, 2016, which stated as follows:

The Respondent improperly used physical force against his students:

- i. The Respondent grabbed a student (B.L.) by the head and slammed it into a wooden table.
- ii. The Respondent grabbed a student (A.F.) by her arms, pushed her to the side and pushed her into a wall.
- iii. The Respondent violently slammed a book on a student's (D.G.) hand and caused injury to the student's fingers
- iv. The Respondent pushed a desk into a student (A.F.) and tried pushing her into a wall.
- v. The Respondent grabbed his students by their shirts and pulled them off of their chairs.

Moreover, Count 2 for Other Just Cause provides that from September 1, 2015 to the present, the Respondent has failed to properly adhere to the District's policy for overseeing students and improving students and classroom management; consistently failed to follow instructions and violated the District's policies and procedures; engaged in corporal punishment and/or physical contact in violation of the District's policies and N.J.S.A. 18A:6-1. As such, Count 1 and 2 of the District's Tenure Charges are based on the District's internal investigation and the Respondent's conduct throughout the entire school year of 2015-2016.

#### **B. Pattern of Physical and Verbal Abuse of Students**

It is undisputed that teachers have been entrusted with the care and custody of children and it is their duty to exercise self-restraint and controlled



behavior in the performance of their job duties." I/M/O the Tenure Hearing of Barbra Emri, School District of the Township of Evesham, Burlington County, OAL DKT No. EDU 4579-00, Dkt. No. 18-6/00 (January 2002) (finding termination warranted for inappropriate language towards students); citing In re Lucarelli, 97 N.J.A.R. 2d (EDU) 537; In re Sammons, 1972 S.L.D. 302.

Further, uncontrolled outburst in front of students, other educators and visitors to the school has demonstrated a pattern of unbecoming conduct sufficient to revoke tenure. Redcay v. State Bd. of Educ., 130 N.J.L. 369 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944) (holding that charges of such conduct have been clearly proved the removal should be easy and prompt); see also In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967) ("unfitness to remain a teacher may be demonstrated by a single incident if sufficiently flagrant", finding that an unjustified use of discipline was sufficient grounds to revoke tenure).

In Emeri, the Administrative Law Judge, who was charged with fact finding under the predecessor to the TEACHNJ Act, reviewed In the Matter of the Tenure Hearing of Johnston, 95 N.J.A.R. 2d (EDU) 439,443, aff'd, Comm'n 95 N.J.A.R. 2d (EDU) 444, quoting:

Children are entitled to a supportive and nurturing classroom environment in which to develop their intellectual capacities and bolster their self-esteem. Adolescents are especially vulnerable to the influences of their teachers, who serve as role models and help to shape how youngsters actually view themselves. **Constant negativity and insensitivity in dealing with students is a serious deficiency which constitutes conduct unbecoming a teacher.** In re Tenure Hearing of Ernest E. Gilbert, 1982 S.L.D. 274, 326 (Comm'r April 5), aff'd, 1982 S.L.D. 328 (St. Bd. Nov. 3). See In re Tenure Hearing of John Birch, 1978 S.L.D. 63 (Comm'r Feb. 9), wherein a teacher was dismissed for displaying a negative attitude toward students, including making disparaging remarks about students in class. **Being a teacher requires an intense dedication to civility and respect for people as human beings.** Morris Sch. Dist. v. Brady, 92 N.J.A.R. 2d (Vol. 4) 419 (Comm'r of Educ.).

Although teachers often face high levels of frustration in dealing with difficult students, it is imperative that educators must retain control of their actions and their classrooms. This is especially true when dealing with vulnerable populations. In Randolph Township Bd. of Educ. v. DiPillo, 93 N.J.A.R. 2d (EDU) 13, 17, modified and adopted, Comm'r, 93 N.J.A.R. 2d (EDU) 24, modified and adopted, State



Bd., 95 N.J.A.R. 2d (EDU) 20; I/M/O Carter and State-Operated School District for the City of Paterson, 51-3/13 (June 2013)(Dismissal warranted for teacher that failed to create a nurturing environment in the classroom, refusal to listen or empathize with others, bad attitude and insubordination).

Failure to follow required protocols in the event of a student's injury also has been found to constitute unbecoming conduct. In re Tenure hearing of Pariano-Keyser; In re Tenure hearing of V.R., Docket No. EDU1525-04 (April 27, 2005), affirmed St. Bd. 05; November 2. Here, Respondent refused to allow DG to go the bathroom when she was bleeding on her hand from an injury, which he caused when he slammed a book on both of her hands. (See Exhibit SD-5). He ignored her request and made her feel as if it was her own fault that she got injured, even though Mr. Olivera slammed the book on her hand. Mr. Olivera should of sent her to the nurse, but failed to do so.

I/M/O Sall State-Operated School District of the City of Paterson, Passaic County, the District established that the teacher's reaction to an aggressive student was grounds for termination and the arbitrator stated "by reacting intemperately to an aggressive student in defiance of clear caution, [the teacher] gave the district ground for doubting his self-control. Thus, taking all the circumstances into account, the district has shown cause for removing the respondent from his tenured teaching position." I/M/O Sall, Agency Docket No. 305-10/14 (May 13, 2015).

Similar to Sall, here Mr. Olivera received several warnings regarding his classroom management. Mr. Olvera consistently displayed a lack of self-control on numerous occasions to the extent that on several occasions where he put his hands on his students in an aggressive manner. In Sall, when a teacher is provoked by a student, the teacher is "obliged to act with restraint and emotional control." Id. at 10. This conduct is especially egregious given the length of time and support the Respondent had been given in seeking effective methods of classroom management.

Even the calling of students names, like "you're ugly"; "why are walking with that ugly face;" "I would pop you in the face;" and "if there wasn't a law stating teachers can't hit students, I would" were deemed "unprofessional, outrageous, constituted harassment, intimidation and bullying" conduct which constituted conduct unbecoming. See I/M/O/ Deering, Hackensack Board of Education 38-2/18. The Arbitrator disciplined this tenured teacher with a 120 day unpaid suspension, loss of step and increment and the requirement to attend anger management. Id. Here, Mr. Olivera was violent and verbally abusive towards his students. The testimony clearly provided that Mr. Olivera's classroom was chaotic and he became frustrated by his students. Not only did he



become physically violent with this students, he also called them stupid, knuckleheads, naco, narco as well as threaten to "f\*\*\* them up."

Moreover, the Tenure Charges against Mr. Olivera also include an allegation of corporal punishment and inappropriate physical contact with his students on May 4, 2016. N.J.S.A. 18A:6-1 prescribes the use of physical force against students in educational settings. The statute states as follows:

No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:

(1) to quell a disturbance, threatening physical injury to others;

(2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;

(3) for the purpose of self-defense; and

(4) for the protection of persons or property;

and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section. Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing corporal punishment to be inflicted upon a pupil attending a school or educational institution shall be void.

In other words, teachers are prohibited from corporal punishment and physical contact with students unless the incident falls within the above exemptions. In this case, there was no testimony or evidence from the Respondent that satisfies the exemptions set forth in N.J.S.A. 18A:6-1.

I/M/O Yarborough, State-Operated School District of Newark, 259-9/15-12/14 (May 24, 2016), the District's tenure charges were sustained against the tenured teacher for conduct unbecoming for shoving a student and using undue force on a kindergarten student. Yarborough received a penalty of a 120 days suspension. Similarly, I/M/O Hawkins, State-Operated School District of

Newark, #243-10/13 (March 10, 2014), where the District's tenure charges were sustained the removal of a Vice Principal. The Vice Principal used corporal punishment when he grabbed a student by the collar and dragging him across the playground into the principal office.

I/M/O Demarco, Wayne Board of Education, 320-12/16, the school district sought termination of a tenured student for improperly confining pre-school students to a bathroom as a means of punishment and /or behavioral control and calling the student "little assholes" and/or little douchebags" to other teachers in the teacher lounge. She admitted to placing children in the bathroom as a means to discipline/deescalate the children's behavior and referred to the students in a derogatory manner. It should be noted that no student's testified in this hearing regarding the incidents in the teacher's classroom.

The Arbitrator determined that use of confining the student's in the bathroom was a form of corporal punishment in violation of the District's policy. The Arbitrator provided that "given the severity of her misconduct, the potential harm to her students and the inability of the District to place trust in her stewardship," termination was the appropriate penalty.

I/M/O Iman Jones, State-Operated School District of the City of Newark, 92-5/17, the Arbitrator issued a 60 day unpaid suspension for her failure to supervise her students in her classroom. A razor in the classroom cut one of the tenured teacher's students while the teacher was on her cell phone. The teacher failed to maintain her classroom and oversee the proper safety of her students.

The Tenured Teacher argued that that the school district didn't meet its burden because it failed to provide student witnesses and relied solely on hearsay testimony. The Arbitrator held that the District established the truth of its unbecoming conduct charges against the tenured teacher, which warranted disciplinary action. The Arbitrator held that the tenured teacher failed to adequately manage her classroom by allowing her students to engage in horseplay and thereby exposing students to potential foreseeable harm, which is constitutes conduct unbecoming.

Here, the District established that Mr. Olivera made physical contact with three separate students. The District's witnesses established that the student's made the following complaints against Mr. Oliver:

- B.L.- Mr. Olivera told him to go to sleep after B.L. asked for more work. Mr. Olivera then grabbed B.L.'s head and slammed it down on the table.



- A.F.- As A.F. was walking towards the trash can, Mr. Olivera pushed a desk into her, which caused her to smash into the wall. He also called them knuckleheads, stupid in Spanish, the b-word (Bitch) and to shut up or he was going to Fu\*\*them up.
- D.G.- Mr. Olivera slammed a large book onto the D.G.'s hands and she began to bleed. Mr. Olivera would not let her go to the bathroom to rinse the blood from her finger. He did not send her to the nurse.
- R.G.- Observed the physical contract between Mr. Olivera and A.F. and D.G. Mr. Olivera called the student's stupid in Spanish (*nacos* and *narcos*). He also said he was going Fu\*\* up the students.

As such, the District has established that Mr. Olivera had inappropriate physical contact with his students in violation of the District's policies and Title 18A. The Respondent should be terminated from the District as he violated the District's policy against corporal punishment and his conduct was unbecoming conduct of a teacher.

Finally, it is well established that unbecoming conduct can arise from just one incident. "Unfitness to hold a post might be shown by one incident, if sufficiently flagrant." Redcay v. State Bd. of Ed., 130 N.J.L. 369, 371 (1943); In re Fulcomer, 93 N.J. Super. 404, 412 (App. Div. 1967); Karins v. City of Atlantic City, 152 N.J. 523, 555 (1996). Therefore, the allegations set forth in the Tenure Charges against Mr. Olivera are sufficient to warrant his termination. Although the incidents that occurred in May of 2016 in Mr. Olivera's classroom were egregious and placed his student in great harm, he also has a history of using physical contact against his students. In March of 2001, Mr. Olivera was reprimanded and disciplined for tying a student to his chair with a belt as a form of punishment for the student. (See Exhibit SD-18).

Further, in the 2015-16, Vice Principal Amparbin verbally counseled Mr. Olivera about an incident, where he forcibly moved a student that was standing in the doorway. Vice Principal Amparbin specifically told Mr. Olivera to keep his hands off of his student. Then on May 4, 2016, Mr. Olivera became physical with three separate students, causing one to bleed. He also became verbally abusive and used offense and foul language towards his students. Therefore, the District has established by the preponderance of credible evidence that the Tenure charges should be sustained and Mr. Olivera should be terminated.

### **C. The District Submitted Credible Evidence at the Hearing**

The District has submitted credible evidence during this proceeding to sustain its Tenure Charges. The Respondent has previously argued that the



District has only relied on hearsay. However, the District presented the testimony of student D.G. who was present in the classroom, In addition during the cross-examination of Ms. Takyi, Respondent's counsel acknowledged that the witness statements were direct evidence. 3T285:286:1-3.

The AAA Labor Arbitration Rules, statutorily applicable pursuant to N.J.S.A. 18A:6-17.1(c), state that "parties may offer such evidence as is relevant and material to the dispute," the arbitrator "may exclude evidence deemed by the arbitrator to be cumulative or irrelevant" (but not evidence determined to be hearsay), and "conformity to legal rules of evidence shall not be necessary." AAA Labor Rule 27. The Arbitrator is required to admit and consider any evidence pertinent and material to the controversy presented. Manchester Twp. Bd. of Educ. v. Thomas P. Carney, Inc., 199 N.J. Super. 266, 274 (App. Div. 1985).

Moreover, the residuum rule also allows inadmissible hearsay is admissible in support of a finding in an administrative law matter. N.J.A.C. 1:1-15.5 provides that hearsay evidence is admissible and provides:

Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.

The residuum rule requires a finding of fact or legal determination to be supported by competent evidence in the record. Weston v. State, 60 N.J. 36, 51 (1972); In re tenure Hearing of Cowan, 224 N.J. Super. 737 (App. Div. 1988). Per the residuum rule, the ultimate finding of determination must be so supported, but not each individual fact leading to it. The residuum rule does not require that each fact be based on a residuum of legally competent evidence but rather focuses on the ultimate finding or findings of material fact. Ruroede v. Borough of Hasbrouck Heights, 214 N.J. 338, 359-60 (2013); Mayflower Sec. Co., Inc. v. Bureau of Sec., 64 N.J. 85, 92-93 (1973). Applying this principal here, the ultimate finding of unbecoming conduct must be supported by "a residuum of legal and competence evidence." Id. See also I/M/O Ratiba Ahmed, State-Operated School District for the City of Newark, Agency Dkt. 281-9/15, I/M/O Ebert, State-Operated School District for the City of Newark, Agency Dkt. 169-15 (May 21, 2015). In this matter, the District presented eye-witness testimony and documentary testimony to support its charges.

Here, the District presented the testimony of student D.G. who was an eye-witness to support its charges. D.G. was present in the classroom and a



victim of the Respondent's temper. The District's witnesses also testified that it conducted its own investigation at the school level by Principal Hernandez and at the District level by Ms. Takyi and Ms. Henderson. The Principal Hernandez and Ms. Takyi both met with the students that were victims of the Respondent's violent behavior. There were four student that prepared written statements that described the Respondent's inappropriate physical contact and use of name calling and threatening, vulgar words used towards the students. The District's witnesses will also describe their observations of Respondent's lack of classroom management that escalated over the course of the school year and resulted in the Respondent physically attacking the students.

In addition, the District presented the testimony of Mr. Robles, the IAIU Investigator. His testimony corroborated the student's statements that Mr. Olivera made physical contact with students B.L., A.F., and D.G. He also confirmed that many of the students that he spoke with corroborated that Mr. Olivera used abusive and foul language towards them including calling them knuckleheads, narcos/nacos and stupid in Spanish.

Lastly, the District presented the testimony of student D.G. regarding the incidents that occurred in Mr. Olivera's classroom. She provided credible testimony that Mr. Olivera slammed. She was an eye-witness of the incident and testified that he caused her to bleed on her hand. Therefore, the District met its burden and the Tenure Charges against Mr. Olivera should be sustained.

In contrast, the Respondent's testimony was dishonest and not credible. He categorically denied all of the incidents in his class. He stated that he did not have any physical contact with the students, B.L. D.G. A.F. and R.G, which was clearly dishonest based on the testimony of the District's witnesses. He also stated that he never raised his voice towards his students, threatened them or used derogative names towards them.

He clearly provided dishonest testimony while on the stand. For example, the Respondent testified that he was never counseled by his superiors at the school on his lack of classroom management and he was warned not to be physical with his students. He was also dishonest about whether he ever received a mentor/coach at the beginning of the school level and that he was assigned Ramapo Coaching for additional support.

The Respondent also stated that he only heard of the incidents after he was interviewed by the IAIU investigator. This is clearly false as he was questioned by the Principal and then placed in a separate room assignment away from students. He unequivocally denied that he slammed the book on D.G.'s hand, which caused her to bleed. D.G. was very honest and stated that this incident did occur and that the Respondent made physical contact with



her hand. Simply put, the Respondent's testimony was completely dishonest and lacked any credibility. Therefore, the District sustained its charges of conduct unbecoming and the Respondent should be terminated.

**D. The Respondent's Request for an Adverse Inference against the District Should Be Denied**

In the State v. Clawans, 38 N.J. 162, 183 (1962), the Court set forth the governing standard that a trial court should apply to determine to give an adverse inference jury charge when a party fails to call a witness. In the event a party fails to produce a witness who it is within that party's power to produce and who should have been produced, the factfinder may invoke the adverse inference rule to infer that the witness's evidence is unfavorable to the party's case. See Washington v. Perez, 219 N.J. 338, 352, (2014). "The mere failure to produce a witness does not of itself permit the jury to infer that" the witness would have contradicted the testimony of other prosecution witnesses. State v. Cooper, 10 N.J. 532, 566 (1952)(the Court held that the charge was inappropriate when the absence of the disputed witness was explained by his confinement to his home following surgery).

The jury is instructed that it may draw an adverse inference from a party's failure to call a witness only if it appears "that the person was within the power of the party to produce and that his testimony would have been superior to that already utilized in respect to the fact to be proved." Clawans, supra, 38 N.J. at 171.

The Washington Court explained that provided that this was a case-by-case analysis for the application of an adverse reference and provided:

[The] failure of a party to produce before a trial tribunal proof which, it appears, would serve to elucidate the facts in issue, raises a natural inference that the party so failing fears [that] exposure of those facts would be unfavorable to him. But such an inference cannot arise except upon certain conditions and the inference is always open to destruction by explanation of circumstances which make some other hypothesis a more natural one than the party's fear of exposure.

See Washington v. Perez, 219 N.J. 338, 352, (2014)(citing Clawans at 170-71). The Court stated that an adverse inference charge would be improper if the witness were unavailable, if the witness were biased against the party who would otherwise be expected to call him or her, or if the witness's testimony



"would be cumulative, unimportant or inferior to what had been already utilized." Clawans at 171.

The Respondent has failed to establish that an adverse inference is appropriate in this matter. On June 6, 2018, the Respondent decided to testify on his own behalf at the hearing. During his testimony of the Respondent categorically denied the allegations set forth in the Tenure Charges. He provided dishonest testimony that was not credible in light of the testimony of the District's credible witnesses.

In accordance with N.J.S.A. 18A:6-17.1(b)3, which provides as follows, in part: "The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses." During the Respondent's testimony he denied that any of the incidents occurred between him and the students in May of 2016. He further testified that we should ask the student why they made their complaints. Therefore, the District was authorized by TEACHNJ to present additional evidence and witnesses to impeach the Respondent's testimony. This request was granted by the Arbitrator on June 19, 2018. The District was prepared to present the testimony of D.G. and A.F. on June 21, 2018.

However, Counsel for the Respondent argued that Mr. Olivera would be away on vacation out of the State starting on June 21, 2018 (June 20, 2018 was the last day of school). The District argued that it would be prejudice if it could not present B.G. and A.F. as it would difficult to produce them during the summer vacation and at the very beginning of the school year. In addition, Mr. Olivera refused to appear for the hearing during the summer and failed to present a Certification indicating where he was during the Summer that caused him to be unable to appear at the hearing.

Notwithstanding these obstacles, the District was able to confirm the appearance of B.L. on August 14, 2018. Unfortunately due to A.F.'s summer schedule, she was unable to appear on August 14<sup>th</sup> as she was away. Further, during this hearing, the District stated on the record that student B.L. was no longer a student in the school district and that student R.G. failed to respond to District's several communications regarding the hearing. The Respondent did not object to this statement. The Arbitrator provided the District with an additional hearing date of September 6<sup>th</sup> to present student A.F. However, this was the third day of school for the 2017-2018 school year, so it was very difficult to coordinate with A.F. for her testimony.

The Respondent has failed to establish that the standard of Clawans applies to this matter. The Court provided that an adverse inference charge would be improper if the witness were unavailable, if the witness were biased

against the party who would otherwise be expected to call him or her, or if the witness's testimony "would be cumulative, unimportant or inferior to what had been already utilized." Clawans at 171. Here, the A.F. was unavailable to testify at the hearing and her testimony would have been cumulative.

The District tried its best to contact A.F.'s parents and new school administrators, however, A.F. was unavailable and ultimately could not be confirmed to provide testimony at the September 6<sup>th</sup> date. The District made multiple attempts to contact A.F. and was unable to get in contact with her. The Arbitrator denied the District's request to reschedule a hearing for another date. The District was prepared to present this witness at the June 21<sup>st</sup> hearing date and the Respondent adjourned that hearing. As such, the District would prejudice to apply an adverse inference because the District was unable to produce student A.F. and the Respondent's request should be denied.

### **CONCLUSION**

For the foregoing reasons, the District has established that the Respondent has demonstrated Conduct Unbecoming and Other Just Cause to revoke his tenure as a teacher within the District, and therefore he should be terminated. [District Brief, pp. 37-54].



## The Respondent's Position

The Respondent provides the following legal argument in his post-hearing brief:

### LEGAL ARGUMENTS

Here, the tenure charges filed against Mr. Olivera must be dismissed with prejudice for one simple reason: the District failed to meet its burden of proof as to any of the allegations levelled against him. Some preliminary legal points must be addressed, however, as follows:

#### **Point I: The Only Component Of The Tenure Charges That Is Ripe For Consideration Is Mr. Olivera's Alleged Conduct Unbecoming on May 4, 2016.**

As previously discussed in Mr. Olivera's May 25, 2018, *Motion for a Directed Verdict*, the only allegations of conduct unbecoming that may be considered for a determination of the tenure charges is the series of incidents that supposedly occurred while he was substituting Ms. Mitchell's classroom on May 4, 2016. These are the only specific accusations he was put on notice of and, consequently, had an opportunity to defend against. The records included in the *Statement of Evidence* section of the tenure charges, mandated by N.J.S.A. 18A:6-11, pertained to the incidents that allegedly occurred on May 4 and nothing else.

None of the generalized allegations stated in the charges, related to vague concerns about Mr. Olivera's teaching performance and classroom management, are fair game. After all, it has long been held by our courts that tenured employment is entitled to the safeguards associated with procedural due process. Emri v. Evesham Tp. Bd. of Educ., 327 F.Supp.2d. 463, 472 (D.N.J. 2004) (quoting Nicholas v. Pa. State Univ., 277 F.Supp.3d. (3d Cir. 2000)). Chief among those safeguards is notice "appropriate to the nature of the case" and an opportunity to be heard "at a meaningful time and in a meaningful manner." Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

Our state legislature expanded the due process rights of tenured employees through the Tenure Employees Hearing Law, and its 2012 amendment, the Teacher Effectiveness and Accountability to the Children of New Jersey ("TEACHNJ") Act. N.J.S.A. 18A:6-117 et seq.; N.J.S.A. 18A:6-10 et seq.



One fundamental protection provided by TEACHNJ is that an employee facing tenure charges must be served with notice of the charges and a statement of evidence in support of each charge. N.J.S.A. 18A:6-11. In other words, vague charges or accusations that lack a factual predicate and evidentiary support are legally defective, violating the provisions of TEACHNJ.

A great example of a tenure case that focused on this notice and due process issue is In re. Frank King, COE 117-4/07, final decision, (September 18, 2007).<sup>8</sup> In King, the respondent was served with tenure charges that "lack[ed] specificity and [were] so general in nature that respondent [was] unable to defend against them." Id. slip. op. at 1. The tenure charges were, accordingly, dismissed by the arbitrator on motion by the respondent.

Here, the only accusations Mr. Olivera was specifically put on notice of, as described in the tenure charges, were his alleged actions on May 4, 2016, consisting of: (1) being verbally and physically abusive to his students; (2) using profanity towards his students and threatening to physically harm them; (3) telling his students he was going to "f\*\*\* them up;" (4) improperly using physical force against his students by (i) grabbing student B.L. by his head and slamming it into a wooden table; (ii) grabbing student A.F. by her arms, pushing her to the side and into a wall; (iii) violently slamming a book on student D.G.'s hands, causing injury to the student's fingers; and (iv) pushing a desk into student A.F.

The remaining allegations contained in the charges are far too vague to be considered for a determination of the charges. Moreover, they speak to Mr. Olivera's teaching effectiveness, which, by law, requires the filing of inefficiency charges predicated on two consecutive "ineffective" or "partially effective" summative evaluations. N.J.S.A. 18A:6-17.3. Here, there is no evidence that Mr. Olivera received a summative evaluation less than "effective" or its equivalent at any point during his thirteen-year career with the District.

Accordingly, the only allegations that may be considered for a determination on the charges are those pertaining to the May 4, 2016, incidents in Ms. Mitchell's classroom. All other tenure charge counts must be dismissed with prejudice.

### **Point II: The Tenure Charges Must Be Dismissed With Prejudice Because No Direct Evidence Was Presented In Support Of The Charges**

This point, which was also previously raised in Mr. Olivera's *Motion for a Directed Verdict*, still applies, and must be reiterated. It has been established, through prior TEACHNJ decisions, that conduct unbecoming cannot be proven

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<sup>8</sup> Copies of both King decisions (initial and final) are attached hereto as Exhibit A.



if the only evidence presented in support of the tenure charges is uncorroborated hearsay. See In re. Thomas Strassle, Agency Dkt. No. 131-5/16, final decision, (October 5, 2016); In re. Lydia Wilson, Agency Dkt. No. 174-6/16, final decision, (February 1, 2017). State law also provides that while hearsay evidence may be admissible in administrative proceedings, under the Residuum Rule, legally competent evidence must exist to support it. N.J.A.C. 1:1-15.5(b). The New Jersey Supreme Court reaffirmed this notion by holding that a final agency decision may not be entered if it is based solely on hearsay evidence. Weston v. State, 60 N.J. 36 (1972).

The decisions in Strassle and Wilson warrant close consideration because the relevant tenure charges in both matters were dismissed based on the same legal principle that compels a dismissal of the charges filed against Mr. Olivera. In Strassle, a tenured teacher was accused of requesting sexual favors from a female student in exchange for money that he allegedly gave the student. Strassle, supra, at 3. These accusations were based on a complaint made by the student, which was referred to the police and investigated by the district. Although the school district called a number of witnesses that investigated the student's claims, including a detective and school administrators, and presented sworn statements prepared by the student, because neither the student nor any other witnesses with direct knowledge of facts that would support the student's claims testified at the hearing, this charge was dismissed at the conclusion of the District's case-in-chief. Strassle, supra, at 4-5.

The arbitrator's rationale for this decision – predicated entirely on principles of due process – was sound. “Because N.C. [the student accuser] did not testify at the hearing, N.C. could not be cross-examined to test the veracity of her claims... Further, Respondent was unable to question N.C. about possible bias, improper motivation or any other facts that might indicate that the allegations were fabricated and should not be believed. Further, because N.C. did not testify at the hearing, I did not have any opportunity to assess her credibility.” Id.

In Wilson, tenure charges were filed against a teacher after a number of her students allegedly engaged in sexually-explicit behavior in her classroom while under her supervision. As was the case in Strassle, the school district failed to call any of the alleged student victims as witnesses during the tenure hearing. The written statements provided by the students - and the testimony of investigators and staff members that fielded the initial complaints made by the students - was insufficient to satisfy the district's burden of proof, thereby warranting a dismissal of the charges. Wilson, supra, at 34-45.

The foregoing jurisprudence is rooted in the simple premise that an individual facing tenure charges “has a fundamental due process right to face



his accusers at trial." In re. Richard Vencenti, Agency Dkt. No. 255-14, final decision, (June 11, 2014). That was a right Mr. Olivera was deprived of in the case at bar. That is because none of the District's witnesses – including D.G. – directly observed any of the alleged incidents that occurred in Ms. Mitchell's classroom on May 4, 2016. There was also no direct, physical, evidence supporting the truth of any of the underlying allegations.

The District's case, in terms of any tangible evidence entered into the record, relied entirely on written hearsay statements provided by four sixth grade students, B.L., A.F., D.G., and R.G., over two years ago. B.L., A.F., and R.G. did not appear at the hearing. D.G. testified, but admitted that she did not directly observe any of the incidents in question. She testified that the events depicted in her statement were mere reiterations of what other students in the classroom told her, whom she was admittedly friends with, and doubted their accuracy, noting that at least one of the students was prone to "exaggerations," and agreed with Mr. Amparbin's assessment that if the allegations were true, the matter would reverberate throughout the entire school (it did not). Evidentially, D.G. does not even credit the allegations contained in her own statement.

By her own admission, D.G. was not a witness to the incident she herself was involved in. She testified that when Mr. Olivera dropped the book on her hands, she was not looking at him or in his direction. Because of this, she acknowledged that it could have been an accident (after all, she testified on direct that there was no reason for Mr. Olivera to discipline her) and had no interest in pursuing the matter further. She even clarified, for the first time on cross, that it was not the book that caused her to bleed, but a paperclip she was holding in her hand at the time.

To be sure, no direct evidence supporting any of the outrageous allegations against Mr. Olivera was presented by the District at any point over the course of the six-day hearing. There were no medical reports. There were no photographs. There was no eyewitness testimony. Even supplementary hearsay evidence that one would typically expect in a case like this, like police reports, law suits, guidance counselor memos or nurse records were never produced. Every District witness, including Ms. Hernandez, Ms. Henderson, Ms. Takyi, Mr. Amparbin, Mr. Robles, and Mr. Nzewku, acknowledged that they did not observe any of the incidents in question, and were unaware of any physical or direct evidence backing the students' claims.

In summary, because the District failed to produce any direct or physical evidence in support of the allegations made against Mr. Olivera, relying exclusively on uncorroborated and unreliable hearsay statements, the tenure charges must be dismissed with prejudice.



**Point III: The Tenure Charges Must Be Dismissed With Prejudice Because The District Failed To Meet Its Burden Of Proof.**

It cannot be argued, in good conscious, that the District met its burden of proving the charges by a preponderance of the relevant evidence. In fact, it is much easier to make the case that the District is guilty of a frivolous prosecution resulting in a defamatory smearing of Mr. Olivera's reputation. At some point along the way, whether upon receipt of IAU's "unfounded" Findings Report or in preparation of the hearing, the District should have done the right thing and moved to withdraw the charges. The fact that we have reached the summation stage of the proceeding, over two years since the date of the incident, and the charges are still pending, is a travesty.

The truth is that the District's so-called investigation into the students' shocking accusations against Mr. Olivera was unimaginably deficient. Even though the lead investigators for the District had little-to-no investigatory training, the sheer lack of effort to even attempt to corroborate the students' claims was downright shocking. Ms. Takyi and Ms. Henderson both admitted that the "investigation" was limited to collecting statements from the four student-accusers, asking those students if their statements were truthful, and conducting an interview of Mr. Olivera. No other substantive steps were taken to verify the truth of the students' claims.

Some of the logical, and readily-apparent, steps that *could* have been taken by the District's investigators include conducting interviews of randomly-selected students in Ms. Mitchell's classroom to determine what, if anything, they observed, checking in with the nurse's office to determine whether any of the students-accusers were treated there, and contacting IAU to inquire about their own investigatory findings, which severely contradicted the student statements. It is concerning that the District rushed to file tenure charges under these circumstances, particularly considering the high costs and resources associated with prosecuting tenure charges. The likely explanation, given Ms. Hernandez's and Mr. Amparbin's obvious displeasure with Mr. Olivera's teaching performance, as made clear during their lengthy testimonies, is that the District wanted him out, and the student-accusers gave the District the ammunition it needed to do so. The District should, however, be reminded that tenure charges may not be brought for "unfounded, flimsy or political reasons." Spiewak v. Rutherford Bd. of Educ., 90 N.J. 63, 73 (1982).

Turning to the heart of the matter - the evidence presented at the hearing relative to the May 4, 2016, incidents in Ms. Mitchell's classroom - the analysis must begin with D.G.'s written statement and testimony because she is the only District witness who was actually there at the time. In D.G.'s written statement, prepared the next day, on or about May 5, 2016, she accused Mr. Olivera of



slamming a large book on her hands, causing her to bleed. She raised her hand and asked to go to the bathroom to rinse the blood off, but Mr. Olivera did not allow her to leave. In her statement, D.G. also reported that Mr. Olivera pushed a desk towards another student, causing her to be pushed against the wall, while almost getting hit on her side. Finally, D.G. asserted, in her statement, that Mr. Olivera "grabs children by their shirts, pulling them off the chair." See Cert. Tenure Charges ("TC"), Ex. 2.

D.G. was subsequently interviewed by no less than four individuals and was asked, on each occasion, whether the contents of the statement she provided were accurate. All four individuals – Ms. Hernandez, Ms. Takyi, Mr. Robles and the attorney for the District, Christina Abreu – approached her in an official capacity, and it should have been obvious to D.G., a subordinate, that it was a serious matter and that she had to tell the truth. However, she did not. It was not until the eleventh hour, during cross-examination, that D.G. finally admitted that she did not directly observe any of the incidents described in her statement; she merely repeated what she heard other students say. She also waited until she was questioned on cross-examination to reveal that she was friends with the other student-accusers, and that it was a paperclip – not the history book – that punctured her finger, supposedly causing her to bleed. Perhaps if D.G. revealed these details in any of her prior interviews, Mr. Olivera could have been spared the indignity of having to go through a tenure hearing.

Obviously, the statement prepared by D.G. lacks any semblance of credibility. This is particularly true since she admitted to discussing the incidents with other students both during and after class, but prior to drafting her statement. Her testimony during the hearing, particularly on direct, is also unreliable. She testified on direct that she asked Mr. Olivera to go to the nurse, but changed her story on cross, revealing that she asked to go to the bathroom. She testified that she never actually went to the bathroom, even after class, to wash the blood off her finger because it had already dried up at the time, which is not particularly believable, and contradicts what she told Ms. Takyi.

The most significant discrediting of D.G.'s account came from the testimony of Mr. Robles. He revealed that D.G. was, in fact, permitted to leave Mr. Olivera's classroom, but went to neither the bathroom nor the nurse; her actual destination was the cafeteria, where she presumably met up with friends, and failed to disclose the incident that had just occurred to the vice principals who were in the cafeteria. In fact, Mr. Robles testified that none of the student-accusers reported Mr. Olivera's outrageous conduct to either administration or their guidance counselors on their own volition. In the case of D.G., Mr. Robles interviewed her in the presence of her mother – a fact D.G. failed to recollect – who confirmed that she looked at D.G.'s finger when she arrived home that day, and did not notice any signs of injury. Mr. Robles did support one aspect of



D.G.'s testimony – he confirmed that the students in Ms. Mitchell's classroom who were part of the same clique' seemed to have similar stories, unlike the other students in the classroom. T4 at 360 (13-24). All told, Mr. Robles did not credit the allegations against Mr. Olivera, which is why he issued an "unfounded" Findings Report, which is the best disposition an individual investigated by IAIU could possibly hope for.

If there is some credit due to D.G., it is that she finally had the courage to admit, on cross, that her statement was not a firsthand account, and that she didn't truly believe the allegations against Mr. Olivera. This became apparent when she agreed with Mr. Amparbin's take on the matter, that if the accusations against Mr. Olivera were truly authentic, it would reverberate throughout the school. She agreed that this wasn't the case, insinuating that the students' claims were made up. Earlier on cross, she acknowledged that the students in Ms. Mitchell's classroom tended to exaggerate, particularly the student A.F., who accused Mr. Olivera of pulling him out of his chair by his shirt.

As for D.G., she was only in sixth grade when she prepared her written statement, and probably deserves some slack. She ultimately came clean and, as the old adage goes, better late than never. While it is not Mr. Olivera's contention that D.G. is a bad person or a liar, the record clearly establishes that her testimony and written statement has no credibility. The District cannot rely on either to prove the truth of the charges.

Due to the lack of any direct evidence, including testimony from any reliable witness who was present in Ms. Mitchell's classroom as to any of the allegations Mr. Olivera was directly put on notice of via the tenure charges, there is not much left to evaluate. The District simply has not met its burden of proof. Even the accusation that Mr. Olivera referred to his students as "narcos," or "nacos," or "stupid," was not proven. Mr. Robles confirmed that Mr. Olivera did not admit to using those words during his interview of him, which runs counter to not only what is alleged in the tenure charges, but the Findings Report issued by IAIU. Mr. Robles explained this discrepancy by revealing that the *Investigative Observations* section of the Findings Report was prepared by his supervisor Mr. Nzeweku, who did not conduct the investigation of Mr. Olivera.

For his part, Mr. Olivera categorically denied the allegations. There was nothing in his testimony, either on direct or cross, that would question his credibility. The fact that he willingly subjected himself to cross-examination, despite the District's failure to present any direct evidence or eyewitnesses to the allegations, speaks to his integrity and willingness to set the record straight.



#### **Point IV: Mitigating Evidence**

Mitigating evidence should not be a factor in this case because the District failed to prove the charges against Mr. Olivera. But, there can be no mistake that there is a litany of mitigating factors here, many of which were laid out in his answer to the tenure charges. These factors include, but are certainly not limited to, Mr. Olivera's discipline-free history, long record of successful teaching performance – having never been issued a negative summative evaluation – and extensive work and involvement in community-related activities that go above and beyond his usual teaching duties.

One mitigating factor that should be considered, in particular, is the District's failure to provide Mr. Olivera with adequate support. We heard Mr. Robles testify to this point. He determined, through his investigation, that Mr. Olivera was not given the assistance he needed to deal with what was a severely misbehaved group of students, despite requesting such assistance on previous occasions. In addition to Mr. Robles, D.G. and even Ms. Takyi acknowledged that the class was out of control on the date in question. Perhaps if Mr. Olivera received more support – for example, in the form of a teacher's aide in the classroom, as suggested by Mr. Robles – this whole situation may have been avoided.

In a tenure arbitration award published just last month, the arbitrator considered the school district's failure to provide support to the respondent reason enough to spare him the loss of his tenure. In re. Eric Deering, Agency Dkt. No. 38-2/18, final decision, (August 9, 2018). In Deering, the arbitrator sustained the district's charges, finding that the respondent called students ugly and other offensive names and threatened to assault them, but didn't take his tenure because the district was "contributorily negligent" for failing to help him deal with unruly students. Id. slip. op. at 38-9. Here, the District's charges cannot be sustained, but even in the extraordinarily unlikely event that one or more of the allegations are credited, its abject failure to provide Mr. Olivera with even a modicum of support should militate against the imposition of a severe penalty.

#### **CONCLUSION**

For the reasons stated in the foregoing, the District failed to meet its burden of proving the truth of the tenure charges, and they must be dismissed with prejudice. Mr. Olivera must be further made whole for all compensation lost during the pendency of this proceeding. [Respondent Brief, pp. 12-23].

## DISCUSSION

Pursuant to N.J.S.A. 18A:6-10, “[n]o person shall be dismissed or reduced in compensation \* \* \* if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state \* \* \* except for inefficiency, incapacity, unbecoming conduct, or other just cause.” I first address the District’s claims that its charges against the Respondent extend beyond the allegations that specifically involve the May 4, 2016 incident. In my review of this contention, I note that the only charges that possess sufficient specificity in this proceeding are those that relate to the May 4, 2016 incident. [See T1:15]. The Respondent has been employed by the Board for approximately 18 years. The evidence reflects that although the Respondent may have had some classroom management issues, the Respondent has not received any level of disciplinary action over his career that can be deemed to have been significant. Moreover, the record does not reflect that any of Respondent’s prior conduct had ever been categorized by the District, or any other governing body/agency, as having engaged in any physical and/or verbal abuse. In the absence of any such credible evidence that the Respondent has an established pattern of having committed physical and/or verbal abuse towards anyone, I do not sustain any allegations or charges that extend beyond the May 4, 2016 incident. The issue before me is whether the District has established by a preponderance of the credible evidence that the



charges of unbecoming conduct and other just cause should be sustained that relate to the May 4, 2016 incident. [See T5:387].

In respect to the allegations involving the May 4, 2016 incident, I have carefully reviewed the evidence offered in the testimony of Ms. Takyi. Takyi acknowledged that she does not have first-hand knowledge of what transpired in the Respondent's classroom on May 4<sup>th</sup>. Takyi's understanding of the incident was derived from the written statements and the interviews she conducted with the four (4) students who complained about the Respondent's conduct in the classroom on May 4<sup>th</sup>. Of these four, Student DG was the only witness who testified during this tenure dismissal proceedings. DG's written account includes a summary of egregious conduct that the Respondent allegedly committed on May 4<sup>th</sup>. This included some of the conduct that the other three (3) students who did not testify claimed to have observed. However, DG acknowledged during her testimony that, notwithstanding her initial account to the contrary, she did not actually observe the Respondent engage in the specific conduct that forms the basis for the most serious allegations the Petitioner has made against Respondent. This includes the allegations that he pushed a desk into a student, slammed a student into the wall/bookshelf, or grabbed a student by the shirt. Although the allegations were reduced to writing, the students who made such allegations did not testify and, therefore, deprived the Respondent of an opportunity to cross-examine them. The Respondent denied these claims,

and there is insufficient credible evidence that contradicts his denial. Based upon the foregoing, and the entire record, there is insufficient credible evidence to support the District's claims that the Respondent was verbally and physically abusive towards students in his class, used profanity towards his students and threatened to physically harm them, told his students that he was going to "f\*\*\* them up, improperly used physical force against his students, grabbed a student by the head and slammed it into a wooden table, or grabbed a student by her arms, pushed her to the side and pushed her into a wall. These allegations are serious but unsupported by credible evidence in the record.

The only allegation that is supported by direct evidence in this case is the claim that the Respondent hit Student DG's hand with a book and caused an injury to her finger. DG testified that her only direct observation of the Respondent was that he was holding a thick book that hit a paperclip she was holding and this caused her finger to bleed when the paperclip cut her cuticle. As to this conduct, DG did not visibly observe the circumstances surrounding the incident, including whether the Respondent intentionally slammed the book on her hands, inadvertently dropped the book, or carelessly attempted to place the book on DG's desk and unintentionally hit the paperclip that caused her finger to bleed. The Grievant admitted in his interview with Henderson during the District's internal investigation that he recalled placing a book on a student's desk as he was in the process of attempting to gain control of unruly, disruptive



student conduct. During his testimony, the Grievant denied that he violently slammed a book on DG's desk and there is insufficient credible evidence that contradicts his denial. Having considered the entire record, the totality of the evidence shows that the Respondent did lack proper control over his classroom that allowed for classroom disruptions. This inability to maintain proper control of his classroom formed a basis for some disciplinary action but not removal. The evidence also supports that the Respondent was negligent in causing a book in his hand to make contact with a paperclip that DG was holding that resulted in a minor cut to DG's finger. In the absence of sufficient, supportive evidence showing that the Respondent meant to harm DG or that he intentionally slammed the book on DG's hand or finger, this incident formed a basis for some disciplinary action but not removal.

I am mindful that the charges in this case, if proven, would have served as strong support for the District's position that the Respondent's employment with the District must be terminated. However, for the reasons stated above and the entire record, I conclude that the District's burden to show that termination of employment was based on proper or just cause has not been met. It is noted that the District made efforts to have direct testimony provided by individuals who may have been in a position to provide broader facts than presented herein but its efforts were not successful. Having considered all of the facts and circumstances of this case, the penalty of termination must be modified to be

commensurate with the conduct proven. I modify the penalty to a 30 working day suspension without pay based on the unbecoming conduct and other just cause that the District was proven. The Respondent shall be reinstated to his position with the District and shall be made whole in all others respects less the 30 working day suspension without pay.



AWARD

The District has not met its burden to show that the Respondent's termination from employment was required. However, for the reasons set forth herein, the penalty of termination shall be reduced to a 30 day suspension without pay for the unbecoming conduct and other just cause that was proven. The Respondent shall be reinstated to his position with the District and shall be made whole in all others respects less the 30 day suspension without pay.

Dated: October 24, 2018  
Sea Girt, New Jersey



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Robert C. Gifford

State of New Jersey     }  
County of Monmouth    }ss:

On this <sup>th</sup>24 day of October, 2018, before me personally came and appeared Robert C. Gifford to me known and known to me to be the individual described in and who executed the foregoing instrument and he acknowledged to me that he executed same.

Linda L Gifford  
Notary Public  
Expires  
1-10-21