

## STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

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In the Matter of the TENURE Arbitration betweenBOARD OF EDUCATION OF THE CITY OF NEWARK,  
ESSEX COUNTY, NEW JERSEY,Docket No.:  
218-8/19

Petitioner,

and

GUSTAVO RIOS,

Respondent.

**OPINION  
AND  
AWARD**-----X  
Before **MELISSA H. BIREN**, Impartial Arbitrator**OPINION**

Petitioner Board of Education of the City of Newark, Essex County, New Jersey (the "District") brought tenure charges against the Respondent Gustavo Rios ("Rios") pursuant to *N.J.S.A. 18A:6-17.3* of the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ") alleging inefficiency and seeking Rios' termination of employment. Respondent was served with the Notice of Tenure Charges signed by Superintendent Roger Leon on July 29, 2019. The District, by its counsel Christina M. Abreu, Esq. (Weber Gallagher Simpson Stapleton Fires & Newby LLP) then filed the tenure charges with the New Jersey Department of Education ("Department") Commissioner of Education on August 26, 2019. Respondent, by his counsel Raymond M. Baldino, Esq. (Zazzali, Fagella, Nowak, Kleinbaum & Friedman PC), filed an Answer to the tenure charges on September 6, 2020. On September 13, 2019, the Department, Office of Controversies and Disputes, appointed me to serve as arbitrator pursuant to *N.J.S.A. 18A:6-16* to hear and decide this tenure matter.

Hearings were held at the New Jersey State Board of Mediation office hearing rooms in Newark, New Jersey on December 10, 2019, January 16, 2020, February 12, 2020, February 20, 2020 and February 21, 2020. Both parties were represented by their attorneys at the hearing. At the start of the hearing, the parties stipulated that the issue before me in this proceeding is whether the Petitioner Board of Education of the City of Newark has proven the charges of inefficiency against the Respondent, Gustavo Rios, consistent with TEACHNJ.

Both parties had full opportunity to adduce evidence, to call and cross-examine witnesses and to make argument in support of their respective positions. Over the course of

the five hearing dates, the District presented six witnesses and Respondent presented three witnesses. In addition, 66 exhibits were admitted into evidence. Post hearing briefs were filed on May 18, 2020. Both parties requested, and were granted, permission to file limited responses to the other party's post-hearing brief; the responses were filed on May 26, 2020.<sup>1</sup> Neither party has raised any objection to the fairness of this proceeding. Whether or not expressly referred to herein, all of the evidence adduced, arguments set forth and authorities cited by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

**Background:**

Respondent, Gustavo Rios, is a tenured teacher for the Newark Public Schools. He began his employment with the District in 2003. He received a standard certificate to teach mathematics in 2002 and a standard certificate as a teacher of bilingual/bicultural education in 2007. (Respondent Exhibit 3.) His first assignment for the Newark Schools was as a bilingual math teacher at Barrington High School from 2003 to 2013, at which time Rios became an Educator Without Placement Site ("EWPS").

As the name implies, an EWPS is a tenured teacher without a permanent position. As an EWPS, the District assigns the teacher to schools at the start of each school year to provide additional support or assistance, often co-teaching with two licensed teachers in the classroom. The teacher remains on the District's budget rather than the school budget. After becoming an EWPS, Rios was assigned to several different schools and grades. He taught sixth and eighth grade bilingual math classes and health at Park Elementary School for the 2013-2014 school year. In the following school year, 2014-2015, Rios was assigned to William Horton Elementary School, teaching seventh and eighth grade mathematics and science.<sup>2</sup> In the 2016-2017 school year Rios was assigned to George Washington Carver Elementary School as a bilingual math teacher in the first grade, working with another first grade teacher. In 2017-2018, still working as an EWPS, Rios was assigned to the Abington Avenue Elementary School ("Abington School") and in 2018-2019, Rios was assigned to the Oliver II School ("Oliver II"). These tenure charges arise from Rios' ratings of partially

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<sup>1</sup> Requests for extensions of time were made and granted by the Department.

<sup>2</sup> Tenure charges were brought against Rios after the 2014-2015 school year; those charges were withdrawn.

effective and ineffective in his annual summative evaluations for the 2017-2018 school year at Abington School and the 2018-2019 school year at Oliver II, respectively.<sup>3</sup> Details regarding Rios' assignment at each of these schools are set forth in the discussion of each school year below.

**Evaluation Framework:**

The goal of TEACHNJ is to “raise student achievement by improving instruction through the adoption of evaluations that provide specific feedback to educators, inform the provision of aligned professional development, and inform personnel decisions.” *N.J.S.A.* 18A:6-118. Teachers in the District are evaluated based on the Framework for Effective Teaching (the “Framework”). Dr. Yolanda Mendez (“Mendez”), Executive Director for Human Resources for the District, testified that the Framework was approved by the Department pursuant to the requirements of TEACHNJ to be used by the District for evaluating teacher performance.

The Framework sets forth five categories of teacher performance, called Competencies. These include the following: a) Competency 1 – Lesson Design and Focus; b) Competency 2 – Rigor and Inclusiveness; c) Competency 3 – Culture of Achievement; d) Competency 4: Student Progress towards Mastery; and e) Competency 5 – Commitment to Personal and Collective Excellence. Each competency then includes several indicators related to the evaluation of the competency.

As set forth in the Guidebook for Teachers and Administrators for both 2016-2017 and 2018-2019 (the “Guide”), the Framework allows administrators “to assess a wide variety of evidence in determining whether or not a teacher is meeting expectations and if his or her students have met the student learning goals/SGOs.” (District Exhibits 70 and 71 at page 15.) The Guide provides that observations are not the only mechanism to collect evidence of teacher performance as related to each of the indicators. Other evidence can include such items as “student learning data, student work, and other artifacts of the teacher’s practice” to allow for “a more complete picture of the teacher’s effectiveness across all five

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<sup>3</sup> The instant tenure charges initially included the 2016-2017 school year; at the start of the hearing, the District withdrew those charges, except to the extent that the rating for that year established the basis for the CAP in 2017-2018.

Competencies.” *Id.* The evidence for the teacher evaluation is informed by four basic components, including:

- **Goal-Setting Conference** to develop student learning goals/SGOs and professional development goals which are captured on the Individual Professional Development Plan (IPDP) or Corrective Action Plan (CAP);
- **Classroom observations**, including pre-observations (as appropriate) and post observation conferences;
- **Mid-year conferences** to examine evidence and data to assess progress towards student learning and professional development goals; and
- **Annual conferences** to examine all evidence and assign final ratings.

(District Exhibits 70 and 71 at page 15.)

The Guide provides that observers are “encouraged to observe teachers in the classroom as often as they think is helpful for the purposes of both providing feedback for the teacher’s development and collecting evidence to assign ratings at the mid-year review and annual evaluation.” (District Exhibits 70 and 71 at p. 17.) Administrators make observations through informal observations of the teacher and his/her classroom, or walk-throughs conducted “over time”, *i.e.*, throughout the school year, as well as through formal observations. Tenured teachers must receive at least two formal classroom observations, *i.e.*, observations of at least 20 minutes in length, up to the entire duration of the lesson. Tenured teachers on a CAP<sup>4</sup> must receive three formal observations. Observations can be announced or unannounced. An announced observation is scheduled in advance and includes a pre-observation conference with the teacher where the lesson elements can be discussed with the teacher. An unannounced observation is not scheduled in advance and does not include a pre-observation conference. Teachers are required to have at least one announced and one unannounced observation each year. A post observation conference is required for all formal observations, whether or not announced. Teachers on a CAP must be observed by at least two different observers over the course of the school year.

Depending on the length of the observation, it is considered a “short” or a “long” formal observation. During a short formal observation, the evaluator is not required to rate all of the competencies and indicators; rather, the teacher is rated on the indicators for which evidence was observed during the lesson. For a long formal observation, Competencies 1 to 4

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<sup>4</sup> A CAP is required for all teachers who receive a partially effective or ineffective rating in their prior year’s annual summative evaluation.

are generally rated.<sup>5</sup> The indicators are rated as either highly effective, effective, partially effective or ineffective. If an indicator is rated, the corresponding competency must also be rated. Points are assessed based on the ratings provided for each competency. Formal observation ratings are entered into EdReflect and are shared and discussed with the teacher at the post observation conference. Teachers may submit rebuttals to the observation ratings.

The mid-year evaluation, required for a teacher on a CAP, provides an opportunity to discuss the teacher's progress towards meeting student and professional goals set at the start of the year, and to modify those goals if appropriate. In completing the mid-year evaluation the administrator considers all evidence gathered for the school year prior to the evaluation, including formal observations as well as over time indicators, providing a rating on all competencies, including all indicators of Competency 4 as well as Competency 5. Competency 5 is rated differently than the other four competencies. The ratings for Competency 5 are: Exceeds Expectations; Meeting Expectations; Slightly Below Expectations; and Significantly Below Expectations.

The annual summative evaluation, required for all teachers, is a "final assessment of progress towards both the teacher's professional goals and the student learning goals/SGOs that were set at the start of the year." (District Exhibits 70 and 71 at p. 21.) The annual summative evaluation also rates the teacher on all competencies based on all evidence gathered throughout the year, including formal observations and over time indicators. The District received approval from the Department to include the required assessment relative to SGOs (Student Growth Outcomes) as part of Competency 4 in the annual summative evaluation. The overall rating is based on the total number of points received for all of the competencies as follows: Highly Effective (17-19 points); Effective (13-16 points), Partially Effective (8-12 points); or Ineffective (0-7 points).

Mendez testified that administrators are trained each August on the Framework. Teachers are also provided information on the Framework's rubric at the start of each year and through the Professional Learning Committees ("PLC") and the School Improvement Panel ("SIP") at each school. Both administrators and teachers are provided a copy of the Guide, which is also on the District website. Administrator training includes "norming"

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<sup>5</sup> Certain indicators in Competency 4 and all of Competency 5, Commitment to Personal and Collective Excellence, are rated only in the mid-year evaluation and the annual summative evaluation.

sessions to be sure that all administrators in all District schools evaluate teachers in a consistent manner. As Mendez testified, the goal is to assure that throughout the District, regardless of school, grade, subject matter, individual administrator or teacher, “our lens of effective or partially effective or ineffective, the definition in the rubric is consistent, normed, and calibrated.” (2/12/20 Tr. at 15.) The training regarding the Framework continues throughout the school year. Indeed, each of the administrators testifying on the District’s behalf confirmed that he/she received training on the Framework each year and that he/she is familiar with the Framework used to evaluate teachers in the District.

**2017-2018 School Year – The Abington Avenue School:**

Rios was assigned to Abington School in September 2017. Nelson Ruiz (“Ruiz”), the principal of Abington School, testified that when Rios arrived, he assigned Rios to a seventh and eighth grade bilingual classroom. He was assigned to teach math; another teacher in the classroom, Vidian Velez (“Velez”), taught the students English Language Arts (“ELA”) as well as System 44, a program designed to support students in vocabulary and reading. Rios’ direct supervisor was Alex Echevarria (“Echevarria”), a Vice-Principal.

At the start of the year, there were 19 students; the roster grew to approximately 23 students during the course of the school year. Rios and Velez taught the same students and shared a classroom. Accordingly, when Rios was teaching math to the seventh graders, Velez was teaching ELA to the eighth grade students in the same room. A classroom schedule introduced into evidence for this class was the student schedule, not the teacher schedule. (District Exhibit 27.) Ruiz explained that Rios was not responsible for Homeroom or the “special” classes (art, gym, Spanish, Music); when students attended these classes, Rios had a preparation period or a PLC meeting. He was also not responsible for ELA or System 44. Rios testified, however, that he was not told he could leave the classroom when ELA was taught (but not math) and that he assisted Velez in teaching the System 44 class, working with small groups. Rios and Velez shared the display space in the classroom, with half of it devoted to math and the other half to ELA.

**Rios’ 2017-2018 CAP**

Because Rios received an overall rating of ineffective in the annual summative evaluation for the 2016-2017 school year, he was required to have a corrective action plan or

CAP for the 2017-2018 school year. Ruiz and Echevarria both explained that completion of the CAP is a collaborative process, although it is controlled by the teacher. The teacher completes the CAP, identifying his/her professional goals and goals for student achievement. The teacher selects indicators to work on during the school year and the goals for student growth outcomes or SGOs. When the teacher is ready to share the CAP with the administrator, the administrator reviews the CAP with the teacher, discusses it and, if appropriate, makes recommendations for modification. The administrator does not, however, make any modifications or additions to the CAP. When the teacher finalizes the CAP, it is sent to the administrator for final sign-off. The CAP can be modified at mid-year to adjust for any changes that may be deemed appropriate.

Rios was already on a CAP prior to arriving at Abington School. That CAP had to be modified for the new assignment. Rios made the changes to the CAP that he deemed appropriate. He selected two indicators to work on during the year; these included indicator (d) under Competency 1, Clarity, and indicator (c) under Competency 2, Responsiveness. With respect to the SGO, Rios indicated that “[b]y June 2018, 15 over 19 students will prove mastery in Standard 7NSA1C” and that “[b]y June 2018, 15 over 19 students will prove mastery in Standard 7NSA1B.” (District Exhibit 9.) In setting the SGOs, Rios indicated that based on testing done early in the school year in these areas, at the start of the school year:

2/19 are well prepared to perform well in this level, 10/19 need to work harder than the first two in order to understand and meet the requires for this level. Finally 7/19 are not ready and need to work more harder than the others but if they came to class every day, participate, do the HWS, and ask for tutoring they will improve the percentage to pass this class significantly.

(District Exhibit 9.) Echevarria reviewed the data with Rios and approved the CAP, testifying that the SGO would be reviewed again at the mid-year evaluation to determine whether students were making progress towards the goal and if necessary, adjust the goal at that time. This was the CAP that Rios signed in the EdReflect system. The CAP was not modified at the mid-year evaluation.

Echevarria testified that Rios received professional development and support during the course of the school year. Professional development was provided at the District and the school level. There are Staff Development Days for professional development. In addition, the School Improvement Panel met with teachers. PLCs were held once a week at the school

level. Some involved more general training, such as use of rich tasks, silent signals and other best practices. Others were directly connected to content areas, including literacy, math, science and bilingual education. (District Exhibit 28.)

Several other training opportunities were offered to Rios, as well as other teachers in the school, including a webinar on rich tasks that the math coach provided to the teachers, including Rios, and that Echevarria separately provided by email to Rios. (District Exhibits 21 and 22.) The math coach in the school facilitated training and was available to meet with teachers, including Rios, during the course of the year; Echevarria did not know if Rios took advantage of all of the learning opportunities that were offered to him. Other professional development, however, was provided to Rios individually. Arrangements were made for Rios to observe another math teacher on multiple occasions and to meet with Echevarria to discuss the lesson modeling he observed. In addition, an instructional specialist from the District math department and Echevarria met with Rios to provide coaching on at least one occasion. Echevarria met with Rios to discuss the coaching session and provide guidance based on his observations. (District Exhibit 23, 24 and 25).

**Rios' Evaluations - 2017-2018 School Year:**

In the 2017-2018 school year, Rios received three formal observations, all unannounced. In addition, Ruiz and Echevarria conducted informal observations, or over time indicators. Rios also received a mid-year evaluation and an annual summative evaluation reflecting all of the evidence gathered in the course of the school year.

**a. Informal Observations:**

Ruiz testified that while he did not perform any of the formal observations of Rios' teaching, he conducted informal rounds, once per quarter. The rounds were done in collaboration with a cohort administrator; for Rios, Echevarria accompanied Ruiz during these informal observations. The informal rounds look at "classroom instruction, classroom environment, classroom organization, student work, and student data, performance data; how they're doing throughout the year..." (12/10/19 Tr. at 40.) Feedback was provided to Rios verbally.

Ruiz testified that Rios generally had a small group of students, teaching one-half of the 7<sup>th</sup>/8<sup>th</sup> grade class at a time. He made the following observations during his informal rounds: (a) Rios knew the math content well; (b) Rios' instruction was not always aligned to



the yearlong pacing guide; (c) the lesson objective was not always met; (d) Rios called on students who raised their hands, but other students did not participate; (e) for students who were not participating, Rios did not check for understanding; (f) Rios did not use silent signals, notwithstanding that teachers received training on use of silent signals; and (g) Rios did not properly implement the use of rich tasks, a central core piece of a lesson intended to allow the students to think independently and to use their prior knowledge. (12/10/19 Tr. at 40-42, 107.)

In addition, Ruiz testified that in the bilingual class, students were at different levels of English proficiency, as determined by the ACCESS assessment taken annually. Students were placed in tiers, ranging from those with little or no English proficiency to those who had greater proficiency; the goal of bilingual education is to prepare students to learn in English, particularly as these students would soon be attending high school where they would be immersed in the English language. Accordingly, the expectation in teaching a bilingual class is not to teach primarily in one language, but rather, to balance the use of English and Spanish based on these groupings. Ruiz noted that there are times a bilingual teacher would teach mainly in English and less in Spanish, particularly because these students would be moving to high school. Ruiz observed that “Rios was more comfortable teaching in Spanish. He did know the content, and he taught in Spanish, and he did answer or translate when asked or if needed be, but it was not to the standard.” (12/10/19 Tr. at 44.) The standard, with a group at this grade level, is generally teaching approximately 70% in English and 30% in Spanish; translations into Spanish would be made as appropriate. Rios taught 80-90% in Spanish. According to Ruiz, Rios was advised to achieve more balance, but his performance in this regard did not change.<sup>6</sup> Rios testified that no one ever discussed differentiating instruction based on English proficiency and noted that it was not set forth in his CAP. Ruiz testified, however, that it was not in his CAP because it was not one of his goals.

Echevarria testified that he usually stopped into the classrooms two to three times per week for just a minute or two. During those brief interactions, he made observations as to

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<sup>6</sup> Ruiz testified on cross-examination that the instructional goal of teaching 70% in English and 30% in Spanish was not one of the goals Rios set for his professional growth. Nonetheless, it could impact his evaluations because it impacted such items as clarity under Competency 1(c), and tailored (or differentiated) instruction under Competency 2(a). Ruiz could not speak to whether this issue was raised in the formal observations but reiterated that it was discussed verbally with Rios.

what was happening in the classroom, such as whether students were doing their work and were following instructions. He jotted down notes from these informal observations over time which were then part of the evidence used in completing the mid-year and annual summative evaluations.

**b. Formal Observation – November 8, 2017:**

Echevarria conducted an unannounced formal observation on November 8, 2017. He observed Rios teach a seventh grade bilingual math lesson for 25 minutes and rated Rios on Competency 2, indicators 2(b) (Questions and Tasks) and 2(c) (Responsiveness), as well as Competency 4, indicators 4(a) (Checks for Understanding), 4(b) (Feedback) and 4(c) Demonstration of Learning. Each of these indicators was rated effective, with an overall effective rating for the observation. He also noted that students were completing a Do Now when Echevarria entered the room and that they were all engaged in the tasks planned for them. (District Exhibit 10.) Echevarria met with Rios for a post observation conference. Rios signed the evaluation form.

**c. Formal Observation – February 6, 2018:**

Echevarria conducted an unannounced formal observation on February 6, 2018. Rios was teaching an eighth grade bilingual math class with 12 students. Because he observed for a full period, he was able to rate Rios on four competencies. The overall rating was partially effective. Detailed comments were provided as to each indicator rated based on the evidence observed in the lesson.

Echevarria testified that he rated Rios effective for Competency 1(d), Clarity, which was one of his CAP goals. This rating, therefore, was directly aligned to his CAP. His instructions were clear, given largely in English with Spanish translation. Rios did not perform as well in the other indicators for Competency 1, spending too much time on one component of the lesson, and not allowing students opportunities to elaborate or explain their thinking. He received a partially effective rating for 1(a) (Lesson Sequence), 1(b) (Lesson Components) and 1(c) (Pacing and Momentum). He testified that he did not see students given an opportunity to really struggle and to explain their thinking. Unlike the first time he was formally observed, students were not engaged in a Do Now. Nor did Rios use a rich task. The lesson did not allow all students to move closer to mastery.

For Competency 2, Echevarria rated Rios effective for indicator 2(b), Questions and Tasks. He received a partially effective rating on indicators 2(a) (Tailored Instruction), 2(c) (Responsiveness) and 2(d) (Precision & Evidence). Responsiveness was the second area connected to Rios' CAP. Echevarria noted that Rios should cold call students that were not raising their hands to respond to non-participating students and hold them accountable for the learning. Echevarria also noted that Rios did not group students in a strategic manner; even though he was teaching math, he should group students based on English language proficiency as a way to better respond to them. He also noted that Rios should post the objective in Spanish and English so that students could master math content easier. This would also allow students who are more proficient in English to move on and continuing progressing through the tasks without having to stop instruction for one group to start instruction for another. As to tailored instruction, he noted that some students did not participate when the teacher asked for student responses and that Rios goes from Spanish to English when addressing the whole class when he could group students according to language proficiency.

For Competency 3, Rios was rated as effective for indicators 3(a) (Enthusiasm for Learning), 3(c) (Community) and 3(d) (Attention). Echevarria testified that the students were happy to be there and felt satisfied at completing tasks. He received a partially effective rating for indicator 3(b) (Persistence) because students did not all show persistence in confronting the tasks and did not all meet the objective. Rios did not allow the students to struggle through the tasks to hold them accountable to work through difficult skills and concepts and to be able to accurately assess where they were and how to move them forward.

For Competency 4, no strengths were noted. He received a partially effective rating for indicator 4(a) (Checks for Understanding) and 4(b) (Feedback). Echevarria noted that Rios only sometimes checked for understanding. His checks for understanding were incomplete, asking if there were questions and when none were raised, he moved on even though there were students observed who did not understand. In providing assistance, he restated what he said previously, a little slower and louder, but did not provide the student the opportunity to restate the explanation. As to feedback, Echevarria indicated that feedback is "academically focused and appropriate" but was not tailored to the needs of individual students and was teacher directed. Echevarria testified that it is the expectation that teachers

will check for understanding for the majority of students in the class and that use of exit tickets or a simple clipboard as the teacher walks around are methods to assess and check for understanding. (District Exhibit 11.)

Rios received an overall rating of partially effective for this observation. A post observation conference was held where Echevarria reviewed his findings with Rios. Rios refused to sign the observation; another vice-principal was called in to provide a witness signature.

**d. Mid-Year Evaluation:**

Echevarria prepared Rios' mid-year evaluation and met with Rios on February 15, 2018 to discuss the evaluation. The mid-year evaluation incorporated the two formal observations as well as informal observations over time. Using this evidence, he created an average rating for each indicator in the Framework, including those rated only in the mid-year and annual summative evaluations. Based on the evidence over the first five months of school, Rios received a partially effective rating for a total of 10 points. The evaluation contained detailed observations as to the strengths and areas of growth in the five competencies. (District Exhibit 12.)

Echevarria testified that Competency 1(d) (Clarity) was noted as a strength, which was directly tied to Rios' CAP. He wanted to see growth through the remainder of the year on lesson sequence, lesson components and pacing and momentum. In Competency 2, his strength was in Questions and Tasks; growth was needed on Tailoring Instruction, Responsiveness and Depth of Knowledge. For Competency 3, Echevarria noted that Rios' strengths were in Enthusiasm for Learning, Community and Attention; Persistence remained a growth area. In Competency 4, no strengths were noted; growth areas included Checks for Understanding and Feedback.

The mid-year evaluation also addressed student progress on the SGO set forth in the CAP in Competency 4(f). According to Echevarria, there were now 21 students in the class. Rios provided the information to update student progress. As set forth in the evaluation, that data indicated that at this point in the year: "7/21 are well prepared to perform well in this level. 8/21 need to work harder than the first two in order to understand and meet the requires for this level. Finally, 6/21 are not ready and need to work more harder than the others but if they came to class every day, participate, do the HW and ask for tutoring they will improve

the percentage to pass this class significantly.” (District Exhibit 12.) The evaluation concluded that per these three results, the teacher and the class were making progress and on track to meeting the year end goal set in the CAP in September.

For Competency 5, which is also rated only in the mid-year and annual summative evaluation, Echevarria noted as follows:

Commitment to continuous improvement: The teacher is struggling to implement the recommendations that were made in his CAP at the end of last year. This year he has struggled implementing some of the recommendations that have been provided by me at our post observation conferences. The teacher should be aware of different resources he can utilize for his professional growth as well as incorporate feedback given and use resources available to him here at the school. (Partially Effective.)

(District Exhibit 12.) Echevarria testified that he wanted to see Rios get better and that he told Rios to continue to work on improving the areas where he was rated partially effective.

Echevarria met with Rios regarding the mid-year evaluation on February 15, 2018. They reviewed the evaluation and again discussed Rios’ CAP; no changes were made to his CAP as a result of the mid-year evaluation. Rios expressed concern about the ratings but did not express disagreement. He did not sign the evaluation.

**e. Formal Observation – March 23, 2018:**

On March 23, 2018, Rios was observed by another administrator at Abington School, Sandra Heintz (“Heintz”), a Vice-Principal. She undertook this observation as a second observer; she was not Rios’ supervisor. She did not review his records in advance nor did Echevarria share his prior findings with Heintz because he did not want to influence her views in any way. She assumed, however, that Rios was on a CAP due to the need for a second observer. The observation was a formal one, but again unannounced. Heintz observed the eighth grade bilingual math class for 30 minutes and provided ratings in Competencies 1 and 3. Rios was rated partially effective in this observation. (District Exhibit 13.)

Heintz testified, and the observation report reflected, that Rios used both English and Spanish in this lesson; while most of the lesson was in English, he translated into Spanish throughout the lesson. Heintz, who is not fluent in Spanish, testified that having grown up in south Texas in a Spanish speaking area, she understands “enough Spanish to usually get the gist of what’s being said.” (1/16/20 Tr. at 80.) Indeed, in listing Rios’ strengths for Competency 1(d), Clarity, she wrote, in part, that “[t]he teacher explained everything well to

student in both English and Spanish ensuring that all the students had access to the information and that they understood it clearly.” (District Exhibit 13.) His rating for Clarity, as well as for Lesson Sequence was effective.

Nonetheless, other indicators for Competency 1, along with the rating for Competency 3 were rated partially effective. According to Heintz, Rios’ biggest issue was student engagement. He did not use student engagement strategies for academic discourse. He did not use silent signals, something that the entire school had been trained to use. Most of the lesson involved Rios speaking. There was one student who was actively involved, and Rios spoke mostly with that student; other students were not engaged, were not paying attention and appeared disinterested or bored. The climate in the classroom, the way the lesson was actually designed and facilitated, prohibited the children from accessing the learning objective. Classroom norms were inconsistently enforced and students were not redirected to pay attention. In addition, opportunities were not provided for students to turn and talk or otherwise grapple with the math problems on their own.

A post observation conference was held where Heintz reviewed her findings and asked if Rios had any questions. He responded that he did not have questions. He did not sign the observation; Echevarria signed as a witness. At no time did Rios tell Heintz that he did not use Spanish because she was observing and that this caused his students not to understand and be engaged. Heintz also testified that she did not tell Rios to change his teaching approach – to use only English -- when she arrived in the classroom to observe.

Rios submitted a rebuttal to the evaluation on May 1, 2018. (Respondent Exhibit 10.) In the rebuttal, Rios expressed disagreement with the conclusions Heintz reached and the ratings he received. In particular, he did not understand why his rating for Community was partially effective, when it was rated effective in a prior observation. He also disagreed that he provided only minimal explanation of the lesson objectives and that he did not include rich tasks. While claiming he received no training on rich tasks, he stated that he routinely included rich tasks from the District’s website. Rios’ rebuttal did not state that he did not use Spanish in the lesson.

**f. Annual Summative Evaluation:**

Echevarria provided Rios' annual summative evaluation on April 6, 2018, meeting with him on April 20, 2018. Echevarria explained that it is District policy for the evaluation to be completed in April rather than in June for tenured teachers on a CAP in order to be able to make early determinations for the following year. Echevarria testified that the rating is based on all of the evaluations, including formal and informal observations and the teacher's progress over the course of the year. In completing the evaluation, Echevarria testified that he considers the trajectory of the teacher's ratings over the year and whether there was an upward or downward slope.

Echevarria testified that in Rios' case, it was not an upward trajectory. Indeed, even in areas where he was rated effective at the start of the year, the rating went down as the year progressed. For example, his rating for Community was effective at the start of the school year, but was only partially effective at the end because the community started to break down; by the mid-year evaluation, Rios was becoming concerned about his ratings because he was on a CAP and there was a shift in attitude impacting community in the classroom.

The annual summative evaluation rated all competencies. Rios was rated effective for Clarity, Coherent Planning and Progression of Instruction under Competency 1, but only partially effective for Lesson Sequence, Lesson Components and Pacing and Momentum. No strengths (or effective ratings) were given for Competency 2; Rios received a partially effective rating for all indicators under Competency 2. He received an effective rating for Enthusiasm for Learning under Competency 3, but all other indicators were rated partially effective. All indicators for Competency 4 were rated partially effective. The evaluation included a rating for all indicators in that competency, including 4(f) which addresses the SGOs that Rios set for the year; he received a partially effective. While students were making progress, only 8 of the original 19 student in the class had mastered the concepts.<sup>7</sup> For Competency 5, Rios was rated effective for Collaboration and Attendance and Promptness, but only partially effective for Commitment to Continuous Improvement and Communication of Student Progress. Details were provided to support the ratings.

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<sup>7</sup> Greater detail regarding the calculation of mastery under the SGO will be addressed in the Discussion section below.

Rios' overall rating was partially effective, with a total of eight points. Rios disagreed with the rating and did not sign the evaluation.

**Rios' Testimony – Abington School:**

Rios testified that as an EWPS, he was not treated well at Abington School (or at the other schools where he worked as an EWPS). He had many complaints about his assignment and treatment. At Abington School (as well as at Washington Carver and Oliver II), Rios claimed that he was not provided a desk or a chair and, therefore, that he was unable to sit the entire day or have a place to put his personal belongings. On cross-examination, however, he admitted that he was never told that he could not sit during the day nor was he prohibited from putting his personal belongings in the closet. He also did not request a locker in the teachers' room. Rios further testified that in his position as a teacher, he did not believe it appropriate to sit. Rios testified that he was not provided a computer. He acknowledged, however, that he was permitted to use the computer in the room for things other than using PowerTeacher. With respect to PowerTeacher, a District computer system for tracking attendance and grading, Rios testified that he was not given his own access code; he had to use Velez's code to input grades. According to Rios, Velez would allow him to enter grades while she was with him in the classroom. Echevarria explained, and Rios confirmed in his testimony, that access to PowerTeacher is only provided to the homeroom teacher. Because Velez, not Rios, was the homeroom teacher, she was the teacher with the access code for that class.<sup>8</sup>

Rios testified that he taught three math classes each day and stayed in the classroom when Velez taught a combined 7/8 ELA class; he was not told it was a prep period. He also assisted with small groups in the System 44 class, a computer program designed to improve English language skills. During System 44, the students were working individually at stations; he and Velez would monitor and assist students as needed. Rios testified, however, that he was not provided with the System 44 materials to review in order to prepare. He acknowledged, however, that he never asked to be able to take the materials home. According to Rios, assisting in System 44 was stressful because he did not feel prepared and was embarrassed if a student asked a question he could not answer.

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<sup>8</sup> As will be discussed, Rios was provided with the access code for PowerTeacher when he taught middle school grades at Oliver II because he was the homeroom teacher for that semester.



Rios also testified that he was required to cover other classes repeatedly in several circumstances. First, Rios testified that he, rather than Velez, would escort the class to specials, including art, gym, music and Spanish, and that frequently, the specials teacher would be absent when he arrived and he had to take the class back and remain with the class the entire time; he was not qualified to teach any of these classes. As a result, he missed numerous prep periods. Rios confirmed that this also happened to the other teachers at the school and he admitted that at no time was he told that he was required to teach the class that the students were missing. He did not file any grievance regarding the missed preparation periods.

Second, Rios testified that he was repeatedly asked to cover classes for teachers who were absent, either for a whole day or a partial day. According to Rios, he covered other classes three to four days per week, missing teaching math on 20 to 25 occasions as a result. In fact, he testified that there were times that he was called out to cover a class while in the middle of teaching a lesson and while Velez was teaching the other group ELA. He kept track of the coverages for the period of October 4, 2017 through February 13, 2018. During that over four-month period, Rios' records show that he was called to cover a class on 18 occasions. Only three were full days; most of the remainder were for one period, with a few for two periods. Rios testified that he stopped keeping track because after complaining to Echevarria and telling him that his students were worried that he was not there to teach them math, Echevarria told him that he appreciated Rios' willingness to cover and that Rios was doing good for the school. He testified, however, that once he stopped keeping track in February, he covered even more classes. Both Ruiz and Echevarria acknowledged that on occasion, Rios was asked to cover for absent teachers when they needed coverage; a licensed teacher had to be with students at all times and there were two teachers in his classroom. Both denied that this occurred regularly or often.

Third, Rios claimed that he missed many classes because he was required to assist with testing. He was required to proctor PARCC tests and ACCESS tests over a month or so. Echevarria testified that Rios was required to assist with testing; all teachers are required to do so. It would not have been for a full month. Heintz, who is responsible for coordinating testing at Abington School, testified that many teachers are selected to proctor the PARCC exams which went on for three weeks. She stated that it is the reality of testing in New

Jersey. The school must use all licensed teachers who can be made available, including the ESL teacher, the teachers of special classes (art, music, etc.) and teachers like Rios who was the second licensed teacher in the classroom. During the two weeks that his class was not testing, Velez would have been responsible for covering his math, notwithstanding that he was the primary math teacher for the class. With respect to the Access tests, they were done mostly by ESL teachers, not by Rios.

Rios also testified that he was not provided with bilingual materials to use in the classroom. Indeed, other than at Barrington High School, the District did not provide bilingual materials for his use. Such materials were only available at the high school level. Accordingly, he testified that he spent hours and hours and weekends translating materials to prepare for class.<sup>9</sup> He testified that he had to translate all materials into Spanish and print the materials for his students and that the time involved was extensive.

As to the CAP, as will be discussed more fully in the Discussion section, Rios claimed that “mastery” as set forth in the CAP meant achieving a passing grade of 65 or higher. He acknowledged that he met with Echevarria to discuss the CAP, including growth areas and the SGOs. Rios testified that the CAP did not mention rich tasks nor did the CAP mention differentiated instruction based on English proficiency.

With respect to his formal observations, Rios testified that rich tasks were not mentioned to him until after the February 6, 2018 observation by Echevarria. He implemented the two recommendations that were made in that evaluation. As to the March 23, 2018 observation by Heintz, Rios claimed that because he knew Heintz did not understand Spanish, he spoke to his students only in English. Because no Spanish was used in the lesson, the students did not understand and for that reason, they were not engaged. As to his annual summative evaluation, he disputed that the SGOs were not met based on using a grade of 65 percent or higher as the measure for mastery. He also testified that Echevarria was not as friendly to him after he refused to grade Spanish papers, believing that this could be the reason for Echevarria’s lower ratings in the annual summative evaluation.

Towards the end of the school year, Rios wrote a letter to Ruiz in response to Ruiz’s request that he advise as to what he would like to do in the following school year. He

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<sup>9</sup> Rios did not provide any examples of the types of translations he provided to his students as a result of these efforts.

indicated that he should be given the same training and support given to other math teachers in the building and would want to work with a math coach; he stated that he did not work with a math coach during the 2017-2018 school year. He also claimed he did not receive any training on rich tasks and would need such training to know how to do it in the same way that the other teachers were trained. He asked for guidance in other areas as well, including teaching in a multi-grade classroom and differentiating instruction based on English proficiency claiming that he received no guidance on these issues. He also took issue with the lower rating for community in the annual summative evaluation, noting that he needed to understand why the sudden shift in the rating from effective at the start of the year to partially effective. (Respondent Exhibit 9.)

**2018-2019 School Year – Oliver II School:**

Rios was assigned to the Oliver II for the 2018-2019 school year. He did not receive this assignment until a few days after the school year started for teaching staff. Oliver II is an elementary school that opened in September 2018 with grades pre-kindergarten, 1, 6, 7 and 8; the students in the middle school grades were newcomers. Oliver II was part of Oliver I Elementary School, although it was located in a separate building; the two buildings were about four doors away from each other. The principal of Oliver I and Oliver II was Dr. Douglas Petty (“Petty”). His office was at Oliver I but he was at Oliver II at least once per day. Day-to-day supervision at Oliver II was the responsibility of Viviana Rodriguez (“Rodriguez”) who was the Vice Principal.<sup>10</sup> Rodriguez was Rios’ direct supervisor.

When Rios arrived at the school, he advised that his focus was teaching math. He was assigned to teach math and science to the sixth, seventh and eighth grade bilingual class. While the initial plan for the middle school students was to split the students by grade, Petty decided to split the class by content area in order to allow Rios to work where his strengths were; therefore, he was assigned math and science, rather than ELA and social studies. Another teacher was assigned to teach ELA and social studies, although for a short time at the start of the year, they did not have a teacher for the ELA/social studies content. Rodriguez testified that for that short time, Rios had the students all day, but was not required to teach

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<sup>10</sup> At the time of the hearing, Rodriguez was the Vice Principal of the Peshine Avenue School. Petty is no longer with the District.

ELA or social studies; he could teach in the content areas assigned. After two weeks, another teacher was assigned to teach the students ELA and social studies. At that point, Rios taught two periods of math, two of science and one small group math instruction.<sup>11</sup>

At the start of the winter holiday break in December, the decision was made to dismantle the newcomers' program and to transfer all of the middle school students from Oliver II to other schools throughout the District, leaving only pre-kindergarten and first grade at Oliver II. While Rios testified that he was advised he would likely be transferred when this change occurred, he was not transferred. Rather, at the start of January, he was assigned as a co-teacher in Maria Kadus' ("Kadus") first grade classroom. Petty checked with Human Resources at the District to confirm that Rios could teach in first grade and was advised that Rios held a standard license in math and bilingual/bicultural education and that "he is able to teach grades P-12." (District Exhibit 65.)

Although this first grade class was not formally designated a bilingual class, many of the students spoke Portuguese or Spanish. Kadus, who spoke both languages, was able to translate into Portuguese as necessary and Rios was able to translate into Spanish as needed. Rios indicated that it was not clear to either Kadus or to him what his assignment was in the classroom, but upon learning that Rios' strength was math, the two decided that Rios would teach the students math, with Kadus assisting. When Kadus taught the other subjects, Rios assisted. Kadus, as the homeroom teacher, continued to do all the planning for all of the subjects. Kadus testified that Rios could modify the math lesson plans or deliver the lessons differently if he felt it appropriate; he had access to the materials, chapter tests and artifacts.

Rodriguez testified that in addition to her meetings with Rios throughout the year (see Informal Observations below), Rios received professional development and coaching from various sources, including a teacher coach, grade level colleagues, PLCs, SIP meetings and from the administration. Isel Stavrou ("Stavrou") was the coach at Oliver II for ELA and math; there was also a math coach at Oliver I who met with Rios when he was teaching math to the middle school students in the fall. Stavrou provided coaching and guidance to Rios regarding assessment tests for the middle school students. (District Exhibit 30.) She visited Rios' class and provided recommendations for teaching math and for the classroom

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<sup>11</sup> Cheryl Avraamides, Vice Principal of Oliver II, testified that teachers in the District are assigned to teach math and science or ELA and social studies; that is how the content areas are paired off. None of these teachers has a special science certification. If they do, it is a different type of class that is strictly science. (2/12/20 Tr. at 170.)

environment. (District Exhibits 31, 32, 33, 35, 37, 44, 45, 54.) Rodriguez also took steps to assure that Rios received support from the Oliver I math coach, Sheila Bruce ("Bruce"), including assuring that Rios had access to various relevant on-line resources. (See, e.g., District Exhibits 34 and 41.) Rodriguez provided resources to Rios for the science curriculum. (District Exhibit 33.) Rodriguez also provided information on a math online resource in Spanish. (District Exhibit 41.) Arrangements were made to provide Rios opportunities to visit another math class (at Oliver I) that was similar to the class he was teaching. (District Exhibit 46.) Guidance was provided regarding bulletin boards, including Rodriguez reviewing other teachers' bulletin boards with Rios and having another teacher speak to him about bulletin boards. (District Exhibit 42.) Rodriguez also communicated with the SIP to obtain additional support for Rios. (District Exhibit 60.) Rodriguez testified that Rios received training on the PowerTeacher system to support him in this area and the opportunity to attend all of the PLC meetings (District Exhibit 59.) Kadus testified that she also provided coaching to Rios as to how to better deliver instruction to the first grade students. She would interject to assist and she modeled lessons over and over again. According to Kadus, Rios understood that she was modeling lessons when in the class.

**Rios' CAP:**

Rodriguez testified that Rios had a CAP when he arrived at the school. The CAP continued because he was still not rated effective in the prior school year. As Echevarria had indicated, Rodriguez testified that the teacher is responsible for creating the CAP in the first instance; the teacher selects the indicators that he wants to work on during the school year based on the Framework, as well as his goals for student achievement. After creating the CAP, the teacher shares it with the administrator. Rios prepared and signed the CAP when he initially shared it with Rodriguez. One indicator was missing so Rodriguez directed Rios to add an indicator. The CAP was then finalized in October, after all of the revisions they discussed were included. The final CAP included Competency 1(d) (Clarity), Competency 2(c) (Responsiveness), Competency 3(d) (Attention), Competency 4(d)(Using Data) and Competency 5(d) (Attendance and Promptness). Student goals were set for grade 6 students in two math content areas and grade 7 in one math content area. The student goals were as follows:

6<sup>th</sup> grade:

2/6 are well prepared to perform well in this level. 2/6 need to work harder than the first two in order to understand and meet the requires for this level. Finally 2/6 are not ready and need to work more harder than the others but if they came to class every day, participate, do the HWS and ask for tutoring they will improve the percentage to pass this class significantly.

By June 2019, at least 75% of students will score 75% or higher or growth at least a percentage point (sic).

7<sup>th</sup> grade:

3/4 are well prepared to perform well in this level, 1/4 need to work harder than the first two in order to understand and meet the requires for this level.

By June 2019, all students will have at least 75% as a grade or growth at least a percentage point (sic).

(District Exhibit 15.)

Rodriguez testified that because Rios' teaching assignment was changed at the beginning of January, the CAP was modified at the mid-year evaluation to adjust for the change in assignment. The indicators that Rios selected for professional growth remained the same. As Rodriguez testified, regardless of the grade or class a teacher is assigned to teach, the teacher is still being rated under the same indicators. The student goals, however, were changed. Rodriguez gave Rios time to confer with Kadus regarding the student goals. The revised goal provided for three content math areas was: "By June 2019, at least 65 percent of the students will score 65 percent or grow 20 points." (District Exhibit 18.)

**Rios' Evaluations – 2018-2019 School Year:**

In the 2018-2019 school year, Rios received three formal observations. Two were announced and one was unannounced. In addition, Rodriguez conducted informal observations, or over time indicators. Rios also received a mid-year evaluation and an annual summative evaluation reflecting all of the evidence gathered in the course of the school year.

**a. Informal Observations:**

Rodriguez testified that the mid-year and annual summative evaluations were based on Rios' entire performance based on her walk throughs on a day-to-day basis, formal observations and attendance. Rodriguez stated that she met with Rios throughout the school

year to discuss what she found during her informal observations and to make recommendations. Some of the guidance provided was set forth in emails she wrote directly to Rios and, in some cases, to all of the teachers at Oliver II.

The record includes evidence that Rodriguez discussed the Diagnostic District Math testing with Rios, confirming her directives and noting that “I met with you on October 9, 2018 and asked you to continue to take your classes to the computer lab to see if they can log on. You must be proactive on this matter.” (District Exhibit 30.) Additional support was provided to Rios in connection with this matter. *Id.* She provided guidance on use of the AMOR Tracker during his lessons and the MIF Data Tracker to track student growth; this information was provided both verbally and by email. (District Exhibit 40.) Based on her walk-throughs, she made recommendations for updating his bulletin board, after looking at other teachers’ bulletin boards with him. (District Exhibit 42.) Rodriguez testified that even after providing recommendations regarding updating his bulletin boards, verbally and in writing, and after getting others to make recommendations, Rios still did not update his bulletin boards.

On several occasions, Rodriguez had to write to Rios to request that he comply with prior requests made to all teachers or to him individually. For example, an email was sent to Rios regarding inputting student council rep information in the Google sheet provided (District Exhibit 36), providing grades in writing for the middle school students (District Exhibit 51), submitting his mid-year reflection form (District Exhibit 53) and annual reflection (District Exhibit 57). In addition, Rodriguez sent email reminders to Rios noting that he had provided lesson plans for math but not science, and asking that he provide his lesson plans for science (for his middle school class) (District Exhibit 43) and to provide a winter break math packet for the middle school students (District Exhibit 48).<sup>12</sup>

**b. Formal Evaluation – October 10, 2018**

Rodriguez conducted an announced formal observation of Rios teaching math to his sixth grade class on October 10, 2018. A pre-observation conference was held on October 5, 2018. Rodriguez observed the class of six students for 57 minutes. The observation was

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<sup>12</sup> Rodriguez also sent Rios a request for disciplinary action for his neglect to properly monitor and supervise students on Friday, December 21, 2018. (District Exhibit 49.) This disciplinary action, however, is not part of the present charges.

rated partially effective. Evidence based observations and recommendations were made for each of the indicators. (District Exhibit 16.)

No strengths were noted for Competency 1. Competencies 1(a) (Lesson Sequence) and 1(d) (Clarity) were rated ineffective and Competencies 1(b) (Lesson Components) and 1(c) (Pacing and Momentum) were rated partially effective. For Clarity, which was also one of his CAP goals, Rodriguez testified, and the observation evaluation reflected, that the content and instructions were unclear; “students were unable to complete the task on their own or with a partner during guided practice and independent practice.” (District Exhibit 16.) Rodriguez recommended use of anchor charts.

For Competency 2, Rodriguez testified she was looking to see how Rios worked with students independently, tailored his instruction and used small group instruction after he presented the lesson. She did not see him do this; all students remained together and although one or two students needed extra help, he did not pull them aside to provide that assistance. While it was already a small group, smaller groups would have been beneficial. Competencies 2(a) (Tailored Instruction) was rated ineffective; Competencies 2 (b) (Questions and Tasks), and 2(d) (Precision & Evidence) were rated partially effective.

Rios was rated effective in Competencies 3(a) (Enthusiasm for Learning) and 3(c) (Community); he had good students and they worked well together. Competencies 3(b) (Persistence) and 3(d) (Attention) were rated as partially effective. Rodriguez testified, and the evaluation reflected, that students could not do the problems on their own, always seeking Rios’ approval and assistance. Some students were not paying attention when he was teaching.

Rios did not receive any effective ratings for the indicators in Competency 4. He received an ineffective rating for Competency 4(a) (Checks for Understanding) and 4(c) (Demonstration of Learning), and a partially effective rating for Competency 4(b) (Feedback). Rodriguez testified she was looking for, but did not see, the monitoring sheet that they had discussed at the pre-observation conference; as she explained to Rios, this was part of “getting a full understanding of where your kids are so you can adjust your lesson the next day or know how to pull your small group in and know what to work with the kids and tailor that instruction for them based on that data that you collect when you’re tracking.” (1/16/19 Tr. at



118.). She also did not see him provide feedback to allow them to reflect on what they were doing and correct mistakes. There was also no independent work going on.

The evaluation also noted that in connection with the indicators he provided for growth in his CAP, he was rated ineffective on Clarity and partially effective on Responsiveness. There was no evidence during the observation of Using Data. Action steps were recommended.

A post observation conference was held on October 17, 2018. Rios did not sign the observation; a witness signature was obtained.

**c. Formal Observation – January 16, 2019:**

Cheryl Avraamides (“Avraamides”), Vice Principal, conducted a formal announced observation on January 16, 2019. She observed Rios teaching math to his first grade students. A pre-observation conference was held. Avraamides testified that during the pre-observation conference, they discussed the lesson that Rios planned to teach. Although after the observation rating was received Rios raised concerns about being observed so soon after he was assigned to the first grade class, Avraamides testified that Rios did not raise any such concern during the pre-observation conference; rather, he discussed the lesson he planned to teach that day and filled in the form. Indeed, Avraamides stated that while it was not necessary for this observation to be announced, as he already had an announced observation, she chose to make it an announced observation so that Rios could be better prepared, taking into account that this was a recent assignment.

Avraamides observed Rios’ math lesson for 30 minutes. She testified that while the lesson was primarily taught in English, Rios translated into Spanish and the other teacher in the room translated to Portuguese to the extent that translations were needed for the students. According to Avraamides, the lesson appeared to be understood in the language Rios was using. She also testified that in providing the evaluation, she took into account that he had been in that class for a short time; as noted above, that was the reason she made it an announced observation. Rios received an overall rating of partially effective. (District Exhibit 17.)

Rios was rated partially effective for Competency 1(d) (Clarity), noting that “content and instruction was somewhat unclear as evidenced by students working independently; introduction was rushed.” (District Exhibit 17.) Competency 2(b) (Questions and Tasks) and

2(c) (Responsiveness) were rated partially effective. Competency 3(a) (Enthusiasm for Learning) and 3(c) (Community) were rated effective. Competency 4(a) (Checks for Understanding) was rated partially effective. Details were provided in connection with each of these ratings. The evaluation also referenced the growth indicators from Rios' CAP noting that none were rated effective in this observation.

**d. Mid-Year Evaluation:**

Rodriguez testified that for the mid-year evaluation, she looked at the formal observations, her walk-throughs on a day-to-day basis and attendance. She noted that Rios was the only teacher who needed a second reminder to provide his reflection for the mid-year evaluation. (District Exhibit 53.) The mid-year evaluation took his changed assignment into account, including providing for a modification of the student goals in his CAP. Rodriguez noted, however, that notwithstanding that his assignment changed from sixth, seventh and eighth grade to first, it is still teaching; the ratings in the system align to whatever grade a teacher is assigned to teach. For example, clarity is clarity, regardless of the grade level. As to the different curriculum, she testified that both grades used Math in Focus, although geared to the different levels.

The mid-year evaluation conference was held on January 29, 2019. The overall rating was ineffective (or 7 total points). Rios was rated partially effective for Competency 1. Rodriguez noted that Rios did not meet expectations set forth in the Framework for Lesson Design and Focus. While he had implemented the math curriculum, he lacked in the implementation of the science curriculum notwithstanding that he was provided support for teaching the science curriculum. He generally did not use District materials and resources in teaching science. He received a partially effective for Competency 2 as he did not meet expectations in the Framework for Rigor and Inclusiveness and did not provide students with tailored instruction to move all students towards mastery.

Rios received a partially effective for Competency 3 as well as he did not meet the Framework expectations for Culture of Achievement. While students seemed to be engaged in learning and paying attention, students had difficulty completing tasks on their own. Competency 4 was rated ineffective. Notwithstanding receiving support on use of Active Monitoring of Record or AMOR sheets, he did not use them in the manner in which he was trained. Similarly, although the math coach provided support on implementing math centers,

neither use of centers nor small group instruction were evident in the middle school classes. He also did not complete the MIF tracker.

Competency 5, which is rated only in the mid-year and annual evaluations, was rated slightly below expectations. Rodriguez testified that he exceeded expectations for attendance and promptness (Competency 5(d), but lost points for leaving parent teacher conferences before 7:00 PM (the scheduled end time) and, therefore, missed meeting with four families. There was also no evidence of parent communication notwithstanding that teachers were encouraged to use ClassDojo for parent teacher communication. The evaluation also noted that Rios did not meet expectations in the Framework for Commitment to Personal and Collective Excellence. It was noted, however, that he did attend two Science LIFTT meetings.

As to the SGOs at mid-year, Rodriguez reviewed the progress made by his sixth and seventh grade students. She testified that she did not expect his students to have met the goals that were set for June; while the goals for June had not yet been met by the time the students were transferred, Rios was on track to meet the goals by June. As noted above, new student goals were set for his new teaching assignment in the first grade.

**e. Formal Observation – April 3, 2019:**

Petty conducted a formal observation of Rios teaching a math lesson in his first grade class on April 3, 2019. The observation was unannounced. Because Petty is no longer with the District<sup>13</sup> and was unavailable to testify, the evaluation was entered into evidence, but no testimony was provided by the District as to the details. As noted in the evaluation, Petty observed the math lesson for 25 minutes. Students were sitting in three groups of approximately five students each; one was working independently and Rios worked with one group while Kadus worked with another. The overall rating for the observation was ineffective. (District Exhibit 19.)

Rios was rated ineffective for Competency 1(a) (Lesson Sequence), 1(b) (Lesson Components) and 1(d) (Clarity), Competency 2(b) (Questions & Tasks), 2(c) (Responsiveness) and 2(d) (Precision and Evidence), Competency 3(b) (Persistence), 3(c) (Community), Competency 4(a) (Checks for Understanding), 4(b) (Feedback) and 4(c) (Demonstration of Learning). He received a partially effective rating for 3(a) (Enthusiasm for

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<sup>13</sup> At the time of the hearing, Petty was the Superintendent of Lodi.

Learning). A post observation conference was held on April 9, 2019. It does not appear that Rios signed the observation; a witness signature appears. (District Exhibit 19.)

**e. Annual Summative Evaluation – May 9, 2019:**

Rodriguez prepared Rios' annual summative evaluation on May 9, 2019.<sup>14</sup> Rodriguez testified that in preparing the evaluation, she considered all of the data collected from the start of the school year, including formal observations, the walk throughs, attendance, trackers and other information on student progress.<sup>15</sup> Based on the evidence collected, Rios was rated partially effective for Competency 1, 2 and 3 and ineffective for Competency 4. In Competency 3, the evaluation noted strengths in two indicators, 3(a) (Enthusiasm for Learning), 3(c) (Community) and 3(e) (High Expectations). Nonetheless, based on the overall ratings for each of these competencies, Rios did not meet the expectations set forth in the Framework. For the indicators in Competency 5, Rios received two effective ratings and two partially effective ratings.

SGO scores for the second part of the school year for his first grade students are set forth in Competency 4(f). The rating was partially effective. The evaluation provided that:

As of April 2019, 66% []of students scored a 65% or higher on the MIF chapter assessments from February to April 2019. Mr. Rios is a co-teacher teaching alongside with the general education teacher in the classroom. Students did not obtain proficiency scoring at this level. Therefore, goals were not met.

(District Exhibit 20.)

Based on these ratings, Rios had a total score of 5 points, an overall ineffective rating in the annual summative evaluation.

**Rios' Testimony – Oliver II School:**

Rios' testified that he did not arrive at the school until September 4 or 5, 2018 and that upon his arrival, Rodriguez told him that he would be teaching math to the sixth, seventh and eighth grade bilingual class. He testified that he initially taught all subjects and that he spent a lot of time preparing for all the classes, including working weekends. Rios' acknowledged,

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<sup>14</sup> Rios was absent from work on an FMLA leave beginning approximately April 10, 2019 and returning in May 2019 before the end of the school year.

<sup>15</sup> Rodriguez testified that in completing the annual summative evaluation on EdReflect, prior ratings from the formal observations are already in the system providing guidance for the rating to be given in the annual summative evaluation. If the rating on a particular indicator in prior observations was ineffective or partially ineffective, the rating for that indicator must be informed by those prior ratings. (1/16/20 Tr. at 141.)

however, that by mid-September, another teacher was assigned to teach ELA and social studies. He testified that he did not know that he was required to teach the students science until Rodriguez asked him for lesson plans for science at the end of September. He was provided the science curriculum but nevertheless spent many hours preparing his lessons. Rios also testified that when teaching the sixth, seventh and eighth grade students, he had access to PowerTeacher because he was the homeroom teacher. He was not called to cover other classes during this time-frame.

When the middle school students were transferred from the school at the end of December, Rios was told that he would be transferred as well; he was waiting for the transfer letter when he began his assignment in Kadus' first grade class. Rios testified that he was not given a title when he was sent to Kadus' class and did not know what role he had in her classroom. In addition, Rios testified that he was not given a desk, chair or computer and did not have access to PowerTeacher; he did not ask that any of these items be provided to him. Further, he acknowledged that he was not prohibited from sitting or from using the closet in the classroom. He further testified that based on his many years working in Newark, teachers do not sit; "the teacher is always standing." (2/21/20 Tr. at 64.)

As with his experience at Abington School, Rios claimed that he was constantly called to cover other classes, either for a full day or for portions of a day. He did not keep any records but testified that it occurred frequently. Without specific dates, Rios testified that he provided coverage as follows: at least six full and four part days in January; at least fifteen full days and 1 part day in February; three full weeks of full day coverage in March and, in the first 10 days of April, "maybe" four full days. (2/20/20 Tr. at 191-198.) When asked if he wrote an email to Petty or Rodriguez to express concerns about the number of times he was called upon to cover or filed a grievance, Rios indicated that he did not; he testified that he understood that as an EWPS, it was his duty to cover classes. Rodriguez testified that Rios could have done coverage, "just like we had other teachers in the building also covering whenever we needed them." According to Rodriguez, however, it was not often that he was called upon to cover; while she could not recall an exact number, she estimated it was likely "two, three times" but noted that he was in his class most of the time. (2/16/20 Tr. at 213-214.)

Rios testified that his first observation in the new class was only 11 days after he was assigned to the class; he had only taught the students for approximately eight days prior to the observation, having been called to cover other classes during that period. According to Rios, he was pulled to cover other classes for three full days and at least twice to cover meetings. In addition, he testified that Avraamides did not show up on the day planned but came a couple days later when he was unprepared to be observed. Contrary to Avraamides testimony, Rios testified that he told Avraamides prior to the observation that it was unfair to observe him at that time. After receiving his evaluation, he wrote to Avraamides to request a new evaluation because he had eight days or less teaching the students prior to the observation and was not familiar with their prior learning other than by reference to the anchor charts. Avraamides responded noting that while it was not necessary to do so, she opted to conduct an announced observation because she “wanted to help prepare [him] and provide that extra support.” She also noted that at no time during the pre-observation conference did Rios express these concerns about being observed at that time. (District Exhibit 55.)

Rios also testified that he did not receive any formal assistance or individual modeling from the teacher coach. Indeed, Rios maintained that he was not provided access to any coach at the school. He then indicated that he did have access to the math coach at Oliver I but that he never asked to meet with her.

Rios did meet with Rodriguez regarding his annual summative evaluation upon his return from leave. The Union representative and another first grade teacher, Sheila Coleman (“Coleman”), attended the meeting with him. According to Rios, Rodriguez listened to his concerns. Rios wrote a rebuttal to his annual summative evaluation raising many of the same issues raised in his testimony. He also maintained that contrary to the rating provided regarding the SGOs, the students in his and Kadus’ first grade class had met the goals that were set; he provided data that Kadus gave to him as evidence in the rebuttal. (Respondent Exhibit 6.)

### **The Tenure Charges:**

Roger Leon, Superintendent of Schools, filed charges of inefficiency against Rios pursuant to *N.J.S.A. 18A:6-17.3*. The inefficiency charges are detailed below:

#### **TENURE CHARGE: INEFFICIENCY**

Respondent has been rated less than effective in three consecutive annual summative evaluations, as follows:

1. Respondent was rated ineffective in his 2016-17 annual summative evaluation.
2. Respondent was rated partially effective in his 2017-18 annual summative evaluation.
3. Respondent was rated ineffective in his 2018-2019 annual summative evaluation.
4. Respondent has failed to effectively perform the duties of a teacher.
5. Respondent has failed to effectively use individual standard-aligned lessons to build on previous lessons and on students' prior knowledge.
6. Respondent has failed to effectively use standard-aligned lesson components to move students toward mastery of an objective that is aligned to objective that is aligned to (sic) essential understanding in the standards.
7. Respondent has failed [to] maximize learning time.
8. Respondent has failed to clearly and accurately communicate content and instructions.
9. Respondent has failed to effectively plan lesson plans that are also standards-based, grade-level appropriate, and reflect work toward annual student achievement goals.
10. Respondent has failed to effectively create lesson objectives which fit into a larger, coherent sequence that leads to student mastery of the appropriate standards.
11. Respondent has failed to effectively tailor instruction to move all students toward mastery.
12. Respondent has failed to effectively use questions and tasks to ensure student comprehension and ask for application, analysis, and/or synthesis.
13. Respondent has failed to effectively anticipate and respond to student reactions and misunderstandings by adjusting instructional strategies
14. Respondent has failed to effectively require precision and evidence in tasks and responses from students and himself.
15. Respondent has failed to effectively demonstrate that student work includes revisions based on teacher and peer feedback, especially revised explanations and justifications to demonstrate student movement toward mastery.
16. Respondent has failed to effectively demonstrate that lesson objectives, tasks, and materials requires students to demonstrate recall and reproduction, basic application of concepts, strategic thinking, and extended thinking.

17. Respondent has failed to effectively demonstrate that students show persistence in confronting demanding concepts and tasks.
18. Respondent has failed to effectively use classroom norms that promote positive and productive teach-student and student-student relationships.
19. Respondent has failed to effectively demonstrate that his strategies and routines capture and maintain student attention on learning.
20. Respondent has failed to effectively demonstrate that he fosters a classroom culture that is consistently one of high expectations and hard work and has failed to effectively model excellence.
21. Respondent has failed to effectively demonstrate that students hold themselves and their peers accountable for learning and supporting the culture of the classroom.
22. Respondent has failed to consistently check for understanding effectively.
23. Respondent has failed to effectively demonstrate that he and his students give and receive timely, specific, and constructive feedback.
24. Respondent has failed to effectively demonstrate students know more at the end of the year than they did at the start.
25. Respondent has failed to effectively track assessment data to understand each student's progress toward mastery and that he uses results to guide planning, instruction.
26. Respondent has failed to effectively articulate specifically (and with evidence) whether or not each student has internalized grade-level standards and, if not, what he still needs to learn.
27. Respondent has failed to effectively demonstrate that data reflects that students are mastering the objectives of the focus areas, leading toward mastery of grade-level standards.
28. Respondent has failed to effectively demonstrate that he accurately self-assesses strengths and substantive growth areas, seeks and incorporates feedback from others, and pursues his own growth and development.
29. Respondent has failed to effectively contribute ideas and expertise to further colleagues' and the school's growth or incorporate productive insights into his or her own instruction.
30. Respondent has failed to effectively communicate student progress clearly and consistently to students, families, and school leaders.

**WHEREFORE**, the undersigned hereby requests the following relief:

- a. Dismissal of Respondent from the position in which he has tenure in the Newark School District.
- b. Suspension of Respondent, without pay, pending review and consideration of this Tenure Charge of inefficiency; and
- c. Such further relief as may be authorized by law and deemed equitable by the Board of Education, the Commissioner of Education, or any assigned arbitrator.

(District Exhibit 1.)



**Relevant Statutory Provisions – TEACHNJ:**

*N.J.S.A. 18:A:6-17.2, Considerations for Arbitrator in Rendering Decision,*” provides as follows:

a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

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

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

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

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

b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

c. The evaluator’s determination as to the quality of an employee’s classroom performance shall not be subject to an arbitrator’s review.

d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

*N.J.S.A. 18A:6-17.3, Evaluation Process, Determination of Charges,* provides, in pertinent part, as follows:

a. Notwithstanding the provisions of *N.J.S.A. 18A:6-11* or any other section of law to the contrary, in the case of a teacher, principal, assistant principal and vice-principal:

(1) the Superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially ineffective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation.

**Position of the Parties:**

The parties' positions are summarized below. More detail is addressed in the discussion section of the Opinion.

On this record, the District argues: (a) that under TEACHNJ, inefficiency charges are required when a teacher receives an overall partially effective and ineffective in his annual summative evaluation; (b) that Rios' 2017-2018 overall rating was partially effective and his 2018-2019 overall rating was ineffective warranting inefficiency charges in this case; (c) that the arbitrator's authority is limited under TEACHNJ; (d) that the District has proven that it has substantially adhered to the evaluation process; (e) that in each of the two school years, Rios was provided a CAP, at least three observations by at least two different administrators, a mid-year evaluation and an annual summative evaluation; (f) that Rios was provided professional support to improve his pedagogy; (g) that five different administrators observed Rios during this two year period and all expressed similar concerns regarding his teaching; (h) that the evaluations were all based on evidence obtained during the lessons observed or over time, as appropriate, and were based on the Framework; (i) that even if some deficiency is found to exist in the process, such as the failure to have one announced observation during 2017-2018, this failure did not materially affect the outcome.

Addressing the challenges to the tenure charges that Respondent raised, the District maintains: (a) that Rios' teaching assignments each year were appropriate given his certifications in math and bilingual education; (b) that Rios was observed only when teaching math; (c) that the evidence does not demonstrate that the District acted in an arbitrary and capricious manner towards Rios; (d) that the credible evidence does not support that Rios was set up to fail; (e) that the credible evidence does not support that Rios was required to provide coverage on a frequent basis as Rios claimed; (f) that Rios was not treated any differently than other bilingual teachers in the District with respect to materials; (g) that all teachers are required to be prepared for their classes; (h) that contrary to the Respondent's arguments, the SGOs were rated in each of the annual summative evaluations as part of Competency 4(f); (i) that even if the SGO rating had been effective, it would not have rendered his annual summative evaluations effective; and (j) that there is no evidence of any factual mistakes.

The Respondent, on the other hand, contends: (a) that the District did not substantially adhere to the evaluation process because it failed to provide a rating for the SGOs in the

annual summative evaluations; (b) that the District did not engage in a collaborative process to establish Rios' CAP; (c) that the District did not prove that Rios should have been on a CAP in the 2017-2018 school year having withdrawn the charges relating to the prior year; (d) that Rios did not receive any professional support; (e) that Rios did not receive an announced formal observation at Abington School; (f) that the evaluations fail to identify that his class was a bilingual class and that he served as a co-teacher; (g) that the District incorrectly claimed that the first grade class at Oliver II was a bilingual class; (h) that Rios was criticized in his ratings for items, such as not using Rich Tasks, that were not part of his CAP; (h) that he was rated partially effective and ineffective in areas where he had previously been rated effective; and (i) that the District failed to consider positive indicators from observations earlier in the year.

In addition, Respondent argues that the District's actions towards Rios were arbitrary and capricious. He maintains: (a) that as an EWPS, the District set Rios up to fail; (b) that he was subjected to degrading treatment; (c) that Rios was treated as just another body, without giving him any real assignment; (d) that Rios was not provided a desk or chair, requiring that he stand all day causing him to be exhausted; (e) that he was not provided with a computer or access to PowerTeacher and could not, therefore review student progress; (f) that the District failed to support bilingual education; (g) that the District failed to have bilingual materials for students as required; (h) that the District administrators who rated Rios were not bilingual educators; (i) that one administrator who observed Rios had no proficiency in Spanish; (j) that Rios was improperly observed shortly after being assigned to teach first grade at Oliver II; (k) that Rios was required to teach in areas outside of his certification, including science, ELA, music, gym, art and more; (l) that he was repeatedly required to cover other classes taking him away from teaching his students; (m) that he was required to teach other subjects when his co-teachers were absent; (n) that Rios' refusal to grade Spanish papers on one occasion at Abington resulted in Echevarria providing negative ratings; and (o) that Rios was required to teach multiple grades in the same classroom.

Respondent maintains that for all of these reasons, the tenure charges should be dismissed and Rios should be reinstated to employment with full back pay, benefits and seniority.

**Discussion:**

On the entire record before me, including my assessment of witnesses' credibility and the probative value of the evidence, the District has proven the tenure charges of inefficiency against Rios. I reach this conclusion for the reasons set forth below.

A couple of preliminary comments are appropriate before addressing the specifics of the tenure charges brought against Rios in this case. First, it is important to note that the arbitrator's authority in an inefficiency case under TEACHNJ is limited. An arbitrator is not permitted to second-guess the pedagogical conclusions reached by the administrators in the evaluation process. TEACHNJ expressly provides that the "evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review." *N.J.S.A.* 18:A:6-17.3 (23.d). The statute sets forth four limited bases upon which an arbitrator may find that the inefficiency charges have not been proven. If the facts support any of the defenses set forth in the statute, the arbitrator must then determine if those facts materially affected the outcome of the evaluation; if it did not, then the arbitrator "shall" render a decision in favor of the District, upholding discharge. The District has the ultimate burden of demonstrating that the statutory criteria for tenure charges have been met.

In this case, the Respondent makes a host of arguments in an effort to establish that the evaluations did not substantially adhere to the evaluation process, that there were mistakes of fact and that the District acted in an arbitrary and capricious manner. In making several of his arguments, however, Respondent indirectly asks that the arbitrator review the evaluator's determination of the quality of Rios' teaching. This I cannot do. Accordingly, while all of the Respondent's arguments have been carefully considered, this decision will only discuss those arguments and facts that address the statutory criteria for challenging inefficiency charges but will not review whether particular ratings given by the administrator observing Rios were appropriate.

Second, Respondent relies, in part, on his experience as a bilingual math teacher and on his satisfactory performance Barringer High School as evidence that the ratings he received at Abington School and Oliver II and the inefficiency charges cannot be supported. This reliance is misplaced for several reasons. The framework for evaluating teachers during the ten-year period he was teaching at Barringer High School was not the same as the Framework used during the relevant time periods. Further, while Rios was generally

determined to be “Proficient” under a rating system that included four ratings, *i.e.*, Unsatisfactory, Basic, Proficient and Distinguished, based on the rubric in effect at that time, Respondent did not produce all evaluations during that time period. (See, Respondent Exhibit 7.) For example, his 2009 evaluation, providing a rating of “Basic” was not produced by Respondent. (District Exhibit 72.) More importantly, Rios has not worked at Barrington High School since June 2013 and he has not enjoyed the same success since leaving Barrington. Indeed, the District previously filed tenure charges against Rios based on inefficiency but withdrew the charges. Further, while the District withdrew the inefficiency charges in this matter relating to the 2016-2017 school year, the record reflects that he received an ineffective rating for that school year.<sup>16</sup> If prior evaluations are relevant at all, then his entire record is properly considered.

Significantly, however, the tenure charges in this case relate to a specific time period, *i.e.*, the 2017-2018 and 2018-2019 school years. These two school years, therefore, are the relevant time period in this case. In this case, five separate administrators evaluated Rios’ performance while teaching within his certification areas, *i.e.*, mathematics and bilingual education. Rios’ experience teaching at Abington School and Oliver II and his evaluations while at these two schools are what is at issue in this case and must, therefore, be the focus of this decision.

Finally, as will be discussed in more detail in connection with Respondent’s arguments that the District acted in an arbitrary and capricious manner, Respondent’s suggestion that he cannot be fairly rated because he is an EWPS (and, therefore, was set up to fail) must be rejected. Whether Rios had a permanent position or was assigned each year to work in schools needing the additional support, he is a teacher in the District. In each assignment, he had responsibilities to teach Newark students. The District has a right to expect that all of its teachers, even those working as an EWPS, meet basic standards of performance based on the Department approved evaluation system in effect during the relevant time. Indeed, the goal of TEACHNJ, is to “raise student achievement by improving

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<sup>16</sup> Although the charges relating to that year were withdrawn, there is no evidence to indicate that the annual summative evaluation for that year was changed. Respondent admitted in his Answer to these charges that he received an ineffective rating for that year, although he disagreed with the rating. While withdrawing the tenure charges as they related to that year, the District nonetheless indicated that “[t]he only mention of that school year will be for the fact that he did receive an ineffective during the annual evaluation which then required him to have a CAP the following school year.” (12/10/19 Tr. at 8-9.)

instruction through the adoption of evaluations that provide specific feedback to educators, inform the provisions of aligned professional development, and inform personnel decision.” *N.J.S.A. 18A:6-118(a)*. Although the position of an EWPS may be a difficult one as the teacher does not have a permanent placement and may be reassigned each year,<sup>17</sup> Rios’ status as an EWPS cannot excuse ineffective performance. To find otherwise would be inconsistent with the goals and provisions of TEACHNJ and would do a disservice to the District’s students.

On the entirety of this record, the District met its ultimate burden of establishing that the statutory criteria for the tenure charges of inefficiency were met. To the extent that there were any deviations from the evaluation process, those deviations are not deemed material to the outcome of the evaluation. Each of the factors to be considered in an inefficiency case under TEACHNJ is discussed below, to the extent relevant to this case.<sup>18</sup>

**A. Substantial Adherence to the Evaluation Process:**

The District must establish that it substantially complied with the elements of the evaluation process. Those elements for each school year at issue include: (a) providing for a CAP; (b) three formal observations per school year by two separate administrators, with at least one announced observation with a pre-observation conference; (c) a mid-year evaluation; and (d) an annual summative evaluation. In addition, the District must establish that it provided professional support to the teacher.

Rios had a CAP in each of the two school years. The Respondent argues that there is no evidence that a CAP was appropriate for the 2017-2018 school year as the District withdrew the tenure charges relating to the 2016-2017 school year and, therefore, that he did not need three observations. I do not find this argument persuasive. The record, including the

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<sup>17</sup>Teachers whose status is EWPS have the right to apply for permanent positions in the District. Mendez testified that some EWPS teachers remain in a particular school if a vacancy in that school opens whereas other EWPS teachers may be in a different school each year. All EWPS teachers have the opportunity to enter the pool to be considered for transfer to a permanent position in the District. It is the EWPS teacher’s choice whether or not to enter the pool. According to Mendez, 70 to 75 percent of EWPS teachers choose not to even enter the pool, preferring to remain in EWPS status. Rios testified that he has entered the pool and applied for numerous permanent positions but has not been selected for the open positions.

<sup>18</sup> Respondent does not claim that “the charges would not have been brought but for the considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law.” *N.J.S.A. 18:A:6-17.2(a)(3)*. This section, therefore, will not be addressed in this decision.

tenure charges, establish that in the 2016-2017 school year Rios was rated ineffective in his annual summative evaluation; an ineffective rating in this school year required a CAP in the following school year. It is true that the District opted to rely only on the 2017-2018 and 2018-2019 school years to prove the inefficiency charges. That it chose to withdraw the charges as related to 2016-2017, however, does not change the rating for that year. Indeed, Respondent's Answer to the charges admitted that this was the rating for 2016-2017, although indicating that he did not agree with the rating. Further, when the District withdrew the charges, counsel expressly stated that the charges are withdrawn except to the extent reference to the charges are needed to establish that Rios was required to have a CAP in place during 2017-2018.

In addition, as the District noted in its Reply Brief, even assuming that no CAP was needed, it does not follow that Rios would not have been observed on three occasions. While only two observations would have been required, the District was free to observe Rios on more than one occasion. Further, it is purely speculative to conclude that if he had only two observations, he would have rated effective on one of them. It is just as possible that the two times he would have been observed would have been the lessons rated as partially effective and ineffective.

As to the CAPs themselves, Rios argued that they were not part of a collaborative process. The record does not support this conclusion. Indeed, Echevarria (for Abington School) and Rodriguez (for Oliver II) credibly testified as to the process followed each year to establish Rios' CAP. It is the teacher who initiates the process. The teacher selects the professional goals he wishes to work on during the year, selecting from indicators in the Framework. The teacher also identifies the student learning outcomes that he wishes to include in the CAP. After the teacher prepares this information, he submits it to his supervisor for review. This was done in both school years. After Rios's submitted the CAP to his supervisors, a discussion took place between Rios and Echavarria (for 2017-2018) and between Rios and Rodriguez (for 2018-2019) before the CAP was finalized. Indeed, Rodriguez testified that although Rios had signed the CAP before she had a chance to review it, she made suggestions for modification. Only Rios could accept those modifications by making changes to the CAP. He did so. The weight of the credible evidence does not rebut

that the CAP was initially prepared by Rios, that he then discussed it with his supervisors, and that Rios then finalized the CAP that was in effect for each year.

Respondent also suggests that if a particular issue is not addressed in the CAP, it is improper to rate him with respect to that issue. For example, Rios argues that he was criticized for not using rich tasks in his second observation at Abington School but that rich tasks were not included in his CAP. He also claims that the CAP did not provide that he should group students by English proficiency to differentiate instruction on this basis and yet he was criticized for not doing so. The fact that these items were not referenced in his CAP does not preclude the District from holding him accountable to implement best practices and to rate him on all competencies. Indeed, a CAP is not required to include all indicators; that does not mean that the teacher cannot be evaluated on all of the Competencies' indicators set forth in the Framework, whether or not it is one of the growth goals for the teacher.<sup>19</sup> The District is not limited to addressing the indicators the teacher selected for growth in assessing the quality of the teacher's performance. For all of the above reasons, Respondent's arguments that the CAP was not subject to any collaboration or that it was otherwise improper is rejected.

Rios received three formal observations in each school year. At least two evaluators observed his lessons in each year. At Abington School, Echevarria and Heintz conducted the observations. At Oliver II, Rodriguez, Petty and Avraamides conducted the observations. Rios was only observed teaching math, which he is certified to teach. Except for the first observation by Echavarria, all other formal observations were rated either partially effective or ineffective. Rios' suggestion that he should have only been observed by evaluators who were bilingual educators is not supported by the record. While bilingual teachers must be observed by teachers qualified to conduct an observation, there is no evidence that any of these administrators were not qualified to observe him teaching a bilingual class. Each had received extensive training on an annual basis as to ratings under the Framework, including norming sessions to assure consistency throughout the District. Indeed, to find otherwise would require that at least two administrators in each school with a bilingual education class be certified in bilingual education. This is not practical nor is it required.

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<sup>19</sup> Rios also claimed he was not trained regarding rich tasks. The record does not support this claim. Rich tasks were introduced at Abington School through professional development given to all teachers, including Rios, and was a subject of PLC meetings which he was expected to attend.



In particular, Rios complains that Heintz should not have been permitted to evaluate his lesson at Abington School because she is not Spanish speaking. He claims that he taught exclusively in English during that lesson because Heintz did not know Spanish and then concludes that the reason the students were not engaged was that he spoke English and that they did not understand, not because the lesson or his teaching was in any way lacking. There are several factual issues that require rejection of this argument. The most significant is that contrary to Rios' claim that he spoke only in English which resulted in the students not understanding and engaging in the lesson, Heintz expressly noted in her observation evaluation that Rios used both Spanish and English during the lesson. Indeed, she rated him effective with respect to Clarity, noting in relevant part as follows: "The teacher explained everything well to students in both English and Spanish ensuring that all the students had access to the information and that they understood it clearly." (District Exhibit 13.) In addition, the record establishes that no one suggested to Rios that he alter his teaching that day to use exclusively in English (and, as set forth above, the evidence makes clear he did not do so). Further, Heintz testified that while she is not fluent in Spanish, she does have some basic understanding of the language. Finally, not only is Rios' claim that the students were not engaged because he spoke only in English not supported by the detailed information set forth in the observation evaluation or by Heintz's testimony but is entirely speculative and self-serving.

Rios also raised several arguments regarding specific ratings and the conclusions the evaluators reached. For example, Rios argues that having been found effective as to a particular component and indicator earlier in the year, it was inappropriate to rate him partially effective or ineffective for a later lesson, suggesting that having demonstrated his competence in one lesson, it could not be rated lower at a later time. This is simply not the case. Each lesson must be observed and rated based on the evidence presented during that lesson. That a teacher may effectively address a particular indicator on one day does not mean that the same indicator is addressed effectively on another day during another lesson. Further, as Echevarria testified, he noticed a downward trajectory of Rios' teaching in areas such as community, for example, after his mid-year evaluation having not received an effective rating at that time. This, too, would explain differences in ratings on the same competencies as the year progressed.

Finally, as noted above, I am not authorized to second-guess the findings of the evaluators as to the quality of Rios' teaching. Suffice it to say, however, that each of the evaluators conducting the formal observations provided detailed descriptions of what they observed relevant to a particular indicator that was being rated, articulating the evidence upon which the conclusion was based and the reason for the rating provided. There is nothing in the ratings or in the testimony of any of the administrators who testified regarding their observation of Rios<sup>20</sup> to suggest that they were not acting in good faith and consistent with the Framework and the Guide in conducting their observations and in reaching the conclusions as to the ratings for each competency and indicator rated.

The above notwithstanding, it is undisputed that Rios did not receive an announced observation in the 2017-2018 school year. All three of the observations that year were unannounced. (The next year, two were announced and only one was unannounced.) The standards do require one announced observation. The question is whether the failure to provide the announced observation materially impacted the outcome of the evaluation. On this record, there is nothing to indicate that there would have been a different conclusion if one of the observations had been announced that year. Indeed, the following year, two of the three observations were announced; this fact did not materially impact the ratings for the particular observations or the overall ratings in the mid-year or annual summative evaluations.

The next requirement is a mid-year evaluation. Echevarria and Rodriguez credibly testified that the mid-year evaluations are based not only on formal observations, but also on informal observations/walk throughs and other evidence obtained during the period prior to the mid-year evaluation. Both evaluations rated Rios on all of the competencies. They also addressed progress towards SGOs. While no modification was made to Rios' CAP in the 2017-2018 school year, a modification was made in 2018-2019 to reflect that he was assigned to teach math in the first grade class beginning in January. The SGO, therefore, was modified to reflect this change. No change in professional goals was made at that time; Rodriguez testified that indicators selected for professional growth remained applicable, whether teaching a middle school grade or first grade class.

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<sup>20</sup> All of the evaluators testified at the hearing except for Petty. As indicated previously, Petty is no longer with the District. My assessment of that observation is, therefore, based solely on the written observation evaluation.

An annual summative evaluation is also required each year, rating the teacher in all of the competencies based not only upon the formal observations but the informal observations/walk throughs and other evidence obtained throughout the school year. Once again, Rios received an annual summative evaluation from both Echevarria (for Abington School) and Rodriguez (for Oliver II). Rodriguez testified that when preparing the annual evaluation in the system, the prior ratings are all referenced in the system for all competencies and indicators providing guidance as to the appropriate rating, although the administrator may adjust based on other evidence. Rios makes several arguments in connection with the annual summative evaluations in an effort to establish that the District did not substantially adhere to the evaluation process.

With respect to the annual summative evaluation at Abington School, Rios asserts that Echevarria failed to consider the effective ratings in Competencies 2 and 4 from the first observation. Significantly, Echevarria only rated two competencies during the first observation when Rios received an overall effective rating; it was a short observation and it was not necessary to rate all competencies. Contrary to Rios' claim, Echevarria credibly testified that he did, in fact, consider the formal observations, as well as informal walk throughs and other evidence obtained during the course of the school year. Echevarria also credibly testified that in preparing the evaluation, he looked for the teacher's trajectory through the year. In Rios' situation, it was his opinion that Rios' trajectory was downward, particularly after the mid-year evaluation when Rios was dissatisfied with his rating and concerned about the impact of the rating given his prior ineffective rating.<sup>21</sup> Accordingly, while he rated Rios effective in certain indicators under Competency 4 in the first formal observation, Echevarria did not make a similar determination in the second formal observation. Instead he indicated that there were no strengths noted in this competency and in the two indicators that were rated in Competency 4, both were only partially effective. Similarly, Echevarria rated Rios effective for the Competency 2(c) (Responsiveness) in the first observation but only partially effective in the same indicator in the second observation.

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<sup>21</sup> Rios asserted that Echevarria's attitude towards him became more negative after he refused to grade Spanish papers as requested; Velez then agreed to grade all the papers. Rios presented no evidence to support this belief, other than the fact that his ratings were not as good as in the first formal observation. I am not persuaded by Rios' testimony. Rather, Echevarria credibly testified as to the basis for his ratings and did not demonstrate any animus towards Rios. Further, he explained his view that Rios' attitude and his performance was in a downward trajectory after he received his mid-year evaluation given his dissatisfaction with the rating.

Heintz did not rate Rios in either Competency 2 or 4.<sup>22</sup> Under these circumstances, that Echevarria concluded after reviewing all of the evidence that a partially effective rating was appropriate for Competency 4 is not subject to review.

A review of the ratings for Competency 2(b) (Questions and Tasks) does suggest that Echevarria may not have taken into account that Rios was rated effective in this indicator in the first two formal observations and was not rated on this indicator in the third formal observations. Echevarria's basis for rating this indicator partially effective in the annual summative evaluation is not evident on this record. Having received two effective ratings, and no partially effective or ineffective rating for this indicator, it would appear that this rating is a mistake. This mistake in the annual summative evaluation, however, is insufficient to find that the District failed to substantially adhere to the evaluation process. Even assuming that the evaluation should have reflected an effective rating in this indicator, the change would add only one point to his final score, moving it from an eight (for Competencies 1 to 4) to a nine. This score is still within the range of partially effective for an overall rating. Thus, this issue did not materially impact his annual summative evaluation.

Rios also maintains that the District ignored the requirement to provide SGO scores, a fatal defect in the evaluation process, citing cases finding that the failure to provide an SGO rating provided grounds to find that the tenure charges cannot be sustained. *N.J.A.C. 6A:10-4.1(c)*. See also, *IMO Tenure Charges of Joel Dawkins (State-Operated School District of the City of Newark, County of Essex)* Agency Docket No. 277-9/15 at p. 39 (Arbitrator Stephen M. Bluth, October 21, 2016) (“[F]ailure to compute a separate score for Respondent based on student growth” constituted a material error.); *IMO Tenure Charges of Danielle Carroll (State-Operated School District of the City of Newark)*, Agency Docket No. 261-9/15 at p. 46 (Arbitrator Robert T. Simmelkjaer, December 30, 2016) (“Annual Summative Evaluations devoid of data-based SGOs in either school year preclude the District from establishing the

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<sup>22</sup> Echevarria also noted that Rios was effective in Pacing and Momentum in the first formal observation in the comment section, although he did not put a rating into the system for that indicator. He did not make any comment regarding Responsiveness in the narrative section but did rate Rios effective for Responsiveness in the system. This confusion would not have impacted the overall rating for that observation which was effective. In his second formal observation, Echevarria rated Rios partially effective for Pacing and Momentum; once again Heintz did not rate that indicator. Accordingly, with respect to Pacing and Momentum the same rationale set forth above applies. Echevarria's determination that the final rating should be partially effective has a rational basis and is not subject to review.

two consecutive years of 'ineffective' or 'partially effective' performance evaluations necessary to pursue charges under Section 25 of the Act.”)

Respondent's argument fails to recognize that, as Mendez testified, the District received Department approval to address SGOs as part of Competency 4 in the annual summative evaluation. See, e.g., *IMO Tenure Charges of Ursula Whitehurst (State-Operated School District of the City of Newark, Essex County)*, Agency Docket No.: 263-9/16 at p. 51 (Arbitrator Ruth Moscovitch, March 30, 2017). Indeed, in the annual summative evaluations from Abington School and Oliver II, Rios did in fact receive an SGO rating under Competency 4(f) (Progress Towards Goal). Contrary to Rios' arguments, therefore, the District did not fail to provide a separate rating for SGO scores as required nor did it ignore this issue in the evaluations; both expressly addressed the issue in providing the rating. In both school years, he received a partially effective rating. Accordingly, Respondent's argument that the District failed to properly provide an SGO rating must be rejected.

Respondent also argues that the partially effective ratings for Competency 4 in both years are improper as the SGOs were not based on specific objective criteria. The record does not support this conclusion. In his CAP at Abington School, Rios included two goals for student growth, one for CCSS Math Content 7NSA1C and CCSS Math Content 7NSA1B. The goals for both were the same, i.e., for 15 of the 19 students to prove mastery in the standard by June. At the time of the annual summative evaluation in April, Echevarria concluded that he had only partially met this objective. The assessments were to include the “Math in Focus pre and post tests, the interim assessments and other assessments.” (District Exhibit 14.) He further noted that the data tracker was showing students making progress since first being assessed in September. Rios claims, however, that he understood the term mastery to mean that 15 of 19 students had achieved a passing grade of 65 or more and that his students did, in fact, achieve this goal. He argues that SGOs must be “specific and measurable” (*N.J.A.C. 6A:10-4.2*) and that mastery would be a subjective criterion based on Echevarria's testimony that mastery would require a grade of at least 75, if not higher.

Echevarria disagreed that a student who has received a barely passing grade has mastered the content. He credibly testified that “[m]astery is understood in the educational setting as being able to do a skill and to be able to do it well.” (1/16/20 Tr at p. 23.). Moreover, Echevarria pointed out that Rios' own analysis when he prepared his CAP and set

the goals reflect that he understood that just passing was not considered mastery. In his CAP, Rios noted that 2 of 19 students were well prepared, 10 of 19 students needed to work harder and 7 of 19 students were not ready based on the results of the pre-test assessment in September. (The 19 was based on the number of students initially in the class; the class grew to approximately 23.). A review of the grades obtained by the students in the pre-test shows that two of students had grades of 75 and 80, respectively, which would correlate to Rios' assessment that 2 of 19 were well prepared. Of the remaining students, two obtained a grade of 60, five obtained a grade of 65 and two obtained a grade of 70; the remaining students received grades below 60. Having concluded that only two of the students had grades that rendered them well prepared, Rios' own analysis indicates that he interpreted mastery to mean a grade of 75 or higher, a specific and measurable standard; that is the standard that Echevarria applied (while testifying that some would find that mastery was a grade of 80 or 90). Indeed, if Rios understood that mastery was obtaining a grade of 65 or better, then his own analysis would have provided that nine, not two, students had already attained mastery or were "well prepared." The post tests in these content areas indicated that although 21 of 23 students passed with a grade of 65 or more, only eight students obtained a grade of 75 or higher, thereby reaching mastery. Given these facts, Rios' testimony that he understood mastery to be a grade of 65 or more is not credible. Indeed, the SGO rating of partially effective is consistent with Rios' own analysis and conclusions of what constituted mastery when preparing his CAP and the goals he set for his students.

Rios also maintains that the SGO score at Oliver II was subjective and incorrect. During the mid-year evaluation, Rodriguez noted that Rios was on track to meet the goals set for his sixth and seventh grade math class, i.e., that 75% of the sixth grade students and all of the seventh grade students will score 75% or higher in the math content areas identified. Because those students were all transferred at the end of December and he was assigned to the first grade class, his student learning goals were changed in the mid-year evaluation. His mid-year evaluation modified the goal to provide that "[b]y June 2019, at least 65% of students will score 65% or grow 20% points" in identified math content areas. (District Exhibit 18.). While Rios claims that this revised goal was not then approved or inserted into the CAP, the mid-year evaluation sets forth the revised goals for student learning outcomes.

In addressing the SGO scores in the annual summative evaluation, Rodriguez testified that she did not consider the goals set for the first half of the year; she only considered the goals set for the first grade class. She reiterated in the annual summative evaluation that the student learning goals, as revised, provided that “[b]y June 2019, at least 65% of students will score 65% or grow 20 points.” (District Exhibit 20.) In rating Rios in connection with the SGO, however, Rodriguez provided as follows:

As of April 2019, 66% of students scored a 65% or higher on the MIF chapter assessments from February to April 2019. Mr. Rios is a co-teacher teaching alongside with the general education teacher in the classroom. Students did not obtain proficiency scoring at this level. Therefore, goals were not met.

(District Exhibit 20.) Rios was rated partially effective on the SGO score. Rios argues that the term proficiency is not used in the goal set and is subjective.<sup>23</sup>

Rodriguez testified that in setting student learning outcomes, “we always want 75 percent or higher...or 20 points of growth” from the students’ beginning results. (1/16/20 Tr. at 201-202.) That said, she indicated that it is “up to the teacher what they want to do” but that a goal of 50% passing would not be acceptable; a goal of 65% passing would be a minimum.<sup>24</sup> (1/16/20 Tr. at 202.) Rodriguez indicated that this goal is indeed quantifiable. When asked what goal Rios had selected, Rodriguez testified that he included the 75% in his CAP and that there was nothing in writing about a 65%. In this testimony, she was mistaken. While Rios’ original goal for his sixth and seventh grade math students had been 75% of sixth grade students achieving 75% and all seventh grade students achieving 75%,<sup>25</sup> it was changed in the mid-year evaluation to reflect that 65% of students in his first grade class would achieve 65% or grow 20 point in the math content areas identified. This was confirmed in the annual summative evaluation. Thus, her conclusion that Rios’ only partially met this objective when 66% of the students scored 65% or higher is indeed a mistake.

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<sup>23</sup> Counsel did not question Rodriguez as to the use of the term proficiency. Use of that term in the evaluation did not, however, determine Rios’ rating. Rodriguez’ testimony made clear that the goals set were quantifiable, using a percentage passing or a number achieving 20 points or more. Thus, Rios’ arguments regarding the use of the term “proficient” is not material to the rating.

<sup>24</sup> Consistent with this testimony, the Student Growth Objectives, NJ Department of Education (Updated 10-17) provides that SGOs should be driven by high expectations for students. Given this provision, it would appear that a goal to have 65% of students just pass the class, *i.e.*, a 65% or higher, would be a minimum. A score of 75% or higher would be more consistent with the requirement that SGOs be driven by high expectations for students.

<sup>25</sup> Rios received a partially effective rating in Competency 4(f) in his mid-year evaluation based on the performance of his 6<sup>th</sup> and 7<sup>th</sup> grade students at that time.

This mistake, however, is not fatal to the evaluation process. Contrary to the Respondent's claims, the District did not fail to provide an SGO score or otherwise ignore student achievement. Rather the issue is the impact of the mistake on Rios' overall rating in his annual summative evaluation, *i.e.*, whether this mistake – incorrectly identifying the applicable SGO standard -- was material to the overall evaluation.<sup>26</sup> On this record, I conclude it was not. Indeed, this mistake directly impacted only one of the indicators in Competency 4, *i.e.*, Competency 4(f) (Progress Towards Goals); there is no basis to find that this mistake of fact impacted any of the other ratings in Competency 4. Significantly, the Guide expressly provides that in assessing Competency 4, the administrator is to consider not only the SGO score but also the other evidence gathered over time. While “there should be general alignment between the over-time Indicators in Competency 4 and whether a teacher did not meet, partially met, met or exceeded their student goals,” all evidence is properly considered in rating the various indicators. (District Exhibit 71 at p. 21.)

That Rios just barely exceeded the minimal expectations he set for student progress, with 66% of students achieving a passing grade of 65%, does not demonstrate that the ratings in the other indicators are the result of a mistake of fact. These other indicators rate different, albeit related, skills under Competency 4 which were properly evaluated based on all of the evidence over time. On this record, I cannot conclude that the other indicators are not in general alignment with the minimal success achieved in the SGO. Under these circumstances, there is no basis to review the administrator's determination on the ratings in these other indicators. Given the ratings in all of the indicators in Competency 4, *i.e.*, three ineffective and three partially effective, even if indicator 4(f) had been rated effective (to reflect that he minimally met the revised SGO), the increase from partially effective to effective in that one indicator would have added only one point to the overall score. The annual summative evaluation indicates that Rios' overall score was a 5. Even with one more point added,

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<sup>26</sup> See, *Dodson v. State-Operated Dist. Of Newark*, Dkt. No. A-2306-16T4 2018 N.J. Super. Unpub. LEXIS 2230 (App. Div. October 11, 2018) (The arbitrator's determination that the District failed to include an SGO score was not the end of the process; under TEACHNJ, the arbitrator is then required to determine whether this failure was material. The arbitrator determined that the teacher's scores were so low that even if the SGO score was included in the analysis, his total score remained too low for an “effective” rating and would still have been subject to tenure charges. Therefore, the arbitrator concluded that that the failure to substantially comply with the evaluative process did not materially affect the outcome, requiring a decision in favor of the district. The arbitrator's decision was upheld.)



therefore, the overall rating, at a 6, would remain ineffective. Accordingly, any mistake of fact in the SGO score for Competency 4(f) was not material to the outcome of the evaluation.

Finally, Rios argues that the District failed to provide professional development and support to Rios as required given his CAP. The facts do not support this conclusion. As set forth in the Background section, both Echevarria and Rodriguez described the support that was provided to Rios over each school year. In addition to significant professional development offered to all teachers, including PLC and SIP and District and other school based programs, other support was provided to Rios. In both schools, administrators met with Rios informally, as part of their informal observations, to discuss their observations and provide individual guidance. Rios was afforded opportunities to observe others modeling lessons. The record also demonstrates that Rios did meet with coaches; while meetings with coaches may not have been frequent or regular, opportunities to have such meetings were provided. Further, arrangements were made for an instructional special assistant from the math department to visit Rios class with Echevarria and to provide guidance. On-line resources to support Rios in various areas were given to Rios.

Rios claims that he received no professional development. I do not credit this testimony given the documentary evidence and the credible testimony of administrators. Indeed, Rios testified that he was never provided training on topics such as rich tasks or silent signals when the record demonstrates that training programs in these areas were offered to all teachers. His blanket denial in the face of the evidence produced impacts the credibility of Rios' testimony overall. Although it is true that administrators were unable to confirm in their testimony how often Rios met with the resources provided or attended certain professional development meetings, the record supports that these resources were provided to Rios. To the extent that Rios did not take the initiative to take advantage of the opportunities that were provided to him, that failure cannot be attributed to the District.

On the entirety of the record, therefore, the District has proven that it substantially adhered to each aspect of the evaluation process during the 2017-2018 and 2018-2019 school years. For the reasons set forth above, any deviation from the process did not materially impact the overall ratings Rios received for each of these school years.

## **B. Mistake of Fact:**

Rios next challenges the evaluations claiming that there were mistakes of fact impacting the validity of the evaluation. In particular, Respondent argues that the evaluations incorrectly identified his first grade class as a bilingual class and that both evaluations failed to note that he was a co-teacher.<sup>27</sup>

As to the first issue, any mistaken belief that his first grade class was a bilingual class was not material to Rios' ratings. The only reference in the evaluations to the class being bilingual was in the summary of performance in the annual summative evaluation at Oliver II; Rodriguez wrote that "Mr. Rios began the year by teaching 6-8 bilingual students in the areas of Math & Science. By January 2019, he was the co-teacher for the bilingual first grade classroom." (District Exhibit 20.) While true that the class was not formally designated a bilingual class, it is undisputed that the class had a large number of students who spoke either Spanish or Portuguese and that the teachers translated as needed to assist the students; this may explain the confusion. Nonetheless, there is nothing in the evaluation to suggest that his ratings in any competency would have been any different had the evaluation not incorrectly referenced the first grade class as bilingual in the summary. That the class was not bilingual was not relevant to whether Rios was certified to teach the class. Rios led and was observed only in math instruction, which was within his certifications even in a non-bilingual class setting. All other classes were properly identified as bilingual.

Respondent also maintains that the failure to indicate that he was a co-teacher is a mistake of fact and, further, that as a co-teacher he should not have been rated on certain competencies, citing Mendez' testimony. As a preliminary matter, I note that his annual summative evaluation at Oliver II expressly stated that he was a co-teacher in the first-grade class where his role, other than in teaching math, was largely supporting Kadus. As to his other assignments at Abington School and Oliver II, although Rios was a co-teacher, he was responsible for teaching math to the students while the co-teacher taught ELA and social studies.<sup>28</sup> He planned and delivered the lessons. That he was a co-teacher did not lessen his responsibilities to his students, as measured by the Framework, in any competency. That the

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<sup>27</sup> Other mistakes of fact were addressed in the prior section; as indicated, to the extent there were any mistakes of fact, they were not material to the outcome of the evaluations in this case. Other alleged "mistakes" would require that I second guess the evaluators' pedagogical determinations which I have no authority to do.

<sup>28</sup> At Oliver II, Rios also taught science to the sixth, seventh and eighth grade students.

evaluations at Abingdon School did not mention that he was a co-teacher was not material as he was responsible for his area of specialization and Velez was responsible for her area of specialization. He was not observed in areas he simply supported while Velez taught, but rather in his area of specialization, i.e., math. The same is true at Oliver II for the first half of the school year. Even when teaching in first grade at Oliver II, Rios led the math instruction while supporting Kadus in the other areas. He was not evaluated, however, while acting in a supporting role in the classroom; rather, he was evaluated teaching math lessons to the students. In that capacity, it was Kadus who was in the supporting role. While Kadus prepared the lesson plans, she credibly testified that Rios had access to the lesson plans, as well as all of the materials and that Rios was free to modify the lesson or deliver it in a different manner if he chose to do so.

More importantly, contrary to Respondent's claims, Mendez did not testify that as a co-teacher, the teacher has any less responsibility for performance in each of the competencies in the Framework. While Mendez testified that not all competencies must be rated in all observations, a review of her testimony does not persuade me that Rios could not be rated in Competency 1 or any other competency as a result of being a co-teacher. Rather, Mendez testified that

a co-teacher would be an individual that would be literally working in conjunction with another teacher. A co-teacher is not less than, is not more than another teacher, but literally would be another licensed individual that is responsible for the students in the class but would specialize in whatever area they possess a license for, but is just literally another individual that is in the class and would enhance the learning the idea being that there would be an opportunity for two individuals that are licensed, and in this case, have a license or specialization in different areas that can only enhance the learning environment.

(2/12/20 Tr. at 22.) Even in those instances where another teacher prepares the lesson, Mendez testified that a teacher still has an important role to play in each of the competencies; she did not testify that the District was precluded from rating a co-teacher in certain competencies.

For all of these reasons, neither the incorrect designation of the first grade class as a bilingual class nor the failure to identify that he was in a co-teaching situation in certain evaluations were mistakes of fact that had any impact on the ratings at issue in this case; these

mistakes, if they can be deemed mistakes at all, were not material to the overall ratings in this case.

**C. Arbitrary and Capricious Action by the District:**

Respondent maintains that the District treated him in an arbitrary and capricious manner and for that reason, the tenure charges cannot stand. According to Respondent, the District's actions did not make it possible for Rios to succeed. In so arguing, Respondent presents a multitude of grievances, from his treatment as an EWPS to the failure of the District to properly implement bilingual education and provide appropriate materials. His complaints include, but are not limited to, the failure to provide a chair in his classrooms rendering him exhausted from standing all day, to excessive coverages, to requiring that he spend a substantial amount of time preparing for his classes. While I will try to address each one of the claimed offenses, the failure to address them all should not be considered a failure to consider them all. Having carefully reviewed the record, I do not find that any of the arguments that Respondent raised, viewed individually or in totality, support the conclusion that the District's treatment of Rios was arbitrary and capricious.

Rios status as an EWPS was not unique to him; there are many other teachers in that status throughout the District.<sup>29</sup> While it is clear that Rios would prefer a permanent placement and does not want to be an EWPS with a new assignment each year, not every teacher in this position feel as he does. Indeed, Mendez testified that although all teachers with this status are able to enter the pool to apply for transfer to permanent positions – and Rios, while not successful, did so – 70-75 percent of EWPS teachers choose not to enter the pool to be considered for a transfer to a permanent position. This evidence is inconsistent with Rios' claim that the District treats EWPS teachers poorly and without respect.

Further, having had the opportunity to hear from the administrators and two of his colleagues at Oliver II, there was no evidence at all of a lack of respect for Rios. I am persuaded that in each school, Rios was treated as other teachers on staff, whether or not he was listed under the heading of bilingual teacher on the Abington School organization chart.

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<sup>29</sup> In *IMO Tenure Hearing of Alexander Gonzalez (State Operated School District of the City of Newark, Essex County)*, Agency Docket No. 264-9/15 (Arbitrator Timothy Brown, March 3, 2016), Respondent made similar arguments, claiming that being designated an EWPS and reassigning him to an elementary school rather than the high school where he successfully taught for years, set him up for failure and constituted arbitrary and capricious conduct by the District; the arbitrator rejected these arguments.

Indeed, while Echavarria testified that he was aware that Rios was an EWPS as his compensation was not on the school's budget, Rodriguez testified that she was not aware of Rios' status as an EWPS while he was at Oliver II. In addition, Coleman, who was called as a witness on Rios' behalf, also testified that she did not know that Rios was an EWPS during the time he was teaching at Oliver II.

Rios complains that he was not provided a chair or desk or space for his personal belongings in either Abington School or Oliver II (only in the first grade classroom). In fact, he had a similar complaint about his prior assignment at Washington Carver Elementary School. He conceded, however, that he was not prohibited from sitting and that there was indeed space where he could have stored his personal belongings. Rios also testified that it was not proper for a teacher to sit in the classroom; teachers are expected to stand. Thus, having to stand while teaching did not make his status as an EWPS any different than other teachers in the school. Nor do I find that the fact that he was not provided a chair caused him to be unable to competently perform his teaching duties. Rather, this is one more complaint that Rios asserts in an effort to dismiss the tenure charges.

Rios complains that when he was not the homeroom teacher, he did not have his own access to PowerTeacher. Rios admitted, however, that the fact that he did not have his own access code was because he was not the homeroom teacher; it had nothing to do with his status as an EWPS. Indeed, when he was the homeroom teacher for the first half of the school year at Oliver II, it was he and not the co-teacher who had access. There is no indication that his performance was improved during that time as a result of having access to PowerTeacher. Further, PowerTeacher is a tool used for keeping attendance and grades. That he had to input his grades when Velez was in the classroom at Abington School, while inconvenient, did not materially impact his ability to teach his classes. Further, neither the fact that he may have had to track student grades and progress on paper or in some other manner for his own reference, nor that he had to note attendance on paper when the homeroom teacher was absent, can be deemed to have created an obstacle to Rios providing effective teaching to his students. (Indeed, before computers, all teachers kept these records in grade books or other non-electronic means.) Significantly, Rios had access to a computer and to on-line materials, including curriculum, separate and apart from the PowerTeacher program. I am not persuaded that failure to have his own access code to PowerTeacher when working with

another teacher who was designated the homeroom teacher can be deemed arbitrary and capricious treatment or was otherwise set up to make him unsuccessful as a teacher.<sup>30</sup>

Rios also argues that he was constantly being called out of his classroom to provide coverage for absent teachers or for meetings and that he was required to proctor certain state mandated exams. Addressing the coverage issue first, the administrators who testified did not deny that Rios was asked to cover classes on occasion, either for a full day or for a period or two. All of the administrators, however, testified that this was not a frequent occurrence. Rios, on the other hand, suggests that he was out of his classroom performing coverage – and unable to teach his students – for a significant period every month. While he only kept track of coverages for a short time while at Abington School – and during that time, most of the coverages were for short periods during the day – he claims without any backup that the coverages were far more significant during subsequent periods. As is not unusual in such cases, the truth likely lies somewhere between the administrators’ claim that he covered classes on only a handful of occasions and Rios’ claim that it was constant.

The District’s witnesses acknowledged that in any class with two licensed teachers, one of the teachers may be asked to cover for another teacher on a short-term basis – either to cover a particular class or for a full day if the school cannot find a substitute for the day. Mendez testified that any teacher with more than four prep periods a week can be asked to cover other classes during a prep period without additional compensation. If asked to cover a class during one of the four prep periods, the teacher is paid for the extra time.<sup>31</sup> There is no evidence that Rios ever sought payment for covering classes notwithstanding his claim that he was constantly asked to cover classes, including during prep periods. Moreover, while Rios complains about excessive requests for coverage, at no time did he file a grievance at either Abington School or Oliver II regarding these requests. Further, Rios had a certain number of periods where he was supporting the co-teacher, but not leading the math lesson; asking that

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<sup>30</sup> See, *IMO Tenure Charges of Tonja DeCaro (Board of Education of the City of Newark, Essex County)*, Agency Docket No. 210-8/18 (Arbitrator Earl Pfeffer, August 29, 2019) (Respondent argued that her inability to access the GOLD system used for data collection and student assessment became a negative factor in her observations and evaluations. The arbitrator stated that notwithstanding these difficulties, “it remains that it was a requirement she maintain data on her students, track their development and differentiate her instruction, independent of her ability to utilize the GOLD system...Her obligation to record data and assess her student’s progress was not tied to her ability to access GOLD. Those obligations existed apart from and even pre-dated the GOLD system, which was merely the tool she was expected to use in aid of that process...” *Id.* at 75-76.)

<sup>31</sup> Rodriguez testified that when teaching the 6<sup>th</sup> and 7<sup>th</sup> graders at Oliver II, he had five prep periods.

he provide coverage during those periods would not impact his teaching math. While Rios claimed that he was often asked to cover classes even when he was supposed to be teaching math – and, in fact, was pulled out for coverage in the middle of teaching a math lesson -- this testimony is not credited. Indeed, while teaching with Velez at Abington School, Velez was teaching ELA when Rios taught math and could not simply take over his math class.<sup>32</sup>

In Oliver II, Rios does not claim that he was called upon to cover classes when he was teaching the sixth, seventh and eighth graders. Instead he claims that he was constantly called upon to cover classes when assigned as a co-teacher with Kadus. Once again, however, his testimony as to the number of days is not credited. Indeed, according to Rios, between January 2 and April 10, 2019, he was called upon to cover classes on 40 separate full school days and five times for meetings or preps; if this were true, it would represent well over 50 percent of school days during that time. This testimony was not supported by notes of any kind or the testimony of any of the other witnesses. Moreover, as with his testimony overall, this claim appears to be exaggerated. Indeed, his testimony regarding coverage appeared off-the-cuff, often qualified by “maybe,” e.g. “maybe” five days, “maybe” more.

Kadus, his co-teacher, testified that he was asked to cover at least three times during the first couple of weeks he was in her classroom and then intermittently thereafter during a prep period; she could not recall how often he was called to cover other classes. She testified that he would still teach the math class, but if the coverage did impact the math period, she was always prepared to teach the math lesson to the students. Similarly, Coleman testified that Rios was asked to cover classes but she, too, did not know how often that occurred. She testified that Rios covered for her on three occasions for 30 minutes to an hour, and once for a full day (which was inconsistent with Rios’ testimony as to his coverage for Coleman). I am persuaded that if Rios was called upon to cover classes with the frequency he claimed during that short time period, Kadus would have recalled that it was excessive, even if she did not recall the precise number of days. The same is true for Coleman, who was also serving as the Union representative for the school and whose classroom was near Rios’ and Kadus’ classroom.

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<sup>32</sup> Rios did not call Velez as a witness to confirm his claim that he was constantly asked to cover classes while teaching with Velez requiring that Velez take over for his math lesson while she was teaching ELA.

As to time proctoring, it is undisputed that all teachers are called upon to proctor exams. The resources needed to be able to meet the requirements for state testing mandated that all licensed teachers who could be available for testing served as proctors. Mendez testified that depending on the school size, testing could take several weeks and that extensive planning is required for coverage based on the mandates for testifying. Those who teach ESL, co-teachers, resource teachers and others who have extra prep periods or are not attached to a classroom are often called upon to proctor exams; it is widely understood throughout the District and by the Union that this would occur. Heintz, who was responsible for testing at Abington School, testified consistently; any licensed teacher who could be available to proctor was called upon to do so. According to Heintz, this is the reality of testing in New Jersey. (1/16/20 Tr. at 77.) Rios was not treated differently than other teachers as relates to proctoring. It is a difficult situation that all schools must address. That he was required to proctor exams cannot be deemed arbitrary and capricious treatment of Rios, as an EWPS or otherwise.

Rios also maintains that the District's actions were arbitrary and capricious because he was observed at Oliver II just 11 days after his reassignment to the first grade class. He claims that he was called to cover other classes on five of those dates and, therefore, had only a few days with the students before the observation.<sup>33</sup> Each of the cases Respondent cites in support of this claim are distinguishable. See, e.g., *IMO Tenure Charges of Jodi Thompson (State-Operated School District of the City of Newark)*, Agency Docket No.: 240-8/14 and 16-1/15 ((Arbitrator Daniel Brent, June 19, 2015) (Held that tenure charges were improper, in part, where one of the observations occurred on the teacher's first day teaching a new subject to a new group of students upon returning from leave, undermining the validity of the 2013-2014 annual summative evaluation.); *IMO Tenure Charges of Rinita Williams (State-Operated School District of the City of Newark)*, Agency Docket No.: 241-8/14 (Arbitrator Tia Schneider Denenberg, January 31, 2015) (Finding that observation conducted on the day after a teacher returned from an extended leave was arbitrary.); *IMO Tenure Charges of Patsy Cuntrera (Passaic County Vocational School District)*, Agency Docket No. 223-8/15 (Arbitrator Mattye Gandel, November 27, 2015) (Finding observation arbitrary when

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<sup>33</sup> Kadus testified that he was called to cover three times during those first weeks, not five.



conducted on the day after a teacher's return from an extended leave and when observations were conducted on back to back days.)

In this case, Rios was not observed on his first day back from a medical or other leave, nor on his first day of a new assignment. The observation took place 11 days after he arrived in Kadus' first grade class. Although in an email to Avraamides after the post observation conference he claimed that he was called to do coverages on three full days and two other days to cover meetings or preps, providing him eight days in the classroom with the students prior to the observation, when asked how many days he had with students prior to the observation, Rios testified "[i]t was maybe five days, but maybe I was calling to cover." (2/20/20 Tr. at 190.) Indeed, he provided this testimony after discussing the email, written closer in time, wherein he stated that he had eight days with the students prior to the observation, once again raising questions as to the overall credibility of Rios' testimony. Further, teaching first grade was not new to Rios; he taught first grade while at one of his prior assignments. He was also observed teaching in his area of specialization, i.e., math.

More importantly, however, while it was not necessary to conduct another announced formal observation as his prior observation was announced, Avraamides testified that she decided to conduct an announced observation precisely because of the recent move to first grade. By making it another announced observation, including a pre-observation conference, Rios would have time to prepare for the lesson. While Rios claims that he was not present to determine prior learning other than anchor charts in the room, by making it an announced lesson, he had the opportunity to review prior learning, either by review of student work, review of lesson plans and/or conversations with Kadus, to be fully prepared for the lesson; that he did not do so cannot be grounds to invalidate the observation.

Significantly, although Rios claims he raised his concern that it was too soon to observe him in this assignment during the pre-observation conference, Avraamides testified that no such concern was raised. Rather, he completed the form and they discussed the lesson. I credit Avraamides' testimony. Indeed, in his January 25, 2019 email to Avraamides complaining about the observation (after he received his rating), Rios does not claim that he had raised this concern with Avraamides at the pre-observation conference. I am persuaded that if this concern had been raised before the observation, Rios would have referenced it in this email. Further, Rios claimed that although this was an announced observation,

Avraamides did not show up when planned; she observed a few days later (on an unknown date) when he was not prepared to be observed. Once again, I do not credit this testimony. If this had been the case, it is not credible that Rios would not have raised this issue in his email to Avraamides following the observation. Further, although Respondent had the opportunity to ask Avraamides whether she observed the lesson on the planned date, she was not asked this question. Indeed, nothing in her testimony or the evaluation suggested that the announced observation did not occur on the date planned or that it was not the lesson discussed during the pre-observation conference. To the contrary, the observation evaluation indicates that the lesson taught was the same as the lesson discussed at the pre-observation conference.

Rios also claims that the District treated him in an arbitrary and capricious manner as he was required to teach outside of his areas of certification and, citing *Pugliese v. State Operated School District of Newark*, 2018 N.J. Super. Unpub. LEXIS 1999, \*22-23 (App. Div. 2018) asserts that this fact alone renders the tenure charges void on its face. The facts in *Pugliese*, however, are distinguishable. In that case, the teacher held an elementary school teacher certificate which did not authorize her to teach departmentalized social studies to middle school students. Nonetheless, she was evaluated and terminated for inefficiency in teaching social studies. The Court found that evaluating and terminating the teacher for inefficiency based on teaching in a subject matter that was outside her certification was improper.<sup>34</sup> In this case, however, contrary to Rios' claim that he had extensive assignments to teach outside his certification, Rios' primary assignment during these two school years was teaching math, in most cases in a bilingual education classroom. Moreover, he was observed only in his content area. The assertion that "it caused untold stress to Rios, who knew he could not teach so many different subjects, and was forced to spend inordinate time educating himself, to no avail" and taking time needed to be a successful math teacher, is not supported by the facts.

Significantly, Rios primary assignment in Abington was teaching math to a bilingual class; this was precisely in his area of certification. The administrators testified that Rios was not assigned to teach other subjects. While he may have assisted Velez in the classroom during ELA and System 44, he was not required to prepare for these subjects. Nor was he

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<sup>34</sup> The tenure charges were found invalid on other grounds as well, not relevant to this case.

observed while in this role. That he may have covered for Velez when she was absent, teaching all subjects on those days, such short-term assignment was not his primary responsibility and was not unusual in a co-teaching situation. There is no evidence that Velez was absent on a substantial number of days. Nor is it clear that he was required to prepare the lesson plans for the other subjects on those dates. Rios did not establish that the time spent teaching the class when Velez was absent was so substantial that it could reasonably cause him to be unsuccessful in teaching his primary subject, math.

Similarly, in his first assignment at Oliver II, he taught a bilingual class both math and science. Avraamides testified that every math teacher in the District, except at the high school level, teaches either math and science or ELA and social studies. That is how the subjects are paired off. "No one has a special science cert. If you do, then you are in a different type of school with a different type of class that's strictly science." (2/12/20 Tr. at 107.) There was no evidence introduced to rebut this testimony. Indeed, this testimony is consistent with his prior assignment at William Horton School where he was assigned to teach math and science to seventh and eighth grade students.

While teaching science was an additional responsibility that was outside his certification, it is significant that he was not observed teaching science; he was always observed while teaching in his strength area, math. Further, the record is clear that he was provided with resources to facilitate teaching science. (See, e.g., District Exhibit 33.) In asking that Rios teach science to sixth, seventh and eighth grade students, Rios was not treated differently than other teachers in the District. The fact that it required additional preparation time is not a basis to find that the District acted in an arbitrary and capricious manner.<sup>35</sup>

As to his assignment in the first grade classroom, once again Rios led math instruction for which he was certified and had prior experience. He was not required to prepare for any other subject. That he found it difficult to assist Kadus in small groups in System 44 or other ELA related subjects for first graders – areas for which he did not lead instruction or prepare the lessons and was not observed – cannot be cause to invalidate his evaluations which were

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<sup>35</sup> Rios also claimed that for the first two weeks of his assignment at Oliver II, he was required to teach all subjects. A long term substitute was then located to teach ELA and social studies, with a permanent teacher hired thereafter. Rios was not required to teach all subjects for a substantial amount of time and was not evaluated during those first two weeks.

based on his math instruction, not his abilities in assisting Kadus with other subjects that she was responsible for teaching.

Rios also claims that he was not qualified to teach the subject matter in the various classes that he was asked to cover. He was not an art, music or gym teacher. He claims that often when he took his class to such special class, the teacher was absent and he was required to return to the classroom and remain with the class; he testified that he was unable to teach in the subject area planned for that period. This complaint does not establish that the District required that he teach in an area outside his certification or that he was treated any differently than other teachers. Indeed, Rios admitted that this happened to all teachers in the school; it was not just him. Moreover, Rios admitted that no one ever told him that he was required to teach music, art, gym or any other subject during these times. Finally, while I am persuaded that this situation did occur on occasion, I am not persuaded that it was a frequent occurrence. Indeed, Rios did not complain to anyone about this situation or seek compensation for covering a class during his prep period or otherwise file a grievance.

Rios also asserts that the District failed to understand and properly implement bilingual education, to have bilingual education administrators to evaluate bilingual education teachers and to provide the necessary resources which further contributed to the District's arbitrary and capricious conduct. As a preliminary matter, I note that this is not the appropriate forum to decide whether the District is in compliance with all statutory and regulatory requirements for bilingual education. To the extent, however, that the arguments raised apply to Rios' claims of arbitrary and capricious treatment, I will address them. As Respondent notes, a bilingual education program refers to instruction in two languages, English and the native language of the student. "According to the New Jersey legislature, 'experience has shown that public school classes in which instruction is given only in English are often inadequate for the education of children whose native tongue is another language' and therefore bilingual programs were established 'pursuant to the policy of the State to insure equal educational opportunity to every child.' *N.J.S.A.* 18A:35-15." (Respondent's Closing Brief at p. 6.) As Ruiz testified, while a teacher in a bilingual program uses both English and the native language (for Rios, Spanish) to teach, the goal is to provide a transition to learning in the English language.

Rios testified that while the District provided appropriate bilingual materials when he taught at the high school level, the District did not provide materials in both languages at the other grade levels requiring that he spend an inordinate amount of time translating materials for use in the classroom. Respondent claims that the District's failure to provide Rios with materials necessary to carry on instruction in two languages requiring this additional preparation time, as well as the distress caused by this failure, "perpetuated educational disadvantages that Rios is tasked with ameliorating as a bilingual instructor, but could not due to the failings of the District." (Respondent's Closing Brief at p. 81.) To support his claims, Rios cites an Office of Civil Rights and Department of Justice "Dear Colleagues" letter dated January 7, 2015 (the "Letter"), which is recognized as authoritative by the Department in its "fall Checklist for New Bilingual/ESL/ELS Supervisors and Coordinators." (Respondent's Closing Brief at 6.) Although Rios selectively quoted part of a sentence in the Letter, under Staffing and Supporting EL Programs, the Letter provides, in part, as follows:

School districts have an obligation to provide the personnel and resources necessary to effectively implement their chosen EL programs. This obligation includes having highly qualified teachers to provide language assistance services, trained administrators who can evaluate these teachers, and adequate and appropriate materials for the EL programs.

At a minimum, every school district is responsible for ensuring that there is an adequate number of teachers to instruct EL students and that these teachers have mastered the skills necessary to effectively teach in the district's program for EL students...

(Letter at p. 14.) No testimony, case law or other authority was provided to provide guidance as to these provisions.

The District has followed the guidance provided in this Letter by establishing a bilingual education program and hiring bilingual educators to teach those programs. While the Letter indicates that appropriate materials must be provided for use in bilingual education classes, it does not provide that all materials used must be in both English and the native language in order to meet the requirements. Further, the Letter's language that Respondent relies upon does not indicate that a district fails to have appropriate materials for the program when it has a bilingual teacher, fluent in the native language, able to translate the instruction and materials, as appropriate, into the native language for the students.

Rios was not creating materials out of whole cloth; curricula materials were provided by the District and, in some instances, materials were provided in Spanish. (See e.g., District Exhibit 41, an email to Rios from Rodriguez regarding Math Online Resource in Spanish and District Exhibit 44, an email from Stavrou, the Oliver II math coach, to Rios providing a link to examples of Spanish math anchor charts for Rios' use.) In addition, this was not the first time Rios was teaching math and science to middle school grades. Neither the fact that his preparation as a bilingual teacher included translating some or all of the math (and at Oliver II sixth, seventh and eighth grade science) materials into Spanish to assure that the students were able to understand the materials and ultimately transition to more English instruction, nor that he spent significant time preparing his materials for class can be considered arbitrary and capricious treatment. Rather, as the District argues, "[c]reating lesson plans and preparing materials to teach his students is part of his job as a teacher." (District's Reply Brief at p. 11.) It is also worth noting that Rios was not the only bilingual education teacher at the lower grade levels. No evidence was presented to indicate that the alleged lack of bilingual materials was a problem for any other bilingual education teacher in the District or that Rios, or any other employee, filed a grievance or otherwise complained about the lack of material translated into the native language of their particular students.

With respect to Rios' argument that the District's actions were arbitrary and capricious because it did not have bilingual education administrators evaluate his performance, the language Rios relies upon in the Letter does not contain such requirement and no other authority has been cited that imposes such requirement. The Letter requires that districts have "trained administrators evaluate these teachers." All of the administrators who observed Rios teach in a bilingual class were fully trained to evaluate teachers in the District. Further, all of the administrators who observed Rios, with the exception of Heintz, were fluent Spanish speakers. While Heintz was not fluent, she testified that she grew up in a Spanish speaking area, her children are fluent Spanish speakers and that she understands enough Spanish to get the gist of what was being said. She is able to meet with parents who speak only Spanish, understanding what they say, although responding in English. As to the class she observed Rios teach, she testified that "[h]e was saying it in English and then saying it in Spanish" and that she was able to understand the bulk of what Rios said in class that day. Her observation evaluation of his teaching that day expressly noted that he spoke in both languages. On this

record, and without authority to support that only administrators certified in bilingual education and only administrators fluent in the native language can evaluate teachers in a bilingual classroom, I do not conclude that the observation by Heintz, must be disregarded as inconsistent with the requirements for bilingual education.

Finally, while relying on a particular sentence in the Letter, Respondent eliminated the reference to the obligation to have "highly qualified teachers" to provide language assistance services for bilingual education. In this case, the District, through the evaluation process, is endeavoring to assure that it does, in fact, have highly qualified teachers provide bilingual education. Having determined, over the course of two school years, that Rios is not an effective teacher under the Framework criteria, and having brought these inefficiency charges, the District endeavors to assure that its teachers, whether in bilingual education instruction or otherwise, are effective teachers throughout the District, consistent with TEACHNJ as well as the requirement set forth in the Letter for bilingual education.

For all of the foregoing reasons, Respondent's claim that the tenure charges should be dismissed because the District acted in an arbitrary and capricious manner is rejected.

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In conclusion, the District has met its burden of establishing that the statutory criteria for tenure charges have been met. For the reasons set forth above, to the extent that there was any deviation in the evaluation process as outlined in paragraphs (1) to (4) of *N.J.S.A. 18:A:6-17.2*, I do not find that the deviation materially affected the outcome of the evaluations. Accordingly, pursuant to TEACHNJ, I am required to render a decision in favor of the District and to dismiss the employee.

By reason of the foregoing, I issue the following:

**AWARD**

The Tenure Charges brought against the Respondent, Gustavo Rios, based on inefficiency as a tenured teacher are sustained. Rios shall be dismissed as a teacher for the District.

Dated: August 14, 2020

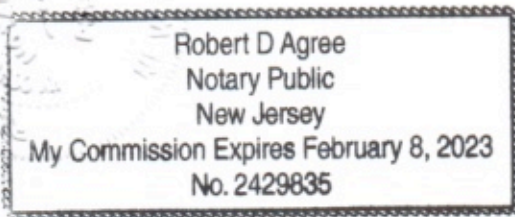
  
Melissa H. Biren

State of New Jersey)

County of Morris )

On this 14th day of August 2020 before me personally came and appeared MELISSA H. BIREN, to me known to be the individual described in and who executed the foregoing instrument and acknowledged to me that she executed the same.

Notary Public



Robert D Agree  
Notary Public  
New Jersey  
My Commission Expires February 8, 2023  
No. 2429835