`NEW JERSEY DEPARTMENT OF EDUCATION

In the Matter of The Tenure Charges Proffered by

THE CITY OF LINWOOD BOARD OF EDUCATION, ATLANTIC COUNTY

"Petitioner"

-against-

KIMBERLEY PESCHI

"Respondent"

Pursuant to the TEACHNJ Act

Agency Docket No. 76-4/17

APPEARANCES

FOR PETITIONER

COOPER LEVENSON
William S. Donio, Esq.
Kasi M. Gifford, Esq.

FOR RESPONDENT

MELLK O'NEIL
Edward A. Cridge, Esq.

BEFORE: Earl R. Pfeffer, Arbitrator

BACKGROUND

These proceedings emanate from an incident in the cafeteria of the Belhaven School in Linwood, New Jersey, on February 9, 2017. Belhaven music teacher, Kimberley Peschi ("Respondent"), while on lunch duty, lifted her right foot to initiate contact with the chair of a 12 year old 6th grade boy, M.M., who had rocked backwards while eating at a school cafeteria table and talking with his friends.[1] The child then fell to the floor. It is the nature of that contact, whether it caused M.M.'s fall, his impact with the floor, and Respondent's actions in the wake of that incident that are in dispute. The District maintains the contact was intentional, forceful, unnecessary, excessive and punitive, and constituted conduct unbecoming a school teacher, in particular because it endangered the child and in fact caused him injury, embarrassment and humiliation. Respondent insists her contact with M.M.'s chair was meant simply to right it from an unsteady and dangerous position, and that he rolled sideways off the chair as he lost his balance when Respondent inadvertently "tapped" the chair's back instead of the seat, which she had intended merely to push forward.

Following an investigation of the incident, Michelle Cappelluti, Ed.D., Interim Superintendent for the Linwood Board

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[1]Student witnesses are referred to herein solely by their initials.

of Education ("Board" or "School District"), by Certification sworn on March 24, 2017, filed a Statement of Charges and Specification Regarding the Employment of Kimberley Peschi, A Tenured Faculty Member Within the Employ of the City of Linwood Board of Education ("Tenure Charges" or "Statement of Charges" or "Charges and Specifications") against Respondent, and same were served by Board Secretary (and School Business Administrator) Terri J. Weeks, along with fifteen (15) day Notice the Tenure Charges and any Response timely received from Ms. Peschi would be presented to the Board.

The Board, thereafter, met in Executive Session during a special meeting convened on April 12, 2017, and as stated in a Certificate of Determination sworn to by Weeks pursuant to N.J.S.A. 6A:3-5.2 for the purpose of transmitting the Tenure Charges to the Commissioner of Education, "[t]he Board determined by a majority vote of its full membership that there is probable cause to credit the Statement of Charges and the Certificate of Superintendent Michelle Cappelluti in support thereof and, that such charges are sufficient, if credited, to warrant dismissal of Kimberley Peschi." As further stated by Weeks in the Certification of Determination, the Board suspended Respondent without pay pending disposition of the Tenure Charges. The Certificate of Determination along with the Statement of Charges were thereupon submitted to the Commissioner of the New Jersey

Department of Education pursuant to N.J.S.A. 18A:6-11, and served upon Respondent's counsel.

By correspondence to the Department of Education's Bureau of Controversies and Disputes on April 17, 2017, Respondent, through her attorneys, asked that the Tenure Charges be held in abeyance and the tenure hearing be stayed pending resolution of criminal charges against Ms. Peschi arising from the same incident. Respondent cited Ott v. Board of Ed'n of the Twp of Hamilton, 160 N.J. Super. 333 (App. Div. 1978) in support of her request. By letter dated April 18, 2017, the Bureau of Controversies and Disputes advised the parties this matter had been placed in abeyance.

Thereafter, following a criminal trial in Linwood City Municipal Court, and a subsequent appeal by way of trial *de novo* before the Atlantic County Superior Court, Law Division, the criminal charges were resolved in Respondent's favor, and pursuant to a request from Respondent the Office of Controversies and Disputes restored the Tenure dispute to active status on May 14, 2019. On May 15, 2019, Respondent filed her answer to the Tenure Charges.

Thereafter, and following a review of the Charges for sufficiency, the matter was referred to arbitration before me pursuant to N.J.S.A. 18A:6-16. By letter dated May 28, 2019, I was appointed to hear and decide the dispute.

The parties subsequently presented to me various pre-hearing issues, most notably, upon motion by the Board, unopposed by Respondent, I issued an Order on July 18, 2019, to the New Jersey Department of Children and Families ("DCF"), in particular its Institutional Abuse Investigation Unit ("IAIU"), directing same to supply to me for *in camera* review a complete copy of its files and records pertaining to its investigation of Ms. Peschi and the incident at Belhaven Middle School on February 9, 2017, which is the subject matter of these Tenure Charges. On or about August 12, 2019, I received DCF's response to my Order and on October 21, 2019, following my review of same, I forwarded the redacted IAIU records to counsel.

Also pertaining to document production in this case, the parties jointly presented to me for signature a Consent Confidentiality Order which I and counsel signed on or about July 24, 2019. Said Order set forth the parties' joint agreement on the use of certain Board files and records, as well as files and records maintained by IAIU, in connection with the February 9, 2017, incident, in particular the confidentiality of those files and records and their use solely for the prosecution and defense of the Charges and Specifications (and any related administrative appeal).

Following the resolution of these and other pre-hearing matters, hearings before me were convened at the Offices of

Cooper Levenson in Atlantic City, New Jersey, on October 28, October 30, November 11, November 22 and December 16, 2019. At the hearings, which were transcribed, the parties each presented evidence and argument in support of their respective positions.[2] All witnesses were sworn. Following completion of the proceedings, the parties on February 12, 2020, submitted post-hearing briefs. Following my receipt of same, the arbitration record was closed.

DISCUSSION AND FINDINGS

The Charges and Specifications

The Charges and Specifications consist of three (3) numbered Charges containing fifty-eight (58) unnumbered Specifications (which I have numbered sequentially for ease of reference in this Decision) spelled out in five (5) pages of text. The gravamen of the allegations is the Board's contention Respondent, on February 9, 2017, while she was assigned to monitor student lunch in the Belhaven cafeteria, "intentionally and purposefully pulled down with her foot and leg, the back of a cafeteria chair in which [M.M.] was seated, causing him to suddenly, unexpectedly and violently fall to the floor." The Charges allege the incident, which was captured on a school cafeteria security video ("the

[2]Citations herein to the hearing transcripts are denoted as "[hearing date] at [page]," e.g., "10/28 at _____."

video") and also witnessed by M.M.'s peers as well as staff, caused him to "suffer physical injury, personal embarrassment, and public embarrassment."

The Tenure Charges base the wrongfulness of Respondent's conduct in the school cafeteria on February 9, 2017, upon allegation she breached multiple Board policies and regulations, as well as New Jersey law. Charge 1 asserts she violated Board Policy No. 3281, and recites same in Specification 11. Policy No. 3281 states, in relevant part:

> **INAPPROPRIATE STAFF CONDUCT**
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> **The Board of Education recognizes its responsibility to protect the health, safety and welfare of all pupils within this school district. Furthermore, the Board recognizes there exists a professional responsibility for all school staff to protect a pupil's health, safety and welfare. The Board strongly believes that school staff members have the public's trust and confidence to protec the well-being of all pupils attending the school district.**
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> **In support of this Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. In appropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.**
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> **The Board recognizes and appreciates the staff-pupil professional relationship that exists in a school district's educational environment. This Policy has been developed and adopted by this Board to provide guidance and direction to avoid actual and/or the appearance of inappropriate staff conduct and conduct unbecoming a school staff member toward pupils.**

School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils. School staff shall not engage in inappropriate conduct toward or with pupils. . . .

*** * ***

A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety and welfare of school pupils. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate of conduct unbecoming a school staff member.

School personnel, compensated and uncompensated (volunteers), are required to report to their immediate supervisor or Building Principal any possible violations of this Policy. . . .

Charge 1 includes the allegation in Specification 8, that Respondent, after "intentionally and purposefully" pulling M.M.'s chair to the floor with him seated in it, failed to help him get up, declined to render first aid, provide care or apologize, and told him she had pulled his chair down to the ground with him in it to teach him a lesson. Charge 1, Specification 9 alleges she explained, "that's what happens when you lean back in your chair." Charge 1, Specification 11, recites Board Regulation No. 3281 for its definition of "Inappropriate Staff Conduct," which

includes "corporal punishment." According to Specification 9, that comment "demonstrates the willful and malicious intent" of Respondent's acts towards M.M.

Charge 1, Specification 12, alleges that when Respondent on February 9, 2017, the day of the incident, was asked to explain why she had raised her leg and used her foot to bring down M.M.'s chair while he was seated in it, thereby knocking him "suddenly, unexpectedly, and violently" to the cafeteria floor, she answered, "it was a joke gone bad." Charge 1, Specification 13 alleges that the following day, February 10, 2017, after she was shown school security video, she claimed she did not knock M.M. to the floor, "but rather he fell when she went to right his chair, and he lost his balance."

According to Charge 1, Specifications 14, Respondent, with or without training, could not believe it would ever be appropriate discipline, regardless of the infraction, "to pull a child's chair down to the cafeteria floor with the child seated in it." Specification 15 asserts her intentional and purposeful act of knocking M.M. "suddenly, unexpectedly, and violently" to the cafeteria floor "was inimical to the welfare and emotional well-being of the District's Students." Specification 16 alleges her actions were "inimical to the public's confidence and trust in the District."

Charge 2 repeats most of the factual allegations set forth

in the various specifications contained in Charge 1, and asserts that Respondent's act of intentionally and purposefully raising her leg and using her foot to pull down the chair on which M.M. was seated and thereby knocking him "suddenly, unexpectedly, and violently to the Cafeteria floor which caused him injury," constituted corporal punishment prohibited under New Jersey Law, N.J.S.A. 18A:6-1, and Board Policy No. 3217, "Use of Corporal Punishment."

N.J.S.A. 18A:6-1, recited in Charge 2, Specification 9, states:

> **No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution, but any such person may, within the scope of his employment, use and apply such amount of force as is reasonable and necessary:**
>
> **(1) to quell a disturbance, threatening physical injury to others;**
> **(2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;**
> **(3) for the purpose of self-defense; and**
> **(4) for the protection of persons or property;**
>
> **and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section. . . .**

Board Policy No. 3217, recited in Charge 2, Specification 10, states:

> **The Board of Education cannot condone an employee's resort to force or fear in the treatment of pupils, even those pupils whose conduct appears to be open**

defiance of authority. Each pupil is protected by law from bodily harm and from offensive bodily touching.

Teaching staff members shall not use physical force to maintain discipline or compel obedience except as permitted by law, but may remove pupils from the classroom or school by the lawful procedures established for the suspension and expulsion of pupils.

A teaching staff member who:

1. Uses force or fear to discipline a pupil except as such force or fear may be necessary to quell a disturbance threatening physical injury to others, to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil, to act in self-defense, or to protect persons or property;

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4. Punishes pupils by means that are cruel or unusual;

will be subject to discipline by this Board and may be dismissed.

Charge 3, repeats most of the factual allegations set forth in the various specifications of Charges 1 and 2, and alleges same constituted violations of Board Policy No. 3280, Liability for Pupil Welfare, which provides, in pertinent part:

Teaching staff members are responsible for supervision of pupils and must discharge that responsibility with the highest levels of care and prudent conduct. All teaching staff members of this district shall be governed by the following rules in order to protect the well-being of pupils and to avoid any assignment of liability to this Board of Education or to a staff member personally in the event a pupil is injured.

The Superintendent shall prepare such regulations as may be required to enforce the following rules:

1. **A teaching staff member must maintain a standard of care fo supervision, control, and protection of pupils commensurate with the member's assigned duties and responsibilities.**

The Positions of the Parties

Position of the Board

The Board argues "[t]his is a straightforward case." It contends the hearing evidence, which is undisputable, demonstrates Respondent, while on lunch duty on February 9, 2017, crossed from the 7th grade side of the cafeteria, to which she was assigned, over to the 6th grade side where, upon reaching the table where M.M. and his friends were conversing and eating, she encountered M.M. leaning back in his chair and, rather than verbally cautioning him to bring the chair upright or, as she had done with another student that very lunch period, gently push the chair forward to a safe position, she instead intentionally, inappropriately, dangerously and without warning "stomped down" on the exposed backrest of the chair, causing M.M. to fall violently to the ground and injure his head on the floor.

According to the Board, Respondent engaged in this "egregious action" to punish M.M. for leaning back in his chair and teach him a lesson. She made no effort to help the child up from the ground, and showed no interest in providing him care or concern, but simply walked away, later that day not even asking him how he was feeling when she passed him in the school hallway

as he was applying an icepack to his head. The Board argues Respondent's intentional act of corporal punishment and inappropriate staff behavior violated Board policies and New Jersey law, and was conduct unbecoming a public school teacher in this State. It insists she should be terminated from her position as a teacher in the School District.

In its brief, the Board observes that the entire incident was captured by a cafeteria security camera, and the resulting video recording ("the video") substantiates the intentional, inappropriate, unjustifiable and punitive nature of Respondent's actions. It also highlights the testimony of its witnesses and of Respondent, which it argues supports her culpability for the charged misconduct as well as her dismissal.

The Board recalls the testimony of two former Belhaven staff members, Lauren Muffley, at the time a substitute counselor at the school, and Ashley Popa, at the time a substitute mathematics teacher, both of whom were on duty in the cafeteria and nearby M.M.'s table when Respondent walked over to push down the child's chair and cause him to fall backwards to the floor. The Board asks that I credit Muffley's recollection that she observed Respondent, during the February 9, 2017, 6th and 7th grade lunch period, walk over to M.M.'s table, "put her foot on the front of the back of the chair [on which M.M. was sitting and leaning back] and kind of stomped the chair to the ground . . . and then

walked out of the room." 10/28 at 94.

The Board asks that I also credit Popa's memory that M.M. was leaning back in his chair despite being told "a couple of times . . . to sit right," and then was "pushed" and "kicked" out of his chair. 10/28 at 155. Both Muffley and Popa credibly described Respondent as visibly upset, according to the Board, citing 10/28 108-110, 165-66, and Popa remembered Respondent, after pushing M.M.'s chair to the ground, said, "that's why we don't lean back," and then walked away. 10/28 at 164.

Popa's recollection of that statement, which the Board argues demonstrates Respondent's punitive intention, is consistent with M.M.'s memory that Respondent told him, while he was still on the ground, "that's why chairs are for sitting in, not leaning in." 11/11 at 63. The Board notes that although Muffley, in her hearing testimony did not recall such a statement, 10/28 at 108, she confirmed her entry in a contemporaneous email to Principal Speirs, written approximately fifteen (15) minutes after the incident, P-11, in which she reported that M.M. told her that Respondent had said to him after she put her foot on the back of his chair and pulled him to the ground, "[t]hat's why you don't rock back in your chair." Id. The Board further notes that L.C., a student who was seated at M.M.'s lunch table when the incident occurred, testified that Respondent told the entire table of children words to the effect,

"that's why you shouldn't lean back in your chairs." 10/28 at 196.

The Board additionally highlights Muffley's recollection there was no disturbance or threat which might have required Respondent to push M.M. and his chair to the floor. 10/28 at 106-7. So, too, according to the Board, Muffley and Popa each recalled that Respondent simply walked out of the cafeteria without apologizing to M.M., or offering him help.

The Board argues that the incident was appropriately investigated before Cappelluti decided to suspend Respondent the following day, February 10, 2017. Speirs, it points out, credibly recalled that she obtained a copy of the video as soon as she became aware of the incident from Muffley's email, and then, upon Cappelluti's direction, she met with Respondent and her Union representative in the afternoon of February 9th, after having reviewed the video. According to the Board, Respondent's sole explanation for her actions was that the incident "was a joke gone bad," a comment which Speirs documented in a memo to Cappelluti the following day. P-17. That memo, the Board argues, confirms Respondent's failure, even the following day, February 10, 2017, to show remorse or provide a meaningful explanation that might justify her actions. Speirs noted that Respondent explained for the first time on February 10, 2017, that the video shows she was merely seeking "to right M.M.'s

chair," and he then "lost his balance." P-17.

The Board argues that Respondent's action of pushing M.M. and his chair to the cafeteria floor was not remotely part of her training. The Board asserts Respondent was trained on how to handle student disciplinary issues and was aware of the appropriate actions available to her, and it stresses Speirs' testimony that Respondent did not assert the occurrence of any events or the existence of any conditions which might have justified a physical intervention. 10/30 at 52. The Board highlights Cappelluti's testimony Respondent received training on all of the policies and regulations it alleges, in the Tenure Charges, that she violated. 10/30 at 173. See also 11/11 at 10 and P-23.[3]

With regard to the testimony of M.M., the Board stresses his recollection that on February 9, 2017, while he was at a lunch table leaning back in his chair he "felt a pushing force in the back of [his] chair bringing it down." 11/11 at 62. The Board notes M.M.'s memory he was confused, angry and surprised because

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[3]Cappelluti's February 17, 2014, letter, P-23, detailing to Peschi her responsibility each year to review District Policies 3280, 3281 and 3217, although obviously written after the subject incident, asserts the Board's determination Respondent was familiar with those policies and their mandates. The letter invited Respondent to contact Cappelluti if she had any "questions or concerns," and there is no record evidence any were raised. Indeed, Respondent does not contend in this proceeding that she did not know and/or understand her obligations under the law, policies and regulations which she is alleged in the Charges to have violated.

he had no idea why Respondent had pushed him down. It recounts his testimony, "I didn't even know what happened because it happened so fast." 11/11 at 64. The Board recounts his recollection Respondent did not offer to help him up, and simply chastised him, as noted above, "that's why chairs are for sitting in, not leaning in." 11/11 at 63. It further recites his testimony that when he passed Respondent in the hallway later that day, she avoided eye contact and again refused to apologize. 11/11 at 64. Indeed, the Board highlights Respondent's admission she saw M.M. in the hallway, as he recounted, and he was applying an icepack to his head, but she nevertheless made no inquiry about his welfare. 12/16 at 94-95.

The Board emphasizes Respondent's testimony that she went to M.M.'s table on February 9, 2017, because the students were throwing food and was "simply going to yell at them." 11/11 at 153. She testified she observed M.M. rocking back in the chair and "I figured if I just pushed him back up I can kill two birds with one stone by pushing him up and still handling the table and, you, which is instinctive." 11/11 at 154. She did not verbally correct M.M. because she "was yelling at the rest of the table." Id.

The Board details many portions of Respondent's testimony on cross examination:

- immediately after the incident, Respondent wrote an email to Speirs complaining about disciplinary issues in the

cafeteria, but made no mention of the incident involving M.M. P-15

- she testified she did not mention the M.M. incident because she does identify students by name in such emails, 11/11 at 159, but then she was shown an email she wrote to Speirs on January 10, 2017, in which she complained about two (2) students by name. P14.

- Respondent repeatedly denied M.M.'s claim, corroborated by Popa, that she chastised him that it would be the last time he would lean back in his chair, or words to that effect, but then was confronted with a memo she wrote to herself on February 10, 2020, in which she records that she told M.M., "this was probably going to be the last time he didn't keep his chair flat on the floor." P-27.

- Respondent, rather than acknowledge her wrongdoing and accept responsibility for pushing M.M. and his chair to the cafeteria floor, cast blame on M.M. for being overly dramatic and on Muffley for making a big deal about the incident and giving M.M. an icepack. P-27.

- Respondent's testimony that it was "instinctive" for her to use her foot to right a chair in which a child is leaning backwards, 12/16 at 36-38, is refuted by the fact she gently corrected with her hands a different child who at 11:50 a.m. on February 9, 2017, was leaning back in his chair, just minutes before Respondent used her foot to push M.M. to the floor.

- the video evidence is inconsistent with Respondent's contention she sought to push M.M. forward to a safer position in his char, and rather shows clearly a forceful, downward push by Respondent with her right foot on the top of the back of M.M.'s chair.

According to the Board, the legal issues are as straightforward as the facts in establishing Respondent's culpability for conduct unbecoming a teaching staff member, corporal punishment and otherwise inappropriate behavior, and it insists she should be terminated. Conduct unbecoming a teacher, according to the Board, "includes a broad range of behavior that

impacts a teacher's ability to perform his duties and otherwise renders him unfit to have the responsibility for the custody and care of students." Citing State Bd. of Exam'rs v. Charlton, 96 N.J.A.R. 2d (EDE) 18; In re Certificate of Fargo, 91 N.J.A.R. 2d (EDE) 1. It asserts "conduct unbecoming" is an "elastic" phrase which includes, "conduct which adversely affects the morale or efficiency" of the public entity, or "which has a tendency to destroy public respect for public employees and confidence in the operation of [public] services." In re Emmons, 63 N.J.Super. 136, 140 (App. Div. 1960).

According to the Board, the "touchstone" of the charge of conduct unbecoming "is a teacher's fitness to discharge the duties and functions of his position," and it may be demonstrated by a single incident if sufficiently flagrant. Citing Redcay v. State Bd. of Ed'n, 130 N.J.L. 369, 372 (Sup. Ct. 1943), aff'd, 131 N.J.L. 326 (E. & A. 1944). "Relevant factors in the equation of whether revocation or termination or something less is appropriate," according to the Board, include the nature and gravity of the offense, any evidence as to provocation, extenuation or aggravation, and any harm or injurious effect that the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system." Citing In re Fulcomer, 93 N.J.Super. 404, 422 (App. Div. 1967).

The Board contends the gravity of Respondent's actions on

February 9, 2017, "are apparent to anyone who watches the security video." According to the Board, "Respondent walked from the complete opposite side of the cafeteria to a table of students she was not in charge of, and intentionally lifted her leg off the ground and stomped M.M.'s chair, sending M.M. to the floor. Respondent did not offer to help M.M., she did not help M.M., she simply made a 'snarky' remark, shrugged her shoulders and left the lunchroom before her lunch duty was over." The Board insists Respondent was not provoked and has shown no signs of remorse, and in fact sought to conceal that her stated purpose at the time was to teach M.M. a lesson about what can happen if he leans back in his chair.

The Board argues that the harm and injurious effect of Respondent's actions on the proper administration of the school cannot be debated. All the witnesses to the incident were shocked, no less the child who suddenly and surprisingly found himself falling to the floor where he painfully hit his head. Instead of offering M.M. an apology and lending him assistance, Respondent chastised him, the Board points out. According to the Board, Respondent was irritated with the misbehaving students, and annoyed at the fact Popa was not correcting their behavior, and she then took her frustration out on M.M., intentionally pushing him to the floor. The forcefulness of her actions, shown on the video, according to the Board, reveals her intention was

to pull M.M. to the ground, and her lack of regard for his safety and welfare is shown by her lack of concern in the wake of the incident. As noted by the Board, Respondent's only apparent concern when she wrote to Speirs right after the incident was that there should be a shorter lunch period because of the students' tendency to misbehave.

The totality of Respondent's conduct, the Board argues, establishes her violation of the prohibition in N.J.S.A. 18A:6-1 on corporal punishment. Likewise, the Board argues, Respondent on February 9, 2017, violated Board Policies 3281, 3217, 3280 and Board Regulation 3281. There was no justification for pushing M.M. to the cafeteria floor. So, too, it asserts, she exposed M.M. to bodily harm by her inappropriate resort to force. Her actions were cruel and unusual, wholly inappropriate, and subject her properly to dismissal, according to the Board. It asserts her termination "is the only way to guarantee the health, safety and welfare of current and future District students."

Position of Respondent

Respondent, on the other hand, insists the Board's proofs and arguments in support of the Tenure Charges fail to establish unbecoming conduct or other just cause for discipline, and fall far short of justifying Respondent's removal from her tenured teaching position. Respondent points out that conduct unbecoming which must be specifically pled in the tenure charges served upon

a teacher, "is a broad term which may include any conduct which adversely affects the morale or efficiency of the public entity, or has a tendency to destroy public respect for government employees and confidence in the operation of government services." Karins v. City of Atl. City, 152 N.J. 532, 554 (1998). It requires more than simple negligence, according to Respondent. Citing IMO Certificates of Featherson, OAL Dkt. No. EDE 05829-05, Agency Dkt. No. 0405-177, 2006 N.J. AGEN LEXIS 163, Adopted, Bd. of Examiners, Ord. of Dismissal No. 0405-177. And if conduct unbecoming is charged as a neglect of duty, Respondent asserts it "implies nonperformance of some official duty imposed upon a public employee, and not merely the commission of an imprudent act." Citing Burlap, Camden County Dept. of Corr., OAL Dkt. No. CSV 10834-12, Agency Dkt. No. 2013-231, 2013 N.J. AGEN LEXIS 64.

Respondent adds that conduct unbecoming does not mandate a teacher's removal. Rather, it points out, "the law requires the arbitrator to evaluate a number of relevant factors in determining whether removal, or a lesser penalty, is appropriate." Respondent Brief at 9. Citing In re Grossman, 127 N.J. Super. 13, 29 (App. Div. 1974) and In re Young, 202 N.J. 50, 66 (2010), Respondent asserts "[t]he fundamental question when imposing penalty is whether the teacher may be returned to his position without harm or injurious effect on the proper

administration of the school district," and "[t]]he touchstone of the determination lies in the teacher's fitness to discharge the duties and functions of her position." Respondent identifies the four "relevant factors" enumerated in In re Fulcomer, and which it argues must be evaluated by the arbitrator: (1) the nature and gravity of the offense; (2) the impact on the teacher's career; (3) any extenuating or aggravating circumstances; and (4) the harm or injurious effect the conduct may have had on the proper administration of the school system.

According to Respondent, progressive discipline is generally applied to findings of unbecoming conduct, even though a single "flagrant incident" may be sufficient to sustain termination. Citing West New York v. Bock, 38 N.J. 500 (1962); In the Matter of Arnold Borrero, City of Newark, 2009 WL 3816616 (N.J. Admin). And citing Elkouri and Elkouri, How Arbitration Works, 7th Ed., 15-40, Respondent asserts, "[i]t is said to be 'axiomatic that the degree of penalty should be in keeping with the seriousness of the offense." She contends, again based on Elkouri and Elkouri, that "[i]n less serious cases, arbitrators are very likely to change or modify an employer's discipline if it is excessive, disproportionate to the offense, inconsistent with principles of progressive discipline, punitive rather than corrective, or inconsiderate of mitigating circumstances." And, she adds, "[e]ven in serious cases, such as theft, mitigating

circumstances . . . and a long, discipline-free record may render termination too harsh a penalty."

Thus, according to Respondent, even unjustified physical contact with a student does not mandate removal from tenure. Even in such serious cases, she argues, factors which must be considered include "[t]he circumstances under which the episode occurred, its provocation, the nature of the incident itself, the age of the pupil, the teacher's record, [her] attitude and the prognosis for [her] continued effective performance and usefulness in the school system. . . [E]ach such matter must be judged in light of all the circumstances." Quoting IMO Tenure Hearing of Eddie Lee Harrell, 1979 S.L.D. 479, citing IMO Tenure Hearing of Ostergren, 1966 S.L.D. 185, 188.

Thus, Respondent argues that in cases where a teacher's contact with a pupil "is not of a punitive nature," the matter is less serious and requires "a more measured response in terms of penalty." Citing Board of Ed. of City of New Brunswick v. Murphy, 92 N.J.A.R.2d (EDU) 527. She points out that the appropriate penalty for a teacher who slapped an eight year old, special education student in the face was a suspension, rather than removal. IMO Tenure Hearing of Edith Craft, Commissioner of Ed. Dec. No. 366-11. She argues "[r]emoval of a tenured teacher is a draconian penalty, not always warranted even in the face of significant misconduct."

Respondent contends that a teacher's wrongful actions, even those involving inappropriate physical contact with a student, may not mandate removal where they are not cruel, premeditated or vicious. Based on her review of numerous tenure cases, Respondent alleges "conduct far more serious or potentially dangerous than anything alleged by the Board in this case" has not warranted removal from tenure. Respondent Brief at 12-14. She asserts, "[i]n light of these well-established principles . . . it is clear that neither [her] actions, nor the totality of the circumstances as per Fulcomer, . . . warrant the draconian penalty of removal from her tenured teaching position.

Respondent argues, as well, that I must consider her nearly two decades of service, during which she "has been a pillar of the Belhaven Middle School Community, and her community at large." Respondent Brief at 15. She recites with specificity her record of "outstanding evaluations, letters of support and commendation, service awards, and letters of appreciation." See Respondent Brief at 15-21, and references the positive character appraisals provided on her behalf in the criminal trial. Respondent Brief at 21-22, citing R-8 at 92-105.

Specifically with respect to the issues before me, and in support of her argument these proceedings have been unfair, Respondent contends she did not receive meaningful predisciplinary due process. The procedural due process rights

that were violated cannot properly be minimized, she argues, given her property interest in her public employment position. As a "vested employee," she asserts she "cannot be terminated without the opportunity to respond to the employer's reasons for dismissal and to rebut the charges on which the dismissal is based." Respondent Brief at 23.

Acknowledging that these arbitration proceedings have afforded her the protections under the Tenure Employees Hearing Law ("TEHL"), N.J.S.A. 18A-6-10 et. seq., Respondent contends her due process rights were lessened during a pre-disciplinary process that denied her a full opportunity to present her side of the case before the Board's position "may have hardened." Respondent Brief at 23. According to Respondent, Cappelluti made up her mind to suspend and charge her solely upon watching the video, and without having given her an opportunity to "tell her side of the story." Respondent Brief at 24. Respondent contends the Board's haste in reaching its conclusions about what happened in the Belhaven cafeteria during lunch on February 9, 2017, "discredits its ferventness in these proceedings," and the fact it now is being sued by M.M.'s parents in connection with the incident, "can only amplify its desire to portray [Respondent's] actions as willful and malicious - thereby absolving itself of any legal responsibility in connection with M.M.'s civil suit." Id.

In any case, Respondent argues, the Board's evidence does not prove "[t]he gravamen of the tenure charges," which is that she intended to knock M.M. out of his chair, that she did so with malicious intent, that her actions constituted corporal punishment or that she caused M.M. physical injury, personal embarrassment and public embarrassment. Respondent Brief at 25.

Respondent does not dispute what can be seen on the video: that while M.M. was leaning back in his chair during lunch on February 9, 2017, she approached him from behind and placed her foot on the chair, and the chair together with M.M. then fell to the ground. Respondent Brief at 25. What the video does not prove, she argues, is the Board's claim she intended to knock M.M. to the floor. In fact, she argues, she has "always maintained" she only placed her foot on the chair in an effort to push it and M.M. to an upright position. Respondent insists the Board has not proved she had a different intention, and in fact, she contends that the Board, in order to prevail in this case, must prove what it charged, "that [Respondent's] purpose in knocking M.M. to the ground was to willfully and maliciously inflict corporal punishment upon him." Respondent Brief at 25-26. "This the Board cannot do," she argues. Id. at 26.

Preliminarily, Respondent argues the video should not have been admitted into evidence. She recites and incorporates into her brief an application she filed on July 25, 2019, asking that

I deny a Board motion to allow the use in these proceedings of the video. In its motion, the Board had pointed out the use of the video in the tenure hearing was possibly contrary to an Order issued in the criminal case by Honorable Timothy P. Maguire, J.M.C. Respondent, through counsel, opposed the Board's motion, asserting, "the appropriate course of action would be for the Board to direct its application either to Judge Maguire, or to the Atlantic County Superior Court, which last exercised jurisdiction over Ms. Peschi's criminal case." When Respondent joined the Board in fashioning a Consent Confidentiality Order for me to enter for the purpose of regulating the use of the video as well as ensuring the confidentiality of the video and other records and files identified therein, she reserved her objection to use of the video in this case without authorization from Judge Maguire or a court of appropriate jurisdiction.

In any case, Respondent argues, the video is not dispositive of the issues of conduct unbecoming and corporal punishment that are before me pursuant to the Tenure Charges. She observes, in particular, reciting Judge Rauh's May 10, 2019, decision finding her not guilty of simple assault, R-1, "[r]easonable neutrals can, and have already expressed divergent opinions on the nature of precisely what is depicted in [the video]." Respondent Brief at 27. She quotes from Judge Rauh's decision, and although acknowledging it "may not be binding," argues "it is well-

considered and persuasive. Certainly it belies the Board's assertion, repeated at least 9 times in the Board's opening statement, that this is a 'straightforward case.'" Respondent Brief at 28.

Respondent, further, contends, the witness testimony in this arbitration, does not compel a different outcome from the criminal trial verdict. Regarding the testimony of student witnesses L.C. and A.M., along with the testimony of M.M., Respondent notes Judge Maguire's observation in the Municipal Court trial that these same students gave "at time contradictory" and "somewhat rehearsed or coached" testimony. R-17 at 15. She contends that 18 months after that trial, and nearly 3 years removed from the incident in question, those concerns continue and must prevail. She asserts the testimony of the three (3) students "has little, if any, value." Respondent Brief at 28. Respondent argues none of them have specific knowledge of her intent, and most likely their testimony is from viewing the video, rather than from first hand knowledge of what actually occurred.

According to Respondent, the testimony of staff members Muffley and Popa is equally unhelpful. Indeed, while Muffley testified she saw Respondent's foot contact the inside of the back of M.M.'s chair, Popa, who was much closer, recalled Respondent made her contact with the top of the seat. Respondent

Brief at 32. Neither observed an injury, Respondent argues.

Respondent's hearing testimony, in contrast, has been consistent, is first hand, and is reliable, she argues. She admits she "instinctively" put her foot on M.M.'s chair, but insists she did not have any intention to push it, or M.M., to the ground. Indeed, she testified she did not approach the table because of how M.M. was seated, but rather to "yell at" the other students at the table who were throwing food and otherwise being rowdy. In the process she noticed the dangerous position of M.M.'s chair and reflexively attempted to right its position. As she did so, the chair rocked backwards, causing her foot to come into contact, inadvertently, with the backrest. Respondent Brief at 33-34. She insists that the fact she used her foot rather than her hand in making the correction to M.M.'s position proves nothing about her intent. Respondent Brief at 38.

Respondent contends that she immediately asked M.M. if he was alright, and repeated her question when he did not answer. He told her he was "okay." Respondent Brief at 34. In short, Respondent argues, the incident was an accident, and the fact she may have told him in the wake of his fall, "guess you won't do that again," is neither surprising nor incriminating. She asserts it is the kind of lighthearted comment "[e]very parent has benignly and unthinkingly said to a child, following an unserious mishap." Respondent Brief at 35.

Respondent has consistently and credibly maintained that she did not see the incident as serious because she had not attempted to hurt M.M., and in fact he did not appear to be hurt or upset. Respondent insists it was entirely reasonable she minimized the incident and did not remove M.M. from the cafeteria. Respondent Brief at 36. She insists her possible insensitivity in writing in a memo that Muffley was "making a big deal about the incident," P-27, and thus "babying" M.M. is not a chargeable offense. Respondent Brief at 36. It certainly does not establish the intentionality and malice the Board has charged, she argues. Id.

Nor is there relevance to the fact she did not apologize to M.M., and thereby show, purportedly a quantum of remorse required to rebut the Board's claims about her malicious purpose. Not only was she not charged with failing to apologize, and not only was she specifically instructed against contacting M.M. or his family, but, she insists, she "did not intend to knock M.M. out of his chair and, frankly, has nothing to apologize for," as she did not believe M.M. was injured or was otherwise in any distress. Respondent Brief at 40.

Respondent insists I evaluate the evidence from her perspective. She was "stunned" at Speirs' allegation she intentionally had attempted to hurt M.M., id. at 37, just as she is incredulous that her reaction, "oh my gosh, this is like a bad

joke," has been misrepresented and misconstrued as her having said it was all a "joke gone bad." Id. Respondent remains dismayed at how she instantly went from being a respected educator to a pariah. Id. She argues there is nothing in her history that even suggests problems with classroom or student management, self-control or anger, issues which would have manifested had they existed. Respondent Brief at 39. She is an experienced teacher who has disciplined students effectively and within existing guidelines over the course of her multi-decade career, she argues. There is nothing in her prior record which might support a conclusion she would overreact to a student leaning back in his chair by intentionally knocking him to the floor. Respondent Brief at 39.

In short, Respondent asks the Tenure Charges be dismissed and she be reinstated to her position with all lawful back pay, benefits and emoluments.

Opinion

The Video

Preliminarily, I address Respondent's argument the video is inadmissible under the Consent Order entered by Linwood Municipal Court Judge Timothy Maguire on August 16, 2017, ("Municipal Court Order"), and should be stricken from the arbitration record. I reject the argument. I find it is without merit, for several reasons.

The video was generated by the Board's security equipment at Belhaven School on February 9, 2017. The video was and remains the property of the Board. Although the Municipal Court Order might on its face appear to bind the Board to the limitation, stated in the Order, that "the Security Video and any and all copies thereto will only be used by the Parties for their prosecution and defense [of] the above-captioned litigation," in the context of the criminal case and of the obvious circumstances under which the Board agreed to release the video to the Atlantic County Prosecutor and to Ms. Peschi based upon their agreement to be bound by certain court ordered confidentiality stipulations, it is plain to me upon my careful review of the Municipal Court Order, as amended by Judge Maguire, that the Order regulates the use of the video by the Atlantic County Prosecutor and by Ms. Peschi, and not by the Board.

To uphold Respondent's objection to the Board's use of the video in this Tenure Hearing without authorization from Judge Maguire, I would have to conclude that the Board, in agreeing to provide the video to the prosecution and defense in the Matter of New Jersey v. Peschi, and in insisting that the prosecution and defense agree to maintain the confidentiality of the video under terms satisfactory to the Board, gave up its control of the video and its right to use the video as evidence in a disciplinary proceeding under the Education Law, N.J.S.A. 18:6-10. There is

nothing in the Municipal Court Order which takes away that right, and Respondent has not identified any law or precedent which give a Municipal Court authority to limit the Board's ability to use its own security video as evidence in a tenure hearing. If Respondent had an identifiable legal right to preclude the use of the video in her Tenure Hearing without the imprimatur of Judge Maguire, it was her obligation to raise that right to Judge Maguire, rather than wait until after the completion of these proceedings.

The Charges

Turning to the Charges and Specifications, I find, based upon my careful review of the hearing record and the arguments of the parties, that Respondent is culpable for the misconduct and violations alleged in Charges 1, 2 and 3.

With respect to **Charge 1**, I find Respondent did engage in conduct unbecoming a teaching staff member in violation of Board Policy No. 3281, when she exposed M.M. to unnecessary harm, when she intentionally, and purposefully, pulled down with her foot and leg, the back of a cafeteria chair in which M.M. was seated, causing him suddenly, unexpectedly, and violently, to fall to the cafeteria floor in front of his peers and Board staff, and suffer physical injury, personal embarrassment, and public embarrassment among his peers and Board Staff. I find that by said conduct, she also violated N.J.S.A. 18A:6-1 and Board Policy No. 3217,

"Use of Corporal Punishment," as alleged in **Charge 2.** I further find that by said conduct, she violated Board Policy No. 3280, "Liability for Pupil Welfare," as alleged in **Charge 3.**

My conclusions are drawn substantially from my careful and detailed viewing the video. I watched and re-watched the incident dozens of times, at regular speed and frame-by-frame. Each viewing led me to the same conclusion. Respondent walked up to a spot just behind the cafeteria chair in which M.M. was seated while he was leaning back and balancing himself on the chair's back supports, with the front supports suspended in the air. The top of the backrest of the chair was approximately two (2) feet above the ground. (A frame-by-frame analysis shows that M.M. was rocking very slightly, but so slightly it is only perceptible in the frame-by-frame analysis.) When Respondent reached a spot behind and just to the left of the chair, she bent her right leg at the knee and raised her right knee to a point where her right foot was higher than the back of M.M.'s chair. Respondent then placed her raised foot on the top of the backrest of the chair and in one very quick and forceful motion, she pushed the backrest of the chair to the floor, which caused M.M. to fall backwards onto the floor.

The video shows that Respondent's right foot makes contact with the backrest of M.M.'s chair at 12:04:19.723. Her downward push extends until 12:04:20.324, at which point M.M.'s chair back

hits the floor. The video frame at 12:04:20.657 shows M.M.'s legs and feet straight up in the air, which convinces me he landed on his back when he hit the floor, as he testified. His contact with the floor was hard, I find, as it took substantial force to cause M.M. to roll back and flip over so his legs and feet were pointing straight up. At 12:04:20.791 he has rolled over onto his side.

At 12:04:21.124, M.M. is still rolling on the floor as Respondent stands over him watching. At 12:04:21.926, M.M. starts to bring himself up as Respondent leans down from her waist. At 12:04:23.060, he has sat up, but is still on the ground looking up at her. At 12:04:24.862, M.M. has begun to right the chair and has lifted himself up onto one knee. Respondent continues to stand next to him with her arms firmly at their sides. There is no hint of any motion by her to help him up.

At 12:04:27.131, M.M. is standing and bringing his chair all the way up. Respondent moves closer to him, but her arms still remain at their sides. At 12:04:28.398, as M.M. brings his chair all the way up and prepares to sit back in it, Respondent turns to her left and begins to walk around to the other side of the table where, at 12:04:34, she stops to face and address the other children at M.M.'s table. At 12:04:34.873 Respondent is gesturing with the palms of both her hands facing up, as she

looks at the children at M.M.'s table. At 12:04:36.341, she leaves that table. At 12:04:40.345 Respondent is turned towards Muffley, and gesturing with her palms up as she walks sideways off camera.

I watched the video very closely from 11:47:42 a.m. until 12:06:43 p.m. It corroborates hearing evidence that Respondent was assigned to lunch duty on the 7th grade side of the cafeteria. In fact, she has no apparent interaction with the 6th grade side (except to retrieve what appear to be paper towels) until she crosses through the opening in the barrier between the 7th grade side and the 6th grade side at 12:04:15, approximately four (4) seconds before she engages contact with M.M.'s chair.

Respondent testified she crossed over to the 6th grade side to address misbehavior she observed at M.M.'s table. 11/11 at 152. She stated she saw children throwing food and observed one of the children at M.M.'s table get out of his seat, throw a bag of chips on the floor and stomp on it. 11/11 at 152. She recalled that as she approached M.M.'s table, she was yelling at the children seated at that table on account of their misbehavior. 11/11 at 153-54. She testified that M.M.'s position in his chair was not the reason she approached the table. 11/11 at 153.

In fact, the video corroborates that testimony, as it shows that M.M.'s chair is upright at 12:04:14.051, the point at which

Respondent first crosses over to the 6th grade side. The video further shows that it is after Respondent crosses to the 6th grade side, the moment she recalls she had decided to walk over to M.M.'s table to correct their misbehavior, that he leans back in his chair. This is at 12:04:15.052.

The video evidence persuades me Respondent's contact with M.M.'s chair, when she placed her foot on the top of the backrest and pushed it squarely to the floor, was not an accidental occurrence. Her movement is fluid and deliberate. There is nothing in the movement of her right leg or any other part of her body which suggests she lost her balance or for some other reason inadvertently ended up pushing M.M.'s chair to the floor instead of pushing the back of the chair forward. Her actions appear purposeful. The video shows her purpose was to push the chair's backrest down rather than to push the back of the chair up so M.M. would not fall.

Respondent's purpose is further revealed, I find, by the fact there is nothing in her body language which indicates an effort to help M.M. up, which is not what one would expect if a teacher has just accidentally knocked a child to the floor, which is what Respondent contends happened here. If a teacher has inadvertently caused a child to fall backwards from his chair onto the floor, especially if the fall is forceful, as it was here, I would expect to see at least some reaction by the teacher

revealing she did not intend to cause the fall or was concerned about the welfare of the child. Minimally I would expect to see her extend a hand to help him up. But here, Respondent offered no such assistance. She has never claimed she gave him any. This evidence persuades me that knocking M.M. and his chair to the cafeteria floor is precisely what she wanted to do.

In ruling that her actions were intentional, I am not making a finding they were premeditated. On the contrary, the video evidence, combined with Respondent's testimony she was disciplining the children at M.M.'s table and "yelling" at them when she noticed M.M. leaning back in his chair, persuades me she acted impulsively against M.M. while she was angry at other children.

Respondent used the word "instinctive" to describe her impulsivity. 11/11 at 154. Regardless of which word best indicates her internal process, the fact remains that when she saw M.M. leaning back in his chair, she abandoned her capacity to respond in a professional, responsible, proportional and safe manner, as she had done earlier that lunch period when, at 11:50:58, on the 7th grade side, she encountered a child leaning back in his chair and she gently righted the chair with her hands. P-29.

Respondent's lack of candor about the incident, in particular her claim she did not intend to push the back of the

chair to the floor, and her persistent denial, until confronted with her memorialization of the incident, P-27, that she told M.M. when he looked up at her from the floor that he now will have learned his lesson about leaning back in his chair, persuades me she has not been honest about her level of anger, and even the existence of rage, she experienced when, while yelling at other children, she saw M.M. leaning back in his chair.

Respondent's lack of candor about the purposefulness of her action, in particular the fact she immediately blamed M.M. for the incident as she explained to him her purpose in knocking him over was to teach him a lesson, persuades me that M.M. is the more credible recounter of the event, and that he has honestly and accurately recalled that Respondent never asked him if he was hurt, or needed any help.

I thus further believe M.M.'s testimony that he was hurt and embarrassed. At 12:06:43 on the video, he is shown, as he is being escorted from the cafeteria by Muffley, wiping his eyes with the right sleeve of his sweater or shirt. At 12:06:44, he continues to wipe his eyes. This corroborates Muffley's testimony M.M. was crying when she approached him after the incident. The evidence persuades me M.M. was crying as he left the cafeteria because he was hurt and embarrassed, as he claims, by Respondent's purposeful and punitive act of pushing him and

his chair to the ground without warning. Indeed, I find it is preposterous for Respondent to claim that when M.M., who was then 12 years old, walked the hallways of the school, in front of other children, with an icepack applied to his head, he was being dramatic. I am convinced he was using the icepack because his head hurt and he was seeking to relieve the pain.

Respondent insists her recollection of the incident as a mere accident is truthful, and her version, at the very least, as Judge Rauh found, is "plausible." Her contention that she inadvertently "tapped" M.M.'s chair and never intended for him to fall to the floor, 11/11 at 156, is only plausible if I ignore what is undeniable: her failure immediately, or even at all, to help M.M. up from the floor; her failure to ask him if he was hurt; her failure to ensure he received a medical evaluation; her comment revealing her purpose was to teach him a lesson; her failure to report the incident to Speirs; her ongoing dissimulation about what happened and the her actions in the wake of the incident to conceal it; the fact that the incident happened while she was angry and "yelling" at other children; that earlier, when she was not disciplining and "yelling" at children, and encountered another child similarly leaning back in his chair, she responded by gently righting the child to an upright position; that she did not inquire how M.M. was feeling even when later that day she saw him with an icepack, because she

believed he was being dramatic; that she believes a teacher, like Muffley, who gave personal attention to a 12 year old child who had fallen backwards to the floor after being pushed down by another staff member, was coddling the child.

Indeed, Judge Rauh, in finding insufficient proof (albeit under a criminal law standard) that Respondent had intention to push M.M. and his chair to the ground without regard for the child's welfare, apparently did not consider these important factors relevant to Respondent's purposefulness or lack thereof. His decision does not consider Respondent's failure to respond to M.M.'s fall with care and support, and that she walked away without offering him any help or showing concern about anything other than the lesson about proper chair use he shall have learned from the experience.

What is undeniable is Respondent's lack of any reaction to a child tumbling hard to the floor with sufficient force it upended him and caused him to land on his back. Although Respondent is certain M.M. did not hit his head, what possible justification did she have for not helping him up and at least asking him if he was hurt? She now of course realizes she had none, and has claimed here she asked him if he was "okay." If M.M.'s fall was an accident, as Respondent contends, I would expect she would have responded at the time as if she inadvertently had just caused a child to accidentally flip over onto the floor, and thus

show concern. Respondent instead, explained to M.M. the lesson she was seeking to teach him when she flipped him over, and she walked away.

Respondent's actions, I find, were unprofessional, irresponsible, dangerous, punitive, purposeful, and amounted to prohibited corporal punishment. Her actions constituted conduct unbecoming a teacher.

As alleged in Charge 1, Respondent violated Board Policy No. 3281. She failed her responsibility to protect M.M.'s health, safety and welfare. She failed to conduct herself at the highest level of professional responsibility when she flipped a child out of his chair, told him she did so to teach him a lesson, and then walked away without providing him any care or support, and then failed to report the incident. By her treatment of M.M. on February 9, 2017, Respondent engaged in inappropriate conduct unbecoming a school staff member which is prohibited under the Policy. Her admitted punitive purpose in flipping M.M. out of his chair to teach him a lesson about the dangers of leaning back in chairs, constituted corporal punishment prohibited under Board Policy No. 3281, as edified by the definition of "inappropriate staff conduct" set forth in Board Regulation No. 3281.

By imposing corporal punishment upon M.M., Respondent violated N.J.S.A. 18A:6-1 and Board Policy No. 3217, as alleged in Charge 2. There is not even a scintilla of evidence that

Respondent needed to upend M.M. as a reasonable and necessary use of force, as spelled out in N.J.S.A. 18A:6-1. He was not disturbing or threatening anyone; he did not have a weapon; he was not threatening anyone's person or property; he was not being disobedient. The proscription in Policy No. 3217 could not be clearer: no teacher may resort to force in her treatment of a pupil, even pupils who are openly defying authority (which was not the case with M.M.), as "[e]ach pupil is protected by law from bodily harm. . . Teaching staff members shall not use physical force or the threat of physical force to maintain discipline or compel obedience except as permitted by law, but may remove pupils from the classroom or school by the lawful procedures established for the suspension and expulsion of pupils." Plainly, within this proscription, Respondent fairly could not possibly have determined there was justification to push M.M. and his chair to the floor.

Respondent likewise violated Board Policy No. 3280, as alleged in Charge 3. She failed to discharge her responsibility towards M.M. with the highest level of care and prudence. Instead of prioritizing M.M.'s safety, which she might have done by protecting him from falling as he leaned back in his chair, she intentionally caused the very thing she should have been protecting him from, falling backwards and exposing himself to possible serious injury.

Penalty

This record persuades me that Respondent's actions towards M.M., although impulsive, were nevertheless punitive, and that she has demonstrated a lack of professionalism and maturity that might have allowed her to reflect upon her actions, understand them, and give credible assurance she has the ability to exercise her good judgment, restraint, proportionality and adherence to governing rules and regulations the next time she might be angered by and yelling at children.

I thus do not see this incident through the same lens as Judge Rauh, as a very brief event which reveals little about Respondent's state of mind. Her actions against M.M. were undertaken with no evident consideration of the immediate danger they presented to M.M., and the possible cerebral and neurological damage, perhaps permanent, he potentially could have suffered by a surprise move by which caused him to flip backwards, without warning, onto his head. Respondent has effectively admitted she lacked the capacity, while on duty charged with the care and safety of children, properly and responsibly to assess those risks.

Disturbingly, Respondent testified she considers a teacher, like Muffley, who offered comfort to a child who had just been flipped out of his chair by another teacher to be "overreacting." She unambiguously stated her view that M.M. should have accepted

her mistreatment of him, instead of crying, complaining of pain, and otherwise being "dramatic." In short, even now she shows no remorse for her inappropriate, unjustified, punitive, irresponsible and dangerous treatment of M.M. on February 9, 2017. Even now, years removed from the incident, Respondent demonstrates her inability and refusal to understand the seriousness of her misconduct.

No parent who entrusts their child to the care of the School District should expect that if their child does something unsafe, like lean back in his chair, a school staff member will punitively teach him a lesson by having him actually experience the very danger that the unsafe action creates.

I hasten to add these would be serious charges if the allegations were only that Respondent observed a child who was leaning back in his chair lose his balance, fall forcefully onto his back and head, do nothing to assist the child, ignore the possibility of a serious injury, chastize the child for his unsafe conduct and then walk away. The actual wrongdoing is far worse where as here Respondent intentionally pushed the child to the floor, and is aggravated further by her lack of candor and refusal to acknowledge the gravity of her wrongdoing.

I have deliberated carefully on whether Respondent here might properly be penalized with a consequence less serious than dismissal. In doing so, I have considered whether she has

provided sufficient assurance she knows the wrongfulness of her misconduct, understands the unacceptable risks it presented, recognizes the circumstances, thinking and emotions which prompted her to lose her ability to act in an appropriate and proportionate way when she saw M.M. putting himself at danger. I must be persuaded that Respondent will not again act impulsively to punish a child, as she did here, unconcerned about the obvious dangers and grave risks of physical harm her decision to flip a child over had created, like the very real risks of brain injury and paralysis.

True, Respondent made her decision to push down on M.M.'s chair almost instantaneously, but as an experienced teacher, she had enough time even in that instant to reflect upon the impropriety and danger of her impulse, and control it. Indeed, Respondent has admitted that what she did here was make a "choice." 12/16 at 51. In this proceeding, she has not presented evidence to convince me she has the awareness, or even the capacity, if again angered and forced to "yell at" children in a disciplinary setting, to control her violent impulses.

For all of the above reasons, I find the appropriate penalty for Respondent's conduct unbecoming and act of corporal punishment against M.M. when she pushed him and his chair to the floor on February 9, 2017, is dismissal.

AWARD

1. Respondent Kimberley Peschi is culpable for the violations and misconduct alleged in the Charges and Specifications, in particular, as discussed hereinabove, she engaged in conduct unbecoming a teaching staff member and committed corporal punishment in violation of Board Policy and Regulation, and of New Jersey Law.

2. For the reasons stated, her penalty for engaging in said misconduct and violating the law, policies and regulations indicated shall be the termination of her employment.

June 1, 2020.

Earl R. Pfeffer, Arbitrator

STATE OF NEW JERSEY)
) ss.:
COUNTY OF ESSEX)

On this 1st day of June 2020, before me personally came and appeared EARL R. PFEFFER, Arbitrator, to me known and known by me to be the individual described herein, and who executed the foregoing instrument and who acknowledged to me that he executed the same.

Sworn to and subscribed before me this 1st day of June 2020.

Notary Public

JOYCE L RUDIN
My Comm. Exp. 10-26-2022
NOTARY PUBLIC
No. 50070820
NEW JERSEY