IN THE MATTER OF THE TENURE CHARGES AGAINST

VINCENT CINQUINA

DOCKET NO. 272-11/18

BY

BEFORE JACQUELIN F. DRUCKER, ESQ.
ARBITRATOR

BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY

AWARD

FOR THE DISTRICT:	**ISABEL MACHADO, ESQ.** **KYLE ULTSCHT, ESQ.** **MACHADO LAW GROUP** **DEVIS RODRIGUEZ, ASSISTANT SUPERINTENDENT** **MICHAEL HEIDELBERG, PRINCIPAL**[1]
FOR MR. CINQUINA:	**PAULINE M. K. YOUNG, ESQ.** **KYARAH BAUTISTA, PARALEGAL** **MCLAUGHLIN & NARDI, LLC** **VINCENT CINQUINA, RESPONDENT**
HEARING DATES:	**MAY 30, JULY 22, SEPTEMBER 4, SEPTEMBER 18,; SEPTEMBER 30, AND DECEMBER 11, 2019; AND JANUARY 17, 2020**

I. Procedural Background

The Perth Amboy Board of Education, Bergen County ("Board," "District," or "Employer") has initiated charges against Vincent Cinquina ("Respondent" or "Mr. Cinquina"), who is employed by the Board as a tenured teacher of special education. The charges at issue seek dismissal from employment on the grounds of inefficiency, conduct unbecoming, incapacity, and other just

[1] Mr. Heidelberg was present during the testimony of students, taken on December 11, 2019, and January 17, 2020.

cause and were certified to the Commissioner of Education on November 15, 2018. The Commissioner of Education's Office of Controversies and Disputes, by correspondence dated November 19, 2018, notified Respondent and his then-counsel that it had received the certified tenure charges. Respondent had changed legal counsel, effective January 4, 2019, and thereafter began proceeding *pro se*, so an extension of the deadline to file an answer was extended for Respondent "while he obtains new counsel." Respondent thereafter requested and was granted a final extension, to March 6, 2019, for submission of his answer. Respondent's Answer, which he prepared and submitted without legal counsel, gave rise to a Motion to Dismiss. On March 13, 2019, the Office of Controversies and Disputes referred the charges to this Arbitrator to hear and decide pursuant to N.J.S.A. 18A:6-16.

Through a number of email communications with the parties, the Arbitrator and her Office Administrator attempted to arrange for a conference call to address scheduling and information exchange. Respondent, who continued to function *pro se* at that time, argued that it was not appropriate for the charges to be heard but eventually agreed to discuss scheduling. Respondent thereafter requested and was granted two postponements of scheduled conference calls to allow time to secure counsel. On March 29, 2019, Respondent reported and counsel confirmed that he had retained the firm of McLaughlin & Nardi, LLC. From that point, throughout this proceeding, both Respondent and the District were ably and vigorously represented by legal counsel.

Through subsequent conference calls, the parties agreed to a schedule for submission of briefs regarding the District's Motion for Summary Decision ("Motion") and also agreed to initial hearing dates to be used if the Motion were denied. Detailed papers were submitted by both parties regarding the Motion, and, following oral argument held on May 30, 2019, the Arbitrator on June 24, 2019, issued a ruling denying the Motion and confirmed same with a full opinion issued on July 17, 2019, which is incorporated herein by reference.

While the Motion was pending, the Arbitrator submitted a request to the Office of Controversies and Disputes, seeking an extension of the statutory hearing and decision deadlines in light of the

delay that had occurred while Respondent sought counsel and to allow time for consideration of the District's Motion for Summary Decision. An extension was granted to November 30, 2019.

Evidential hearings on the charges were held on July 22, September 4, September 18, September 30, December 11, 2019, and January 17, 2020. By agreement of the parties, hearings were held at the Administrative Offices of the Board, at the High School, and at the offices of the Machado Law Group. As hearings progressed, it became clear that additional time would be required to accommodate schedules and witness availability. Therefore an extension of time was requested and approved to March 31, 2020, as the deadline for conclusion of the proceedings and issuance of the Award.

In the course of the hearings, each party was given a full and fair opportunity to present evidence through documents and testimony of witnesses. All witnesses, except Mr. Cinquina and the District's party representative, were sequestered and all testimony was provided under oath and was subject to direct, cross, redirect, and re-cross examination.[2] At the commencement of the hearing, it was agreed that a court reporter would prepare a transcript that would be provided to both parties and the Arbitrator. When the presentation of evidence was concluded, the parties agreed to a schedule for post-hearing briefs. Same were timely submitted to the Arbitrator, and exchange copies were forwarded by the Arbitrator's Office Administrator, whereupon the record was closed.

[2] The Arbitrator notes that, as to some witnesses, the transcript of this proceeding indicates that the witness "was sworn/affirmed by the Notary Public." This is not correct. The oath/affirmation for each witness was administered by the Arbitrator.

II. FINDINGS OF FACT

A. Background

Respondent holds tenure as a special education teacher in the District. He was educated at Rutgers and, for graduate-level work, William Paterson University, and he holds teaching certifications in business administration and special education. Mr. Cinquina began his career as an educator teaching severely disabled youths. He then worked for a number of years as a substitute teacher, which he combined with his work in other industries not associated with the education field. Respondent initially was hired by the District in October 2004 as a long-term substitute teacher. In May 2005, however, the Principal of the McGinnis School asked that Respondent be taken off the list for assignment as a substitute teacher at that school.

Effective September 2005, Respondent was hired as a full-time special education teacher for the 2005-2006 school year. The charges at issue in this case in some respects cover his entire career at the District, but the more specific issues relate to actions taken by Respondent in the school years 2016-17 and 2017-18 and, even more significantly, in May 2018. Relevant circumstances, however, date back to 2012, during which time Respondent was assigned to the High School and the Adult High School.

B. 2011-2012 and 2012-2013 School Years

Respondent in March 2012 received a Letter of Reprimand for an incident in which students in a class Respondent was co-teaching used an offensive and inappropriate group label, posted on a classroom board, for their activity team. The Letter of Reprimand, which was not challenged by Respondent, indicated that even if Respondent had not been aware of the use of the term, it was his responsibility to become aware of the students' activities and to correct them when needed and when the students were in need of guidance. He was advised in the Letter that he was to become "immediately familiar with the lesson being taught and immediately attempt to remedy

an inappropriate situation." He was notified that "Any future deviation will result in withholding of increment or termination." Respondent did not grieve or otherwise challenge the Letter of Reprimand, but at hearing he testified that the inappropriate team name had been on the board from the prior class, that he entered the room after his co-teacher had begun a movie, when the room was dark, and he therefore had not noticed it.

Soon after the 2012-2013 year began, a student alleged and submitted a written statement indicating that, when he asked Respondent if he could play some music he had selected, Respondent answered with a derogatory, racist description of the music and a remark that the student viewed as a comment on his sexual orientation. The student told an English teacher about the conversation and his reaction. The English teacher mentioned it to Respondent, to let him know that she had forwarded the information to the Principal, and she advised Respondent and the Principal that she had no direct knowledge of the conversation the student cited. The Principal of the Adult High School issued a letter to Respondent on October 24, 2012, directing him to "arrange to meet with me at your earliest convenience" and that he should attend with his Union representative. Respondent replied by returning the letter with the handwritten note that said, "Call my lawyer for a conference time," providing the name and telephone number of the attorney. Ultimately, at the direction of the Superintendent, a meeting with Respondent and a Union representative was held on November 15, 2012. Documentation of the meeting indicates that Respondent denied all wrongdoing, at which time Respondent was shown the student's written statement and that of the teacher to whom the student spoke. Respondent was advised to be careful with the "vocabulary he uses when students are present and to behave in a professional manner at all times."

On December 21, 2012, an incident occurred that resulted in Respondent being placed on paid administrative leave, effective that day. Respondent testified that a plan was underway to hold an ice cream party for the students and that, on December 20, he purchased items needed for the party, which he loaded in his personal vehicle. On December 21, he arrived early at the school to unload the items from his car, taking them to the basement. He said that, by the time he finished, the parking spot he usually used was taken. As he drove by, he saw a sign for faculty

parking and parked there in an open space. Later, while Respondent was preparing for the party, a security guard approached him and told him he would have to move his car, as the spot he was in was reserved for another employee. According to the guard's written statement, the space had been reserved for an employee of the Business Office. Respondent refused to move his car and told the security guard not to have him towed. At hearing, Respondent explained that, even though there was a vacant spot next to where he was parked, he refused because he believed the guard was giving the space to a non-faculty member, whose position Respondent did not know; Respondent believed that he was entitled to the space on a "first come first served" basis. Respondent explained that he had concluded that the spaces were public because he had noticed that they were numbered, which, he said, had to have been done by the municipality.

The Principal of the Adult School was alerted and had Respondent come to the office, at which time he instructed Respondent to move his car. Respondent refused, asserting that the parking was public and cars did not have permits indicating assigned spaces. The Director of Buildings and Grounds also met with Respondent, in the presence of the Principal, and told Respondent that he had five minutes to move his car or it would be towed. Respondent still refused. He testified that the Director of Buildings and Grounds called him an idiot and stormed out of the meeting. At some point, Respondent's vehicle was towed. The Superintendent was notified of the situation and directed that Respondent be sent home. Security guards found Respondent in the main office and told him he was to be escorted from the building. Respondent reportedly proceeded nonetheless to visit two classrooms. Eventually, he was escorted from the building. Respondent had called the local Police Department but was told that there was nothing they could do. The Police Officers, however, did provide Respondent with a ride to retrieve his car.

By letter dated that same day, December 21, 2012, the Human Resources Manager notified Respondent that he had "been placed on paid administrative leave effective immediately. Central Administration will be contacting you." The letter notes that copies were sent to the Superintendent, the Principal, and the Union representative.

C. Paid Administrative Leave: December 2012 – February 2016

It is peculiar that Respondent then remained off duty, on paid leave, through the remainder of the 2012-2013 school year, all of the 2013-2014 school year, and the remainder of 2014. While the details of the December 2012 incident and the actions taken by the District and by Respondent are not at issue in the Arbitrator's resolution of the charges in this matter, Respondent contends that the events of December 21, 2012, gave rise to Post-Traumatic Stress Disorder ("PTSD") and, combined with the lengthy period of paid administrative leave, created a lens through which his subsequent actions as a teacher will be forever framed, creating the specter of concern about violence or danger. Respondent argues also that, following three years on paid administrative leave, he returned to a system with new administrators, new lesson place systems, and computer software.

In March 2014 the District prepared a Corrective Action Plan (CAP) for Respondent that provided, among other steps, for him to attend anger management sessions. The stated goals of the CAP included "exercise good judgment regarding interactions with and among students, as well as with staff members and administrators" and "plan appropriately for instruction." Respondent was summoned to a meeting and was told that he needed to follow the steps in the CAP to be able to return to work. With the help of the District's Employee Assistance Program ("EAP"), Respondent located a recommended therapist and attended several sessions with her. He also continued to see a therapist with whom he had begun sessions before the CAP was created.

In May 2014, following notice to Respondent, the Board of Education met in closed executive session to address Respondent's employment status. Respondent thereafter was sent to Rajeswari Muthuswamy, M.D., a psychiatrist, for a medical evaluation. That examination was conducted on May 21, 2014, and the doctor's report indicates that the examination resulted from a recommendation from the District's Employee Assistance Program (EAP). The recommendation was made for continuation of service through EAP to address interpersonal

conflicts and for Respondent to be permitted to resume "his work related activities after being cleared by EAP."

With the beginning of the 2014-2015 school year, Delvis Rodriguez was retained by the District as Director of Personnel and Evaluation.[3] Director Rodriguez testified that, immediately upon learning that a teacher was on long-term administrative leave, he reviewed Respondent's file and took steps to address the situation. In October 2014, Director Rodriguez wrote to Respondent regarding the above-referenced medical recommendation that he return to EAP to receive further treatment. He advised Respondent that information regarding such compliance would help the District assess his ability to return to work, and he requested that Respondent "provide copies of any documentation that serves as proof that you have been participating in and completed anger management counseling with EAP since the time of the request in May of 2014." The letter at one point included a typographical error and referred to a medical examination of May 21. 2004, rather than 2014, although later in the letter it referred to 2014. Respondent's then-attorney responded to Director Rodriguez, arguing that the request was out of date, since it referred to a medical report dated 2004 and noting that Respondent had worked from 2004 to December 2012. The attorney also noted that Respondent had been seen by a physician who had advised that his was "not a case of anger management." Counsel for the Board then responded, citing the May 21, 2014, findings and asking that, if Respondent had complied with the treatment and referrals, documentation of same be provided.

Director Rodriguez wrote to Respondent on January 29, 2016, confirming receipt of "documentation stating that you are able to return to work" and stating that he was expected to return to work on Monday, February 8, 2016, and would be assigned at the South Campus of the High School.

[3] At the time of hearing, Mr. Rodriguez had been promoted to Assistant Superintendent of Administration. During times relevant to this proceeding, however, he held the position of Director of Personnel and Evaluation. In the interest of clarity and brevity, he is referred to herein as "Director Rodriguez."

D. Return to Work

Respondent returned to work as assigned, on the South Campus, which was a location at which he had not previously taught. Within days, issues with coworkers and administrators began. On Saturday, February 20, 2016, Respondent sent an email to Director Rodriguez seeking to "initiate a complaint" against an English teacher he identified by name, noting that she was "Hispanic." (This teacher had been involved in the matter in 2012, cited above, in which a student alleged that Respondent had used inappropriate terms and comments in referring to his preferred music.) Respondent's email recounted an exchange in which Respondent had told another colleague that he would find and show her a video of a former student and that the English teacher, having begun a conversation with the co-teacher, stopped to tell Respondent "do not video me," which Respondent construed as an unfounded accusation. Later, alleged Respondent, she accused him of various acts associated with his administrative leave and called him "an animal." Respondent sent Director Rodriguez another email, that evening, offering to allow him to examine his cell phone and asserting that the English teacher's comments would not have been made had he been young, female, and Hispanic.

Director Rodriguez met with the English teacher and also met with Respondent, both of whom conveyed their accounts of the interactions. The English teacher submitted a detailed written report of her interactions with Respondent, denying the account Respondent had conveyed and describing the interaction as one in which Respondent had been on a "rant" and that "his behavior scared me." Based upon his exploration of the allegations, Director Rodriguez wrote to Respondent on March 18, 2016, thanking him for having raised the issue but stating that, having investigated the matter, he could not "say that there was any definitive harassment on her part." He noted that Respondent had asked only that Director Rodriguez have a conversation with the teacher, which he had done. He wrote that he would call upon Respondent's professionalism to ensure that both he and the other teacher are "cordial and amicable with each other during times you are asked to interact." Director Rodriguez also submitted a report to the Superintendent indicating that both teachers currently are in PLC together but that he would explore with the

Vice Principal the possibility of placing the teacher in a different PLC to avoid any uncomfortable interactions between the two.

Also in March 2016, only a few weeks after having returned to work, the Vice Principal met with Respondent to address a situation in which Respondent had appeared to have been asleep. Respondent referenced having PTSD but explained that he was not sure if that had caused him to doze off or if it was because of inactivity, which he attributed to lack of access to the computer system.

E. 2016-2017 School Year

For the 2016-2017 school year, Respondent continued his assignment at the High School, which had just come under the direction of a new Principal of the High School South and East Campuses, Ninth Grade Programs.[4] On October 5 and 6, 2016, she met with Respondent to review several performance issues. Respondent requested training with technology but also informed the Principal, as Respondent later commemorated in an email, that he had PTSD and that this condition made it impossible for him to respect supervisors.[5]

Training sessions were set up for Respondent with the District Instructional Leader. In addition, Director Rodriguez communicated with Respondent in October regarding his desire for accommodation, explaining that documentation of a disability that requires accommodation was needed before steps could be taken with regard to requested accommodations.

On November 25, 2016, Respondent sent to the Principal an email with the subject line "My well being." In it, he wrote: "In order for my mental well being and to overcome trauma. [sic] I am requesting the removal of the following personnel from the South Campus or from any building

[4] While the actions at issue involve at times several individuals holding the title of "principal," the content that follows uses, for economy of wording, the term "Principal" to refer to the Principal of the South Campus Ninth Grade. All others are specified by their full titles.

[5] Many months later, in August 2017, Respondent wrote a brief email to Director Rodriguez regarding the October 6, 2016, meeting. In it he confirmed the forgoing and stated that the Principal responded that she demanded respect. Respondent argued, in the email, "I consider this to be a threat to my mental well being and safety."

in which I will be present." He listed eight names. Among them were a Vice Principal, the Director of Buildings and Grounds, the English teacher referenced above, the Supervisor of Special Services, the Principal of the Adult School, and an attorney for the Union. The Principal testified that a number of the people identified were not assigned to the South Campus and several others were names she did not recognize. She forwarded the email to Director Rodriguez.

On December 16, 2016, the Principal and the Instructional Leader met with Respondent and a Union representative, with the intention of providing Respondent with a written reprimand regarding a failure to complete lesson plans. The Principal testified that, during that meeting, Respondent compared himself to a rape victim who was working for the rapist. He also explained that it was difficult for him to be in the building and that he had "flashbacks" sometimes when walking down the hall. He told them, "I want to do things to people; things I won't discuss here but I've been talking with my doctor." When the Instruction Leader asked Respondent if the remark was a threat, Respondent replied that it was not. The Principal and the Instructional Leader conveyed their concerns in emails to Director Rodriguez, recounting the Respondent's remarks. Respondent does not deny having made these comments but has cited them as notification of his need for accommodations and an effort to educate the administrators regarding PTSD.

When school resumed on January 3, 2017, Director Rodriguez notified Respondent by letter that he was being placed on paid administrative leave. Respondent promptly was sent for medical evaluation by Dr. Muthuswamy, who had conducted the examination prior to Respondent's return to work in 2016. Dr. Muthuswamy wrote, with regard to Respondent's assertion of having developed PTSD from having been escorted out of the building in 2012, as follows: "From a strict diagnostic criterion, it is not considered a criterion for PTSD since it did not involve, 'The person was exposed to: death, threatened death, actual or threatened serious injury, or actual or threatened sexual violence,' as noted in [the Diagnostic and Statistical Manual of Psychiatric Disorders, 5th Edition]." The physician noted that Respondent acknowledged that his relationship with administrators was negative and that hostility gave rise to safety concerns. As

he denied any plans, thoughts or intent of harm, the physician recommended Respondent's return to work but recommended that he have ongoing therapeutic services, which Respondent had indicated he was undergoing through a therapist and a psychiatrist. Accordingly, Respondent was taken off paid administrative leave and was permitted to return to work.

On March 28, 2017, Respondent submitted a request for accommodations, but he did not supply medical documentation. Respondent testified that he did not convey his personal therapist's letter and diagnosis because he wanted first to see if he could handle working without accommodations. Yet, in October 2017, he was requesting accommodations. Some were addressed. Many were not options because of undue burden and would result in neglect of certain job responsibilities. Respondent was asked at some point by Director Rodriguez for documentation regarding Respondent's representation that he suffered from PTSD.

Respondent also told Director Rodriguez about his interaction with the Principal regarding a cross that she wore on a necklace. Respondent reported that his religion was special to him and that he felt that it was not "being shown the respect it deserves." He therefore told the Principal to remove the necklace. Respondent has asserted the Principal thereafter had written him up and had threatened him, which he viewed as discrimination against him on the basis of his religion. [6]

At the end of the school year, a CAP was put in place for Respondent, under the supervision of the Instructional Leader. The goals included developing and implementing appropriate modifications for students specific to both the lesson and the student, developing strategies for formative assessments throughout lessons, and updating gradebooks and submitting modifications to lessons on time. It called for monthly meetings with the Instructional Leader as well as classroom observations. Respondent signed the CAP document on June 23, 2017, noting, "Impossible to achieve – no special ed sup[port] + no mod[ification] poss."

[6] Respondent raised this issue again, more than a year later, when, on May 13, 2018, he wrote to the Superintendent, in an email bearing the title, "[The Principal] disrespects Christianity," as follows: "I am Christian and have instructed [the Principal] to remove the Cross (religious symbol) from her sweaty neck. She has not."

F. 2017 – 2018 School Year

During the next school year, Respondent resumed his assignment on South Campus. In October 2017, Respondent wrote to Director Rodriguez asking for a transfer. He wrote: "With all the evidence, complaints and lawsuits that I have been presented to your office in regards to [the Principal, the Assistant Principal ….] and the Hostile workplace they created why would you in God's name expect these people to train me? Please remove me from the situation and place me in a situation I can thrive and not fail." Dr. Rodriguez denied the request for transfer, assuring Respondent that the administrative team would be professional in their support. Respondent replied via email that they had not answered his questions or provided support "and you still have not provided me with the ways they have supported me in the past. You are placing people who don't like each other in a difficult situation, that should be very concerning for you. I see you as the problem and your lack of motivation to make this situation better for all."

Respondent also was resistant to the CAP and believed that it had not been properly imposed. On October 16, 2017, the Principal reminded Respondent that he was scheduled for a CAP Support Meeting that coming Friday and she reminded him of the required monthly meetings. She asked him to bring a copy of his lesson plans to the meeting. Respondent replied via email, as follows: "To Whom it may concern, Because I believe that my Administrators [sic] unethical behavior will lead to my termination I will not participate. Thank you." The Principal, in her reply, notified Respondent that she was forwarding his response to Human Resources. Respondent then wrote, two days later, "I do not see the purpose of working with a bigot who sees men as less than women." Respondent acknowledged at hearing that he perhaps should not have used the term "bigot," and he testified that he spoke with Director Rodriguez and apologized. A few days later, Respondent received a letter from Director Rodriguez cautioning him that use of the term was unprofessional and that "inflammatory comments such as these are not acceptable in the workplace." He wrote that the Principal and her administrative team have gone beyond the scope of their responsibilities in an effort to help him "acclimate to the culture and climate of the 9th grade program" but that he has resisted and had resorted to making unnecessary and unprofessional comments. In the letter, Director Rodriguez told Respondent

that his behavior must "cease and desist immediately" and that further negative comments toward school leaders or any co-worker would result in further disciplinary action. Respondent viewed the letter as retaliation for efforts to challenge actions that he felt were discriminatory on the basis of sex and disability.

With regard to the issue of disability and accommodation, Respondent had been making references to PTSD and expected accommodations since his return to duty, but he had not provided documentation of the diagnosis to the District, even though same had been requested. The District's only relevant information had been the results of the examination by the Board-selected psychiatrist who, citing the DSM, had noted that Respondent was not experiencing PTSD. Ultimately, however, in November 2017, Respondent provided Director Rodriguez with a document from his personal psychiatrist (the document was dated March 28, 2017, but Respondent at that time provided no explanation for not having provided the document earlier). The document confirmed that Respondent had been diagnosed with PTSD and outlined a series of modifications needed for his job. They included "restructure job to include only essential functions"; provide written as well as visual instructions; provide written checklist; provide a wall calendar; use a daily or weekly task list; allow to record messages; provide printed minutes of meetings; allow additional training time; make daily check or to do list; assign a mentor; modify attendance policy; day to day feedback."

On February 12, 2018, a written reprimand was issued by the Vice Principal for the East Building for failure to complete lesson plans for English and History classes. The reprimand indicates, as does the Vice Principal in the cover email, that Respondent had refused to meet formally with him and the Principal. It noted that the Principal, another Vice Principal, and a supervisor had met with Respondent in November 2017 to discuss lesson plans and modifications, and Respondent was shown how to modify objective and procedures, which is an important step in preparing plans for special education students.

On February 14, 2018, a technology coaching meeting was held for Respondent regarding accessing MS outlook email and uploading lesson plans, and an observation was conducted by a

Vice Principal. Respondent wrote to Director Rodriguez asserting that the Vice Principal had engaged in disability discrimination during the observation. He asserted that she had falsely accused him of not submitting lesson plans after he gave her a list of accommodations that require him only to perform the essential functions of his job. Respondent wrote, "She essentially looked at my Accommodations/Modification list and selected an essential function like lesson plans and lied about me furnishing them because I have a disability not because it was true." Director Rodriguez responded that he had not been aware that disability accommodations had been made regarding lesson planning, adding: "Lesson plans are expected to be submitted via google docs as every other teacher. Please make note of that." He also provided a longer email in which he stated that he had again reviewed the March 2017 request for accommodations.

G. May 2018

1. Truth or Dare

Matters that moved the District to proceed with these charges arose in May 2018. Central to these charges are allegations regarding the events of May 1, 2018, in the class to which Respondent was assigned. He usually was the cooperating teacher in this English class but, on May 1, the English teacher was absent and Respondent was supervising the Ninth Grade students for Periods 8 and 9 (from 1:33 to 3:00 p.m.) It is not clear exactly how many students were in the class, but the record indicates that it is likely that there were 18 students in the class. Respondent asserts that the class was larger than it should have been, and the District contends that Respondent allowed students who were not assigned to the class to enter and remain in the classroom during these two periods.

The main teacher had left activities for the students to do. Respondent recalls that it was a series of questions based upon their reading. Some students, Respondent testified, did not wish to perform the assignment and told him that they wanted to play truth or dare instead. Truth or dare, Respondent testified, is commonly played by the students and is incorporated in some sub-

lesson plans. In the game, he testified, dares might include things like saying something nice about the teacher, doing something crazy with their hair, etc. The students, he said, can make up their own questions or dares, if they are reasonable. He testified that he gave the students a list of questions to use for the game but that they were permitted to create their own. Respondent put on music and then walked around, he said, to help those students who were performing their assignments.

Three students from the class testified at hearing. One student had little recollection and, while aware of the game, had not participated or observed it. One male student expressed reticence about testifying because, he said, he was sorry that the situation had created problems for Respondent. He testified that it had been the students' fault, as they should not have been playing the game. The student recalled that, at the beginning of class, Respondent took attendance and handed out an activity sheet that involved reading a story. He said, however, that only a few of the students proceeded with the assignment. Most of the students, he said, were playing Truth or Dare, using a bottle to spin to identify the person who would have to either tell the truth or take the dare. He also noted that there were approximately three students participating who did not belong in the class but had simply walked in. Respondent has acknowledged that he was aware that other students in the past had asked to come in his class but he denied knowing that they were in his class on May 1.

The students who were working on the assignment were off to the side and the others had turned their desks into a circle for purposes of the game. Throughout the two periods, the witness said, Respondent was walking around the class and, when he came to stand near their desks, they did not stop the game. The dares to be performed by the students, this witness testified, were things like kissing a girl or hugging someone. As the game progressed, he testified, there were boys and girls kissing as part of the dare and also at least one girl took a dare to perform a lap dance with a boy and another girl performed a lap dance with a girl. This student believed that Respondent observed this activity, although he did not elaborate on why he believed this. He testified that Respondent said nothing. This student, with hesitance and expressing remorse, testified that he

had taken a dare to touch a girl on her breast. He did not think that Respondent had seen him do this. He testified that one other boy had taken a dare to "grab" a body part of a girl.

Another student from the class testified. She confirmed that there were students from outside their class in the room that day. She had chosen not to participate in the game, having observed, she said, that it was mostly the "popular kids" and, while she had been invited and was tempted, she declined, especially, she said, when she saw the things they were doing. This student, however, observed the game, which she said she found interesting. In fact, she lent the group her metal water bottle for use in spinning. The configuration of desks described by this witness was the same as that of the young man who also testified. One of the dares, she recalled, was for the student to lick the floor and another was to run around the hallway screaming (although she recalled that the student taking that dare just walked out and closed the door, appearing to leave, which prompted Respondent to ask who had left the room). Other dares, she said, were to kiss, to twerk, and to provide lap dances. The dares were, she said, "mainly sexualized things that I didn't want to get involved with, so that's exactly why I said no." She recalled the instance described above, when the male student touched the female student's breast. It was, this witness felt, consensual between the two children, as she would have said something if it had not been. She observed Respondent looking up from his phone to observe the activities, walking around, and going to the side of the room. This witness also recalled that, with one of the lap-dance dares, someone started playing club music on their phone, and Respondent instructed them to turn down the volume, which the students did. Then, she said, the girl "started dancing on" the male student. This witness recalled that the game was played "nonstop" for both class periods until the bell rang and everyone left, with someone indicating that they would continue the game at one of their homes.

After the class ended, another student who had been there told the Vice Principal what had happened, and an investigation was undertaken. Students were interviewed, separately, and written statements were taken. The Department of Children and Families was notified. Students, Respondent, and other employees cooperated with that investigation, which resulted in an investigative finding that neglect/inadequate supervision was not established.

2. Observation by the Principal

This student cited above, who had not participated in but recalled the details of the game, was a witness to the other event that forms a primary basis for the charges at issue. That event occurred on May 11 when the Principal entered the History class for which Respondent was the inclusion teacher. As recalled by the student, the Principal came to the classroom and Respondent "called the cops on her in class because he was getting quote, unquote harassed, and the police came up." She was, she testified, unnerved by the presence of police who had come up the stairs and into the classroom. As this was unfolding, she said, the regular teacher instructed the students to look at the board and to not watch what was happening. Respondent, she said, was loudly saying the school was harassing him.

The record contains an audio recording of the interaction, which the Principal made, she testified, because of Respondent's "unpredictable" behavior. The Principal entered the classroom to conduct what was to be a fourth observation of Respondent pursuant to the CAP. Moments after the Principal entered the classroom, Respondent approached her and asked why she was there. She responded only that he should continue with the classroom activities. He then raised his voice and told her to leave, saying:

> No, you need to leave. You need to leave. Get up and leave. That's go. I'm asking you to go out the door. Get your stuff and get out the door now. You are not coming into this classroom unannounced. Leave. I'll call the police on you. I will call the police on you for harassing me. Out the door. You are stopping this kid from getting an education. Out the door.

The Principal responded by telling Respondent, "Mr. Cinquina, do what you need to do," and he responded:

> We're not doing anything. We're going to wait for you to leave. Put that away. You need to leave. I don't think you've got that in your head. You need to leave. All right, take a seat. I'm going to call the police on you right now.

Respondent left the room and telephoned the police, and the Principal remained in the classroom. The regular teacher resumed instruction.

When the police arrived, they told the Principal that Respondent had complained that the past week he had been trying to teach but that she had been taking ten of his students out at a time to her office. The Principal explained that she was conducting an investigation of an unrelated matter but that she was in the classroom at that time to conduct Respondent's evaluation. The officers asked to speak to the Principal and Respondent together and, as they were gathering, Respondent called a nearby Union representative to join them. The Principal explained that she can enter any classroom and the officer noted to Respondent that the Principal obviously does observations. Respondent attempted to argue with the officer, saying that all observations for the year already had been completed and that the Principal was harassing him. Ultimately, the officer commented that if Respondent felt that it was not right, it was not a police matter, with which Respondent expressed agreement, but then continued to assert that the Principal was "impinging upon my freedom to do my job." The officers suggested to Respondent that this was a matter to take up with the Union. They left, and Respondent and the Principal returned to the classroom.

The Principal later that day forwarded the recording of the interaction to Director Rodriguez. Thereafter, Director Rodriguez placed Respondent on paid administrative leave, with written instructions not to report to his work location(s) until further notice.

The following day, Saturday, Respondent submitted to the Superintendent an email citing the Principal's conduct as "one of the most unfortunate examples of leadership. . . during my fourth observation." He questioned the basis for commencing the fourth observation and stated that, during the observation, the Principal "demonstrated to myself and the students unfortunately a level of incompetence, hippocracy [sic] and frankly childishness." He alleged that, during the observation, she had positioned herself with her back to the teacher, which he surmised was for the purpose of shielding her social media texting.

The next day, Sunday, March 13, Respondent wrote to Director Rodriguez, asking "Who is the person who contacted Dyfs? What involvement do you believe I have?" He then wrote to the Superintendent telling him that he had "instructed" the Principal to remove the cross from "her sweaty neck," noting that "She has not." This was followed by an email to the Superintendent, with copies to Director Rodriguez and the Principal criticizing the quality of the proofreading of the Principal's doctoral dissertation, with a link to access the paper on line. This was followed that afternoon by an email to the same recipients criticizing the focus of the Principal's dissertation, which he described as inquiring why "woman [sic] are leaving the teaching profession after five years." On Monday at 2:51 a.m., he again emailed, alleging that the Principal had "someone else tell her what to right [sic]" in her dissertation, as it appeared to him that she had failed to remove comments from the final draft. On Monday afternoon, he wrote to Director Rodriguez: "Btw if you would like to see the WORK my students completed on this so called period of abuse (lol)/investigation done with my assistance just let me know. Also if someone calls Dyfs on me I will sue you!"

Respondent's flurry of emails on Monday included a message to Director Rodriguez, as follows: "Consider the school notified that I plan on returning to work tomorrow." Director Rodriguez responded that Respondent was not permitted to return to the building until advised to do so. Respondent replied that he was going to come to the administration building the following day to pick up his credentials and would have a police escort. Director Rodriguez responded again, reminding Respondent that he was not permitted to enter any district building. This led Respondent to write that the District and the administrators are afraid of people with PTSD, that such people are not more violent "than anyone else" and, "You are being notified for the last time to return me to work immediately." He then forwarded that message to the Principal, Vice Principal, and a supervisor, stating "This is why you are about to be personally and collectively sued if I'm not returned to work tomorrow. It's a very good time for you to take care of yourselves."

III. ANALYSIS

In seeking the dismissal of Respondent, the District asserts four charges: unbecoming conduct; inefficiency; incapacity; and other just cause. Any one of these grounds, if established, could support dismissal under N.J.S.A. 18A:6-10. In support of all four charges, the District poses 114 assertions of fact that are common to all charges, with two additional assertions of fact relating to inefficiency, incapacity, and other just cause. The factual allegations incorporate information regarding the full range of performance evaluations and disciplinary actions that began soon after Respondent's employment in 2005. The facts associated with years 2005 through 2011, however, are addressed here only generally, for the Arbitrator finds that the central charge in this proceeding is that of unbecoming conduct, and the action sought by the District is warranted by the most recent developments, without reliance on any prior shortcomings or misconduct. Thus, other aspects of Respondent's service need be examined only as to his defenses to the charge of unbecoming conduct.

As to shortcomings associated with the content and timeliness of lesson plans, Respondent has asserted that, when he returned to work in 2016, the entire system had changed, requiring access to a computer and use of a program with which he was not familiar, and the administration, too, was populated with entirely different personnel. Respondent has noted that he had been accustomed to conveying hard-copy lesson plans. Also, as a special education teacher, his lesson plans were dependent upon those of the main teachers, so that he then could develop the appropriate modifications for each student, as envisioned by N.J.A.C. 6A:14-4.6(i). [7]

Respondent argues that the references in the record to failures to prepare proper and timely lesson plans were unjustified under the circumstances and were pursued pursuant to discriminatory motives and, thus, must be disregarded. For purposes of this analysis, the Arbitrator accepts Respondent's explanation for what the District has described as shortcomings in his preparedness and compliance, but she also notes that Respondent's pre-2012 employment

[7] Students in the District's special education programs are required, by regulation, to be "provided with modifications to the instructional strategies or testing procedures or other specialized instruction to access the general education curriculum in accordance with the student's IEP."

with District also was marked by documentation of late submission of lesson plans. While Respondent may have a legitimate explanation for what was happening in recent years, the record does indicate that similar issues existed before 2012 and under entirely different systems and administrators. Nonetheless, upon reviewing all the facts and arguments in this proceeding, the Arbitrator finds that this matter may be decided without findings regarding the alleged failure of Respondent to prepare and submit lesson plans as required or expected.

Similarly, while the District submits a detailed analysis of Respondent's performance evaluations throughout the years and while both parties rely to some extent upon the CAP plans (Respondent asserting that they were improperly imposed and implemented and the District arguing that Respondent failed to cooperate and comply), the Arbitrator finds that those issues need not be reached to resolve the charges.

Ultimately, the proofs adduced by the District establish through credible evidence far beyond a preponderance that Respondent engaged in multiple instances of unbecoming conduct and that those actions, standing alone, warrant dismissal from service. As a preliminary matter, however, the Arbitrator notes Respondent's argument that the District has created and perpetuated a campaign to demonize him, creating the impression that he is potentially violent and has posed threats of violence. The Arbitrator does not see the District's case as such, but she nonetheless wishes to address any such impression. After careful scrutiny of the extended direct and pointed cross examination of Respondent, of the pages of evidence documenting Respondent's actions, and days of testimony from administrators as well as students, the Arbitrator concludes that it is appropriate to dispel any suggestion that Respondent poses a risk to the safety of others. It was, however, appropriate for the District to be concerned and to take the steps it did for medical evaluations and to require EAP involvement. Respondent's frequent commentaries have contained ambiguities that could be construed as red flags, and all involved were justified in expressing concern. Yet through a detailed examination of the evidence, the Arbitrator notes that Respondent, even in his sometimes concerning and anxious flurries of emails, consistently has conveyed and exhibited a genuine, if sometimes oddly focused, concern for and caring about the students.

What is problematic and what the evidence shows, however, is that Respondent has a total disregard for the structure of administration and supervision necessary for an educational institution to fulfill its purpose. While having generous intent toward the welfare of the students, Respondent had demonstrated a continuing unwillingness to abide by supervisory structures, to accept responsibility for his specific obligations within the educational institution, and to adhere to fundamental standards of conduct that are essential for the efficient and effective functioning of the District. In short, Respondent has shown a remarkably poor judgment as to his responsibilities and a stunning disregard for the role of administrators and the standards of professionalism required of any educator.

These failings are shown through the objective evaluation of Respondent's actions, aside from any evaluation or interpretation applied by those with whom he has continually been in conflict. Respondent asserts that he was discriminated against on the basis of a disability, which he describes as PTSD sparked by his removal from school property in December 2012 and for which he argues he had been requesting but has been denied reasonable accommodation. Yet the record reveals that it was not until November 2017 that Respondent provided documentation of the disability and insight into the nature of the accommodations that were medically recommended. Further Respondent's requests and demands for accommodations for his then un-documented condition were understandably viewed by the District as unmanageable and questionable, such as Respondent's assertion that it was not possible for him to respond to supervision and his exhortation that eight people, including a lawyer for the Union and the District's Director of Buildings and Grounds, be removed from the buildings in which Respondent would be present. Ultimately, when presented with a list of potential reasonable accommodations prepared by Respondent's personal physician, the District did provide meaningful compliance and explained why they viewed other requested accommodations as being unduly burdensome. Accordingly, the record does not support a conclusion that Respondent was discriminated against through denial of reasonable accommodations.

The Respondent also has argued that he was discriminated against on the basis of disability by having been characterized as violent, but in those few instances in which the District responded as if a threat were posed, the actions were based upon justifiable concerns, such as Respondent's statement that he had thoughts of "doing things to people" and, later, his expression of irrational outrage and efforts to order the Principal out of the classroom when she sought to perform an observation. There is no evidence that, in dealing with Respondent's sometimes peculiar and concerning approaches to communication, the administrators at any time portrayed Respondent to the community of educators, administrators, and students as a danger. The Arbitrator sees nothing the record to indicate that the adverse employment actions at issue here were motivated by discriminatory animus based on disability.

Respondent also asserts that he has been subject to retaliation for asserting his rights with regard to disability and for highlighting practices that he alleges are discriminatory on the basis of sex and national origin. He contends that adverse employment actions, including these charges, are in violation of the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-3(a). Respondent is correct in his argument that an employee is protected from retaliation when he discloses a policy or practice he reasonably believes to be in violation of law, even if the employee ultimately is wrong about the violation. The employee's belief, however, must be reasonable, and, based upon this record, the Arbitrator cannot conclude that Respondent's many oblique and some pointed references to what, to him, in moments of anger, appeared to be examples of sex or national origin discrimination were reasonable.

In his brief, Respondent also emphasizes the issue of religious discrimination that he contends was associated with his "instruction" to the Principal to remove her cross from "her sweaty neck." Respondent asserts that his complaint in this regard was based upon a perceived violation of the First Amendment/Establishment Clause by the wearing of a religious symbol in a public school. While this is a worthy effort by counsel to cast Respondent's actions and comments in a favorable and legally sound light, the evidence, including Respondent's own testimony, establishes that Respondent found the situation offensive to his personal religious sensibilities,

without regard to those of the Principal, and that he was not seeking to advance any First Amendment protections or restrictions relating to religious garb in public schools.

Ultimately, as noted above, the central elements of this case turn on Respondent's actions in May 2018, and those actions are so thoroughly based upon Respondent's choices and judgment and action that there can be no suggestion of any discriminatory ore retaliatory motivation in pursuit of these charges. The record associated with these two events amply establishes, by more than a preponderance of the credible evidence, that Respondent engaged in conduct unbecoming and that this conduct warrants dismissal from employment.

As both parties have noted in their briefs, there is no binding definition of "unbecoming conduct." Respondent argues that case law developed under N.J.S.A. 18A:6-10 show actions such as theft, assault, and fraud. that are far worse than any version of the allegations against Respondent, some of which resulted in penalties less than dismissal. While conduct unbecoming can be found to have included a litany of egregious acts that arguably are more serious than those of Respondent, the facts of record establish several startling and unacceptable actions and failings of profound significance. Looking to only the events of May 2018 and disregarding any assertions of prior misconduct, the Arbitrator must find that Respondent has been shown to have knowingly allowed children under his supervision to engage, during two classroom periods, in a game that led to boys and girls openly kissing, to girls performing lap dances for boys, and to one now chastened and regretful boy touching a female student's breast. Respondent acknowledged that he allowed the game to proceed but he has denied that any unwholesome "dares" were undertaken and, in the alternative, he asserts that, if they were, he was not aware of them.

First, the direct and highly credible accounts of the students establish that these troubling actions indeed occurred. Moreover, the evidence establishes that Respondent must be regarded as having been aware of the nature of the students' interactions. The student witnesses, who expressed fondness for Respondent and thus offer accounts untainted by personal bias, also established that no attempt was made to hide the actions from Respondent. Moreover, the final

witness in this proceeding recalled that, with the commencement of one of the lap dances, Respondent instructed the students to lower the volume on the "club music" they were playing. He also was aware that a student left the classroom. It is implausible that Respondent would have been attentive to a student leaving the room but would have remained unaware of a girl gyrating on a boy's lap, students kissing, and other actions that continued for the duration of two class periods. The Arbitrator thus cannot disregard the powerful, compelling evidence establishing that Respondent was aware of these actions. Even if Respondent's assertions that he was unaware of any of this conduct were credited, however, he then must be found to have engaged in a woefully deficient level of supervision of these classroom activities. This action, standing alone, is, without question "unbecoming conduct" for an educator responsible for teaching and protecting 18 ninth graders.

Further, Respondent's reaction to the Principal's effort to conduct an observation on May 11, established by incontrovertible and powerful evidence, was disruptive and disconcerting to students and so contrary to the level of professionalism and decorum expected of a teacher that it is a profound instance unbecoming conduct warranting dismissal from employment. Respondent's actions constituted insubordination writ large, disrupted the teaching environment to the extent that the main teacher instructed students to avert their eyes, challenged the authority of the school's primary administrator in the presence of faculty and students, and drew law enforcement into a fracas caused by his own inability to find a professional, non-disruptive way to convey his displeasure with the situation.

Respondent has argued that unbecoming conduct generally requires intentional acts. See e.g., *In the Matter of the Certificate of Sandra Kearney*, 2005 WL 2261018, OAL DKT. No. EDE 03866-04 (August 22, 2005). Yet Respondent's actions with regard to the Principal were clearly, openly, and stunningly intentional. Further, given the level of awareness the evidence shows regarding the activities of the students on May 1, that, too, must be regarded as having involved an intentional and extraordinarily poor choice to allow such actions. Respondent has benefited from superb legal representation in his matter, but ultimately it is not possible to minimize the profound degree to which this conduct is unbefitting that of a teacher or to disregard the manner

in which Respondent has revealed an inability to adhere to fundamental standards of professional conduct required within an educational institution and to exercise the restraint and sound judgment essential for any educator. For these reasons the Arbitrator must conclude that the evidence of record establishes unbecoming conduct that warrants dismissal from employment.

Dated: March 31, 2020

Jacquelin F. Drucker, Esq.
Arbitrator

AFFIRMATION

I, Jacquelin F. Drucker, Esq., an attorney admitted to the practice of law in the State of New York, hereby affirm under penalty of perjury that I am the duly appointed Arbitrator in the foregoing matter and that this document, which I have executed on this day, is my Award, issued in resolution of the foregoing matter and in compliance with all relevant and applicable laws.

Dated: March 31, 2020

Jacquelin F. Drucker, Esq.