

OAL DKT. NO. EDE7017-12
STATE BOARD OF EXAMINERS DKT. NO. 1112-111;
COMMISSIONER APPEAL NO. 3-1/14A

NELSON EVANS, JR.	:	
APPELLANT,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE BOARD OF EXAMINERS,	:	
RESPONDENT.	:	
_____	:	

Appellant Nelson Evans, Jr., challenges the determination of the New Jersey State Board of Examiners (Board) that his actions during a 2010 administration of the New Jersey Assessment of Skills and Knowledge (NJASK) tests constituted unbecoming conduct and warranted the suspension of his teaching certificate for one year. The Commissioner has reviewed the record¹ and the findings set forth in the Initial Decision of the Office of Administrative Law (OAL) and the Board of Examiners’ Order of Suspension, and concurs with the Board that appellant violated NJASK testing policy.

The material facts disclosed through exhibits and testimony presented at the OAL hearing are as follows. In May 2010, appellant was responsible for administering NJASK tests to three of his students, all of whom had “multiple disabilities challenged by behaviors.” (Summary of testimony of School Principal Angela Rose-Bounds, Initial Decision at 4) It appears undisputed that prior to the testing, appellant received training in the required rules and testing protocols, received a script setting forth what to say and do when administering the NJASK tests, and signed a test security agreement. Shortly after the testing had been administered, the district superintendent received an

¹ The Commissioner has not been provided with a transcript of the hearing in the Office of Administrative Law.

anonymous call suggesting that appellant had breached testing protocol. This call precipitated an investigation.

On May 17, 2010, Vice Principal Robert Holmes interviewed the three children who took the NJASK test under appellant's supervision. (Board Exhibit P-6) Two of the three indicated that appellant had helped them. (*Ibid.*) On May 18, 2010 Principal Rose-Bounds met with appellant, at which time he indicated that he might have given the students clues. (Summary of Rose-Bounds testimony, Initial Decision at 4; Board Exhibit P-7) On or before May 19, 2010, Rose-Bounds interviewed the above referenced three children with their parents and/or other school personnel present. (Summary of Rose-Bounds' testimony, Initial Decision at 5) In notes which she took during or immediately after those meetings, and in a memorandum dated May 19, 2010 (Board Exhibits P-8 and P-9), Rose-Bounds recounted that M.F. and N.B. told her that appellant had reworded a passage in the reading portion of the NJASK test. M.F. and C.L. recalled that appellant had demonstrated how to do a mathematics problem. M.F. stated that appellant had "used scratch paper to explain how to do a long division problem" and helped her with another math problem requiring the calculation of a maximum number of color combinations possible in a given scenario. (*Ibid.*) N.B. mentioned that he perceived appellant to have suggested to M.F. that she rethink some of her answers on the mathematics test. (*Ibid.*) He also recalled that appellant had reminded C.L. to begin answering science test questions by eliminating answers that C.L. knew to be incorrect. (*Ibid.*)

Based upon what she had learned from her interviews with appellant and the students, Rose-Bounds determined that appellant had breached his test security agreement. (Summary of Rose-Bounds' testimony, Initial Decision at 6) While test monitors may assist students with disabilities in accordance with the accommodations set forth in their Individual Education Programs (IEPs) or 504 plans, Rose-Bounds concluded that appellant had given more assistance than what was indicated in the IEPs – to the detriment of the integrity of the testing. (*Ibid.*) After sitting in on the

interviews which Rose-Bounds conducted with the three students, Gloucester Township Special Education Supervisor Bonnie Edwards also concluded that the assistance which the students attributed to appellant went beyond what was appropriate for the accommodations included in their IEPs. (Summary of the testimony of Bonnie Edwards, Initial Decision at 9-10)

Appellant was placed on administrative leave with pay on May 24, 2010, and the district developed a corrective action plan to avoid future test breaches. Appellant was returned to service for the 2010-11 school year, but the Gloucester Township Board of Education had voted to withhold his increment.

The results of Rose-Bounds' investigation were shared with the State Department of Education (DOE).² Upon review of same, Jeffrey Hauger, Director of the Office of Assessments at the DOE, agreed that appellant's conduct had violated the integrity of the NJASK assessment. (Summary of the testimony of Jeffrey Hauger, Initial Decision at 11) According to Hauger, examiners are allowed to read out instructions and periodically post the remaining time for a test. An examiner may issue a general reminder to a class to check work, but may not direct such a comment to an individual student after looking at the student's work. Examiners may not reword passages or "clarify" portions of the test itself. After the tests are given out, examiners must say "Sorry, I cannot help you," if they are asked for assistance. Interactions between individual students and examiners should be minimal. (*Id.* at 10-11) At the hearing in the OAL, Hauger referred to Paragraph 8(c) of the security agreement which the examiners are required to sign, which states:

I will not interfere with the independent work of any student taking the assessment, and I will not compromise the security of the test by any means

² Immediately after Rose-Bounds advised Superintendent Seddon of her conclusion that appellant had breached NJASK test security, Genevieve Lumia from the Camden County Office of the Department of Education conducted a preliminary investigation concerning the incident. She interviewed appellant, Rose-Bounds, Edwards, Holmes, Rodney Greco (the Gloucester Township District Test Coordinator) and Dion Davis (the District Human Resources Coordinator). She did not interview the students, but reviewed their statements. (Joint Exhibit J-3) Her conclusion was that appellant inappropriately gave the students answers to the tests. (*Ibid.*)

including, but not limited to: coaching students during testing or altering or interfering with the students' responses in any way.

(Board Exhibit P-1 at 69)³

Hauger further referenced the first page of the 2010 "Grade 4 Examiner Manual, Group 2" (Examiner Manual) (Board's Exhibit P-4) which reminded teachers, *inter alia*, that they may not answer any questions about test items or content. (Summary of Hauger testimony, Initial Decision at 11)

With regard to the question of accommodations for special education students, Hauger testified that appellant's assistance to the students in question fell outside the parameters of allowable accommodations. (Summary of Hauger's testimony, Initial Decision at 12) Appendix B to the Examiner Manual, which addresses the procedures for testing special education students, reinforces Hauger's determination. At the outset, any modification of the testing procedure for a special education student must relate to an accommodation set forth in the student's IEP or 504 plan. Section D of Appendix B allows an examiner to read out loud, repeat, clarify or even reword test directions. It also allows an examiner to read aloud test questions. It expressly forbids an examiner from reading aloud passages in the Language Arts Literacy section of NJASK. In addition, amongst the slides in the training presentation given by Rose-Bounds to the examiners, was one entitled "Never." (Board's Exhibit P-23 at 68) Two of the admonishments on the slide were: "Never read the reading passages to students includ[ing] IEP and 504 students;" "Never provide extra sheets of paper [*e.g.* scratch paper] unless an IEP or 504 plan specifies this as an accommodation." In light of all of the foregoing, the Office of Assessments voided the results of the tests administered by appellant. (Summary of the testimony of Jeffrey Hauger, Initial Decision at 11) As far as he knew, appellant's students were not retested. (*Ibid.*)

³ Also, Paragraph 6 of the security agreement states "I will not review any test items or passages with students before, during or after the assessment." (Board Exhibit P-1)

The Investigations Unit of the Office of Fiscal Accountability and Compliance of the Department of Education (OFAC) also conducted an inquiry into appellant's administration of the 2010 NJASK tests. In December 2010 it issued a "Report of Examination." (Joint Exhibit J-4) Investigator Joanne V. Griffith interviewed the Gloucester Township Superintendent Thomas Seddon, Vice Principal Holmes, Principal Rose-Bounds, Special Education Supervisor Edwards and appellant. She did not interview the students, but rather relied on Rose-Bounds' memorandum summarizing the student accounts of the May 2010 testing.⁴ (Joint Exhibit J-4 at 3)

In his interview with Griffith, appellant expressed his view that the 2010 test administration training was inadequate, particularly concerning what was or was not appropriate procedure in administering the NJASK tests to special education students. He conceded that the test training had been the same when he previously taught in the middle school, but that the inadequacies had been counterbalanced by the fact that he had proctors when administering the tests in the middle school. (Joint Exhibit J-4 at 4) Without the assistance of proctors in the 2010 testing, appellant felt himself at a disadvantage. (*Ibid.*)

Appellant told Griffith that he had reviewed methods for solving long division problems before he administered the NJASK test because he felt that division had not been adequately covered in class. (Joint Exhibit J-4 at 5) Review before tests had always been his practice as an examiner. (*Ibid.*) He had also reminded the students of test-taking aids which they had previously learned. (*Ibid.*) However, he denied that he gave any of the students answers, told anyone that their answer was wrong, or reworded reading passages. (*Ibid.*) He only reworded directions. (*Ibid.*)

⁴ Edwards told Griffith that, in her view, M.F. and N.B. were functional and capable of adequately reporting about their testing experiences. C.L. had lower comprehension skills and may have been less capable of reporting adequately. (Joint Exhibit J-4 at 4)

The conclusion set forth in the December 2010 OFAC report was that appellant did not properly administer the NJASK4 tests. (Joint Exhibit J-4 at 5) The report was forwarded to the State Board of Examiners (Board) for its review and consideration, and on November 1, 2011 the Board voted to issue appellant an Order to Show Cause why his teaching certification should not be suspended for one year. The Board sent the Order to Show Cause to appellant on April 17, 2012. Upon receiving appellant's answer on May 11, 2012, the Board transmitted the matter to the Office of Administrative Law (OAL) for a hearing, which hearing was held on May 21 and 23, 2013.

At the OAL hearing, appellant testified that he had attended the 2010 training for the NJASK testing, but it had felt brief and rushed.⁵ (Summary of the testimony of Nelson Evans, Initial Decision at 12) His recollection was that the slide concerning acceptable accommodations was not legible. (*Ibid.*) He asked for a proctor⁶ -- which had been provided to him when he taught in the Gloucester Township middle school -- and/or to be located close to the principal during the 2010 testing, in the event that he needed assistance. These requests were not granted. (*Ibid.*) Appellant urged that the absence of a proctor was a significant disadvantage because all three of his students had both learning disabilities⁷ and behavioral issues, did not want to sit still and take the test, took significantly different amounts of time to complete each test section, and needed more time than regular education students. (*Id.* at 13) The process was arduous and the students became tired.

⁵ Subsequent to the April 19, 2010 training appellant signed a security agreement which acknowledged that he had been trained to administer the statewide assessments. (Board's Exhibit P-1)

⁶ Appellant conceded that he had never followed up on his verbal request for a proctor, which request was made a month before the testing. He had never spoken with his principal or put the request in writing. (Summary of Evans testimony, Initial Decision at 14)

⁷ The record indicates that for all three of the students taking the NJASK test with appellant, accommodations called for in their IEP or 504 Plans included 1) the reading aloud, repeating, clarifying and/or rewording of directions, 2) the reading aloud of test questions (but not Language Arts reading passages), supervision by an examiner familiar to the students, and description by the examiner of charts, pictures or graphs. One of the three students was also allowed manipulatives and graph paper for math problems. (Joint Exhibit J-4 at 4)

While appellant conceded that on the test date he went over math and long division, using scratch paper, he testified that it was prior to his procuring the test materials and starting the test. (Summary of Evans' testimony, Initial Decision at 13-14) He acknowledged that he may technically have interfered by conducting a review prior to the test, but he had never been told he could not do so, and did not believe that his review was, in fact, interference. (*Id.* at 13) He further stated, as he had to the OFAC investigator, that he had only reworded the directions, not the test questions or items in the language arts test section. (*Id.* at 13-14) Appellant denied 1) assisting M.F. on the test, 2) telling her to look at another letter before putting her answer on the test, 3) helping her with a question involving combinations of colors. (*Ibid.*) He also denied telling C.L. to eliminate answers. (*Id.* at 14) Appellant testified that when the students asked him for help, he referred them to the test-taking clues that they had learned in an assembly. (*Ibid.*) He suggested that the students may have confused incidents that had occurred in the regular classroom with what took place on the days of the NJASK testing. (*Id.* at 13-14)

The Administrative Law Judge (ALJ) assessed the testimony of all of the witnesses. Particularly crucial was the testimony of M.F., whom the ALJ found to be credible, and whose testimony the ALJ found consistent with both the documents entered into evidence and the testimony of other witnesses. M.F. could not recall receiving help with a problem involving color combinations, but did testify that during the testing appellant reworded a language arts passage for her and explained a math problem using scratch paper. (Summary of the testimony of M.F., Initial Decision at 17) Further, M.F.'s testimony was the 'residuum of competent evidence' needed to consider Rose-Bounds' and Holmes' double hearsay memoranda identifying what N.B. had told them about appellant's conduct during the testing.

The ALJ found M.F.'s testimony and N.B.'s memorialized accounts to be harmonious and more persuasive than appellant's version of the testing he had administered. More specifically, the ALJ found that appellant "reviewed both Math and Language Arts items with his

students, particularly M.F.”, in violation of Section 6 of the Statewide Assessments Test Security Agreement (Security Agreement) which states: “I will not review any test items or passages with students before, during or after the assessment.” (Board Exhibit P-1; Initial Decision at 18) Further, the ALJ found that the evidence in the record supported the conclusion that appellant interfered with the independent work of M.F., contravening Section 8(c) of the Security Agreement which prohibits coaching during the tests. (*Ibid.*)

Thus, the ALJ concluded that appellant breached the Security Agreement, which breach constituted conduct unbecoming a teacher. Notwithstanding the fact that subsequent to his deficient administration of the 2010 NJASK tests, appellant had served successfully as an NJASK examiner during the 2010-11 and 2011-12 school years, the ALJ determined that appellant’s conduct in 2010 had been sufficiently damaging to warrant a one year suspension of appellant’s teaching certificate. On August 8, 2013, she issued an Initial Decision recommending same.

On November 1, 2013, the Board voted to adopt the Initial Decision and on December 6, 2013, it issued a decision suspending appellant’s certificate for one year, commencing on January 1, 2014. However, on January 17, 2014, the Board granted appellant a stay of its decision pending the resolution of the instant appeal before the Commissioner.

Careful review of the record, Initial Decision, Board decision and appellate papers filed by the parties reveals no basis to disturb the factual findings set forth in the Initial Decision, nor the consequent determinations of the ALJ and Board that appellant perpetrated unbecoming conduct by breaching NJASK test security. Further, while the penalty suggested by the ALJ and adopted by the Board of Examiners is stringent, the Commissioner cannot conclude that it is arbitrary, capricious or unreasonable.

Appellant may not go without discipline. His actions resulted in the disqualification of test results for three students, depriving the school district, the State Department of Education, and

the students themselves of important feedback about their progress. Accordingly, the one year suspension of petitioner's teaching certification is upheld.

IT IS SO ORDERED.⁸

ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 30, 2014

Date of Mailing: October 3, 2014

⁸ Pursuant to *P.L. 2008, c. 36 (N.J.S.A. 18A:6-9.1)*, Commissioner decisions are appealable to the Appellate Division of the Superior Court.