

**Pursuant to Referral by the Commissioner of Education
State of New Jersey
Before Timothy J. Brown, Esquire**

In the matter of:

The Tenure Hearing of Iman Jones

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: **Agency Docket No. 92-5/17**

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**State Operated School District
of The City of Newark, Essex County**

:

:

Decision

Appearances:

On behalf of the State Operated School District of The City of Newark:

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On behalf of Iman Jones:

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Introduction

This matter arises from tenure charges of conduct unbecoming a staff member against teacher Iman Jones, (Respondent) by the State Operated School District of The City of Newark, Essex County (the District) and a June 16, 2017 referral of the tenure charges to the undersigned by the New Jersey Department of Education, Bureau of Controversies and Disputes pursuant to *P.L. 2012, c. 26* as amended by *P.L. 2015, c. 109*.

The hearing in this matter was conducted on July 24, August 21, 25 and 28, 2017 in Newark, New Jersey. All parties were afforded the opportunity for argument, examination and cross-examination of witnesses and the introduction of relevant exhibits. Respondent Iman Jones was present for the entire hearing and testified on her own behalf. At the close of the hearing on August 28, 2017, the parties elected to submit written closing argument, upon the receipt of which by the arbitrator on September 29, 2017 the matter was deemed submitted.

This Decision is made following careful consideration of the entire record in the matter, including the under-sign's observations of the demeanor of all witnesses.

Issues

The issues presented in this matter may be accurately stated as follows:

Has the District met its burden of establishing the truth of its conduct unbecoming tenure charges against Respondent, and (a) if so, what is the appropriate penalty, if any, and (b) if not, what is the appropriate remedy?

The Tenure Charge

The tenure charges in this matter were certified by the State District Superintendent of the State Operated School District of The City of Newark Christopher Cerf on May 11, 2017. The related March 24, 2017 Notice of Tenure Charges to Iman

Jones focuses primarily upon a May 5, 2015¹ incident involving Students A and Z² in

Respondent's classroom and provides in relevant part:

PLEASE TAKE NOTICE that H. Grady James, IV Principal of Hawthorne Avenue School, hereby files charges of unbecoming conduct and other just cause against Iman Jones ("Respondent"), a tenured teacher employed by the State-operated School District of the City of Newark ("School District"), pursuant to N.J.S.A. 18A:6-11 AND N.J.S.A. 6A:3-5.1.

CHARGE ONE: UNBECOMING CONDUCT

1. Respondent has engaged in conduct unbecoming a professional teaching staff member. Specifically, Respondent has committed the following acts that constitute unbecoming conduct:
2. On May 5, 2015 two first-grade students in Respondent's class at Hawthorne Avenue School, A.B. and Z.T., were running around the classroom and engaging in horseplay near Respondent's desk. During the horseplay while running around, student A.B. cut student Z.T. on his scalp with a razor. Student A.B. had obtained the razor in, on or near Respondent's desk.
3. At the time of the incident in which student A.B cut student Z.T. with the razor, Respondent was standing in the doorway of the classroom, using her cellphone and not paying attention to the students. Respondent was unaware of the occurrence and unaware of Z.T.'s injury until Z.T. approached her with blood running down his face and his hand on his head.
4. Z.T. was taken to the school nurse, who administered emergency medical treatment. An ambulance was called, Z.T.'s parent was contacted, the Newark Police Department was advised of the incident. Z.T.'s parent was advised to take Z.T. to the hospital for treatment. Z.T. was taken to the hospital and there received treatment, including sutures and stitches.
5. The School District reported the incident to the New Jersey Department of Children and Families, Institutional Abuse Investigation Unit ("IAIU"). IAIU investigated the incident and determined that "neglect/inadequate supervision is established regarding [Respondent's] action, in accordance with N.J.S.A. 9:6-8.21" and that A.B. and Z.T. were neglected children.
6. By engaging in the conduct set forth above, Respondent exercised extremely poor judgment and careless, reckless and wanton disregard for her students, such that Respondent cannot be trusted with the supervision of students. For these reasons, Respondent's behavior

¹ All dates are 2015 unless otherwise indicated.

² Students are herein identified by their first initial.

was conduct unbecoming a member of the professional staff of the School District.

7. By engaging in the conduct set forth above, Respondent failed to carry out her duty to protect the safety and well being of students, and put one or more students at substantial risk of harm. For this reason, Respondent's behavior was conduct unbecoming a member of the professional staff of the School District.
8. Respondent's conduct set forth above is contrary to that which the School District may reasonably expect of members of its professional staff, resulted in physical injury to a student, provided a poor role model for students, and is damaging to the reputation of the School District. For these reasons, Respondent's behavior was conduct unbecoming a member of the professional staff of the School District.

TENURE CHARGE TWO: OTHER JUST CAUSE

9. The School District repeats and realleges the facts set forth in paragraphs 1 to 8 above.
10. The acts and omissions described above constitute other just cause for dismissal of a tenured teaching staff member.

WHEREFORE, the undersigned hereby requests the following relief:

- a. Dismissal of Respondent from the position in which she has tenure in the School District;
- b. Suspension of Respondent without pay, pending review and consideration of these charges; and
- c. Such further relief as may be authorized by law and deemed equitable by the State District Superintendent, the Commissioner of Education and any assigned arbitrator.

District Evidence

As fact witnesses the District presented Hawthorne Avenue School Principal Henry Grady James, IV; Vice Principal Terry Lane; Hawthorne Avenue School nurse Karen Wenson ; District's Manager of Compliance and Tenure at the time Michelle Takyi and the District's Special Assistant for Teacher Quality at the time Javier Nazario.

Nazario testified that the District has a policy - reviewed with staff annually on organization day – that teachers are responsible for supervising their students and maintaining such supervision at all times. He testified that the general policy relating to adult use of cell phones in schools is that the phones should be kept on silent, that they can be used for emergencies and that it is not considered an appropriate classroom management technique for teachers to telephone the parents of students during class and in front of other students for student-behavior purposes. Such use of a cell phone, Nazario testified, degrades the authority of the teacher in the eyes of students and cannot be accomplished without diverting the attention of the teacher from the students. Nazario also explained that other District policies are also reviewed at the beginning of the year staff meetings including those relating to accident responses and injuries by weapons responses.

A razor blade is considered a weapon, Nazario testified, and he recalled receiving a call about the May 5 incident late in the day of the 5th from vice principal Lane during which the vice principal reported there had been a serious injury; that a student had been cut in the head and that at the time Respondent was not in the classroom and was on her cell phone. Vice principal Lane also reported that the police had been called and that the student and student's parents were on the way to the hospital in an ambulance. According to Nazario, he instructed Lane to write up an incident report and the matter was reported to the New Jersey Department of Children and Families, Institutional Abuse Investigation Unit (IAIU). Nazario explained that the District Talent Office immediately determined to remove Respondent from the classroom pending the IAIU and subsequent District

investigations of the matter, and that as a result, Respondent was assigned to the District's central office as of May 6.

Nazario admitted that each school principal has the authority to establish his or her own cell phone rules, but that in any case it was his opinion that no principal would approve the use of cell phone calls to parents for classroom management reasons in the presence of students.

Terry Lane is the vice principal of the Hawthorne Avenue School and during the 2014-2015 school year supervised the school's K through Second Grades. Lane was Respondent's immediate supervisor. She testified that she visited Respondent's class daily because, in her view, Respondent had challenges relating to classroom management. According to Lane, as a consequence of her frequent visits to the classroom, she believed she had a good relationship with the first-grade students in the class. Lane testified that at some point after the start of the school year, co-teacher Warren Davis was assigned to Respondent's class in an effort to address what Lane characterized as Respondent's pattern of absences and to assist with pedagogy, etc. Eventually the co-teachers split the subjects to be taught with Respondent being responsible for literacy. Lane testified that on occasion she observed Respondent sitting at the teacher's desk in the classroom, but never saw her instruct from the desk. Like other teachers, Lane testified, Respondent would teach from all around the classroom. It is undisputed that Davis was not present in the classroom during the afternoon of May 5.

Lane explained that Respondent's classroom was located in the Temporary Classroom Unit (TCU); a one-story facility attached to the main school building by a door and consisting of two hallways in the shape of an "L." According to lane, the school

nurse's office is also located in the TCU and fairly close to Respondent's classroom; about half way down the hall. Lane claimed that she told Respondent a number of times that she did not want the teacher using her cell phone during instructional time because it would cause the children to get excited and distracted the teacher from monitoring the students. Although she believes Respondent heard her on this issue, Lane testified, Respondent did not "own it." Lane testified that she also told Respondent it can be a problem to call parents on the teacher's personal cell phone because the parents then have the teacher's number. Better to use the nurse's office phone for calls to parents, Lane explained to the teacher.

Lane testified that she knew the protocol at the school was that teachers could call parents. However, she further testified, she did not understand the protocol to mean that teachers could call parents during instructional time; that is why she informed her teachers that they could use the phone in the nurse's office or the main office to call parents.

Lane testified that prior to May 5, she never had an incident of a student being injured by a weapon in the school. Lane explained that there have been other injuries at the school from gym class or playground activity; including injuries that have resulted in the student being taken to the hospital by ambulance at the request of parents. The school's practice, Lane testified, it to have the injured student examined by the school nurse and to have the student's parents contacted. The nurse decides if paramedics should be called. If more than one student is involved, Lane further testified, the involved students are separated. All involved adults are asked to submit a written report on the incident.

Lane testified that in the late afternoon of May 5 she was in the main office when the office clerk told her the vice principal was needed in the nurse's office. Lane walked to the nurse's office and observed Z with an ice pack on his head. According to Lane she asked the student what happened; what the student was doing and what Respondent was doing at the time. According to Lane when she asked Z what respondent was doing the student stated that the teacher was on her cell phone and not in the classroom.³ According to Lane, the blade used to cut Z was in the nurse's office at the time – a metal blade about two inches in length, sharp on one side with a hole in the wider end where it looked to Lane as if the blade could be attached to a handle.

Lane testified that she then went directly to Respondent's classroom where, according to Lane, she found "mass hysteria" with all of the students trying to explain what had happened; that A and Z were running around the classroom and when Lane asked where Respondent was, students reported that she was on the phone. According to Lane when she asked A what had happened and where did the blade come from, the student responded that "he hit me" and did not offer a response to the question of where the student had gotten the blade.

School security removed A from class and took the remainder of the class to dismissal. Lane was aware that the police were coming and returned to the nurse's office. There, she observed Respondent, paramedics, Z's parents and two police officers. Lane testified that while in the office she overheard Respondent say that A and Z were running

³ Lane completed a "Staff Incident Report" that same day stating only that; "When asked, What was the teacher doing? Z stated, 'She was talking on her cell phone.'" The following day, the school, via an "Incident Report" signed by vice principal Tijuana Porter as "recorder" and identifying Lane as the "reporter" reported to the District again that "When asked, What was the teacher doing? Z stated, 'She was talking on her cell phone.'"

around the classroom and she saw A cut Z on the top of the head. Respondent also stated that she did not know where A got the blade from. According to Lane, Respondent stated that she was in the classroom at the time. Z and Z's parents then accompanied the paramedics to the hospital. Lane testified that she asked Respondent to write a report on the incident, that such was protocol, and that she wanted the report because the statements of Respondent in the nurse's office did not match the accounts Lane had received from students in the classroom that Respondent was on the cell phone at the time of the incident. Respondent did not submit the requested report.

Lane explained that it was not up to her to decide whether Respondent was in the room or not at the time of the incident and that she knew the matter had to be subject to an investigation. By letter dated May 5, Respondent was informed by District Chief Talent Officer Vanessa Rodriguez that the District "has been notified of an allegation that was made against you" and that effective May 6, the teacher was reassigned until further notice to Assistant Superintendent Roger Leon's Network Office.

Neither A nor Z, nor many of the other students in the class returned to the classroom the following day. Leon testified. However, Z's mother and many "aunts and uncles" did come to the classroom that afternoon and wanted answers about the safety of Z in the school. Lane testified that after the May 5 incident the community was angry and intense and wanted to know why the police had been in the school, and the identity of the other child involved. Additionally, Lane stated, there were media outlets outside of the school trying to interview classmates of Z.

Lane testified that on May 6 she called Child Protective Services (NJ Department of Children and Families) and explained the situation. The Department's Institutional

Abuse Investigation Unit (IAIU) thereafter conducted an investigation of the matter and eventually issued two December 1 “Findings Reports,” one to an interested parent and one to the District, the former stating in part:

IAIU conducted its required investigation and determined that the allegation of Neglect/inadequate Supervision is Established. IAIU has determined that [Z] is a neglected child, but, in taking into account the aggravating and mitigating factors associated with the incident, the neglect does not warrant a finding of substantiated. The determination of whether a finding of child neglect is Substantiated or Established is an administrative decision made sole by IAIU.

...
The appropriate licensing or supervisory authority may take additional action as a result of this investigation.

The IAIU report issued to the District again stated that the report (“review”) is solely administrative and summarized the findings of the investigation, in part as:

...The results of the investigation indicate that [Respondent] failed to provide adequate supervision for A and Z. A and Z were horse-playing behind [Respondent’s] desk and running around the classroom. While running around, A inadvertently cut Z on his scalp with a razor found in or near [Respondent’s] desk. [Respondent] was standing in the doorway of the classroom on her cell phone and not paying attention to A and Z at the time of the incident. [Respondent] was unaware of any incident until Z walked over to her with his hand on his head and blood was observed running down his face.

Based upon the information gathered and the physical observation of the children, A and Z are neglected children. The information gathered indicates that A and Z were placed at substantial risk of harm by virtue of the incident...

The District also conducted its own investigation into the matter, a process that was held in abeyance per District policy while a matter is being investigated by the IAIU. The District’s investigation included the findings of the IAIU; review of surveillance videos of the hallway outside of Respondent’s classroom before, during and after the May 5 incident; and interviews of Lane, school nurse Karen Wenson, eight-year-old classmate “J” and Respondent. The District’s investigator, then Manager of Compliance

and Tenure Michelle Takyi, issued a January 6, 2017 “Findings Report” wherein Takyi concluded with the following “Recommended Action:”

Z was injured by a razor that was found in [Respondent’s] classroom while she was inside the classroom teaching the classroom. According to [Respondent’s] own testimony.⁴ She noticed that A kept getting out of his seat. Besides threatening to call his father as an attempt to get him to sit down, [Respondent] did not utilize any other classroom management technique to ensure that A remained seated. As such A was allowed to roam the classroom. Although [Respondent] denied seeing A near the teacher’s desk located in the classroom. Student witness J witnessed A take the razor from the desk located in the classroom. During the course of horseplay with Z A cut and injured Z on the head with the razor. Student witnesses informed Vice Principal Lane and J also informed district representative that [Respondent] was outside of the classroom at the time A cut Z on the head. Although surveillance cannot corroborate this, the witnesses’ testimony was consistent in this regard. Based on the findings, I recommend the District pursue tenure charges for termination against [Respondent] for neglect of duty, which resulted in serious injury to a student.

School nurse **Karen Wenson** testified that in her 13 years as nurse at the school she has requested an ambulance many times for various student injuries, but that the May 5 incident was the first time she requested an ambulance due to an injury by a weapon. According to Wenson, even before Z arrived in her office she could hear students running down the hall calling out “nurse, nurse.” When they arrived with Z – who she described as being hysterical - she quickly began washing off Z’s head and asked what happened. The five or six first graders reported A had cut Z with a blade that he got from the teacher’s desk, and when Wenson asked; “where is your teacher?” they responded “in the classroom.”

Wenson testified that Z’s head wound looked more serious than it actually was because – like mouth wounds – head wounds bleed profusely. She explained that, as the

⁴ The Report’s references to “testimony” refers to unsworn statements made to the investigator. There are no sworn witness statements in the record.

school nurse, she determines if and when an ambulance is required to transport a student to the hospital. In the case of Z on May 5, after she washed up the student and stopped the bleeding she observe two cuts on Z's scalp; one superficial and a second an inch long that was deep enough to require stiches; a procedure that required the student to go to the emergency room. Thus, Wenson explained, she called an ambulance and when dispatch summoned the ambulance due to a blade injury of a student, the police – who monitor ambulance dispatch – also responded to the call. When the police arrived, they wanted to interview A, but, Wenson testified, she and school administration would not permit such without a parent being present.

Z did not return to school for two or three weeks after May 5, Weson recalled. Although she attempted to called Z's mother to check on Z, her calls were not answered. In her view, Wenson testified, the cut would have required only a few stiches and there was no medical reason for Z to be out of school.

Hawthorn Avenue School Principal **Henry Grady James, IV**, was on an extended leave at the time of the May 5 incident. He testified the District and school have a policy that teachers are responsible for the safety of their students and his school had a policy that teachers were not to use their cell phones as such conduct means the teachers are not teaching. According to James, he follows a progressive discipline policy relating to teacher cell-phone use when he observes such. He further testified that a December 9, 2014 email⁵ he sent to his teaching staff, including Respondent, providing:

...The world is not perfect, therefore when a situation arises where a child disrupts the lesson for any reason, make a mental note of it and reach out to the parent (if the level of disruption is not very serious). If in fact a student is habitually disruptive, disrespecting and or not focused during the lesson, it is the job of the supervising adult to

⁵ Relied upon by Respondent as authority for her calling parents during class time.

redirect the child with some sort of intervention(s). Reach out to a parent first. Try to converse with the student at lunch or after school. Whatever you do, please do something...

was not an instruction for teachers to call parents during instructional time. He testified that he had previously explained at a staff meeting that the primary message (as contained in the email) was to first speak with the parents about student disruption before contacting an administrator.

James testified that he signed off on the Tenure charges. Before doing so, he reviewed all of the evidence attached to the charges (the Statement of Evidence and supporting documents) but did not review Takyi's January 6, 2017 Internal Investigation Findings Report. According to James, the May 5 injury was a direct result of a teacher not managing her classroom. If Respondent was on her cellphone at the time, James asserted, she could not have been managing her class, and if she was not on her cell phone, it would be even worse as the teacher was simply not paying attention; was not managing the class. Such conduct James asserted, is "conduct unbecoming" as it is conduct by the teacher that is outside of the expectations of the District.

There was significant aftermath to the May 5 incident, James testified, as he heard from parents that they were "pissed" about what happened and the incident was reported on a local television news channel. Considering this occurred during the period of the "One Newark" initiative where parents could choose the schools for their children, James explained, such bad publicity could result in fewer parents sending their children to Hawthorne Avenue School and could eventually result in the closure of the school.

The **surveillance video** offered by the District shows the hallway outside of Respondent's classroom from a five or so minutes prior to the cutting incident to a number of minutes after the incident. The video does not show Respondent outside of the

classroom at the time of the incident. The video does not offer a view into the door alcove leading to Respondent's classroom.

Respondent Evidence

Respondent Iman Jones has taught in the Newark School District since 1999, initially as a per diem teacher and since 2003 as a full-time teacher. At the time of the incident at issue herein, Respondent had no record of discipline.⁶ Following closure of the District elementary school where she taught for a number of years, Respondent was assigned to teach first grade at the Hawthorn Avenue Elementary School for the 2014-2015 school year. Respondent testified that she had not previously taught first grade. Her first-grade class was composed of 20 or 21 students.

Respondent described her classroom at Hawthorn as having clusters of student desks arranged in groups forming the dots on a five dice, an additional area with a rug (referred to as the rug area) and a single teacher desk. According to Respondent, she did not use the teacher desk as she usually would be standing, walking around the classroom or seated at one of the five desk clusters (her "stations") when instructing students. Respondent further testified that the first-grade class was assigned two teachers, herself and Ms. Warren Davis; that the two teachers split the subjects for purposes of teaching and that Respondent told Davis that Davis could have the teacher desk. Respondent explained that she kept her personal belongings in a locked cabinet in the classroom. The door into the classroom from the hallway had a single window covered by paper and opened toward the hallway into an alcove somewhat larger than the width of the door.

⁶ Grievant's file contained a subsequent December 11, 2015 letter of reprimand; a letter Respondent asserted should have been removed from her file as the result of a settlement.

According to Respondent, she collected her students from gym class in the early afternoon of May 5 and as they were returning to the classroom one of her students, N, asked if he could go back to gym. When Respondent told N he had just been to gym and could not go back, the student, according to Respondent, responded by grabbing items off of a cabinet in the classroom and throwing them onto the floor, pushing a desk over and throwing things sporadically around the classroom. Respondent testified that N had engaged in such behavior in the past; that the school's child study team had come up with a number of interventions for N when he acted out, and that on this occasion Respondent thought it best to use her cell phone to call N's mother to avoid the child possibly being referred to an area hospital's mental department where the child had been sent by school administration on six prior occasions. Respondent recalled that N's mother came approximately five to seven minutes after her call and took N home. Respondent testified that she understood that under school policy she could use her cell phone under such circumstances.

After N left and she straightened out the class room, Respondent began teaching the subject block, during the course of which, she testified, she stood at the board and walked around the classroom. During the course of the lesson Vice Principal Lane came to the class-room, returned a student she had been meeting with to the room and sat in the back of the room for a minute and then quietly got up and left the class. Respondent recalled that sometime thereafter during the course of the lesson, student A – who Respondent described as a very energetic student who had a hard time staying seated – got up out of his seat. Such conduct by A was not unusual in Respondent's experience, and she had previously used different strategies to modify A's behavior, including sitting

the student in another seat away from other students, spend one-on-one time with the student, established various rules, used a student contract and written daily reports home. Such strategies did not work with A, Respondent asserted, and she eventually submitted INRS study team paperwork seeking assistance from the administration with respect to A. (Grievant further recalled that she had not yet received a response to her request due to the extended absence of the study team's head counselor.) In any event, on the occasion when A got up out of his seat on May 5 Respondent asked the student to sit with her at the cluster where she was then seated. A did not do so and instead, Respondent testified, walked to the rug area and Respondent again instructed the student to take his seat. He again did not do so and Respondent again told the student to come sit near her. When A refused the instruction, Respondent stated she would have to call A's dad. (Respondent explained that she had used this strategy in the past and when she had previously gotten A's dad on the phone and had the dad speak to A, the student would thereafter cooperate.) On this occasion, Respondent recalled, A went to his seat as Respondent was making her call but when he realized his dad did not answer the call, A got back up, walked over to another student desk cluster and spoke to student Z, at which point both students A and Z walked over to the rug area. Respondent testified she then called A's mom, was unable to get her and left her a message. Respondent then called out to Z to return to his seat, that he did not want to "get a yellow," at which point Z returned to his desk.

According to Respondent, she then got up and walked between the rug area and Z's student cluster, a conduct Respondent described as creating a barrier between A and Z consistent with the "Strategy of Proximity Rule." There was a point, Respondent

explained, where A walked over to Z and “did some playful type of movement” with his hands toward Z. Both students were smiling and Respondent explained she could not describe A’s action as a hit. Respondent again told A to sit down. Respondent remained standing and recalled that she was looking down at another student’s paper and work when she sensed a child standing next to her. Respondent looked down to her side and saw Z standing there with his hands on his head and a “trickle” of blood on his forehead. According to Respondent, she then looked at A and said: “what did you do?” A responded by just looking at the teacher and looking surprised. Respondent testified that she hit the classroom intercom button, assigned another student to accompany Z to the school nurse, opened the classroom door for the two students so no blood would get on the doorknob and using the intercom told the main office what had happened. She testified that as she was speaking to the main office, some of her students began to say “that’s my cousin and such” and ran out of the room to accompany Z to the nurse. Respondent testified that she did not call the nurse to her classroom because there was only a “trickle” of blood on the student’s forehead and she was confident Z could get to the nurse’s office – only down the hall and to the left – with no problem.

Respondent testified that at the time she did not know what could have caused Z’s injury and that another student pointed out something on the floor to her; a small piece of bloody metal that Respondent then picked up with a piece of paper. She testified that she had never seen the object before, does not know where the object came from or how long it was in the classroom. Respondent testified that she later handed the object to the security guard. Although Respondent testified that she did not actually see the incident happen, she was present and “in the moment” standing by Z’s cluster. Respondent denied

that she was out of the classroom or in the classroom doorway vestibule or on her phone at the time of the injury. She testified that she was surprised by the incident and does not know what she could have otherwise done to prevent the incident.

Positions of the Parties

The parties submitted post hearing briefs containing exhaustive analysis of the factual and legal issues presented by the record, the entirety of which have been fully and carefully considered by the undersigned. Only summaries of the post hearing briefs are offered below:

Position of the School District

The District argued that the evidence supports its tenure charges. There are a number of important undisputed facts in the record that on their own lead to a conclusion that Respondent failed to supervise her students adequately. A and Z were misbehaving in the class; A somehow had a razor or box cutter and in the course of their horseplay A cut Z in the head causing injury requiring the student to be taken by ambulance to the hospital where he received stitches. Respondent was unaware of the razor being in the room, was unaware of A having the razor and does not know how it happened that A cut Z. In such circumstances, the facts should speak for themselves. Whether Respondent was on her cell phone or not or whether Respondent was in the classroom or outside of the classroom, she was on duty and responsible for the safety of her students. Yet her student was injured and under the circumstances presented the burden should shift to Respondent to establish that she was not negligent and Respondent failed to show she was not negligent. Considering further that the evidence establishes that Respondent was

on her cell phone and out of the classroom at the time of the injury and failed to follow procedures and protocols, the record further supports a finding that Respondent engaged in unbecoming conduct.

In regard to a finding of unbecoming conduct based upon failure to supervise, as is presented here, such can be found when a teacher is present but is negligent in supervising students, or when a teacher leaves students unattended. Teachers have a duty to supervise students and monitor their behavior in spite of other distractions and even one incident of failure to supervise can be sufficient to support removal. Here, Respondent owed a duty of care to her students; she was required to exercise the degree of care for the safety of others which an ordinary person would exercise under similar circumstances. Here, the District has a pupil safety policy recognizing that the “safety of its pupils is a consideration of utmost importance” and that “the staff must maintain complete classroom...supervision during regular school hours.” As principal James testified, the District has a blanket policy that “adults who are supervising children are responsible for the safety of children period.” Thus, the duty of Respondent toward her students was clear.

Also clear is the fact that Respondent breached her duty. Respondent clearly failed to exercise the level of vigilance required of a teacher. In this regard, if the teacher is in front of students, circulating and engaging, the May 5 incident would never have happened; the razor blade would not have had a presence the classroom, A would not have had the opportunity to cut his classmate with the blade. Z would not have been injured and required medical attention and trauma experienced by other students in the class would never have happened. The doctrine of *res ipsa loquitur* supports a finding

that Respondent's negligence was the proximate cause of Z's injury. Thus, as is required by the doctrine, Respondent was the only adult in the room and consequently had exclusive control of the object or means that caused the accident. New Jersey courts have recognized that in child abuse matters, the doctrine of *res ipsa loquitur* has resulted in a shifting of the burden of proof where only certain individuals have had access or custody of the abused child. In this matter, the District argued, fairness and common sense dictate that the burden of proof shift to Respondent. Respondent had a duty; she was in a circumstance where she was required to meet that duty; she was the only one in the classroom with the duty and during her time in such circumstance a hazard arose, continued and resulted in injury to Z. Given that Respondent had an undeniable duty to supervise her students adequately and ensure their safety, she should be required to offer a satisfactory explanation of Z's injury. Respondent offered no such explanation and she should not be permitted to hide behind the burden of proof in order to avoid the consequences of her negligence.

Although Respondent should be found to have engaged in unbecoming conduct even in the absence of her being on her cell at the time of Z's injury, the evidence establishes that she was, in fact on her cell phone, and such conduct has been found to be unbecoming conduct. Here, when Lane first saw Z in the nurse's office the student reported that at the time of his injury Respondent was on her cell phone. Although such may be hearsay, the statement is nonetheless admissible because it was an excited utterance having been made soon after the significant event when Z was still in an excited state and had not had time to deliberate and fabricate a false story. Moreover, the statement by Z was made in response to a plainly open ended question by Lane and was

consistent with the statements of multiple students made within five minutes of Z's statement. Z's statement establishes that Respondent was on her cell phone at the time of Z's injury. Additionally, the statement should be held reliable under the residuum rule.

The record also establishes that Respondent engaged in unbecoming conduct by leaving her classroom unattended during the time when Z was injured. In this regard vice principal Lane testified that students reported to her that Respondent was outside of the classroom on her cell phone at the time of the injury to Z, and one student witness reported the same during his interview with the District investigator. Considering Respondent presented a self-serving statement on the issue, the students had nothing to gain by providing their version of events, that their statements that Respondent was not in the room at the time of the injury, should also be credited.

Respondent also engaged in unbecoming conduct by failing to present a written report on the incident as required by District protocol, and further failed to comply with the clear directive of her supervisor to write such a report.

Respondent's failure to adequately supervise students and failure to comply with her supervisor's directive represented a clear failure by Respondent to conduct herself in a manner expected of a public-school teacher. Such a duty represents the most basic obligation of a teacher to her students and their parents. The penalty for instances of such misconduct should reflect the nature and gravity of the offense found, including any injury to students and the harm done to the school district's maintenance of discipline and the proper administration of the school system. Here, Respondent's failure to meet her obligation resulted in a significant injury to a student, caused trauma to her entire class and degraded the reputation of the school in the eyes of the school community and the

public. Considering that Respondent failed to take responsibility for her conduct and failed to show remorse, such establishes a strong likelihood of reoccurrence of the failure to supervise should Respondent be returned to the classroom. Under such circumstances dismissal is appropriate; the tenure charges should be upheld and Respondent should be dismissed from her tenured position.

Position of Respondent

Respondent maintained that the tenure charges should be dismissed. The District has the burden of establishing by a preponderance of the evidence that its tenure charges against Respondent are true. Such a burden is not met where, as here the Respondent argued, the District has primarily relied upon hearsay testimony to establish its case. The District's case is based upon the hearsay content of staff reports and the hearsay content of the final report of investigator Takyi. The District failed to present any live witness to establish the facts upon which the District relies and, as a consequence, Respondent has been wholly unable to confront the witnesses who have testified against her. Although the arbitrator may have the authority to admit documents into evidence that contain hearsay statements, certainly where, as here, there is no corroborating evidence to support the truth of the hearsay, documentary statements should not be considered for the truth of the matters asserted therein.

In this regard, there were no witnesses offered at the hearing who saw the May 5 incident: neither Z nor A, nor any of their classmates were call to testify at the hearing and no formal written or recorded statements were taken from any student. Similarly, the report of the IAIU is hearsay and on its face the report states that it is not adjudicative,

but is solely investigative. Due process requires the District to prove the charges as serious as those brought here against Respondent, by a preponderance of the credible evidence. Here, the hearsay evidence relied upon by the District is not reliable and is insufficient to satisfy the District's burden.

In its effort to bolster its weak case the District offered evidence of observations of prior classroom lack of management by Respondent and Respondent's reputation relating to classroom management. Such should not be given weight as it is well established that evidence of prior bad acts may not be the basis for drawing inferences relating to what Respondent may have, or may not have, done on May 5. Certainly, such may not act as a substitute for admissible evidence relating to what happened in the classroom on May 5.

As for the surveillance video offered by the District, it can fairly be assumed that what is shown on the video from 2:05:41 and 2:11:28 shows what occurred in the hallway after the injury to Z. Arguably relevant as to what happened before and during the incident is shown on the video from 1:58:53 to 2:05:41, and that portion of the video does not show Respondent outside of her classroom. In this regard, the District's claim that Respondent could have been outside of her classroom but in the door alcove and consequently not within the video view is mere guessing on the part of the District.

The fact is, the Respondent argued, here Terry Lane showed bias against Respondent and rushed to judgment against the teacher. Thus; (1) Lane stated as early as May 5 that she wanted Respondent removed; (2) Lane's claim that Respondent did not comply with instructions to write a report did not acknowledge that the employee was not permitted to return to the school after May 5; (3) Lane prejudged Respondent by

assuming that the teacher had some wrongdoing to acknowledge, amounted to an inappropriate attempt to justify her actions even before the matter had been investigated; (4) Lane presumed Respondent had received favorable ratings at her prior school to “get her out” of that school; (5) Lane reported that Respondent could be seen in the hallway on the surveillance video at the time of the incident, even though such is not reflected in the video; and (6) Lane made no effort whatsoever to ask the co-teacher in the room about that teacher’s use of the teacher desk or other possible sources of the blade.

The District also failed to prove negligence by Respondent as the evidence establishes that Respondent acted reasonably under the circumstances. A and Z were engaged in horseplay – conduct not uncommon with six-year-old boys. There was no reason whatsoever of Respondent to anticipate that one of the two boys would have a blade or that the injury done to Z was reasonably foreseeable.

The fact is Respondent was the only eyewitness to the incident offered at the hearing and her testimony was clear, concise and direct. Based upon her testimony there was absolutely nothing whatsoever to indicate that A and Z had any animosity between one another or that a risky or dangerous situation was developing. As reflected in Respondent’s testimony that the two were smiling at one another at the time of the incident and from the surveillance video that just minutes before the incident the two boys were together in the hallway getting drinks of water without any conduct that could be interpreted as a precursor to violence. They were two six-year-old boys behaving as six year old boys.

There is nothing in the record to show that Respondent deviated from the standard conduct expected of a teacher and the District cannot support its case by hearsay upon hearsay evidence; it cannot, as it has attempted to do, bolster non-reliable hearsay evidence with more non-reliable hearsay evidence. Hearsay cannot compensate for a lack of evidence. The tenure charges should be dismissed and Respondent should be reinstated with full back-pay.

Discussion

New Jersey law establishes that no tenured, public school teacher in New Jersey may be dismissed or reduced in compensation “except for inefficiency, incapacity, unbecoming conduct or other just cause.” Unbecoming conduct is defined generally as conduct that has a tendency to destroy public respect for government employees and confidence in the operation of public services, or where it is shown that an employee lacks fitness to discharge duties and functions of the employee’s office or position. Unfitness to remain in a tenured teacher position may be established by a single incident if significantly flagrant, or through progressive discipline for less serious matters. Here, the District has the burden of establishing the truth of its tenure charges by a preponderance of the evidence.

Considering the full record in this matter including all testimony, evidence and argument of the parties, I find that the District has established the truth of its unbecoming conduct charge against Respondent in part, thus warranting discipline, but has failed to establish that Respondent engaged in such conduct that otherwise warrants her termination.

The Record Fails to Establish that Respondent was on Her Cell Phone and/or Outside of the Classroom at the time of the May 5 Incident or that Respondent was the Source of the Razor Blade

The District offered no witness with first-hand knowledge of what occurred in Respondent's classroom on May 5; no student was called as a witness to give testimony on what led up to the injury to Z and/or what Respondent was doing during the period leading up to the injury. Nor did the District show that first-hand witnesses were unavailable to testify, offer any statements of any witnesses taken under oath or offer any direct statements of any first-hand witness whatsoever. Instead, the District relied upon the report and testimony by Lane of a statement made by Z to Lane while Z was in the nurse's office being treated after the incident; testimony by nurse Wenson of statements by other students made to the school nurse while she was treating Z that the blade came from the teacher's desk; testimony of Lane regarding statements made to her by students immediately after the incident; a report of a statement made by a student during the District's internal investigation; and statements made by Respondent as to what occurred in the classroom that the District argues are inconsistent with Respondent's later statements and inconsistent with the statements of students. All of these statements offered by the District are out-of-court statements. Those alleged to have been made by students were offered by the District for their truth. All such offered statements of students are hearsay. The District argues that notwithstanding their hearsay nature reported student statements are admissible for their truth and are reliable because; (a) in regard to the statement of Z to Lane in the nurse's office that Respondent was on her cell phone and was not in the classroom at the time of the injury, the statement falls within the excited utterance exception to the hearsay rule, (b) the statements of other students that

Respondent was on her cell phone and standing outside of the classroom are consistent with both the statement to Lane by Z and the statements of other students and (c) the statements are admissible under the residuum rule.

I am not persuaded by the District's arguments in this regard. The statement of Z to Lane, although not made contemporaneously with the injury, may have been made during the period when Z could be fairly said to have still been in an excited state as a result of the incident, and the student's narrow statements about how he received his injury may arguably be admissible under the exception. However, I do not find the further statement of Z made in answer to a question by an authority figure such as Lane about the whereabouts of the teacher, to be so directly related to the injury as to fall within the exception. Even assuming *arguendo* that the statement of Z falls within the exception, I do not find the statement reliable as the contents of the statement itself presents questions of its reliability by begging the question of how the student could have been aware of what the teacher was doing at the time the student was engaged with A who had a blade in his hand and was attacking the student. Additionally, Lane's testimony in this regard is inconsistent with her own recording of Z's response in her own "Staff Incident Report" of the conversation made within hours of the conversation on May 5 wherein she reported that Z responded to her question by stating only that the teacher was on her cell phone and made no record of any additional statement by Z about the teacher being outside of the classroom. As for the statements of other students made to the school nurse about the source of the razor, those statements do not arguably fall within any exception to the rule. Similarly, the statements of other students made to Lane in the classroom after the incident and to the District investigator many months later do

not benefit from any exception to the hearsay rule. Again, if such statements were important to the resolution of this matter, they could have been, but were not, offered through testimony of the students.

The District also argues that considering the circumstances involving young students and the unusual nature of the event, the residuum rule should apply as this is an administrative matter and as such, findings – even those in part based upon hearsay - need be supported by only a small amount of non-hearsay evidence. Additionally, the District argues that as the rules of arbitration apply, the undersigned need not slavishly comply with the rules of evidence.

The AAA rules of arbitration are controlling of this matter and the residuum rule is well recognized. However, children can be easily influenced by statements of their peers and by their desire to please the adult authority figures around them. Under the circumstances presented, I find no admissible evidence - relating Respondent's whereabouts or phone use - of significance sufficient upon which to hang a hat of residuum. Similarly, in applying my experience as an arbitrator, I am simply not persuaded as to the appropriateness of relying upon the recollection of District witnesses as to the collective statements of a group of mostly unidentified six and seven year olds as the basis of my finding fact, where, as here: (1) the District has presented no direct testimony or other evidence of what took place in the room and (2) the evidence presented by the District of what took place outside of the classroom does not support the District's claim that Respondent was outside of her classroom at the time of the incident.

Based upon such considerations, I find that the District has failed to meet its burden of establishing the truth of those portions of its tenure charges asserting that

Respondent (1) was on her cell phone⁷ and (2) was not in the classroom at the time of the May 5 incident.

The Record Nevertheless Establishes that Respondent Failed to Adequately Supervise her Students

Although I have found out-of-court statements by students to be non-admissible, the statements of Respondent as a party to the proceeding are admissible for their truth. To support its charges, the Districts relies, in part, upon statements by Respondent⁸ overheard by Lane made to the parent of Z while in the nurse's office describing the boys "running around" the classroom and being in the teacher's desk area. These statements are in contrast to the subsequent statements and testimony of Respondent that does not describe the two involved students "running around" the classroom together and engaging in horseplay, but instead offers a more tempered description of the boys' conduct.

Between the description of events reportedly given by Respondent at the time of the incident describing the two students as "running around" the classroom and the description given by Respondent over two years later on the stand, I find that the former more accurately described the nature of the conduct of A and Z. I base such finding on; (a) the contemporaneous character of Respondent's reported May 5 statements and (b) the fact that the contemporaneous descriptions are entirely consistent with the energetic character of the conduct of the two students in the hallway as captured on the surveillance

⁷ Consistent with the argument of Respondent, I do not find that Respondent's prior use of her cell phone in the classroom may be relied upon to establish that she was using the phone at the time of the May 5 incident.

⁸ None of these alleged statements by Respondent addressed in this section are arguably relevant to the issues previously addressed of whether or not Respondent was on her cell phone or outside of the classroom at the time of the incident and, as a consequence, are not relevant to my prior discussion of those issue.

video only minutes prior to the incident; conduct that I find likely continued when the two returned to the classroom.⁹ Additionally, it is plain from Respondent's various descriptions of the student's conduct and the fact that the two students were obviously engaged in non-academic activity when Z was injured, that the two boys were engaged in "horseplay."¹⁰

Considering that the May 5 incident took place eight months into the school year, by which time standards of conduct and behavior should have been well established in the classroom by the teacher, I am in agreement with the District's position that the fact that A and Z were engaging in horseplay and running around the classroom evinces a failure by Respondent to manage her classroom. In such circumstances, I find it reasonable to hold Respondent accountable for any harm to students or property that could foreseeably result from such behavior. Students running around and engaging in horseplay or roughhousing in a classroom environment in the presence of other students is not a benign or inconsequential activity. Aside from its impact on education, permitting such activity unnecessarily increases the risk of accidents and student injury; injury that could foreseeably range from minor to serious. Whether such injury actually occurred or not, I find that by failing to adequately manage her classroom and supervise her students on May 5, Respondent allowed her students to be exposed to the potential of such foreseeable harm.

Considering such, I find that the District has established the truth of its charges to the extent they allege that by failing to adequately manage her classroom on May 5

⁹ Even crediting Respondent's version of events, I am persuaded that Respondent was failing to adequately managing her classroom.

¹⁰ Respondent also characterized the students' activity as horseplay in her brief.

Respondent failed to conduct herself in the manner the District could fairly expect from a reasonably prudent person in her teaching position and thereby, through such negligence, caused her students to be unnecessarily exposed to harm that could foreseeably result from such conduct. However, my findings of such unbecoming conduct by Respondent in this regard is limited to the “exposure” of her students to foreseeable harm. Respondent should not be held accountable for exposure to unforeseeable harm or actual harm that occurred of an unforeseeable nature.

Z’s Being cut by a Blade was Unforeseeable

I am not persuaded that Respondent should be held accountable for the harm that actually occurred to Z. The blade involved, as described by two District witnesses and Respondent was small, was without a handle and was not a knife in the traditional sense. As reflected in the testimony of various District witnesses – no student has ever been injured before by a weapon of any kind in the school and the District, to this day, has no idea where the blade used by A came from or how it got into the school. There is no evidence in the record that the District anticipates (i.e.; foresees) first graders having weapons in its elementary schools. There is no record evidence that the District trains its grade school teachers to be weapons aware, or how to disarm a student with a weapon, or how to protect other students in the presence of a weapon wielding student. In other words, the District as an organization does not anticipate – it does not foresee – its first graders having knives in school. In such circumstances, there is no reason to believe that a reasonable person in the position held by Respondent would have been aware of the blade’s existence, or foreseen first grader A’s using a blade to cut first grader Z in the

head during the school day. I find that such classroom conduct was well outside of the reasonable expectations of foreseeable conduct in the classroom.

Based upon such considerations, I find that the actual injury received by Z was not foreseeable by a reasonably prudent person and, as a consequence, I do not find that Respondent failed her duty of care in such regard. Consistent with such finding, I further find that although the District experienced negative consequences from the community for the May 5 incident, such consequences were not the result of Respondent failing to satisfy a duty owed the District or her students. Having not failed a duty, such may not be a basis for supporting a tenure charge against Respondent.

Failure to Submit a Written Report

Finally, the District argues that Respondent should be subject to discipline because she failed to submit a written report of the incident as directed by Lane on May 5. Respondent argues that she was not given the opportunity to file such a report as she was removed from the school effective the very next day.

I find the District has failed to support its assertion in this regard as the tenure charges do not allege such a failing by Respondent and considering the extended period between the May 5 incident and the District's filing of the tenure charges, and the fact that there is no evidence that the District ever attempted to remind the relocated teacher of the need to file a report nor counseled that such failure could result in discipline, I find the District's attempt to base discipline on such is untimely and contrary to fundamental notions of fairness that underlay principles of due process.

Conclusions

The District has failed to establish the truth of a significant portion of its tenure charges and, as a result, has failed to establish that termination of Respondent, a tenured teacher, is warranted.

The District has established the truth of the tenure charge that Respondent failed to adequately manage her classroom by allowing students to engage in horseplay and thereby exposing students to potential foreseeable harm, contrary to the reasonable expectation of the District, and that Respondent thereby engaged in conduct unbecoming.

Discipline for the unbecoming conduct found should be reasonably commensurate with the gravity of the offense found, within the context of progressive discipline and Respondent's discipline and service record. Considering that Respondent is a long-term employee with little or no history of prior discipline, and acknowledging that the foreseeable harm to students from failure to manage the classroom in the manner found herein could be significant, I find that a suspension of 60 calendar days is consistent with the gravity of the offense found.

ORDER

To the extent that the District has shown that Respondent failed to adequately manage her classroom by allowing students to engage in horseplay and thereby exposing students to potential harm, I find that the District has established the truth of its conduct unbecoming charge against Respondent. As to all other allegations of conduct

unbecoming within the subject tenure charges, I find the District has failed to establish such by a preponderance of the evidence and hereby dismiss such charges.

Consistent with such findings the District is ORDERED to:

1. Promptly offer Respondent reinstatement to her former position.
2. Make Respondent whole for any and all losses of pay, seniority and other benefits she may have suffered as a result of her unpaid suspension-pending-investigation from the date of the commencement of her unpaid suspension to the date of her reinstatement by the District, less 60 calendar days of pay attributable to the suspension ordered herein.

Dated: October 20, 2017



Timothy J Brown, Esquire
Arbitrator

I, Timothy J Brown, affirm that I have executed this document as my Decision in Agency Docket Case No. **92-5/17** relating to tenure charges against Iman Jones on Friday, October 20, 2017.



Timothy J Brown