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DEPARTMENT OF EDUCATION

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In the Matter of Tenure Charges Against Dale R. Orlovsky:

**THE BOARD OF EDUCATION OF THE
TOMS RIVER REGIONAL SCHOOLS**

Agency Dkt No.
230-9/13

Petitioner,

**OPINION
AND
AWARD**

- and -

DALE R. ORLOVSKY

Respondent.

Before: Joyce M. Klein, Arbitrator

Appearances:

For the Petitioner:

Valter H. Must, Esq.
Carluccio, Leone, Dimon, Doyle & Sacks, LLC

For the Respondent:

John J. Mensching, Esq.
Mensching & Lucarini, P.C.

Pursuant to N.J.S.A. 18A:6-16, as amended by *P.L. 2012, c. 26* ("TEACHNJ"), tenure charges were brought by the Board of Education of the Toms River Regional Schools (the "Board") against Dale R. Orlovsky ("Orlovsky" or "Respondent") on September 20, 2013. Respondent filed a Sworn Statement of Evidence/Position in Opposition to the Tenure Charges on September 30, 2013. This matter was referred to me for a hearing and decision. I conducted hearings at the offices of Carluccio, Leone, Dimon, Doyle & Sacks in Toms River, New Jersey on November 21, 22 and 26, 2013.

At the hearings, the parties argued orally, examined and cross-examined witnesses, and introduced documentary evidence into the record. Testimony was received from teachers Lisa Jannarone and Cheryl Petrecca, computer technician Rob Beaton, Middle School Social Studies Curriculum Supervisor Thomas Lanza, Intermediate South Principal Paul Gluck, Assistant

Superintendent Debra McKenna and Respondent Dale (Rod) Orlovsky. Post-hearing briefs were received by December 19, 2013, whereupon the record was closed.

THE CHARGES

The Sworn Tenure Charges brought against Dale Orlovsky on August 30, 2013 provide in pertinent part as follows:

Charge I

On or about October 20, 2006, Orlovsky called a male student in his class a "fag." He also told a student that he "smiled like an idiot" and told that same student that he was a "fruit loop." He told another student that he was going to "throw his ass out of class." As a result, Orlovsky was questioned. Orlovsky advised that the boys in class told him that they were going to get their brothers to beat him up. Orlovsky said that he responded by telling them to tell their brothers that he would meet them after school, but wouldn't fight them in school.

On or about November 7, 2006, Orlovsky frequently cursed and used inappropriate language including the word "fuck" in front of the students. He called a female student "smart ass." He made fun of the less popular male students. He told a female student "that answer sucks" when she answered a geography question. When he found out that there had been earlier complaints about his conduct in class, he told his students that they were being put on probation and that there would no longer be any "fun stuff, like watching videos and playing games and talking about sports (except football) ... stuff we shouldn't be doing anyway." He moved a female student next to another boy telling them "you can become close and be a couple." During a private conversation with a female student, Orlovsky embarrassed the student and made her feel uncomfortable by commenting that her "jeans fit well" and when she asked Orlovsky whether he was staring at her, he replied that his wife has big hips and he wished that his wife had hips small like hers. Orlovsky inappropriately stared at several girls' behinds and made them feel uncomfortable. On one occasion he paused a movie when an older man was on the screen and then announced that a female student "must like that guy, because you go for older men." Orlovsky played sexually suggestive music videos which portrayed scantily clad females upsetting several female students.

On or about December 8, 2006, Orlovsky, in violation of District Policy, misused his school computer by accessing websites unrelated to school activities. On at least one occasion, a female student was exposed to obscene and/or otherwise inappropriate images on Orlovsky's computer screen. As a result, Orlovsky's computer was confiscated and examined. Said examination revealed that Orlovsky regularly during school hours visited inappropriate non-school related sites. Orlovsky was warned regarding his misuse of the computer.

On or around May 13, 2009, Orlovsky, in violation of District Policy and despite having been earlier warned about similar conduct, again misused his school computer by accessing websites unrelated to school activities and which contained obscene and otherwise inappropriate materials. Several students witnessed Orlovsky viewing "porn" on his computer. An investigation of Orlovsky's school computer revealed that he had visited inappropriate websites on several occasions and had viewed inappropriate "You Tube" videos. Orlovsky was warned that his internet use would be monitored and reviewed daily. Orlovsky was given written warning advising that said warning constituted a "second warning" and that any future violation would result in discipline.

In or around February of 2013, Orlovsky demonstrated a pattern of disregard for administrative and school policy by failing to attend scheduled parent conferences and leaving school without administrative permission. Orlovsky also arrived late on numerous occasions. Orlovsky was warned because these same and similar concerns had been previously addressed in the 2010-2011 and 2011-2012 school years. Orlovsky was given a written warning on March 4, 2013 advising that he would be subject to discipline.

On or about March 15, 2013, Orlovsky, in violation of District Policy, and despite having been earlier warned about similar conduct, again misused his school computer by accessing websites unrelated to school activities and which contained obscene and otherwise inappropriate materials. As a result, Orlovsky's students were exposed to obscene, sexually suggestive and otherwise inappropriate sounds coming from Orlovsky's computer. During the investigation of the incident, Orlovsky denied any knowledge of how the offending material made its way onto his computer. A complaint made by a student's parent was investigated by the Ocean County Prosecutor's office which revealed that Orlovsky had

not been truthful in his account of the situation and that he had intentionally accessed a website which contained the offending material. An additional investigation of Orlovsky's computer by the school's computer technology expert revealed that Orlovsky had engaged in email exchanges containing graphic and explicit sexual dialog. The incident was also investigated by the State of New Jersey, Department of Children and Families, Institutional Abuse Investigation Unit, which found that at least two of the children exposed to the offending sound had been harmed.

RELEVANT POLICIES

Technology Policy

Staff Acceptable Use Policy

With the spread of telecommunications throughout the modern work place, the Board recognizes that employees will shift the way they share ideas, transmit information, and contact others. As staff members are connected to the global community, their use of new tools and systems brings new responsibilities as well as opportunities.

In general, employees are expected to communicate in a professional manner consistent with state laws governing the behavior of school employees and with federal laws governing copyrights. Electronic mail and telecommunications are not to be utilized to share confidential information about students or other employees.

The network is provided for staff to conduct research and communicate with others. Communications over the network are often public in nature: therefore, general rules and standards of professional behavior and communications will apply.

The following behaviors are not permitted on district networks:

- Providing anyone with legally restricted or confidential information on students or employees
- Sending or displaying offensive messages or pictures
- Assisting a campaign for election of any person to any office or for the promotion of or opposition to any ballot proposition
- Using obscene language
- Harassing, insulting or attacking others

Engaging in practices that threaten the network (e.g. loading files that may introduce a virus, downloading programs, or installing any software)
Violating copyright laws
Using others' passwords
Trespassing in others' folders, documents or files
Day trading or gambling
Conducting union business unless authorized by the Superintendent
Promoting or support or celebrating religion or religious institutions

The superintendent shall devise regulations, including forms and procedures to implement this policy.

BACKGROUND

Dale (Rod) Orlovsky has been a teacher in the Toms River School District since the 2000-2001 school year and is tenured. Orlovsky has taught seventh grade social studies at Intermediate South since it opened. Orlovsky received generally good evaluations. However, evaluations for the 2010-2011 and 2011-2012 school year discussed specific needed improvements and are addressed herein.

Since 2006, Orlovsky has had a computer in his classroom. Orlovsky's computer is password protected and he has not shared that password with anyone, although he testified that he had not been specifically told to keep his password private. On occasion, when he has been already logged onto his computer, an inclusion teacher has used it.

Orlovsky acknowledged that he frequently discussed sports with students but that has never influenced grades. Orlovsky also acknowledged that he is a sports buff and an ardent fan of the Miami Hurricanes. Orlovsky spent summers in Miami while he was growing up and his brother played football for the Miami Hurricanes. Orlovsky does not recall complaints regarding sports discussions but when a student asks a question about sports, he answers it and then directs the conversation away from the topic.

Orlovsky had a conversation with then Social Studies Supervisor Janet Parker on November 21, 2006 regarding submitting his lesson plans on time and other conduct and teaching issues.

On November 21, 2006, Parker gave Orlovsky a follow-up letter that included a notation that "discussion of football and other sports is not part of instruction, nor are grades to be influenced by a student's interest or non-interest in sports." That letter included the following instructions:

- D. Students are not to use the teacher's computer for any reason.
- G. Discussion of football and other sports is not part of instructions, nor are grades to be influenced by a student's interest or non-interest in sports.

Other Administrative Concerns:

1. You are expected to be on your assigned duty every day.
2. If you leave the building during his prep, you are to sign out and sign back in when you returns (sic), as per building policy.

Also on November 21, 2006, Orlovsky met with Nancy Enrico, then the Affirmative Action Officer, to address allegations brought to her attention by students and parents. Those allegations involved using the "F-word" on two occasions as well as other inappropriate language in front of students, using language showing "sexual orientation bias" such as "fag", "gay" and "fruit loop", showing inappropriate music videos in class, making inappropriate comments of a personal nature to female students and showing favorites and gender bias in teaching. Orlovsky did not receive discipline stemming from any of the parent or student complaints.

On December 1, 2006, Parker e-mailed Orlovsky with a few reminders, including a reminder to "remember to e-mail me anytime your instruction deviates from your lesson plan" and "you must notify the Main Office when you change location, in case of emergency and the Office needs to locate a student from your classroom."

Then on December 8, 2006, a student alleged that she had seen pornography or naked pictures of an unclothed woman on Orlovsky's computer screen on the previous day. On that same date, Orlovsky's computer was confiscated. The log of Orlovsky's computer use from December 7, 2006 that was generated by the technology staff reflected several visits to websites about the Miami Hurricanes including Miami.Rivals.com, www.CaneSport.com, and other sports websites at various times of the day including during class time. No evidence was found that Orlovsky visited pornographic websites.

On Monday, December 11, 2006, Orlovsky was called to meet with Assistant Superintendent Debra McKenna and then Superintendent Michael Ritacco. They discussed with him the proper use of computers during class time and visiting inappropriate websites. Specifically, McKenna recalled that Ritacco made the point that the computer was in the classroom for academic purposes and his computer use to look at Miami Hurricanes websites was inappropriate. According to McKenna, teachers have been cautioned to be professional all of the time, including on the computer and on e-mail. Teachers also have been cautioned against inappropriate contact with students such as texting and instant messaging with students.

According to McKenna, in education it is "a big deal to get a talking to" and similarly a write up is a "big deal." McKenna characterized the initial 2006 meeting between herself, Ritacco and Orlovsky as a verbal warning.

Orlovsky testified that in 2006, he did not believe that he was not permitted to view personal websites and did not believe that access to sports websites violated school policy. Orlovsky noted that many teachers use computers for personal reasons. Orlovsky acknowledged that when he met with then Superintendent Ritacco and McKenna, they discussed use of the school computer and he was warned that he should no longer use the computer for personal use. Orlovsky testified further that there was no discussion of the consequences.

On May 13, 2009, new allegations by students that there was "porn" on Orlovsky's computer surfaced. At the time, McKenna wrote the following note to the file:

On 5/13/09 the superintendent's office received a phone call from a parent regarding her daughter and some other students seeing their teacher, Mr. Orlovsky, looking at "porn" on his computer as they went to enter the classroom. A review of the school server revealed inappropriate pictures stored on the "U" drive under Mr. Orlovsky's personal space. This prompted an investigation and the securing and reviewing of Mr. Orlovsky's school computer. The district supervisor of technology reviewed Mr. Orlovsky's internet use for the dates of 5/11, 5/12 and 5/13. This search showed Mr. Orlovsky had visited inappropriate websites and viewed inappropriate "You Tube" videos on these dates. Clearly, this is a violation of school technology policy. Mr. Orlovsky was informed that his internet use would be monitored and reviewed daily.

Orlovsky recalled that Principal Gluck told him that a student walked by his classroom and saw what the student thought was porn on his computer.

Orlovsky denied that he ever accessed porn on the school computer. Orlovsky suggested that the student probably saw a signature from a Miami Hurricanes related website. Orlovsky suggested that what the student thought was porn was most likely a girl in a bikini. Photos from the 2009 computer audit of Orlovsky's computer included photos of scantily clad women including women in bikinis. Orlovsky maintained that his computer use during 2009 did not occur during classroom time.

After this incident, McKenna and Ritacco met with Orlovsky again, this time with then counsel for the School District Thomas Monahan. McKenna recalled that this time, Ritacco was more angry and sought to give him a stern warning so he asked the District attorney to attend the meeting. According to McKenna, Monahan did most of the talking at that meeting and cautioned Orlovsky to use the computer for school business only. McKenna recalled that Monahan expressly told Orlovsky not to visit ESPN or the Hurricanes' website and then asked if Orlovsky understood.

After that meeting, on June 15, 2009, Monahan sent Orlovsky the following letter:

During the 2006/2007 school year, it came to the attention of Administration that you were improperly using your computer during school hours. You were using it for personal items and visiting web sites not authorized by the school district and unrelated to educational purposes. At that time, you were warned not to use the computer in that manner.

On May 13, 2009, as a result of a parent complaining to the Administration that her child saw you accessing an inappropriate site on your computer, your computer was removed from your class room and reviewed to determine in what manner you were using the same. After the computer was reviewed by the IT staff, it was again determined that you were again inappropriately using the computer. Specifically, you were reviewing web sites unauthorized, and inappropriate for school purposes. You were having personal E-mails unrelated to school business being forwarded to you.

You were again specifically advised by Mr. Michael J. Ritacco, Superintendent of Schools, and Ms. Debra L. McKenna, Assistant Superintendent, that your use of the computer was improper. You were again advised not to use your computer for personal use to include visiting unauthorized web sites.

You were specifically advised that this was your second warning, and that if any inappropriate use of the computer occurred in the future, you would be disciplined. This letter is being placed in your personnel file so that it is clearly understood as to the penalty you will incur in the event that there is a violation in the future.

Orlovsky acknowledged attending this meeting and that Ritacco and McKenna reinforced that he should use the computer only for school purposes.

During the 2010-2011 school year, Thomas Lanza, the Toms River Regional School's Curriculum Supervisor for Middle School Social Studies, and Intermediate South Principal Gluck met with Orlovsky because he was missing conferences, not fulfilling hall duties, not signing in and out and not arriving at school fifteen minutes before school started. Orlovsky's final evaluation for the 2010-2011 school year reflected these concerns. That evaluation included the following critical remarks:

There were several areas this year in which Mr. Orlovsky faced challenges with fulfilling building-level and teaching duties in a professional and successful manner. He left the building during the instructional day without asking permission and without properly signing himself out or in. This led him to missing several scheduled parent conferences. Mr. Orlovsky failed to attend a majority of the Catapult Learning professional development sessions that were offered as replacements for the cycle's mandatory Professional Learning Community meetings. On such occasions, scheduled far in advance, Mr. Orlovsky called out a number of half days. He also failed to attend a significant number of his scheduled hall duties. Mr. Orlovsky had a considerable number of absences this year, particularly when calling out half days. A number of these times, he failed to leave adequate plans for the substitute to follow in his absence. Mr. Orlovsky faced further challenges in managing behavior and effectively supervising classes. Several times, he had disruptive students stand unsupervised in the hallway for significant lengths of time, even after being told not to do so by administration. During Mr. Orlovsky's inclusion teaching period, he has left the room when his inclusion teacher entered and either has not returned or has spent considerable time away from the lesson. Furthermore, Mr. Orlovsky has left students under the supervision of the inclusion teacher or a substitute during fire drills. Finally, it has been noted that Mr. Orlovsky has spoken to students in a less than professional manner at times during his classes.

Lanza acknowledged that everyone runs late occasionally but Donna Cicala, the head secretary at Intermediate South, had brought Orlovsky's attendance record to his attention where Orlovsky was late ten out of eighteen days in December of 2011.

In Orlovsky's evaluation for the 2011-2012 school year, Lanza noted that in many areas Orlovsky's performance improved. However, he continued to submit lesson plans late and Lanza noted that he needed to improve his communication with staff in a positive and professional manner. Specifically, the evaluation provided:

The following will address the areas marked above as "Improvement Required":

- **Punctually fulfills job-related assignments:** Although most lesson plans were submitted throughout the year, a majority of them were received after the established deadlines. Plans should be submitted by the time students enter the building on the first day of the school week. In addition, a number of times this year, Mr. Orlovsky failed to sign in each morning in the fashion designated by school policy. This continued even after it was addressed by his supervisor.
- **Communicates with staff in a positive and professional manner:** When his supervisor addressed issues raised by school administration (failing to notify the school of an absence and failing to sign in each morning). Mr. Orlovsky sent emails and engaged in a phone conversation in which his language and tone were highly charged and less than appropriate. In addition, on several different occasions, Mr. Orlovsky failed to acknowledge or respond to emails from his supervisor which requested information about lesson planning or which specified concerns for him to address.

On February 22, 2013, a parent teacher conference was scheduled with a student in his cycle and each of the other teachers accepted the invitation to the meeting and signed the parent conference sign-in sheet but Orlovsky did not attend. Addressing the parent teacher conference, Orlovsky acknowledged missing one when he was at work and called it a "one time thing" as distinguished from other conferences he missed when he was absent.

The evaluation also stressed that Orlovsky needed to improve his lesson planning. After Orlovsky missed the February 22 parent teacher conference and

the issues identified in his 2011-2012 evaluation did not improve, Principal Gluck and Lanza met with him on or about March 4, 2013 and outlined continuing problems including his failure to sign out, leaving without permission, not completing hall duty and missing conferences. At that meeting, Orlovsky disputed many of the allegations. Nonetheless, at the conclusion of the meeting, Lanza and Gluck sent the following warning letter to him:

On 2/22/13, you failed to sit in with your cycle colleagues at a scheduled parent conference. Monday, 2/25/13, you signed out during school hours without administrative permission and did not return. On Thursday, 2/28/13, you again left during the school day without permission from administration, did not sign out, and again failed to return. Then, on Friday, 3/1/13, you once more signed out during school hours without administrative permission and did not return. In addition, on a number of occasions throughout this academic year, you have arrived to school after the contracted arrival time, and have failed to sign in according to school protocol each morning.

School policy requires a teacher to request permission from an administrator to leave during school hours and then to sign out, as well as back in. In addition, teachers must sign in each morning at the designated time and location. Contractual obligations require a teacher to be present fifteen minutes before student arrival in the morning and fifteen minutes after ending-of-day dismissal.

Each of these concerns has already been addressed more than once in the past. Your end of year evaluations for both 2010-2011 and 2011-2012 school years detailed the need for improvement in punctually fulfilling job requirements. At two meetings with administration, one in May of 2011 and another in January of 2012, these issues were addressed as concerns and improvement was required.

At this meeting on 3/4/13, we once again noted the importance of addressing these concerns immediately. Furthermore, we notified you that we have contacted the Superintendent's office about our concern with these ongoing issues. We have recommended disciplinary action to be taken. One form of disciplinary action may be to withhold an increment.

Orlovsky acknowledged that he attended a meeting with Principal Gluck and Lanza and received the letter. Orlovsky explained that during the 2010-2011 school year, he was going through a divorce and had somewhat isolated himself

from his cycle-mates. Orlovsky testified that did not have problems with his cycle-mates and had no personal animosity but thought they were unhappy with him because he had distanced himself from them.

A few days later, Lisa Jannarone, a seventh grade math teacher who has worked on the same cycle with Orlovsky for the past seven years, recalled that another teacher handed her an IEP or other document and asked her to pass it to other teachers within her cycle for review and so that the last teacher who received it would return it. When Jannarone attempted to pass the document to Orlovsky, they began to argue in the hallway in front of students because Orlovsky did not want to be responsible for doing what he believed to be another teacher's work in passing the document. During that argument, Jannarone heard Orlovsky say "I can't wait to get fucking out of here." Jannarone reported this incident to Principal Gluck a day or two afterwards. Jannarone did not recall any other example of Orlovsky cursing in front of students.

Orlovsky recalled having a disagreement with Lisa Jannarone in the hallway where students could have observed the disagreement, but did not recall saying "I can't wait to get the fuck out of here" or a similar statement during that disagreement. Orlovsky did acknowledge that he could have made such a statement

Cheryl Petrecca, a seventh grade language arts teacher who also works in Orlovsky's cycle, and Jannarone both testified that Orlovsky frequently did not come to school early enough to monitor students in the hallway early in the school day and did not always attend parent teacher conferences. Jannarone testified further that Orlovsky frequently left the building during prep periods.

Gluck also raised concerns with Orlovsky's track record of a documented parent teacher conference that he missed as well as missing 6 of 8 professional development prep days during the 2010-2011 school year. According to Gluck, each time he would discuss these issues with Orlovsky, Orlovsky would apologize and indicate that it would not happen again and then the conduct would be repeated.

On Friday, March 15, 2013, Orlovsky, upon arriving in his classroom, turned the computer on and logged in using his name and password. Once he took attendance, he used Internet Explorer to access the CNN Student News website. Using the projector to project the computer onto the screen, his first class of the day watched CNN's Student News for approximately ten minutes. Orlovsky recalled that the computer repeatedly prompted him to shut down and he hit cancel but the shutdown message kept returning and eventually the video finished. He then gave students a brief quiz and heard the Windows chime signaling that the computer was shutting down on its own. He then heard

another Windows chime signaling that the computer had restarted on its own. Then, sounds began coming from the computer. Orlovsky described the sounds as "explicit in nature" and said that they sounded pornographic, like heavy breathing and sexual in nature. The computer was within arms reach and Orlovsky immediately turned the sound down and then calmed the class.

After that class and the next class were completed, he immediately went to Principal Gluck's office and told him what happened and asked him to check his computer. Gluck acknowledged that Orlovsky "came right down and brought it to my attention" and told Gluck he did not do it and asked Gluck to take his computer and check it out. According to Orlovsky, he did nothing to make the sound come on.

Petrecca testified that in March of 2013, she taught the last class of the day before students would go to enrichment and students did not want to leave her classroom to go to Orlovsky's classroom to attend enrichment but students refused to tell her what had occurred.

Rob Beaton, a computer technician for the District, was asked by Ms. McKenna to conduct a forensic analysis of Orlovsky's computer. At the time, McKenna told him that a room full of students suddenly heard sounds of a pornographic nature coming from the computer. Initially, she asked him to investigate within a thirty-minute window of those sounds. He began by documenting the chain of custody and the serial number and took steps to make the hard drive "read only." Beaton then generated an exact copy of the hard drive and then used two different software programs to perform an investigation of the hard drive. Beaton found an index file for www.kidcash.com/subliminalmessage.mp3. Beaton explained that he cannot tell exactly how it happened.

Specifically, he found that Orlovsky was logged on at the time of the documented web browsing and that there was one instance of access to [host:www.KidKash.com](http://www.KidKash.com) at 8:45:16 est and one instance of access to <http://www.KidKash.com/subliminalmessage.mp3> at the same time. Beaton then saved and reviewed the [subliminalmessage.mp3](http://www.KidKash.com/subliminalmessage.mp3) audio file and found that it was a rap song that begins with approximately 13 seconds of sexually explicit noises. He found further that the noises were consistent with the noises that were described by the students present. At the conclusion of this report, Beaton found "it should be noted that a single instance of web access to a website does not necessarily indicate intentional access."

A meeting was held on March 22, 2013 to discuss the results of the investigation into the incident with the sounds coming out of Orlovsky's computer. At that meeting, based upon Orlovsky's strenuous denial that he accessed the

KidKash site and Beaton's initial conclusion that Orlovsky may not have intentionally accessed the KidKash MP3, the administrative officials determined that Orlovsky could return to school. McKenna explained that the thinking in the administration was that it was awful that it had happened but it wasn't criminal and Orlovsky should be allowed to go back to the classroom. McKenna testified "I didn't want him to go back without feeling 100% sure. I didn't feel sure. But he was being paid ..." and the decision was made to return him to the classroom after the Easter break.

After the meeting, McKenna drafted a summary, including the following statement that "it is clear that Mr. Orlovsky is aware of the Appropriate Use Policy which guides teachers in the use of the school district's computer that he uses." A second meeting was held on April 1, 2013 to discuss the steps required to return Orlovsky to the classroom. McKenna also summarized that meeting. Those notes provide in pertinent part:

During a prior meeting on March 22, 2013, Mr. Orlovsky stated that he had not visited any sites on March 15, 2013 other than Genesis and CNN News for Kids. At that, Mrs. McKenna told Mr. Orlovsky that the computer audit had identified the source of the noise coming from his computer as coming from a site of a music rapper, www.KidKash.com/subliminalmessage.MP3. When accessed, this audio played approximately 13 seconds of sexually explicit noises, consistent with what had been heard in the classroom. Mr. Orlovsky responded strongly that he had not accessed the host site KidKash.com. It was explained to Mr. Orlovsky that all the identified sites had been visited under his login and password. Further examination found that Mr. Orlovsky had visited a site called Hurricane Mutiny, a website for Miami Hurricane Football team fans just prior to accessing the KidKash.com site. Mrs. McKenna expressed her extreme frustration and disappointment that Mr. Orlovsky had not been forthcoming with this information at the last meeting.

At today's meeting, Mr. Orlovsky admitted to having visited the Miami Hurricane's website and explained that it was an exclusive site for coaches and players, thus explaining why the examiner was unable to access the site on his own. It is the opinion of the examiner that Mr. Orlovsky may have arrived at the www.KidKash.com website as a result of his activity on the web session which began with the Hurricane website.

Mrs. McKenna was straight forward in telling Mr. Orlovsky that the administration has set out clear expectations for technology use in

school and using school equipment. She reminded him of the Acceptable Use Policy and stressed that not only had he signed an agreement to abide by the policy, but he had been reminded of the policy on more than one occasion and received a formal letter of reprimand on June 15, 2009.

On April 2, 2013, Principal Gluck sent a letter to the parents of Orlovsky's students notifying them that he would be returning to work on Wednesday, April 3 and explaining the March 15, 2013 incident as follows:

You may have knowledge of an incident involving inappropriate noises played from his classroom computer during a class period on March 15, 2013. The district ordered and completed a thorough Forensic Investigation on this computer. The results of this investigation revealed the teacher did not intentionally play or access the sounds heard by this class. It is with deep regret, by Mr. Orlovsky and this entire school, that students were subjected to such noises. I urge you to discuss this situation with your children.

Orlovsky returned to school on April 3, 2013 and the next day, on April 4, 2013, officials from the Ocean County Prosecutor's Office appeared with a warrant for Orlovsky's computer. At that time, he was again suspended and placed on paid leave after consultation between then Acting Superintendent Frank Roselli and counsel. Once the computer was returned from the Prosecutor's office, McKenna asked Beaton to investigate further and gave him a copy of Orlovsky's schedule to compare Orlovsky computer use with his instructional time.

So, Beaton conducted a second investigation looking at the whole computer and he found an earlier instance of a visit to the website on February 28, 2013. Beaton believed that the earlier visit was intentional. Beaton based this belief on Orlovsky's browsing activity before and after he accessed the KidKash websites. Specifically, on February 28, 2013, Orlovsky accessed five different pages of the HurricaneMutiny.com/RCTForum in approximately five minutes and then the next minute accessed host:www.KidKash.com and http://www.KidKash.com/ subliminalmessage.mp3. Two minutes later, Orlovsky conducted a Google search for men's string tank-tops and two minutes after that returned to a HurricaneMutiny.com/RCTForum. Beaton noted that this browsing activity requires user participation to create the user entry. Beaton explained that the entry host:www.KidKash.com followed immediately by the subliminalmessage.mp3 address means that Orlovsky went directly to the MP3 file. Beaton "imagines" that Orlovsky's visit to the MP3 file caused it to play in the future and concluded that it was "probably based on previous activity." Beaton thought it was possible that there was an active tab and when the browser

restarted, Internet Explorer asks to restore the tabs and the could have been stored and played, or the site could have been reopened accidentally. Beaton explained that if you visit a site "you can certainly visit it again, whether purposefully or accidentally." Beaton explained that he was not able to visit the RCTForum itself because it is password protected but the computer downloads a copy of the website visited to get there faster. That is known as the cache. Beaton looked at the computer cache and noted most of the postings on the RCT message board that Orlovsky visited were football related but some other topics included deer antler powder used as a muscle-building agent. Beaton also reviewed Orlovsky's signature on the message board and the most recent one included scantily clad women on posters and an older one was of guys making hand gestures.

Beaton also used Orlovsky's schedule to determine whether students were present in the classroom when Orlovsky accessed the computer. Beaton's review found regular access to the RCTForum and sports-reference.com while students were present. Other websites accessed while students were present include Pandora, Amazon, Turbo Tax Web, Intuit, Twitter, the Knicks Blog, FansEdge.com, ESPN.go.com, bulldogbreeds.com, Tick.pick Blog, Knicks 2012, Ticketmaster, Stub Hub, TaxBrain.com, HRBlock, Gap.com, Caneinsight.com, Reddit.com, and several Google searches, some clearly work related and some clearly personal such as a federal tax calculator. An example of Orlovsky's computer usage during the school day shows that on February 21, 2013, Orlovsky had homeroom and classes from 7:53 to 9:55 a.m. Orlovsky accessed Pandora.com at 9:32 a.m., then TurboTax from 9:36 to 9:49, and Oceanfirstonline.com at 9:53. Orlovsky's classes continued from 10:29 a.m. to 12:47 p.m. Orlovsky accessed Yahoo.com at 10:30 a.m., Pandora at 10:40, HurricaneMutiny.com topic 43280 at 10:41, topic 43279 at 10:41, topic 43263 at 10:43 and topic 43261 at 10:44, TurboTax from 10:45 to 11:03, and Amazon.com at 12:17 p.m. Orlovsky was scheduled for afternoon duty from 2:00 to 2:19 p.m. but completed a series of Google searches from 2:01 to 2:04 p.m.

The KidKash.com/subliminalmessage.mp3 was also visited at 12:50 p.m. on March 15, 2013 by Orlovsky's login.

Beaton's review of Orlovsky's computer activity for the month before March 15 also revealed a series of personal e-mails between himself and his then girlfriend. Those e-mails were exchanged on February 26, March 13 and 15, 2013. At least one of the e-mails on March 13 was sent when students were present and several others were sent while Orlovsky had hall duty. Several of those e-mails included explicit sexual content. Beaton had no reason to believe anyone else saw the e-mails and believed them to be personal. According to Beaton, the goal of both his initial investigation surrounding the sound and the

second investigation a month prior to the sound were both to find out where the sound originated.

Beaton concluded as a result of his review of Orlovsky's web use from February 18 to March 15, that he accessed the RCTForum "regularly and on a daily basis" with the usage logs showing "hundreds of entries related to activity at RCTForum between the dates of February and March 15. Further, Beaton indicated that "web history logs show that Orlovsky both viewed and posted content on RCTForum." Beaton concluded further that cached RCTForum web pages showed inappropriate content posted by Orlovsky including obscene language and an inappropriate picture of a woman. Further, content posted by others but viewed by Orlovsky also included obscene language and other inappropriate pictures of women. Beaton concluded that all of the activity related to RCTForum was intentionally generated by Orlovsky but could not guarantee that access to Kidcash.com was intentional. Beaton indicated that "it is possible for audio content to play without user intervention" and then listed ten possible ways this might occur. Each of these ten possibilities involve action by the user to either access the URL intentionally, or visit a webpage with potentially inappropriate content. Beaton explained, once the URL has been visited, it is possible for the user to revisit it either intentionally or unintentionally."

Beaton believed that the RCTForum was the likely source of the inappropriate content from KidKash.com. Beaton based this conclusion on the fact that any other websites Orlovsky visited immediately before or after, each instance of KidKash activity "are strictly controlled, heavily moderated corporate websites." Beaton concluded that:

It is very plausible that ... [Orlovsky] may have indirectly caused the "Subliminal Message" audio file to play as a result of inappropriate web activity. His frequent, deliberate access to online forums carries a great risk; the user-generated content that is present on those web sites may not be appropriate for a work setting and inappropriate content can appear or play without forewarning.

Beaton offered the conclusion "I don't think there's any way the KidKash MP3 file would play on March 15 had he not been there previously."

Orlovsky testified that he never went to the Miami Hurricane site while students were in class. He acknowledged that he may have visited the Miami Hurricanes site on March 15 and failed to close the tab but emphasized that he did not visit the site while students were in class. Orlovsky acknowledged going to Miami Hurricanes message boards but testified that he had not come across similar audio files in the past.

Orlovsky acknowledged further that the school's IT investigation of the websites he visited showed that he visited Pawn Stars, the History Chanel website, Hurricane Mutiny, which is a Miami Hurricanes message board which cannot be accessed without a registration, Sports-Reference.com, Pandora, Turbo Tax, Intuit.com, FansEdge.com, ESPN.go.com and bulldogbreeds.com. Despite this list, Orlovsky testified that he never actively used the computer while in class.

Orlovsky testified that he does not visit websites when he is in class but he does not necessarily close the website he visited before class. Orlovsky acknowledged that he visited Miami Hurricanes message boards that included some photographs that students should not see. Orlovsky explained that message board participants have signatures and those signatures may include photographs of scantily clad women.

Orlovsky acknowledged that he used the computer for e-mail and he testified that he did not believe that using the computer for personal e-mails was prohibited. Orlovsky also acknowledged a personal e-mail exchange with his then girlfriend that included explicit sexual discussion.

Orlovsky acknowledged having a Twitter account and testified that he did not share his Twitter account with students. Orlovsky's Twitter account was taken down as soon as it was brought to his attention.

Gluck testified that every year on the first in-service day of the school year, Gluck discusses computer use with staff including technology procedures with staff and that Orlovsky has been present at these staff meetings. According to Gluck, he has emphasized that school computers are for school use only and not for shopping. Further, Gluck has discussed Websense which notes teachers' internet web activity. Gluck has also cautioned teachers not to post pictures on Facebook from parties and not to talk about students on their web pages. Lanza recalled that the District's Acceptable Use Policy has been outlined at various training events.

Gluck agreed that it was permissible to use clips from CNN for educational purposes and noted that Orlovsky would need to get permission from Lanza to use websites in lessons. In Gluck's view, neither Turbo Tax nor the Miami Hurricanes were appropriate websites to be accessing during the school day.

Gluck testified regarding the phone calls with upset parents and conversations with upset staff and students that resulted from the March 15, 2013 incident. According to Gluck, teachers in his cycle including Jannarone and Petrecca said that students complained to them.

According to McKenna, the Prosecutor's investigation was completed without criminal charges before the filing of tenure charges. However, the matter was referred to the Department of Children and Families Institutional Abuse Investigation Unit. On July 3, 2013, the Institutional Abuse Investigation Unit made the following investigative observations:

AM, age 12, was not examined medically. The results of the investigation indicate that audio of an inappropriate nature played from the computer in Mr. Orlovsky's classroom. As a result of this incident, AM decided to follow Mr. Orlovsky on Twitter. Based upon the interviews and physical observations of the child, AM is not an abused or neglected child. However, the information gathered indicates that AM was harmed or placed at risk of harm by virtue of the incident. The appropriate licensing or supervisory authority may take action as a result of this investigation.

A second and almost identical letter issued from the Institutional Abuse Investigation Unit on the same date making the same observations and findings involving student SK.

The Institutional Abuse Investigation Unit advised the school district through a letter to then Acting Superintendent Frank Roselli indicating "while corrective action is not required by the Department, you may submit details regarding any further remedial actions taken by your organization as a result of this investigation." The letter also indicated that "it is the understanding of this office that the following remedial action was taken at the time of the investigation:

1. On April 5, 2013, the school district placed Mr. Orlovsky on suspension.
2. On June 21, 2013, the investigator advised Assistant Superintendent Debra McKenna that the investigation was complete."

McKenna testified that the Institutional Abuse Investigation Unit "weighed heavily" in the Board's decision to bring tenure charges. Further, the administration learned that Orlovsky may have been untruthful based upon the first report from the Prosecutors' office and Beaton's report. Specifically, Orlovsky said he had never been to the KidKash site but the Board subsequently learned that he had.

DISCUSSION

Pursuant to N.J.S.A. 18A:6-10, a tenured teacher shall not be dismissed from his or her position or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct or other just cause." The Board bears the burden of proving the charges are true and warrants the penalty it seeks to impose.

The Board emphasizes that it is seeking to revoke Orlovsky's tenure due to his "unbecoming conduct." The Board cites the definition of unbecoming conduct in In re Young, 202 N.J. 50, quoting Karins v. City of Atlantic City, 152, N.J. 532, 554 (1998), as conduct "which has a tendency to destroy public respect for [government], employees and confidence in the operation of [public] services." The Board continues, noting that unbecoming conduct can include "any conduct which adversely affects the morale or efficiency" of the employer. *Id.* The Board asserts that determination of this depends upon the employee's fitness to discharge the duties and functions of one's office or position" quoting In re Grossman, 127 N.J. Super 13 (App Div. 1974). The Board emphasizes that a single incident is sufficient to demonstrate the fitness of a teacher. In re Fulconer, 93 N.J. Super 404, App Div. 1967).

The Board maintains that there is no precedent that would suggest that a teacher is entitled to progressive or incremental discipline and therefore its failure to punish Orlovsky with progressive discipline for earlier instances of unbecoming conduct precludes the Board now from seeking his revocation of tenure and dismissal.

The Board cites the unpublished opinion in In re Tenure Hearing of Donohue, 2008 W.L. 553029, Superior Court of New Jersey, Appellate Division (2008) where a teacher with no prior disciplinary history surfed the internet for pornography sites and sent e-mails of a provocative sexual nature. In that case, despite the fact that there was no evidence that any student had been exposed to her activities, the court upheld her discharge finding that the misconduct "may be based merely upon the violation of the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of what is morally and legally correct." (Citations omitted). The Court continued finding that "unfitness to remain a teacher may be demonstrated by a single instant if sufficiently flagrant."

The Board emphasizes that Orlovsky acknowledged that he accessed inappropriate websites. Further, the Board emphasizes that Orlovsky admitted that he was sternly warned against such activity in both 2006 and 2009. Despite these warnings, the Board points out that on March 15, 2013, Orlovsky visited

the Miami Hurricanes website which he had been specifically warned not to visit in 2006 and 2009. In both of those instances, investigations of his computer use were initiated after complaints by students and parents that students had viewed inappropriate material on Orlovsky's computer screen.

The investigation of Orlovsky's computer in 2013 was initiated when his students in his first morning class heard an MP3 audio file entitled "subliminalmessage" coming from Orlovsky's computer.

The Board does not dispute that Orlovsky immediately reported the incident to Principal Gluck and ask that his computer be examined to determine the source of the sound. The Board would reject the argument that his prompt reporting demonstrates Orlovsky's innocence. Instead, the Board suggests that it demonstrates a recognition that he was already in trouble for performance issues because he had been advised that Gluck and Lanza were recommending his discipline for performance issues only eleven days earlier.

The Board emphasizes that Orlovsky was also well aware that he had been regularly and consistently visiting websites that he had been strenuously warned against on two previous occasions. The Board would compare Orlovsky's conduct in promptly reporting the incident to Principal Gluck to that of a speeder who has been caught on radar and pulls over before the police have to chase him in the hope that he will get a break. The Board suggests that Orlovsky knew what the investigation of his computer would reveal. Specifically, the Board suggests that Orlovsky knew he was continuously visiting the Miami Hurricanes website, particularly the RCTForum which contains adult material. The Board compares Orlovsky's vigorous denial that there was pornographic material on his computer with the adult nature of the material on the RCTForum. Similarly, Orlovsky must have known that the investigation would reveal e-mails which were extremely sexually graphic in content. The Board points to Orlovsky's admission that this use was inappropriate as well as his acknowledgement that he did not think anyone would find out.

The Board emphasizes that Orlovsky's employment history demonstrates a "blatant and flagrant disregard of school policies and procedures." The Board argues that this history would suggest that Orlovsky would not be compliant with its requirements in the future. The Board emphasizes that Orlovsky had been given ample and explicit warning to avoid the conduct that led to the incident which exposed his students to harm and which harmed his students. The Board maintains that Orlovsky's assertion that he did not intend the consequence of his actions serves only to underscore his lack of judgment.

The Board maintains that if Orlovsky had not intentionally accessed the website containing the adult material, the incident on March 15, 2013 would not have happened. The Board compares Orlovsky's conduct to visiting a brothel after being warned against it twice, and picking up a communicable disease. The Board suggests that this argument demonstrates an extreme lack of judgment and maturity that it expects in a teacher.

The Board emphasizes that Orlovsky's conduct adversely affected the morale and efficiency of the school. Orlovsky's actions caused students and their parents to complain on three separate occasions and on three separate occasions his computer was removed and investigated. The Board emphasizes that on the last occasion, Orlovsky's actions caused the Ocean County Prosecutor to serve the school with a warrant for his records and computer. On this occasion, Orlovsky's actions also caused the State of New Jersey, Department of Children and Families Institutional Abuse Investigation Unit to conduct an investigation. The Board cites the testimony of teachers in Orlovsky's cycle who were aware of the events and at least one teacher witnessed the anxiety of students not wanting to return to Orlovsky's classroom. The Board cites testimony by administration officials who had to address calls from understandably angry and concerned parents. Further, the Board had to write a letter to all of the parents of Orlovsky's students regarding the situation. For these reasons, and based upon all of the evidence submitted, the Board argues strenuously that Orlovsky had displayed conduct unbecoming a teacher that demands his dismissal.

Respondent relies largely upon the arbitrator's award in Randolph Board of Education v. Buglovsky, Ed Docket No. 265-9/12 (Arb. Licata, December 21, 2012) where an arbitrator modified the penalty of dismissal to a suspension without pay and increment withholding after rejecting consideration of the teacher's conduct for which she had received prior discipline. In comparison, the Respondent cites the Board's "evolving" technology policy and the paucity of evidence that such a policy was ever presented to Orlovsky. The only evidence that Orlovsky received any policy was the acknowledgement of receipt of "guidelines for professional behavior and attire" which he signed on September 1, 2004. The Respondent cites the only technology policy document produced which is a one page undated, unsigned document from 2007 without evidence of either the effective date of that policy or if and when it was disseminated to Orlovsky. Further, Respondent notes that that policy includes a generalized list of "non-permitted" use behaviors but does not mention any penalties for violation of the policy. The Respondent notes that the tenure charges include several generalized allegations against Orlovsky that were not supported by the Board. The Respondent would characterize those allegations as remote and stale and points out that they were not dealt with by the Board contemporaneously when they occurred. Given that those charges date from 2006 and before, the

Respondent suggests that the Board may not now improperly resurrect those charges and issue discipline for conduct that did not merit discipline seven years ago.

Addressing the computer incident from December of 2006, Respondent acknowledges that Orlovsky used a school computer to access one or more websites unrelated to school activities such as the Miami Hurricanes website. Respondent emphasizes that none of these sites were pornographic in nature. The Respondent acknowledges that Orlovsky was spoken to about the computer by members of the administration but he did not receive a formal warning, reprimand or other discipline with respect to that computer use.

Noting Ms. Jannarone's testimony that he used the word "fuck" during a verbal altercation, the Respondent cites her testimony that she did not recall Orlovsky ever using curse words in front of students on any other occasion. The Respondent would characterize that single instance as an excited utterance not worthy of discipline.

Turning to the instances in 2009, Respondent emphasizes that Orlovsky never accessed or visited pornographic websites or websites which contained "obscene or pornographic material in 2009 or at any other time." Nor did Orlovsky view pornography on his computer. Instead, Orlovsky acknowledged that he accessed one or more sports related websites not directly related to school activities. His computer was examined in 2009 and apparently it was found that he did not use the school computer to access pornographic websites because if he had, it is likely that disciplinary action would have been imposed at that point in time. Respondent notes that accessing pornographic material on a school computer may constitute a criminal offense and Orlovsky had never been charged with any such crime. Rather, Respondent points out that in 2009, his use of the school computer resulted in a June 15, 2009 letter from the Board's then counsel indicating that Orlovsky was advised that this was his "second warning" and any future inappropriate use of the computer would result in discipline. Asserting that it is unclear when he received an initial warning, the Respondent cites the conclusion of Monahan's letter that "this letter is being placed in your personnel file so that it is clearly understood as to the penalty you will incur in the event that there is a violation in the future." However, Respondent emphasizes that letter does not indicate what that penalty might be. Respondent emphasizes further that at no time before 2013 was Orlovsky ever advised that a subsequent improper use of the school computer would or could result in the filing of tenure charges.

Addressing charges that Orlovsky failed to attend a scheduled parent teacher conference, Respondent acknowledges Orlovsky's lapse and also that Orlovsky left school without administrative permission on two or three occasions.

Respondent defends this conduct asserting that Orlovsky believed he was allowed to sign out during prep periods and that he was specifically directed to do so by the school's Supervisor of Instruction in her letter dated November 21, 2006. Respondent suggests further that there is no evidence to the contrary nor is there evidence that Orlovsky's failure to sign out negatively affected his performance as a teacher or impacted his students. Respondent also notes Orlovsky's unrefuted testimony that he was not the only teacher who failed to sign out or in.

Addressing allegations that Orlovsky arrived late on numerous occasions, there is no evidence that he missed class. Further, Respondent cites Orlovsky's unrefuted testimony that virtually all of the teachers arrived at school at the same time that he did. Citing Principal Gluck's undated letter in connection with a meeting conducted on or about March 4, 2013, Respondent notes that disciplinary action was recommended and that the letter provided "one form of disciplinary action may be to withhold an increment." Respondent cites Gluck's testimony in making this recommendation that he considered Orlovsky's "entire history dating back to 2006." Turning to the event that led to the filing of charges in this case, on March 15, 2013, during his period one class, Orlovsky turned the school computer on, took attendance, accessed CNN News for Kids and then his students viewed the approximately 10 minute program. Citing Orlovsky's testimony, Respondent notes that after the completion of the news program, the computer began to shut down on its own without physical prompting from anyone, and as it did so, sounds that seemed sexual in nature emanated from the computer. Respondent notes that Orlovsky immediately turned the sound down and turned the computer off. As soon as he had a free period, Orlovsky went to the Principal to report the matter. Respondent cites Principal Gluck's testimony that Orlovsky expressly urged him to take and examine his computer. Respondent emphasizes that there was no picture or video accompanying the few seconds of sounds. Respondent cites an April 1, 2013 summary which provides that Orlovsky admitted to having visited the Miami Hurricanes website and denied intentionally playing the sounds heard by the class. At that meeting, Respondent points out there was discussion about how to reintroduce Orlovsky back into his classroom and plans included sending a letter home to all students in his classes providing factual information and that Principal Gluck would speak to each class.

The April 2, 2013 letter that Gluck sent home to parents indicated that the results of the District's investigation "revealed the teacher did not intentionally play or access the sounds heard by this class." Respondent argues that it is disingenuous for the Board to now take a contrary position. Respondent emphasizes that Orlovsky was indeed allowed to return to work and was suspended anew only because of the pendency of the Ocean County Prosecutor's investigations which has since been completed and closed without

criminal charges. Respondent also cites the investigation conducted by DCF's Institutional Abuse Investigation Unit which determined that sexual abuse/sexual exploitation had not been established. Respondent also cites the findings of the Ocean County Prosecutor's Office High-Tech Crime Unit Digital Evidence Report which included the following: "he had no knowledge of this audio or how it was accessed from the computer. The examiner was unable to be determined if the URL was accessed intentionally or unintentionally. ... (He) reported the computer rebooted and the sound played automatically." Respondent notes that the Board's forensic investigator or expert listed ten possible ways the file might have been played noting "that it is possible for audio content to play without user intervention..." Respondent also emphasizes that Orlovsky cooperated with all of these investigations and cites the Board's computer expert who indicated that his investigation into the RCTForum revealed mostly football-related topic discussions.

Respondent asserts that Orlovsky did not allow his students to access his password protected computer and did not share his password with anyone. Further, there is no evidence that Orlovsky showed any of his e-mails to any of his students or teachers or that any of them had a realistic risk of viewing such e-mails. The e-mails at issue were exchanged with Orlovsky's then girlfriend, a non-school employee and were intended to be for his and her eyes only. Respondent emphasizes that the e-mails came to the administration's attention only because of the investigation launched as a result of the March 15, 2013 incident. Although Respondent acknowledges that some of the e-mail exchanges contain sexually explicit language, there are only three such exchanges over a period of three days. Further, Respondent points out that Orlovsky had not previously been disciplined or warned relative to personal e-mail exchanges. Respondent emphasizes Orlovsky's unrefuted testimony that "everyone" sends and receives personal e-mail using District computers. Respondent also notes that the Board's witnesses were unable to point to a single instance of anyone else being subject to discipline for sending personal e-mails on the District's computers. Further supporting Orlovsky's testimony that virtually all of the teachers at one time or another use school computers to access non-school websites, the Respondent cites Orlovsky's testimony that when he was sitting in Gluck's office during school hours, Gluck's computer showed images from ESPN.com. Respondent notes that Gluck did not dispute this testimony. Other than the built-in "WebSense" program, Respondent notes that there is no evidence to suggest that the District had a uniform monitoring system in place or that disciplinary action had been imposed on anyone else based on such conduct.

Under these circumstances, Respondent argues strenuously that the District has failed to meet its burden, that it imparted "clear notice" to Orlovsky of

the penalties he might face if he continued to access non-school related websites and/or exchange personal e-mails.

Addressing the Board's argument that the sounds emanating from Orlovsky's computer on March 14 were the direct result of his failure to follow the directive not to access non-school related websites including the Miami Hurricanes website, the incident would not have occurred, Respondent asserts that this argument is undercut by the District's expert who opined that there were at least ten different ways where the incident could have happened and that Orlovsky had no formal training or education regarding computer use and had no idea that the computer could shut itself down and reboot without prompting and then restart and play an audio file which had last "appeared" over two weeks earlier without prompting where he did not save it or download it. Further, Respondent notes the District has not provided formal computer training to Orlovsky or warned him about these technological possibilities. Citing Beaton's testimony that he would "imagine" that there was a causal link between Orlovsky visiting KidKash.com on February 28, 2013 and the audio file which was not on the computer playing on March 15, 2013; Respondent points to Beaton's testimony that "it is very plausible that the teacher may have indirectly caused the 'subliminalmessage' audio file to play as a result of inappropriate web activity."

Respondent suggests that the real motivation underlying the tenure charges may lie with the current administration's dissatisfaction with the previous administration's discipline or lack thereof or expressions of dissatisfaction on the part of parents with the outcomes of the forensic investigation and the investigations performed by the Ocean County Prosecutor's Office and DCF.

Additionally, Respondent points to Orlovsky's generally good and favorable performance evaluations from 2001 to the present. To that end, Respondent cites comments on the 2012 report including the following:

Based on his formal observation and several informal ones, Mr. Orlovsky appears to have positive interactions with students and enjoy quality discussions about content. In his end-of-year evaluation last May, several concerns were detailed for Mr. Orlovsky to address and upon which to improve for the 2011-2012 school year. It should be noted that, in many of those areas, his observable performance this year improved. These include the following actions on his part: developing a greater variety of assessments, including more writing opportunities for students; being sure not to leave the building during school hours without permission or signing out; avoiding having disruptive students stand unsupervised in the hallway; remaining in the classroom during instructional time for inclusion classes; speaking to students in a

more professional and appropriate manner. Mr. Orlovsky's attention to these matters and improvement in those areas is much appreciated by school administration. ... Mr. Orlovsky is an intelligent and personable individual who, if he addresses the noted areas of concern in regards to lesson planning, can achieve much academic success in the classroom with his students.

Finally, Respondent notes that Orlovsky seeks to return to work and in terms of progressive discipline, moving from a 2009 warning directly to dismissal without intermediate discipline as penalty for his access to non-school related but non-pornographic websites is unduly harsh. Accordingly, Respondent seeks Orlovsky's reinstatement.

Turning to the merits, the tenure charges encompass a seven-year span from 2006 to the current allegations of misconduct in 2013. As Respondent emphasizes, these charges are "remote and stale" and to the extent that they were not addressed by the Board when they occurred, it is not permissible to resurrect these charges to support discipline when no formal discipline was imposed in 2006. The relevance of these charges is limited to the extent that the Administration's consideration of those charges served to place Orlovsky on notice regarding Board policies and procedures both for permissible or acceptable use of the school computer and regarding signing in and signing out during the school day. I note that when Orlovsky met with Parker on November 21, 2006, she followed up with a letter expressly reminding him "[i]f you leave the building during ...[your] prep, you are to sign out and sign back in when you returns (sic), as per building policy." Orlovsky also met with the Affirmative Action Officer and was counseled regarding his use of improper language and calling students names. Orlovsky was not disciplined for this conduct in 2006 and these incidents cannot now be brought back to support tenure charges. Accordingly, to the extent that the charges rely on non-computer related incidents that occurred in 2006, they are dismissed.

Later in 2006, Orlovsky was found to have used the computer for impermissible purposes for the first time. The audit of Orlovsky's computer use that resulted from a student complaint that he visited several sports-related websites, mostly related to the Miami Hurricanes and that he accessed these websites during class times. As a result, Orlovsky was called to then Superintendent Ritacco's office to meet with Ritacco and McKenna. This meeting has been described both as a "talking to" and as an oral warning. Regardless, Orlovsky has acknowledged that as a result of that meeting, he was aware and on notice that his school computer usage should be limited to school related purposes and should not include access to sports-related or Miami Hurricane websites.

The Board has already taken action with regard to these charges and cannot now resurrect those allegations to support its current efforts to revoke Orlovsky's tenure. The allegations from 2006 are relevant to show that Orlovsky was aware that it was not permissible to access non-school related websites on the school computer and that message had been given to him directly by the Superintendent and Assistant Superintendent. As a teacher, Orlovsky's direct supervisor is the Grade 6-8 Social Studies Director of Curriculum, who reports to McKenna, who in turn reports to the Superintendent. So, this initial counseling or oral warning came not from Orlovsky's immediate supervisor, but from the highest levels of supervision in the school district. This meeting may be construed to both place Orlovsky on notice regarding his computer use and to send the message that his improper computer use had caused concern at the highest level in the District. It may not be used to support the current tenure charges and the December 2006 computer-related charges are dismissed.

Despite the 2006 warning, a similar incident occurred in 2009 when Orlovsky's school computer was once again confiscated and reviewed by technology staff after a student alleged that she could see pornography or pictures of an unclothed woman on his computer screen. The review of Orlovsky's internet usage from that day showed that Orlovsky had visited inappropriate websites including YouTube videos and included photos of scantily clad women. Orlovsky indicated that these photos were probably signatures from a Miami Hurricanes message board.

After this incident, Superintendent Ritacco and McKenna again met with Orlovsky, this time with then counsel Monahan. At that meeting Monahan warned Orlovsky very specifically not to use the computer for personal reasons and specifically warned him to avoid all websites having to do with the Miami Hurricanes as well as ESPN, YouTube, and others. Orlovsky acknowledged attending this meeting being warned to use the computer for school-related purposes only.

After that meeting, Monahan sent him a letter, memorializing the oral warning from December of 2006, reiterating the impermissible and unauthorized viewing in May of 2009 and providing a specific written warning that Orlovsky was advised "not to use your computer for personal use to include visiting unauthorized websites." The letter concluded with the following warning:

This letter is being placed in your personnel file so that it is clearly understood as to the penalty you will incur in the event that there is a violation in the future.

Respondent contends that this warning is not specific in nature and does not suggest or warn that Orlovsky would be subject to termination in the event of

another such incident. This letter can be construed both as a written warning to stop visiting inappropriate and non-school related websites and as further warning that a more serious, but unspecified, penalty would be incurred if Orlovsky was found to continue to visit inappropriate websites. The lack of explicit warning that the more serious penalty could include dismissal does not preclude the Board from seeking such penalty in this case. Following this meeting Orlovsky had been fully warned for the second time that there would be consequences to any violation of the District's computer usage policy by visiting inappropriate websites, including Miami Hurricane websites and other sports-related websites. Monahan's letter constitutes a disciplinary written warning that was placed in Orlovsky's personnel file. Thus, Orlovsky received formal discipline for this incident. The District's efforts to include this incident in the 2013 tenure charges is akin to double jeopardy in a criminal context, or an effort to punish Orlovsky for his 2009 conduct a second time. As with the 2006 computer-related misconduct, this incident is relevant only to show that Orlovsky received a second warning not to use the computer for non-school related purposes including visits to Miami Hurricanes or other sports-related websites. Accordingly, to the extent that the charges include Orlovsky's 2009 computer-related misconduct, they are dismissed.

With this backdrop, I turn to the events of March 15, 2013. It is undisputed that during the first class of the day, after the class watched CNN Student News, Orlovsky's computer shut itself down and then restarted. After it restarted, inappropriate sounds that were sexual in nature began coming from the computer. Orlovsky quickly turned the sound down, calmed the class, and reported the incident to Gluck, asking that his computer be taken away and checked out. Orlovsky was placed on a paid suspension and his computer was subjected to forensic analysis.

Initial forensic analysis of Orlovsky's computer use on March 15 showed that the sounds were the first few seconds of a KidKash rap video titled "subliminal message" found on KidKash.com. This forensic analysis, which was limited to the 30 minutes surrounding the emanation of the sound from Orlovsky's computer was designed only to look for the source of the inappropriate sounds. In his initial report, Beaton pointed out "that a single instance of web access to a website does not necessarily indicate intentional access."

As a result of that conclusion, a meeting was held on March 22 where it was decided to bring Orlovsky back to work after the Spring Break. This determination was based upon the fact that he was on a paid suspension and that Orlovsky vehemently denied ever accessing the KidKash website or MP3 file.

A letter of explanation was sent to parents and Orlovsky returned to the classroom on April 3, 2013. The next day, personnel from the Ocean County Prosecutor's office produced a warrant for Orlovsky's computer and Orlovsky was suspended anew. The investigation by the prosecutor's office produced no criminal charges. When Orlovsky's computer was returned, McKenna asked Beaton to conduct a second investigation of the computer and gave him a copy of Orlovsky's schedule to compare Orlovsky's computer use with his instructional time.

This investigation found that Orlovsky had previously accessed the KidKash MP3 file on February 28, 2013 and had likely done so by clicking on a link from a Miami Hurricanes message board. The investigation found extensive evidence of non-school related internet usage throughout the school day, including when students were present. This internet usage included frequent and repeated access to the RCTForum throughout the day when students were present. Further, the investigation found a series of e-mails from three separate dates between Orlovsky and his then girlfriend that included explicit sexual content.

As a result of the March 15, 2013 incident, Orlovsky was charged with misusing his school computer "by accessing websites unrelated to school activities and which contained obscene and otherwise inappropriate materials" and resulted in the exposure of his students to "obscene, sexually suggestive and otherwise inappropriate sounds coming from ... [his] computer." The charges also provide that Orlovsky "engaged in e-mail exchanges containing graphic and explicit sexual dialogue."

That Orlovsky frequently and repeatedly accessed Miami Hurricane websites, including the Hurricane Mutiny RCTForum is not disputed. Forensic analysis shows that the KidKash MP3 with sounds that were sexual in nature was accessed through the RCTForum. There is no doubt that Orlovsky did not intentionally expose his students to the subliminal message MP3. However, Orlovsky's use of the RCTForum did lead directly to the exposure of his seventh grade students to the MP3 with inappropriate sounds that were sexual in nature. This occurred despite the fact that Orlovsky had been strenuously warned on two occasions not to visit any Miami Hurricanes related websites using the school computer. The 2006 warning was oral and the 2009 warning was both oral and followed up with an explicit written warning from the Board's counsel. Orlovsky acknowledged receiving each of these warnings. There can be no question that Orlovsky was well aware that he was not permitted to visit the RCTForum. Orlovsky does not dispute that he used the e-mail system to send personal e-mails to his then girlfriend, but asserts that everyone used the e-mail system for personal usage without consequence.

Orlovsky's response that everyone, including Principal Gluck, used the computer to visit non-school related websites is troubling. Even though some personal internet usage has been tacitly permitted by the Board, Orlovsky seems unable to understand the distinction between a brief visit to Amazon.com or ESPN.com on lunch hour when students are not present and usage of a message board that includes inappropriate content such as photos of scantily clad women and links to other inappropriate content such as the KidKash MP3 during instructional time. Similarly, Orlovsky does not distinguish between brief personal e-mails that may be tacitly permitted and those with explicit sexual content that are not appropriate for a school. While it is not disputed that the context of those e-mails was meant only for Orlovsky and his former girlfriend, the content of those e-mails on a school computer where they might be seen by students calls Orlovsky's judgment into question. Orlovsky's actions in continuing to access Miami Hurricanes-related websites, including the RCTForum with its adult content and sending sexually explicit e-mails using the school computer and e-mail system also show a lack of judgment necessary to teach and function as a role model to seventh grade students. Orlovsky's actions in continuing to access Miami Hurricanes-related websites, including the RCTForum with its adult content and sending sexually explicit e-mails using the school computer and e-mail system and while students were present is conduct unbecoming a teacher.

Further, Orlovsky was unequivocally and repeatedly placed on notice that visits to Miami Hurricanes related websites and message boards were explicitly forbidden by the Superintendent. This conduct resulted in student and parent complaints on at least three occasions, with the March 2013 incident leading parents to contact the Ocean County Prosecutor's office. Additionally, the investigation conducted by DCF's Institutional Abuse Investigation Unit found that at least two children had been harmed or placed at risk of harm as a result of Orlovsky's conduct.

This unbecoming conduct must be considered together with Orlovsky's record of failing to correct other conduct-related issues such as his tardiness and failure to sign in and sign out as well as his failure to attend a scheduled conference with parents. In Orlovsky's 2010-2011 evaluation, he was specifically counseled about leaving the building "during the instructional day without asking permission and without properly signing himself out or in." As a result, he missed "several scheduled parent conferences." The evaluation also notes that he missed professional development sessions and a "significant number of scheduled hall duties." In the 2011-2012 evaluation, it was noted that in many areas, Orlovsky's "observable performance" improved. However, that evaluation continued to point to needed improvements in following school policy to sign in even after Lanza spoke with him about it. Despite this counseling and notice in his evaluations, Orlovsky continued to flout school policies during the 2012-2013

school year leading to the March 4, 2013 meeting with Lanza and Principal Gluck where they discussed his continued conduct in failing to attend a scheduled parent conference, leaving during the school day without administrative permission, as well as his failure to sign in. Lanza and Gluck had recommended that his increment be withheld for this conduct.

Without addressing what level of discipline would have been appropriate under these circumstances without the computer-related misconduct, I find that this administrative misconduct, by itself, would not be sufficient to warrant tenure charges. However, this administrative misconduct by itself would warrant formal discipline and when considered with the computer-related misconduct, does support the tenure charges. This pattern of conduct of failing to follow administrative directives and warnings is similar to the multiple warnings for computer-related misconduct that were ignored by Orlovsky. This pattern is troubling when viewed in conjunction with the number of warnings not to access Miami Hurricanes related websites before the current incident. The record demonstrates that Orlovsky has, on many occasions, engaged in misconduct (computer-related or otherwise), been counseled or warned to change his behavior, and then continued to engage in the same conduct.

Further, Orlovsky has failed to be truthful both to the administration in the March 22, 2013 meeting and in this proceeding. At the March 22 meeting, and in this proceed, Orlovsky denied any knowledge of the KidKash MP3 despite having originally accessed the video on February 28, 2013, as demonstrated by Beaton's forensic analysis. Also on March 22, Orlovsky told administration officials including McKenna that he had not accessed any websites on March 15 other than Genesis and CNN News for Kids when he had in fact accessed a Miami Hurricanes website called Hurricane Mutiny less than an hour before the KidKash MP3 played in his classroom. During this proceeding, Orlovsky testified that he did not use the internet while students were present, although he doesn't always close tabs that are open. However, the print-out of Orlovsky's computer usage in the weeks before March 15, 2013, shows that he visited a multitude of websites during instructional time while students were present.

When Orlovsky's history of promising to correct his conduct only to repeat the same conduct is considered together with his failure to acknowledge the extent of his misconduct, I cannot find that his desire to return to the Toms River Schools and to teaching is sufficient to outweigh his misconduct. Orlovsky's record in his approximately 12 years as a teacher has included a lengthy record of counseling and correction. This record, together with the current charges, outweigh his generally good evaluations and his "positive interactions with students."

Given the failure of counseling and warnings to correct Orlovsky's conduct, when current misconduct is considered in light of principles of progressive discipline, I find it unlikely that additional progressive discipline such as a withheld increment or unpaid suspension would be successful in correcting Orlovsky's conduct. Respondent cites instances, such as the Buglovsky Award, where progressive discipline has been used to mitigate the penalty for misuse of computers and e-mail. However, Buglovsky had sought to comply with previous disciplinary measures, did not have a history of failing to comply with prior counseling and discipline and was truthful and forthright. In contrast to the respondent in the Buglovsky Award, Orlovsky has consistently repeated the same conduct for which he was warned and disciplined. When Orlovsky's misconduct, together with his history of failing to modify or correct his conduct despite counseling and discipline as well as the finding from DCF's Institutional Abuse Investigation Unit that children were harmed or placed at risk of harm are taken together, neither progressive discipline nor mitigation of the penalty is warranted. In sum, when the seriousness of Orlovsky's misconduct is considered in light of his failure to heed correction to his performance or warnings to cease his non-work related computer use, modification of the penalty is not warranted.

For all of these reasons, I find that the Board has demonstrated that it had just cause to dismiss Orlovsky for conduct unbecoming a public employee based upon his misuse of his school computer by accessing websites unrelated to school activities and which contained obscene and otherwise inappropriate materials; his e-mail exchanges containing graphic and explicit sexual dialogue; his failure to be truthful and his demonstrated pattern of disregard for administrative and school policy by failing to attend scheduled parent teacher conferences, arriving late on numerous occasions and leaving school without administrative permission

AWARD

The Board of Education of the Toms River Regional Schools has met its burden of proving the following charges that Respondent Dale Orlovsky engaged in unbecoming conduct when he:

- (1) misused his school computer by accessing websites unrelated to school activities and which contained obscene and otherwise inappropriate materials;
- (2) engaged in e-mail exchanges containing graphic and explicit sexual dialogue;
- (3) failed to be truthful in his account of the situation; and
- (4) demonstrated a pattern of disregard for administrative and school policy by failing to attend scheduled parent teacher conferences, arriving late on numerous occasions and leaving school without administrative permission.

The remaining charges are dismissed. Based upon the charges that have been proven, Dale R. Orlovsky has engaged in unbecoming conduct that constitutes just cause for dismissal.

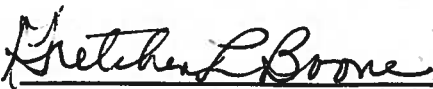
Dated: January 6, 2014
Ocean Grove, New Jersey



Joyce M. Klein

State of New Jersey }
County of Monmouth } ss:

On this 6th day of January, 2014, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.



Gretchen L. Boone
Notary Public of New Jersey
Commission Expires 4/30/2014