

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

-----X
In the Matter of the **TENURE** Hearing of:

GINA PRIANO-KEYSER,

Respondent,

and

**SCHOOL DISTRICT OF THE CHATHAMS,
MORRIS COUNTY**

Petitioner.

-----X
Before **MELISSA H. BIREN, Esq.**, Impartial Arbitrator

Agency Dkt. No.
86-4/14

**OPINION
AND
AWARD**

APPEARANCES:

For the Petitioner

Adams, Gutierrez & Lattiboudere, LLC
Derlys M. Gutierrez, Esq.

For the Respondent

Oxfeld Cohen, P.C.
Gail Oxfeld Kanef, Esq.

Pursuant to *N.J.S.A. 18A:6-16*, as amended by *P.L. 2012, c 26* ("TEACHNJ"), the tenure charges brought by the School District of the Chathams, Morris County (the "District") against Gina Priano-Keyser ("Priano-Keyser") were referred to me for a hearing and decision. I conducted a hearing at the District's offices on May 27, 2014 and June 9, 2014.¹

At the start of the hearing, the parties agreed that the issue to be decided in this tenure hearing is as follows:

Has the School District of the Chathams, Morris County, established that the Respondent, Gina Priano-Keyser, engaged in misconduct as alleged in the charges? If not, what shall be the remedy?

Both parties were represented by counsel and had a full opportunity to adduce evidence, to cross-examine each other's witnesses and to make argument in support of their respective positions. A stenographic record was taken on each hearing date. The

¹ A request for additional time to conclude the hearing and to issue the Opinion and Award was timely made to the Commissioner, which request was granted on June 2, 2014.

parties submitted written closing memoranda. The record closed upon my receipt of both closing statements on June 21, 2014. Neither party has raised any objection to the fairness of this proceeding. The evidence adduced, the legal authorities cited and the positions and arguments set forth by the parties have been fully considered in the preparation and issuance of this Opinion and Award.

The Charges:

The Statement of Charges against Priano-Keyser includes five separate claims of misconduct arising out of the same set of facts. Charge Four was dismissed at the end of the District's case-in-chief for failure to present any evidence to support the charges. It will not, therefore, be addressed in this decision. The remaining charges are as follows:

Charge Number One:

Priano-Keyser is guilty of Conduct Unbecoming by way of the following:

- a. At all times relevant, Priano-Keyser has been employed by the Board as a teaching staff member.
- b. In 2010, Priano-Keyser was found guilty of unbecoming conduct and was suspended for ninety (90) days for leaving her class unattended.
- c. During the 2013-14 school year, Priano-Keyser was assigned to teach Theater Arts at the Chatham Middle School.
- d. On or about September 27, 2013, during her 8th grade Theater Arts class, Priano-Keyser instructed her students to answer questions regarding topics including sexual behavior, sexual experiences, sexual orientation, use of drugs and alcohol, bullying, socioeconomic status, self-incriminating behavior, and familial relationships.
- e. Priano-Keyser instructed her students to step to one side of the stage if their answer to a question was 'yes' and to step to the other side of the stage if their answer to a question was 'no.'
- f. Students were required to answer the questions by moving to one side of the stage and were not permitted to simply stand in the middle of the stage.
- g. Priano-Keyser's questions to her students, included, but were not limited to the following:
 1. Have you ever had sex?
 2. Do you lie about having lost your virginity?
 3. Do you know someone who has had sex?
 4. Have you ever tried alcohol?
 5. Have you ever gotten drunk?
 6. Do you want to have a drink?
 7. Would you experiment with drugs or alcohol?
 8. Have you ever stolen anything?
 9. Are your parents divorced?

10. If your parents are divorced, are they re-married?
 11. Are your parents bad influences on you?
 12. Do you hate your parents?
 13. Do you wish you had different parents?
 14. Do you have a family member who is an alcoholic?
 15. Would you be friends with someone who is gay?
 16. Do you think if a boy wears pink, he is gay?
 17. Do you think you would hang out with someone who has a disability?
 18. Have you ever been bullied?
 19. Have you ever bullied someone?
 20. Have you thought about running away from home?
 21. Is your house big?
- h. Priano-Keyser instructed her students to answer private and embarrassing questions in front of the entire class.
 - i. If a student answered 'no' to a particular question, Priano-Keyser made statements such as 'You're lying' or 'Are you being honest with yourself?'
 - j. Priano-Keyser's questions were not related to any legitimate or approved Theater Arts lesson and did not serve any educational purpose.
 - k. Priano-Keyser's conduct embarrassed her students.
 - l. Priano-Keyser's conduct humiliated her students.
 - m. Priano-Keyser's conduct made her students feel uncomfortable and awkward.
 - n. Priano-Keyser's inappropriate and unprofessional conduct violates Board policy and law.
 - o. Priano-Keyser's questions were not appropriate for 8th grade students.
 - p. Priano-Keyser's intentional actions placed the students at a risk of harm.
 - q. Priano-Keyser's intentional actions were sufficiently flagrant and egregious to warrant termination.
 - r. Priano-Keyser's intentional actions demonstrate that she is not fit to serve as a teaching staff-member.

Priano-Keyser's willful misconduct as described above constitutes Conduct Unbecoming sufficient to warrant dismissal from employment.

Charge Number Two:

Priano-Keyser is guilty of Conduct Unbecoming by way of the following:

- a. The Board reiterates the allegations set forth above.
- b. N.J.S.A. 18A:37-13, et seq. is entitled the 'Anti-Bullying Bill of Rights Acct.'
- c. Board Policy 5512 is entitled 'Harassment, Intimidation and Bullying.'
- d. On September 27, 2013, Priano-Keyser committed multiple acts of 'harassment, intimidation and bullying.'
- e. Priano-Keyser's conduct on September 27, 2013 violated both the 'Anti-Bullying Bill of Rights Act' and Board Policy 5512.
- f. Priano-Keyser's intentional actions were sufficiently flagrant and egregious to warrant termination.

- g. Priano-Keyser's intentional actions demonstrate that she is not fit to serve as a teaching staff-member.

Priano-Keyser's willful misconduct as described above constitutes Conduct Unbecoming sufficient to warrant dismissal from employment.

Charge Number Three:

Priano-Keyser is guilty of Conduct Unbecoming by way of the following:

- a. The Board reiterates the allegations set forth above.
- b. N.J.S.A. 18A:36-34 governs the administration of student surveys.
- c. N.J.S.A. 18A:36-34 mandates that written consent be obtained from parents and/or guardians prior to students being asked about certain topics, such as 'sexual behavior and attitudes;' 'illegal, anti-social, self-incriminating and demeaning behavior;' and 'critical appraisals of other individuals with who a respondent has a close family relationship.'
- d. Although Priano-Keyser asked her students to openly and outwardly answer questions concerning the aforementioned topics on September 27, 2013, Priano-Keyser never obtained, nor attempted to obtain, written consent from her students' parents and/or guardians.
- e. Priano-Keyser willfully violated N.J.S.A. 18A:36-34.
- f. Priano-Keyser's conduct could subject the District to monetary penalties by the New Jersey Commissioner of Education.
- g. Priano-Keyser's inappropriate and unprofessional conduct violates Board policy and law.
- h. Priano-Keyser's intentional actions were sufficiently flagrant and egregious to warrant termination.
- i. Priano-Keyser's intentional actions demonstrate that she is not fit to serve as a teaching staff-member.

Priano-Keyser's willful misconduct as described above constitutes Conduct Unbecoming sufficient to warrant dismissal from employment.

Charge Number Five:

Priano-Keyser is guilty of Other Just Cause by way of the following:

- a. The Board repeats and reiterates the allegations in all the charges set forth above.

Priano-Keyser's willful and intentional misconduct as described above constitutes Other Just Cause sufficient to warrant dismissal from employment.

(Joint Exhibit 1.)

On April 8, 2014, Priano-Keyser, by counsel, filed an Answer to the tenure charges brought against her, denying the allegations.

Background:

The following is a summary of the relevant evidence in this case. The Respondent, Gina Priano-Keyser, is a tenured teacher in the District. She has been a District employee since on or about July 1, 1998. Priano-Keyser is certified by the State of New Jersey to teach Speech and Drama as well as English. She also holds a supervisory certificate. During her employment with the District, Priano-Keyser has worked primarily in Chatham Middle School under her Speech and Drama certification, teaching Public Speaking, Theater Arts and Theater Arts as a 21st Century Life Skill, among other courses. Over the years, she has also been involved in various extra-curricular activities in the District, some on a volunteer basis, including the debate club, the eighth grade video, the talent show, stage lighting club and the school play.

Since the fall of 2011, Priano-Keyser has been teaching a course called Theater Arts as a 21st Century Life Skill at Chatham Middle School; she prepared the curriculum for this course during the summer 2011. This course incorporates State standards on performing arts, as well as State 21st Century Life Skills, teaching students to use the skills they learn in theater, such as improvisation and public speaking, to address 21st century life issues. The course is taught as a “cycle class.” There are seven cycles during each school year. Students in all grades rotate through the various cycle classes throughout the year. Each cycle is approximately five to six weeks long. In each cycle Priano-Keyser teaches Theater Arts as a 21st Century Life Skill to two sections each of sixth, seventh and eighth grade classes. The curriculum is different for each grade level, each building on the prior year’s curriculum. The lessons repeat for each grade level in each cycle throughout the year. Thus, for example, Priano-Keyser teaches the same curriculum to two sections of eighth graders during each cycle; that curriculum is repeated seven times during the year for each cycle.

One of the lessons that Priano-Keyser has taught as part of the eighth grade curriculum for Theater Arts as a 21st Century Life Skill is called “Can of Squirms.” Priano-Keyser testified that she started teaching this same lesson in eighth grade Theater Arts as early as January 2009. The objective of the lesson is “to actually make the kids squirm, because it deals with adolescent issues.” (Tr. at 199-200.) The students are asked to examine their own lives and then do skits where they play characters faced with a moral

choice; the character's choice in the skit could be based on the student's own life or not. As part of the lesson, Priano-Keyser put a piece of tape on the floor. She then made various statements taken directly from the Can of Squirms lesson plan. (Board Exhibit 1.) Students were asked to move to the right of the tape if they agreed with the statement, move to the left of the tape if they disagreed and, if unsure, to stand right on the tape. After a series of statements, students were asked to perform a skit dealing with the particular topic covered by the statements. The process repeated approximately three times during the class – statements followed by a skit. This lesson was repeated with each eighth grade class in each cycle, for a total of approximately 14 times each year since she started teaching this lesson.

According to Priano-Keyser, the lesson plan for the Can of Squirms lesson, including the list of all statements/questions asked of students as part of the lesson (Board Exhibit 1), was provided to all of her supervisors since she has been teaching the lesson. It was submitted to Robert Accardi, both electronically and in hard copy, during the 2010-2011 and the 2011-2012 school years; Accardi was the Principal at the time and Priano-Keyser's supervisor. It was submitted electronically to Pete Trebour, Assistant Principal, during the 2012-2013 school year when he was Priano-Keyser's supervisor. Further, it was submitted to Dr. Barbara Klemp, her supervisor for the 2013-2014 school year, by email dated September 24, 2013, a few days prior to the date she delivered the lesson at issue in these charges. (Respondent Exhibit 3 and 4.) In addition, Priano-Keyser testified that she provided a copy of the lesson plan, with the list of statements (Board Exhibit 1) to Robert Gardella, Assistant Principal, when he did a formal observation of the Can of Squirms lesson on January 29, 2009. (Board Exhibit 12.)²

Priano-Keyser taught the Can of Squirms lesson to both eighth grade sections on or about September 27, 2013. On October 1, 2013, Gardella received a telephone call from a parent indicating that the parent overheard her daughter and some friends talking about Priano-Keyser's lesson over the weekend and she was concerned about the content that the students were discussing. Gardella testified that the parent indicated that students were "polled as to whether or not they've engaged in illegal activities such as drinking, drugs, as

² Priano-Keyser did not teach in the District during the 2009-2010 school year due to the pendency of prior tenure charges.

to whether they had had sexual intercourse, as to whether they had known of anyone who had had sex. There were some other sensitive topics that they were asked about, such as divorce, disability.”(Tr. at 145-146.) Gardella contacted Principal Jill Gihorski and Assistant Principal Trebour to advise that he received the call and was going to investigate. On October 2, 2013, he interviewed six students from Priano-Keyser’s eighth grade class, including E.B.³ whose mother had called Gardella. The students told Gardella that Priano-Keyser had asked various questions during the lesson, that the students considered the questions to be personal and that the students felt uncomfortable. (Board Exhibits 2 and 10.)

Later that same afternoon, Gihorski and Gardella met with Priano-Keyser and her Union representative, Stephanie Coviello. By that time, based on a verbal report from Gihorski and Gardella, the Superintendent, Michael Lasusa, decided that Priano-Keyser should be suspended with pay. Accordingly, Gihorski told Priano-Keyser about the concerns that had been raised about her lesson and the Superintendent’s decision to suspend her with pay until further notice. Priano-Keyser explained at that time that the lesson was called Can of Squirms. She presented the list of statements that she used for the lesson and checked off those statements on the list that she used in the eighth grade classes during her lessons the prior week. She described how she conducted the lesson and also told Gihorski and Gardella that Gardella had seen the same lesson a couple of years prior during an observation. Gihorski testified that Priano-Keyser explained that the lesson was intended to make students feel uncomfortable so that they could take their feelings and apply them to their acting. (Tr. at 73.)

On October 3, 2013, Gardella and Gihorski continued the investigation. They re-interviewed four of the six students who Gardella had interviewed the prior day. All were from the same eighth grade class. They also interviewed several students from the other eighth grade class; none of those students indicated that they were uncomfortable with the lesson. No additional investigation was performed. No other complaints were received about the lesson. Based on the investigation, on October 7, 2013, Gardella, who is also the school’s Anti-Bullying Specialist, issued a report concluding that Priano-Keyser had

³ The student witnesses’ full names were provided to Respondent and at the hearing. The students are referred to by initials only in this decision for confidentiality purposes.

violated the school's Harassment, Intimidation and Bullying ("HIB") Policy by the questions asked of students during the Can of Squirms lesson. (Board Exhibit 3.)

Three students, all from the same eighth grade class, testified at the hearing. E.B. testified that she recalled having Theater Arts in the first cycle in September. She testified that "our teacher was asking us different questions, and they were a little bit odd and out of the ordinary, and then we acted and did skits in between questions." (Tr. at 21.) They were odd because "well, she never really asked us any of these questions before, and it was just like uncomfortable." (Tr. at 21.) E.B. testified that Priano-Keyser asked: "Are your parents alcoholics? Have you ever taken drugs before? Have you ever had sex? Are your parents divorced?" (Tr. at 22.) She was uncomfortable because the questions were personal. According to E.B., "no one really was taking it like that seriously. They were just kind of like, 'What the heck? Why is she asking us this?'" (Tr. at 23.) EB did not complain to Priano-Keyser or tell her that she felt uncomfortable. She just went on her normal day. She did tell her mother what happened during this class period.

T.L. testified that she was in the same first cycle class and that Priano-Keyser "asked a few questions that may have been irrelevant to the class...she asked us some personal questions that were a bit out of the ordinary, and I - it made me feel a little uncomfortable, but I wasn't like in tears or anything..." (Tr. at 33.) The questions were about "drugs and families, problems and issues, and friends and other stuff," like sex. (Tr. at 33.) She did not ask Priano-Keyser to stop asking questions, not wanting to be disrespectful. She talked with her friends about it after class but did not tell her mom, stating that while she and her mom are close, "maybe I had other stuff going on in the day or I had a sport right after school." (Tr. at 35.) She also did not complain to the Principal or anyone at school.

R.N. testified that Priano-Keyser split the room up into two and then asked the students questions about sex, alcohol and drugs. According to R.N., "they were questions like: Are your parents divorced? Do you love your parents? ... Like do you think kids in your grade have had sex before? Have you ever tried alcohol? ...Like are your parents like alcoholics and stuff like that." (Tr. at 44.) He testified that the questions made him "feel uncomfortable, made me feel like weird I guess. It was just unusual, out of place." (Tr. at 44.) No one refused to participate nor did R.N. or any other student tell Priano-Keyser that they were uncomfortable. R.N. did not ask Priano-Keyser to stop asking the questions.

After the class, R.N. talked to his friends and said “Yo, That was kind of weird.’ And a lot of people were saying, ‘Like why was she asking those questions?’ And then after that, I think everyone just forgot about it.” (Tr. at 46.)

According to Lasusa and Gihorski, the questions asked of students, including personal questions regarding sexual promiscuity, divorced parents, drugs and alcohol, were inappropriate for 13 to 14 year olds. Lasusa testified that the questions Priano-Keyser asked her students violated the HIB policy and were inconsistent with professional conduct. Accordingly, Lasusa made the decision to move forward with tenure charges seeking Priano-Keyser’s termination. Lasusa based this decision on the verbal reports from Gardella and Gihorski, Gardella’s interview notes and Gardella’s HIB report, as well as a prior suspension Priano-Keyser served three years prior;⁴ he did not interview any of the students himself or speak with Priano-Keyser. Lasusa was unaware that Priano-Keyser had been teaching this same lesson for several years or that Gardella observed the same lesson in 2009.

Positions of the Parties:

On this record, the District argues: (a) that a school district has a responsibility to protect its students and to keep them safe; (b) that conduct unbecoming is “an ‘elastic concept that ‘has been defined as any conduct which adversely affects the morale or efficiency of the bureau...[or] which has a tendency to destroy public respect for [government] employees and confidence in the operation of [government] services.’” (District Closing Statement at 11-12, citations omitted); (c) that Priano-Keyser failed to exercise good judgment and professional responsibility when she chose to ask “her young, immature and impressionable 8th grade students questions that made them feel uncomfortable and ‘icky’” (District Closing Statement at p. 13); (d) that it is inappropriate to make students reveal personal and private information in a public forum; (e) that Priano-Keyser failed to establish that any administrator, including Gardella, observed the exact class given her admission that she does not always ask the same questions from the

⁴ It is undisputed that the prior suspension is not relevant to a determination of whether Priano-Keyser engaged in the misconduct charged in this case. The prior suspension is only relevant to consideration of the penalty if misconduct is found.

Can of Squirms lesson in all classes; (f) that the evidence supports that students were upset by the lesson; (g) that the evidence supports that Priano-Keyser violated the HIB Policy; (h) that Priano-Keyser was previously suspended for three months for exercising poor judgment; (i) that her intentional actions, which were “sufficiently flagrant and egregious” demonstrate that Priano-Keyser is not fit to serve as a teaching staff member (District’s Closing Statement at p. 16); and (j) that the tenure charges and the penalty of termination should be sustained.

The Respondent, on the other hand, contends: (a) that Priano-Keyser’s actions in teaching the Can of Squirms lesson were for a legitimate academic purpose and do not reflect any inappropriate interaction with students; (b) that the evidence does not demonstrate that Priano-Keyser intentionally placed students at risk; (c) that Priano-Keyser has been teaching this same lesson multiple times each year for several years with no complaint; (d) that Priano-Keyser submitted her lesson plan for Can of Squirms lesson, including the list of statements, on multiple occasions and was never notified that the lesson was inappropriate; (e) that the lesson plan was given to Gardella in 2009 when he observed the Can of Squirms lesson which he praised at that time; (f) that notwithstanding that several administrators were provided with her lesson plan, not one has been disciplined for failing to take action regarding the lesson; (g) that there is no evidence that Priano-Keyser was motivated in any way by an intent to harass or intimidate students and, therefore, did not violate HIB policy or law; (h) that the District failed to provide notice to Priano-Keyser of the HIB charges or an opportunity to be heard in that investigation; (i) that there is no evidence that Priano-Keyser was ever trained with respect to requirements for a student survey ; (j) that the statute regarding student surveys applies to the District, not to Priano-Keyser; (k) that there is insufficient evidence that the questions constituted a student survey in violation of any legal standards; (l) that even if the arbitrator finds that Priano-Keyser engaged in any misconduct, which is denied, termination is too harsh a penalty under the circumstances; and (m) that on this record, the tenure charges should be dismissed and Priano-Keyser restored to her tenured employment.

Discussion:

On the entire record, including my assessment of witnesses' credibility and the probative value of evidence, I find that the tenure charges against Priano-Keyser are properly dismissed. I reach this conclusion for the following reasons.

All of the tenure charges in this case arise from Priano-Keyser's teaching a lesson she called Can of Squirms to eighth grade classes as part of her Theater Arts as a 21st Century Life Skill curriculum. The District has charged that by teaching this lesson, Priano-Keyser engaged in "intentional actions" that "were sufficiently flagrant and egregious" to support a finding that she engaged in unprofessional conduct, an HIB violation and other violations warranting termination. (Joint Exhibit 1.) Yet, the weight of the credible evidence in this case establishes that Priano-Keyser has taught this same lesson for several years to her eighth grade classes and, in fact, that she has taught this same lesson multiple times per year because it is a cycle class. Significantly, consistent with District policy, Priano-Keyser credibly testified that she submitted her lesson plan for the Can of Squirms lesson, including the list of statements/questions she uses, to several administrators over the years. She submitted the lesson plan with the list of statements to her supervisor, Klemp, just days prior to teaching the lesson in September 2013. (Respondent Exhibit 3 and 4). She submitted the lesson plan with the list of statements to Trebour during the 2012-2013 school year and to Accardi in the 2010-2011 and 2011-2012 school years.

No witness disputed Priano-Keyser's testimony that the complete lesson plan was submitted to each of these administrators. Indeed, it is undisputed that it is a District requirement that lesson plans be submitted monthly to a teacher's supervisor.⁵ (Board Exhibit 8.) Because a lesson may be given before the lesson plan is submitted or reviewed, lesson plans are not approved before each lesson. Nonetheless, as Gihorski testified, the lesson plans are reviewed by the supervisor and used as a "good spring board for professional conversation in terms of pedagogy assessment, planning of activities." The supervisors "look at the lesson plans and meet with teachers and discuss them and get a nice snapshot of what they would expect to see in their classroom in terms of lesson design

⁵ Because the Theater Arts as a 21st Century Life Skill was taught as a cycle course, Priano-Keyser only submitted the lesson plan once per year, as the same lesson was repeated throughout the year. She testified that she generally did so in the fall.

and assessment.” (Tr. at 82.) According to Gihorski, if anything in the lesson plan were objectionable, the supervisor “absolutely” would discuss it with the teacher. (Tr. at 85.)

Notwithstanding that Priano-Keyser submitted her lesson plan for this lesson multiple times to multiple supervisors and that the supervisors were to review the lesson plan and discuss the lesson plan with her, including discussing anything in the lesson plan that was objectionable, Priano-Keyser’s testimony that over the years not one of her supervisors discussed the lesson plan with her or expressed any concerns about the Can of Squirms lesson plan is undisputed. To the contrary, the only feedback she received previously about this lesson was positive. In January 2009, Gardella conducted a formal observation of Priano-Keyser’s class; the lesson she taught that day was the Can of Squirms. Priano-Keyser testified that she provided a copy of the lesson plan, including the list of statements/questions, to Gardella for the formal observation. Although Gardella suggested on rebuttal that he might not have received the lesson plan notwithstanding that this was a formal, planned observation, I am not persuaded by his testimony. Indeed, Gardella had previously testified that he had no recollection of the lesson, including the questions asked that day, except for what was written in the observation/evaluation form. Moreover, both Gihorski and Lasusa testified that when a teacher is being observed, it is customary for the teacher to provide a copy of the lesson plan to the observer. This is true even for an unplanned, informal observation. I, therefore, credit Priano-Keyser’s testimony that she provided the lesson plan to Gardella.

Significantly, Gardella’s description of the lesson in the observation/evaluation form is consistent with Priano-Keyser’s description of this lesson. Gardella stated as follows in his evaluation:

...Once the warm up exercise was complete, the students were instructed to remain standing for ‘Agree versus Disagree.’ During this activity, Mrs. Priano-Keyser presented the students with statements that encapsulate scenarios that are common for adolescents. The students then physically moved to one side of the stage if they agreed with Mrs. Priano-Keyser’s statement, moved to the opposite side if they disagreed with the statement, or moved to the middle of the stage if they were unsure. After each statement and subsequent movement, there was discussion led by Mrs. Priano-Keyser about the topic. Students were encouraged to talk about their decisions to agree or disagree, and to relate the statements to their lives.

After 20 minutes, the lesson transitioned into an improvisation activity. Mrs. Priano-Keyser called on small groups of students to perform improvisations with limited information. She had the students read about a scenario, step to the side of the stage to brainstorm for a minute, and then perform. Each scenario acted out was based on middle school issues, therefore proving valuable to the students.

The lesson was closed with discussions about the improvisations and the important messages that the students could take from them. The students were very reflective during this segment, and were thinking about their life decisions and the impact that they can have on others.

(Board Exhibit 12.)

In each area of the evaluation, including “Designing Knowledge Work (Planning)”, “Classroom Environment” and “Facilitating Knowledge Work (Instruction)”, Gardella praised Priano-Keyser in connection with this lesson. In the Summary section, Gardella stated as follows:

Gina, I truly enjoyed observing your class! You are an energetic teacher that continues to work toward mastering your program, with the students’ success being the top priority. I encourage you to continue to evolve your lessons and activities as you explore novel and exciting ways to present material.

During our post conference, we discussed this lesson and the success that you enjoyed. Your content, delivery, and most of all connection to the students benefit their growth tremendously. The students are energetic and excited about being in your class. You are incorporating lessons that relate to their lives, and having a lasting impact on their daily function.

You shared all of the theatrical components of this lesson with me, specifically that there was a focus on characterization. You also made a conscious effort in this lesson to build on the district’s DSACS initiative. My only suggestion is to make sure that you include a clear connection to a specific theatrical concept in each objective, and communicate the concept to the students early in the lesson. I look forward to working with you in the future. Great job!

(Board Exhibit 12.)

Although the lesson plan lists all of the topics and statements she uses as part of the Can of Squirms lesson, Priano-Keyser acknowledged that she does not use every topic and every statement from the Can of Squirms list every time she teaches the lesson; she tries to

mix it up.⁶ Throughout each year, however, each topic and all statements are used on multiple occasions given the number of times that she teaches the lesson each year. Priano-Keyser candidly testified that she could not recall which of the statements she used when she was observed in 2009. Similarly, Gardella had no recollection of the statements used during that lesson. His testimony that it could not have been the statements she used in September 2013, as he would have found these to be objectionable, was speculative and self-serving. Indeed, his evaluation references that the lesson dealt with issues that relate to the students' own lives and that as part of the lesson, the students "were thinking about their life decisions and the impact that they can have on others." (Board Exhibit 12.) Moreover, all topics and statements (including the ones he now claims to be objectionable) for the Can of Squirms lesson were in the written lesson plan that was provided to Gardella at the time of the observation.

Under these circumstances, I cannot agree that Gardella's praise of the lesson in 2009 is irrelevant or should be otherwise disregarded. To the contrary, based on Gardella's evaluation of the observed lesson, it was reasonable for Priano-Keyser to believe that the Can of Squirms lesson was a good lesson and one that was worth repeating in the future. Significantly, there is nothing in Gardella's observation/evaluation report to suggest in any way that anything in the lesson or in the lesson plan was objectionable or, more specifically, constituted "intentional actions placing students at risk of harm" or "intentional actions that were sufficiently flagrant and egregious to warrant termination." Nor could it reasonably be concluded that he found anything in the lesson to be an act of harassment, intimidation or bullying or that the lesson otherwise violated any law relating to student surveys.

On this record, therefore, it is not necessary to make any determination as to whether the lesson was appropriate for eighth graders in order to resolve these tenure charges. The District certainly has the right at this time to determine that the lesson, including the statements/questions listed in the Can of Squirms lesson plan, are inappropriate for eighth graders and to instruct Priano-Keyser that she should not repeat this lesson again. That said, with several administrators having been provided with the

⁶ Priano-Keyser testified that she used different topics and statements from the Can of Squirms lesson in the two eighth grade classes on September 27, 2013.

lesson plan for the Can of Squirms lesson, including the list of statements/questions at issue in this case, over several years without objection or discussion, and with the favorable observation of this lesson in 2009 by Gardella, for the District to bring tenure charges against Priano-Keyser for teaching this same lesson, seeking the termination of her employment, violates fundamental fairness, due process and just cause standards and cannot be sustained. Under the circumstances presented in this case, not only did Priano-Keyser have no notice that the lesson was inappropriate, she had a reasonable basis to understand that the lesson was not only appropriate, but was a good, positive lesson.⁷ Indeed, given the facts presented, to find that Priano-Keyser engaged in flagrant and intentional misconduct warranting discharge, when none of the administrators charged with reviewing and discussing the lesson plans with Priano-Keyser have been disciplined in any way for their failure to discuss, question or object to the lesson, is similarly inappropriate.

Although the above reasons are sufficient for dismissal of all of the tenure charges, some additional comments as to the specific charges are warranted. As to Charge One, although it is undisputed that the statements used in one of the eighth grade classes involved topics such as divorce, drugs, alcohol and sex, the record does not support that Priano-Keyser asked many of the questions enumerated in the charge itself. Priano-Keyser credibly testified that in giving this lesson, she read the statements exactly as set forth in the Can of Squirms lesson; these statements were carefully prepared when the lesson was first created. Indeed, Gardella's typed notes of his student interviews support Priano-Keyser's testimony that she reads the statements from the lesson plan. Those notes twice indicate that the students "reported that Mrs. P-K appeared to be reading the questions from a clipboard" or "paper." (Board Exhibit 2.)

The majority of the questions enumerated in the charge were not set forth in the Can of Squirms lesson plan. Further, the evidence presented does not support that Priano-

⁷ By this decision, I do not hold that a teacher cannot be brought up on tenure charges for teaching an inappropriate lesson unless given prior notice that the lesson is inappropriate. My ruling is limited to the unique facts of this case where the lesson has been taught for several years, where the lesson plan with the allegedly inappropriate content was submitted for review on multiple occasions over the years to multiple administrators without any objection and where the lesson was previously observed and was given a positive evaluation.

Keyser asked the following questions listed in Charge One: (a) Have you ever had sex? (b) Do you lie about having lost your virginity? (c) Do you know someone who has had sex? (d) Do you want to have a drink? (e) Would you experiment with drugs or alcohol? (f) Are your parents bad influences on you? (g) Do you hate your parents? (h) Do you wish you had different parents? (i) Do you have a family member who is an alcoholic? (j) Would you be friends with someone who is gay? (k) Do you think if a boy wears pink, he is gay? (l) Do you think you would hang out with someone who has a disability? As discussed below, other than one student, E.B., who testified that Priano-Keyser asked “[h]ave you ever had sex?” there is no evidence in this record that these questions were asked.⁸

Indeed, the questions set forth in the Charge suggest that that there was substantial exaggeration in the retelling of the statements used in the lesson that were then incorporated into the charges. As an example, the only statements about sex in the Can of Squirms list are: “You think a lot of kids your age are having sex” and “You’ve told someone you’ve had sex when you haven’t.” (Board Exhibit 1.) Students were asked to agree or disagree with these statements or, if unsure, remain in the middle. Priano-Keyser admitted in the initial meeting with Gihorski and Gardella and at the hearing that she used these statements in the lesson, precisely as written in the lesson plan. She is charged, however, with asking the students: “Have you ever had sex?” or “Do you lie about having lost your virginity?” or “Do you know someone who has had sex?”

While all three of the student witnesses recalled the topics covered in general terms, including sex, as stated above only E.B. testified that Priano-Keyser asked, “Have you ever had sex?” The other two students did not testify that this question was asked.⁹ The weight of the credible evidence, therefore, does not support that Priano-Keyser asked the students the questions as they are described in the charges. Rather, as she admitted from the first

⁸ I find that the other “questions” enumerated in Charge One were asked during the class, although not in the form of a question, but rather as a statement as written in the Can of Squirms lesson plan, including: (a) Have you ever tried alcohol? (b) Have you ever gotten drunk? (c) Have you ever stolen anything? (c) Are your parents divorced? (d) If your parents are divorced, are they remarried? (e) Have you ever been bullied? (f) Have you ever bullied someone? (g) Have you thought about running away from home? and (h) Is your house big?

⁹ T.L. did not specify the questions asked. R.N. said that the question was something “[l]ike do you think kids in your grade have had sex before?” (Tr. at 44.) This is consistent with the statement in the Can of Squirms lesson plan. I also note, however, that overall, the students did not recall many of the details of the lesson, as reflected in their testimony on cross-examination.

interview, she used the statements written in the Can of Squirms lesson plan. Nonetheless, in describing the inappropriateness of the lesson, Lasusa testified Priano-Keyser asked “teenage girls if they had sex” and then told “the girls to walk across the stage in front of the rest of her classmates if the answer is yes.” (Tr. at 112.) Not only has the scenario Lasusa described not been proven, this testimony is an example of how the lesson content has been exaggerated in the retelling and in the allegations brought against Priano-Keyser.

The District has also not proven the allegation that Priano-Keyser required that students move to one side of the stage or to the other and that they were not permitted to remain in the center. Priano-Keyser testified credibly that students were directed to remain in the middle, on the line, if they were unsure whether they agreed or disagreed. While the student witnesses could not recall whether they could stay in the middle, none of the students contradicted this testimony. Moreover, Gardella’s description of this lesson in 2009 expressly stated that students were permitted to remain in the middle, corroborating Priano-Keyser’s description of the lesson.

In addition, contrary to the allegations in Charge One, none of the student witnesses testified that Priano-Keyser accused any student of lying. Nor did any of the students testify that he/she was embarrassed or humiliated. While they each testified that the questions were unusual and made them uncomfortable, none of the students appeared to be upset by the lesson. In fact, based on the evidence presented at the hearing, notwithstanding the many times that the lesson has been taught and the multiple students who were given this lesson, the only complaint received was from one parent who, according to Gardella (the only one who spoke to the parent), overheard her daughter and some friends discussing the class. The students who testified stated that they did not complain to Priano-Keyser or to any administrator and, except for E.B. whose mother overheard her talking about the lesson, did not tell their parents about the class.¹⁰ In fact, T.L. testified that while she is close to her mother, she must have had other things to do that

¹⁰ On this record, there is no evidence to dispute Priano-Keyser’s credible testimony that she taught this same lesson, including asking the questions at issue in this case, multiple times over the years. In so finding, I reject the District’s argument that the lack of any prior complaint “logically leads to the conclusion that she did not teach that lesson to other students.” Indeed, it can also lead to the contrary conclusion that the students in the other classes were not uncomfortable and did not find the lesson to be objectionable, even if it was unusual.

afternoon, leading to the conclusion that the lesson did not cause the extreme level of discomfort that the District contends.

For all the reasons set forth above, therefore, the tenure charges set forth in Charge One are properly dismissed. Once again, in dismissing the charge I make no finding as to whether the lesson, *as it was taught*, was appropriate for eighth graders. Nor do I find that the District did not have the right to determine that the lesson was not appropriate for eighth grade students and to ask that the lesson not be taught again. I find only that under the particular circumstances of this case, the tenure charge cannot be sustained.

In Charge Two, Priano-Keyser is charged with violating both the Anti-Bullying Bill of Rights Act, N.J.S.A. 18:37-13, et seq., and Board Policy 5512 (Board Exhibit 11). For the reasons set forth above, this charge is also properly dismissed; having taught this lesson for many years, been observed teaching it and having submitted the lesson plans to numerous administrators without objection, the HIB violation cannot be sustained. There is also no evidence to support that Priano-Keyser's intentions in teaching this lesson was other than to achieve the educational objective as stated. There is no evidence that she was motivated in any way to harass, intimidate or bully the students or that the lesson was an attempt at "wielding her power and authority as a teacher" in an effort to harass, intimidate or bully students. (District Closing Statement at p. 15.) Moreover, while the students testified that the statements made them uncomfortable and that they did not understand the purpose of the questions, none of the students testified or even suggested that Priano-Keyser was motivated by any ill-will towards any student or that they felt harassed, intimidated or bullied as a result of this lesson.

Indeed, E.B. testified that "no one really was taking it that seriously" (Tr. at 23.) and that after class, she went on with her normal day. T.L. testified that Priano-Keyser "asked a few questions that may have been irrelevant to the class...she asked us some personal questions that were a bit out of the ordinary, and I - it made me feel a little uncomfortable, but I wasn't like in tears or anything..." (Tr. at 33.) She, too, went on with her normal day after class. R.N. testified that students were saying: "Like why was she asking those questions? And then after that, I think everyone just forgot about it." (Tr. at 46.) No one asked Priano-Keyser to stop or complained about the lesson until questioned by Gardella.

This record does not support the allegations that Priano-Keyser engaged in willful misconduct in violation of HIB. Charge Two is properly dismissed.

Charge Three alleges that by asking students to agree or disagree with various personal statements without obtaining parental consent, Priano-Keyser willfully violated NJ State law regarding the administration of student surveys. This charge has no merit. There is no evidence that by her lesson, Priano-Keyser was administering a student survey. Indeed, when the arbitrator asked Lasusa whether he determined that there was a survey, Lasusa responded, "No. At this point I had not determined that there was survey." (Tr. at 100.) There is no other testimony in the record as to any later determination that there was a survey except for the filing of this Charge. More importantly, to the extent that asking students to agree or disagree with personal questions constituted a student survey, regardless of precisely which questions were asked in the 2009 lesson, there is no evidence that Gardella, who praised the lesson in 2009, ever suggested that the lesson might constitute a student survey for which parent consent was required. The same is true for each administrator who was responsible for reviewing the lesson plan thereafter. In addition, there was no evidence presented that the District ever discussed student surveys with staff or otherwise provided any training to teachers, including Priano-Keyser, as to the statutory requirements for student surveys. To charge Priano-Keyser with willful violation of the State statute regarding student surveys, without providing any training or notice that a lesson such as the Can of Squirms could constitute a student survey and require consent, is inconsistent with due process and just cause principles and cannot be sustained.¹¹ Charge Three is properly dismissed.

Charge Four was dismissed at the conclusion of the District's case-in-chief for lack of evidence. Charge Five is a catch-all allegation which need not be separately addressed given my rulings above.

In conclusion, while the Can of Squirms lesson as taught by Priano-Keyser may not, in fact, be appropriate for eighth grade students, and while the District may properly direct that the lesson not be taught again, under all of the circumstances of this case, including, in

¹¹ Respondent also argues that under the statute, it is not clear that a "survey" in which no information is recorded by anyone constitutes a "survey" as contemplated by N.J.S.A. 18A:36-34 and that, in any event, the statute imposes obligations and legal liability on Districts, not on teachers. Given my decision above, it is not necessary to address these legal arguments.

particular, that Priano-Keyser taught the lesson for several years, received a positive evaluation when the lesson was observed and submitted the lesson plan with all of the Can of Squirms topics and statements to numerous supervisors and administrators over the years without any discussion or objection raised, the tenure charges brought against Priano-Keyser arising from teaching this lesson must be dismissed in their entirety. Priano-Keyser must be restored to her tenured position. She is also entitled to an award of back pay for any period of suspension without pay, with full benefits and without loss of seniority for any purpose.

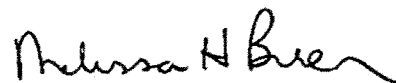
By reason of the foregoing, I issue the following:

AWARD

a) The tenure charges brought against the Respondent, Gina Priano-Keyser, are dismissed in their entirety.

b) Respondent, Gina Priano-Keyser shall be restored to her tenured employment with the School District of the Chathams, without loss of seniority for any purpose. She shall be made whole for any lost salary and benefits while suspended in connection with these tenure charges, subject to reduction for any replacement earnings, including unemployment compensation that may have been paid during this period.

Dated: July 4, 2014

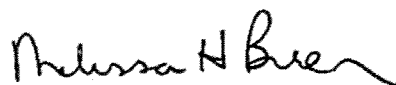


Melissa H. Biren, Arbitrator

AFFIRMATION

I, Melissa H. Biren, do hereby affirm that I am the individual described in and who executed this instrument, which is my Opinion and Award.

Dated: July 4, 2014



Melissa H. Biren