
In the Matter of the Tenure Hearing of

**Marie Ebert,
State-Operated School District
of the City of Newark
Essex County**

Agency Docket No. 49-3/15

Arbitrator's Opinion and Award

Tia Schneider Denenberg, Arbitrator

APPEARANCES

FOR THE PETITIONER:

Ramon E. Rivera, *Scarinci Hollenbeck*

Shana T. Don, *Scarinci Hollenbeck*

Christina M. Michelson, *Scarinci Hollenbeck*

FOR THE RESPONDENT:

Nancy I. Oxfeld, *Oxfeld Cohen*

BACKGROUND

On November 20, 2014, the parties and the arbitrator opened hearings by telephone in the tenure charges filed by the district against the respondent, Marie Ebert [Agency Docket No. 267-9/14] and agreed to postpone two hearing days scheduled for November 21 and 22. In a ruling on January 30, 2015, the arbitrator granted respondent's motion to dismiss the charges for failure to comply with statutory time limits. The ruling stated, in relevant part: "[T]he dismissal is without prejudice to the district's right to file charges again in a manner that fully comports with applicable statutory provisions" [at p. 19].

Subsequently, the district filed “amended” tenure charges against the respondent, alleging inefficiency¹ and unbecoming conduct, pursuant to Section 25 and Section 8 of TEACHNJ [Agency Docket No. 49-3/15]. In a telephone conference held on April 8, 2015, the arbitrator advised the parties that, in light of her decision in *Rinita Williams, SOSD of Newark* [Agency Docket No. 241-8/14, January 31, 2015], she was inclined to dismiss the Section 25 charge of inefficiency. As requested, the arbitrator allowed the parties to file submissions. Hearings were scheduled for June 11 and 12 at the offices of Scarinci Hollenbeck in Lyndhurst, New Jersey.

On April 20, 2015, the respondent submitted another motion to dismiss the charges. On April 30, 2015, the district replied, opposing the motion. On May 21, 2015, the arbitrator ruled that both charges would proceed to hearing under Section 8 on June 11 and 12. A transcript was taken, and the following witnesses testified for the district under oath or affirmation:

Katherine Kaczka,² Special Education Teacher, Alexander Street School

Rebekah (Rhodes) de La Rosa,³ Special Education Teacher, Alexander Street School

Homere Breton,⁴ Executive Legal Assistant, 504 Compliance Officer, NPS

Keith Barton,⁵ Managing Director of Operations, Affirmative Action Officer, NPS

¹ The amended document charged inefficiency under both Sections 8 and 25. DOE docketed the case as a new matter.

² Ms. Kaczka, who has worked in the district since September, 2012, holds a master’s degree in education. In 2013-2014, she and Ms. Rhodes taught a fifth-grade inclusion class of 18 students, some with an IEP, at Alexander Street School [Tr., pp. 30-31, 59]. Ms. Rhodes said that she functioned as the designated Special Education teacher in the classroom and that Ms. Kaczka was the general education teacher [Tr., p. 92].

³ Ms. Rhodes has a bachelor of arts degree in sociology and a master of arts degree in teaching from Montclair State University. She has three New Jersey standard teaching certificates: preschool to third grade, 16 kindergarten to fifth grade, and teacher of students with disabilities. In her first year in the district (2013-2014) she taught in the Alexander School until it closed [Tr., pp. 85, 113].

⁴ Mr. Breton has served in various administrative capacities in the district, including manager of administrative operation services and manager of records and verification for the Talent Office. He has been employed since 1999 [Tr., pp. 125-126, 128].

⁵ In his EEO capacity, Mr. Barton said, “my office responds to allegations of harassment, hostile work environment, that sort of thing.... [W]e investigate claims that come into our office, and we also are responsible for training each year throughout the District [Tr., p. 194]. He was been with the district for 20 years [Tr., p. 196].

Kimberly Kassnove,⁶ Executive Director of Staffing and Recruitment, NPS
Sharanda Evans-Humes,⁷ Vice Principal, Alexander Street School (2013-2014)
Rhonda Williamson-Green,⁸ Vice Principal, Alexander Street School (2013-2014)
Al-Jathiyah Cannon,⁹ Social Worker, Alexander Street School (2013-2014)
Maria Ortiz,¹⁰ Principal, Alexander Street School (2012-2014)

The respondent called no witnesses and entered one exhibit for the purpose of impeaching a district witness [Respondent Exhibit 22]. Briefs and all other submissions were received by the arbitrator. The commissioner extended the due date for the arbitrator's award to February 23, 2016. In the course of the proceeding the arbitrator conducted conference calls with the parties.

The objective of this proceeding is to determine the validity of following charges:

CHARGE ONE: INEFFICIENCY

During the period from October 19, 2012 to the present, Respondent has demonstrated an inability to completely and responsibly execute her duties as a teacher in the following manner:

- a. The Respondent was rated as "ineffective" and/or "partially effective" in 2 consecutive annual evaluations.
- b. The Respondent has failed to implement curricular goals and objective(s).
- c. The Respondent has failed to design coherent instruction.
- d. The Respondent has failed to assess student learning.
- e. The Respondent has failed to manage classroom procedures.
- f. The Respondent has failed to establish a culture of learning.

⁶ Ms. Kassnove is responsible for teacher transfers and other staffing matters in the district [Tr., pp. 212-213]. She explained that teachers may apply for vacancies during a yearly transfer period (April through June), using Talent Match, an online, web-based portal [Tr., p. 213].

⁷ Ms. Evans-Humes was a vice principal at Alexander Street during the 2012-2013 and 2013-2014 school years. A holder of teaching and principal certificates, she has been with the district for 17 years [Tr., p. 239].

⁸ Ms. Williamson-Green is a certified K-8 teacher and holds an administrator's certificate [Tr., p. 286].

⁹ Ms. Cannon was assigned to the Alexander Street School in 2013-14. She was tasked with investigating an incident of alleged name-calling that involved the respondent [Tr., p. 346].

¹⁰ Principal Ortiz now leads the Munoz Marin Elementary School in Newark [Tr., p. 354].

- g. The Respondent has failed to communicate clearly and accurately.
- h. The Respondent has failed to use questioning and discussion techniques with flexibility and responsiveness.
- I. The Respondent has failed to engage students in learning.
- J. The Respondent has failed to provide feedback to students.
- k. The Respondent has failed to attain student achievement that meets or exceeds performance benchmarks.
- l. The Respondent has failed to reflect on teaching.
- m. The Respondent has failed to contribute to the School and District.
- n. The Respondent has failed to grow and develop professionally.

CHARGE TWO: CONDUCT UNBECOMING AND OTHER JUST CAUSE

During the period from June 7, 2013 to the present, Respondent has demonstrated unbecoming conduct in the following manner:

- a. The Respondent has failed to create an environment of respect and rapport.
- b. The Respondent has failed to manage student behavior.
- c. The Respondent has failed to engage students in learning.
- d. The Respondent has failed to contribute to the School and District.

[Petitioner Exhibit 1]

Accompanying the charges was a Statement of Evidence (SOE), comprising 45 points. Specific evidentiary items were attached to the SOE as exhibits keyed to each point. The exhibits are shown herein as italics in parentheses: Evidence admitted at the hearing is bracketed. Quoted material is shown as it was received in evidence. Errors in spelling, grammar, punctuation, and capitalization have not been corrected unless necessary for clarity. The legibility of many exhibits was poor, and some were missing dates or signatures. On some observations it was difficult to ascertain with precision when they occurred. The signature date is indicated in this opinion as a post-observation conference [POC]. The absence of a date is odd since the forms appear to reside in a computerized system which should make it simple to note the actual date of the observation.

The district's brief maintained that the evidence related to the two charges has proven just cause to remove the respondent from her tenured teaching position. The evidence establishes, according to the district, that she "was incapable of managing her classroom" and "demonstrated a pattern of racism and prejudice toward her students"[at pp. 1 and 2].

Charge One, the district asserted, focused on the respondent's

consistent lack of improvement and declining performance as documented in her evaluation ratings of "partially effective" and "ineffective", consecutively for the 2012-2013 and 2013-2014 school years.

These evaluation ratings took into account the Respondent's poor attendance, failure to prepare and implement a behavioral management plan; failure to provide lesson plans for an extended absence, and her inability to effectively manage a classroom. In the 2012-2013 school year alone, the Respondent's inefficient classroom management was demonstrated by the thirty-seven (37) incident reports she herself submitted documenting disruptive students, name calling, being off-task or taking art supplies. Therefore, Ebert did not have control over her classroom [at pp. 1-2].

The respondent's brief [at p. 2] countered the district's argument as follows:

There are two charges against Ms. Ebert, the first charge being Inefficiency and the second charge being Unbecoming Conduct and Other Just Cause. There are fourteen specifications (a-n) to the charge of Inefficiency and four specifications (a-d) to the charge of Conduct Unbecoming. The arbitrator can only consider allegations that are set forth specifically in those charges, and the burden is on the NPS to prove those allegations....[T]he NPS has not met its burden. No testimony was proffered on most of the fourteen subcategories of Inefficiency and four subcategories of Conduct Unbecoming.

By failing to meet its burden, according to respondents's brief, the district has not demonstrated just cause for removal. The teacher thus should be reinstated and made whole.

DISCUSSION

At the time of the charges, the respondent was an art teacher in the Alexander Street School.¹¹ Located in the Newark's West Ward, the school closed in June, 2014 [Tr., p. 196]. According to Mr. Barton the building had been emptied by the second week in July, 2014, in order to allow a charter school to prepare for its opening in August [Tr., p. 197]. Mr. Barton described the school's pre-closure student population:

The majority of the student population is African-American. There's certainly a portion of the population in that area of the city that is Jamaican, that is Haitian. So I don't know particularly to what degree the student population consisted of folks from Haiti or from Jamaica, but I would say easily 90 percent, 95 percent African-American [Tr., p. 201].

Charge One: Inefficiency

Charge One is based on two annual evaluations in which the respondent was rated less than effective. "Newark Public Schools Framework for Effective Teaching—Teacher Observation and Performance Evaluation" was a guidebook for administrators and teachers

¹¹ The respondent had worked there since the 2011-2012 school year.

in 2012-2013 and in 2013-2014 [Petitioner Exhibit 26 and 27 respectively]. The guidebook called for teachers to be rated as Highly Effective, Effective, Partially Effective, or Ineffective in the following competencies:

- Competency 1: Lesson Design and Focus
- Competency 2: Rigor & Inclusiveness
- Competency 3: Culture of Achievement
- Competency 4: Student Progress Toward Mastery
- Competency 5: Commitment to Personal and Collective Excellence

The first four competencies would be rated on the basis of observations throughout the year. The fifth competency would reflect the teacher's cumulative performance and would appear only in the mid-year review and end-of-year evaluation. A mid-year review conference was not required in Year One but was strongly recommended by the guidebook as

an opportunity for the administrator to discuss the teacher's progress toward student, classroom, school, and district performance goals as well as the implementation and alignment of the professional standards for teachers.

* * *

The mid-year ratings are formative ratings, rather than summative. The mid-year ratings serve as one piece of evidence for the Annual Review Ratings and as an important element of formative feedback for the teacher.

[Petitioner Exhibit 26, pp. 22-23]

In 2013-2014, teachers on a Corrective Action Plan (CAP) were subjected to additional minimum requirements:

- Four observations per year, one in each semester.
- Two short observations (20 minutes in length), completed by different observers.
- Two long observations (40 minutes in length or an entire lesson, the shortest of the two).
- Midyear reviews, to be completed by February 15th.
- Annual reviews, to be completed by May 15th.

[Petitioner Exhibit 27, pp. 21- 25]

The fifth competency rating may add points for highly effective teaching or subtract points for poor attendance and lateness. Tenured teachers require one announced observation, with a pre-observation conference, followed by a POC within ten calendar days of the observation [Id., pp. 20-22]. A performance review "must be completed for each teacher on an annual basis. This evaluation is a summative statement which incorporates the data and evidence gathered throughout the year" [Id., p. 23].

Table A, below, indicates observations and evaluations of the respondent during SY 2012-2013.

Table A—SY 2012-2013

| Date | Observation Type | Evaluator | Rating | Exhibit No. |
|----------------------|-------------------------------|------------------|---------------------|--------------------|
| 12/14/12 12/17/12 | Announced POC | Ortiz | Effective | P 70 |
| 2/15/13 2/20/13 | Mid-Year Evaluation Signed | Ortiz | Effective | P 72 |
| 5/10/13 5/21/13 | Formal Observation POC | Williamson-Green | Partially Effective | P 29 |
| 6/7/13 | Annual Evaluation | Ortiz | Partially Effective | P 73 |

Every teacher was instructed to create a Professional Development Plan that year, as noted in the SOE:

9. A Professional Development Plan for Evaluation Year 2012-2013 (*SOE Exhibit 4*) [Petitioner Exhibit 74].
10. The Plan provided that Respondent would work on enhancing her teaching strategies (*SOE Exhibit 4*) [Petitioner Exhibit 74].

The period, according to the SOE, began on October 19, 2012:

2. During the period from October 19, 2012 to the present Respondent failed to satisfactorily perform the duties and responsibilities of a classroom teacher despite numerous suggestions and assistance given by the administrative staff. The following documents are relied upon to support the charge of inefficiency:
3. Correspondence from Maria J. Ortiz, Principal, to Respondent dated October 19, 2012 (*SOE Exhibit 1*) [Petitioner Exhibit 67].
4. The correspondence advises Respondent that she is responsible for providing her students with effective classroom management, Respondent having reported 4 incidents where students were out of control in her class (*SOE Exhibit 1*) [Petitioner Exhibit 67].

The SOE refers to the following memo by Principal Ortiz about classroom management, dated October 19:

Mrs. Ebert, this notification is to memorialize our conversation in reference to your classroom management. You are responsible for providing your students with effective classroom norms that promote positive and productive teacher-student and student-student relationships.

Since September 2012, you have reported 4 incidents w[h]ere the students were out of control in your class. Since, several of the students in the classes who you have reported as having difficulty have transferred out of Alexander Street School. On Tuesday, October 16, 2012 at 3:10 p.m. you came in to my office stating that, "The students were out of control again, that they were getting up from their seats and being disruptive." You stated, "Something has to be done." I informed you, that it was not a good time to discuss because I was in the middle of preparing for the Staff Development day the next day. I proceeded to tell you that when we meet to come with solutions, you stated, "We have to get these kids out of here." I stated that was not an option and I repeated that it was not a good time to discuss the matter. You insisted that we discuss the concern and before storming out of my office, you stated, "It's never a good time."

Again I remind you that time is available on your schedule for PLC weekly meetings where a forum is provided to problem solve, raise student concerns and create SMART goals in order to maximize student learning. I also remind you that PD360 is a district resource that can offer several classroom management strategies. It is the teacher's professional duty to adhere to all the responsibilities that are required for teaching.

In an effort to set a culture of rigor and high quality instruction, you must re-design your classroom management plan. A meeting is scheduled for October 26, 2012 at 2:05 p.m. to discuss the new classroom management plan that you will implement. If there are any problems with regard to this matter, please feel free to speak to me.

[Petitioner Exhibit 67]

On the meeting day, the respondent and principal were apparently working cooperatively to improve the teacher's control of a classroom. The respondent emailed Ms. Ortiz (October 26, 2012) to report her progress:

Attached find two articles which I have read and am currently implementing with Room 312. The second article titled "What to Do when you realize you have lost control of your class," has proved to be very helpful.

By walking around the room and politely asking students to take their seats.. I was able to keep everybody in their seats for the duration of the lesson on Monday, October 24th. They were not disrespectful at all. Unfortunately 7 of the students did not complete the assignment. I gave them all week to finish it but as of 2:05 today they did not hand in the completed assignment. They told me they could not access the PP on the computer in their classroom, therefore I am extending the deadline for them.

I look forward to seeing them again on Monday October 29th and will again visit them in their classroom.

I will keep you posted. Have A Great Weekend

[Petitioner Exhibit 69]

The respondent's first observation (December 14, 2012) was announced. Pre- and post-observation conferences were held with the principal, who rated her "effective" overall. Ms. Ortiz was particularly impressed with her effectiveness in Competency 2:

Rigor and Inclusiveness, she did a very good and effective job at questions and tasks. I think underneath that I rated that indicator Highly Effective, because she really captured and did a great job in making sure that the students were asking questions and they were really having an opportunity to get deep into the objective of the lesson. So I was so impressed with that indicator that I even encouraged Ms. Ebert to do a lesson or share that technique of what it took for her to plan questions and tasks that well with other teachers, and she did do that, which was awesome. She did have an opportunity for her to share that workshop of questions and tasks with the rest of the staff and she did really well [Tr., pp. 365-366].

The teacher's mid-year evaluation rating was also "effective" [Petitioner Exhibit 72]. The mid-year report called attention to the following aspects of her professional conduct:

Competency 2: Rigor and Inclusiveness

2b. Questions & Tasks: Questions and tasks ensure student comprehension and ask for application, analysis and/or synthesis - Highly Effective for 2.b

Competency 3: Culture of Achievement (Partially Effective) under evidence:

A reduced number of incidents related to student behavior in the third grade shows that classroom management and classroom culture supports a culture of learning [at p. 2].

Finally, in Competency 5 (Commitment to Personal and Collective Excellence) the teacher exceeded expectations, earning an extra point in the overall rating. The bonus appeared to recognize her commitment to professional growth through workshop and conference participation, as well as a good attendance and promptness record: "The teacher is present and prompt and attendance reflects his/her focus on student learning as a priority" [at p. 4]. The following comment appears under IPDP:

By February 19, 2013 attend the workshop on classroom management offered by the district's Special Education department and immediately turnkey to colleagues during PLC meetings. In order to promote a classroom culture of Achievement when the students are disruptive, arrange with homeroom teachers to have Art lectures and lessons in the homeroom classes [at p. 4].

During the first half-year, the respondent avoided a negative rating. Her second and final observation was conducted on May 10; the post-observation conference occurred on May 21. The observer described the lesson as follows:

Lesson Objective: Warm & Cool Tissue Paper Flower. After reviewing the color wheel and naming the primary secondary colors, the art student will Learn about warm and cool colors by looking at a slide Show, - Choose and be able to identify a warm or cool scheme. - Create a tissue paper flower for mother's day using warm or cool colors.

Ms. Ebert went over the concept of warm and cool colors using a slide show. She questioned her students to gauge their understanding of the concept. Then she had them create tissue paperflowers using warm and cool colors.

The SOE summarized what the district found lacking:

5. A Formal Observation Form dated May 21, 2013 wherein Respondent was rated "partially effective" (*SOE Exhibit 2*) [Petitioner Exhibit 29].
6. Respondent was advised in this Formal Observation Form that, among other things, her questions and tasks for students were not challenging and she did not adjust instructional strategies based on student reactions (*SOE Exhibit 2*) [Petitioner Exhibit 29].

That is an apparent reference to Competency 2, "Rigor and Inclusiveness: Instructional strategies challenge all students and provide multiple pathways to mastery," the sole competency in which she was rated less than effective. The teacher's comment was "Rigour was related to student testing and the fact that Sunday was Mother's Day."

The annual evaluation, held 17 calendar days later,¹² also rated her "partially effective:"

7. An Evaluation Summary Form dated June 7, 2013, wherein Respondent was rated "partially effective" (*SOE Exhibit 3*) [Petitioner Exhibit 73].
8. Respondent was advised in this Evaluation Summary Form that, among other things, she needed to consider the population of students she is servicing and prepare lessons matching her students' learning styles and further that she needed to promote positive and productive teacher-student and student-student relationships. It was also noted that Respondent had filed 37 incident reports concerning the conduct of her students and that she had made statements to the effect that she would rather teach in a school where "the students are better behaved" and that the kids at the school "are out of control" (*SOE Exhibit 3*) [Petitioner Exhibit 73].

In her mid-year evaluation she gained an extra point for Competency 5, but in the annual evaluation two points were deducted. Point 8, quoted above, is from that section. Several events were also mentioned, including that

several students in Mrs. Ebert's class have been recognized by the Essex County... Executive for their art work. Mrs. Ebert joined the Alexander Street School Essex County Fun Run. Mrs. Ebert conducted

¹² School days would not include weekends and the Memorial Day holiday.

a workshop on how to provide highly effective questions and task to her colleagues.

Her attendance also met expectations.

Table B, below, lists observations and evaluations of the respondent during SY 2013-2014:

Table B—SY 2013-2014

| Date | Observation Type | Evaluator | Rating | Exhibit No. |
|---------------------|-------------------------------------|------------------|---------------------|--------------------------|
| 10/8/13 10/11/13 | Announced POC | Williamson-Green | Effective | P. 36 |
| 5/8/14 5/9/14 | Long Observation POC | Ortiz | Ineffective | P. 83 |
| 5/12/14 5/13/14 | Short POC | Evans-Humes | Partially Effective | 41 a,b [Tr., pp. 249] |
| 5/13/14 5/15/14 | Short POC | Williamson-Green | Ineffective | P. 38 a, b |
| 5/14/14 5/15/14 | Annual Conference Date Signed | Williamson-Green | Ineffective | P. 39 |

Because of her rating of ineffective for the previous school year, the respondent was required to follow a CAP, as noted in the SOE:

11. Corrective Action Plan ("CAP") prepared by Respondent in collaboration with Maria J. Ortiz, Principal dated September 27, 2013 (*SOE Exhibit 5*) [Petitioner Exhibit 33].
12. In the CAP, Respondent set forth numerous professional goals, including but not limited to the development of a timeframe for student mastery of various standards, the establishment of a baseline using beginning and end-of-the-year assessments, and the commitment to the design of lessons predicated upon the NJ Core Curriculum Standards (*SOE Exhibit 5*) [Petitioner Exhibit 33].

Additionally, the SOE indicates that all teachers received the following:

13. ASE Actionable Feedback SY 13-14 "Five Focus Indicators for November 2013-January 2014", provided to all Alexander Street School teachers, including Respondent, in November of 2013 (*SOE Exhibit 6*) [Petitioner Exhibit 79].
14. The Actionable Feedback SY 13-14 document provides 3 areas of indicators upon which all teachers, including Respondent, were encouraged to focus. The indicators included Pacing

and Momentum, Questions & Tasks, and Responsiveness (*SOE Exhibit 6*) [Petitioner Exhibit 79].

The district listed other supports that were provided to the respondent:

15. Email dated March 10, 2014 from Rhonda Williamson-Green, Vice Principal, to Respondent (*SOE Exhibit 7*) [Petitioner Exhibit 35].
16. The email advises Respondent that Ms. Williamson-Green intended to set up a formal weekly meeting schedule and provided proposed times (*SOE Exhibit 7*) [Petitioner Exhibit 35].

On October 8, Vice Principal Williamson-Green undertook a Long Observation of the respondent. Her summary comment was as follows:

Ms. Ebert has established an exemplary classroom environment that promotes student learning. She has taken the time to know the needs of her students and teaches accordingly. Her lessons are thorough and rigorous which lea[d]s most of her children to mastery.

[Petitioner Exhibit 36, p. 4]

As in the first year, there was a long gap—in this instance seven months—between her first, “effective” observation of the year and her next observation. She had a number of lengthy absences (discussed below), beginning in late November. She also submitted several requests for transfers to another school.

Leave and Transfer Requests

In evidence is the respondent’s absence **authorization** report [9/3/13-5/15/14] rather than her complete attendance record. There is a handwritten notation, indicating that, from November 26, 2013, through February 18, 2014, she was on FMLA leave [Petitioner Exhibit 15]. The record was not adequately explained in the hearings, but it appears that only some days of absence were authorized, from the district’s perspective. Despite requests from the arbitrator, the district did not provide data for school year 2013-2014 that would summarize her complete record and indicate the sources that were relied on.¹³ It is also apparent that, owing to the siloing of functions, there was a marked lack of coordination between the school and various district officials. It goes without saying that employees must be accountable for their attendance, but the district did not confront the respondent promptly and precisely and neither did the school.

¹³ The absence authorization report lists a total of 81 sick days [Petitioner Exhibit 15, p 2] but the annual evaluation lists 35 days out [Plaintiff Exhibit 39].

On February 6, prior to her return to work, the respondent's psychiatrist wrote to Vanessa Rodriguez, the Chief Talent Officer:

I am writing this letter in regards to Marie Ebert (dob 11/4/59), a patient in my care. I have been treating Mrs. Ebert since December of 2013. After several visits with Mrs. Ebert, it is my firm recommendation that she be given priority in transferring to a different public school other than the one she is currently working in (Alexander Street School).

I find it quite likely that a return to the environment in this school would be a detriment to her health & well being.

[Petitioner Exhibit 17]

Shortly after her return, on February 26, the respondent wrote to the principal and other officials:¹⁴

As of February 19th I returned to work at Alexander Street School as the Art teacher. My Dr. Had recommended that I not return to the same location as it would be a detriment to my health and well being. Against his advice NPS Human Resource Department placed me back at Alexander Street School. On Monday February 24th I was involved in an incident in my classroom, where students began fighting. I was pushed into the door and the door knob struck me in the back. I sustained a bruise and injury to my back. I was sent to Concentra for X-rays. Luckily I am not seriously injured. I am back to work today. However I feel this incident is a clear indication that I should not be in this environment. The procedures and protocols to protect my safety are not in place at this school and therefore I am asking that you honor my doctor's recommendation.

A full investigation of the incident has not been reported to me. Security did not arrive when I first called them. I sent a student to get security. A teacher from upstairs heard the commotion and came to my aide.

[Petitioner Exhibit 9]

Mr. Breton recalled that he contacted the respondent

because it was understood that she was in need of a 504 accommodation. Ms. Ebert actually paid a visit to me and stated, No, she is not in need of a 504 accommodation, she is not disabled. What she is in need of or was in need of was a transfer from the respective school location....She stated that the students were out of control; that she feared for her safety. And that she had brought it to the attention of her respective administrator, to no avail [Tr., pp. 136, 139-140].

He said that she was "adamant" [Tr., p. 180] about not being disabled but desired a transfer based on medical need. The district had received two letters from her psychiatrist,

¹⁴ Superintendent Cami Anderson, Assistant Superintendents Michael Mailaro, Mitchell Center and Chief Talent Officer Vanessa Rodriguez.

requesting a transfer [Petitioner Exhibits 17 and 18], but Mr. Breton explained to her that a request for transfer must be addressed to “our staffing department, the head of which is Kimberly Kassnove” [Tr., p. 138].

On March 5 the psychiatrist wrote to Tiffany Hardgrove, Assistant Superintendent:

I continue to see this woman on a monthly basis. On 2/19/14 she returned to work at the Alexander Street School. It is quite unfortunate that on 2/24/14 she was involved in an altercation in her classroom, where she was pushed into a door, requiring medical attention.

As her physician, I am reporting to you that her health & well being is being compromised by her working environment & the conditions in her school.

I have been treating Mrs. Ebert since December of 2013. After several visits with Mrs. Ebert, it is my firm recommendation that she be given priority in transferring to a different public school other than the one she is currently working in.

[Petitioner Exhibit 18]

Mr. Breton testified that the respondent had a leave that terminated in March, 2014 [Tr., p. 124]. He explained the procedure that employees are required to follow when applying for leave:

They...will give me an application which will secure medical document to support their medical disability. And once I have that information, we will move forward to see whether or not we can provide reasonable accom[m]odation for the respective employee [Tr., p. 127].

For FMLA, he said, the process is similar:

The teacher must go through the same process as an employee would go through, and there are particular requirements that the employee must have in order for them to go out on an FMLA. First and foremost, we need to make certain that the employee had been with the District for one year, and that they have provided the District with 1,250 hours. Step one of that process really speaks to whether or not the person is eligible. If they have satisfied that requirement of 1,250 hours, they would go into the next level, which would be qualifying the employee. Qualification occurs when the employee provides medical documentation to our Health Services Department. Our Health Services Department reviews that medical documentation, and then ascertains whether or not they would recommend that the employee be approved for Family Medical Leave and/or an illness leave of absence. Once we receive that recommendation from Health Services, a letter goes out to the respective employee denying or approving or even asking for further supportive medical documentation to see whether or not we could provide such approved leave [Tr., pp. 128-129].

Teachers may apply directly through an on-line, self-service system [Tr., p. 130]. When returning from an approved leave, the employee must be cleared by the district's

Health Services as well as the employee's personal physician. When cleared, Health Services will provide a receipt of return to the Administrative Operations Services Department, which Mr. Breton also heads. This allows the district to notify the teaching location when to expect the employee's return.

Mr. Breton advised her that because she was alleging a hostile work environment that complaint "needs to be brought to the attention of our Affirmative Action officer," Keith Barton [Tr. p. 138].

Ms. Kassnove testified that there are no midyear transfers except "unless there is a true hardship" [Tr., p. 214]. On March 7, 2014, the respondent emailed Joy Lindsay, the former manager of staffing, with copy to Ms. Kassnove, requesting a transfer to Park Elementary, where she believed there was a vacancy. She noted she was placed in Alexander school against the recommendation of her physician at the end of her FMLA leave [Petitioner Exhibit 10]. Ms. Kassnove wrote to Principal Ortiz, asking her views on the possible transfer:

we are looking into whether there is a vacancy at Park. I wanted to make you aware of her request. Per our earlier conversation we will not be allowing a transfer until next year.

If there is a budgeted role at Park, will you support her getting hired into that role should Sylvia make her an offer?

[Petitioner Exhibit 10].

Since Alexander School was closing, there would be a necessity to place staff, including Ms. Ebert, in other schools for the next school year. Ms Kassnove recalled there was a request to transfer to Lafayette as well but she was told that it was denied since

is not District policy to transfer educators outside of the transfer period....It's the policy because when we transfer educators, it leaves holes at schools. So it doesn't actually support the holistic means of the District. It's really important for students that they have a consistent teacher throughout the year. It's really important for schools that they're not scrambling midyear to find a replacement [Tr., p. 218].

She noted that the two schools she requested are "in higher socioeconomic brackets" and are sought after by teachers [Tr., pp. 219-220]. She acknowledged that teachers who was suspected of causing harm to students could be transferred at any time to a non-teaching assignment, pending investigation [Tr., p. 233].

There was a series of emails beginning on March 14, in which the respondent's complaint of a hostile working environment and the need for a transfer was discussed. The respondent wrote

As of March 13, 2014 I have not heard any response from the Human Resources Department regarding my Dr's requests that I be placed in a different environment. The hostility and aggressive behaviors from students at Alexander Street School Is placing me In a detrimental situation. I am looking into extending my FMLA or filing a new one. I have asked you in good faith to find me another placement. I continue to experience a great amount of stress and anxiety surrounding the working conditions at Alexander Street School. I look forward to hearing from you.

[Petitioner Exhibit 12]

Mr. Barton responded:

Per our conversation today, you were previously informed by Ms. Kassnove that you were to report to Alexander St. School. Your assignment has not changed. I am continuing to follow up on this matter per our meeting and our brief talk today. I am scheduled to visit Alexander St. School on Thursday of this week. You stated to me today that your FMLA has been extended until May. I am now unable to observe your interaction with students in the classroom setting. During our first meeting I stated that I would make an unannounced visit to your classroom during one of the periods you identified for me. In closing I will continue to progress through the steps previously outlined for you.

[Petitioner Exhibit 12]

Mr. Barton said that he met with the respondent in her classroom for about 20 minutes to discuss her concerns about student behavior, but "at this point Ms. Ebert had been out consecutively. So it was rendering it virtually impossible me for to visit her while she was teaching, which was really the whole thing" [Tr., p. 207]. However, the classroom visit never happened. Ms. Ortiz informed him that "Ebert has been out" [Petitioner Exhibit 11].

On May 2, Ms. Rodriguez wrote to the respondent:

It has come to the attention of the Talent Office of Administrative Operation Services that you are and have been on an unauthorized leave of absence as of Friday, March 14, 2014. Although the district has recognized that you submitted a medical documentation to our Health Services department, it is evident that you have not received a notice of approval to be out as of the above-mentioned date. Consequently, your employment status with the district is AWOL (absent without authorized leave). Accordingly, you are directed to report to your school location immediately; failure to do so may have already subjected you to disciplinary action.

[Petitioner Exhibit 14]

On May 5, Ms. Kassnove wrote: "Concerning the stated disciplinary action, should Marie Ebert report to Alexander Street School effective 5/5/14 all disciplinary infractions for this stated period will be dropped" [Petitioner Exhibit 14]. Ms. Kassnove said she did not give the respondent a chance to correct any paperwork problems or deficiencies regarding the so-called AWOL period [Tr., p. 230]. The respondent's brief noted that she "returned to

work on Monday, May 5, 2014 and worked on that date through May 13, 2014, dates on which she was deemed medically unable to work by the Board's physician" [Respondent Brief at p. 16, Respondent Exhibit 22].

Mr. Breton maintains that while the district received medical notes the respondent never in fact applied for a new FMLA leave or extension in March [Tr., 188]. Leave, he said, is "formally authorized by Vanessa Rodriguez," Chief Talent Officer and ultimately approved by the superintendent [Tr., p. 189]. During the March exchange of emails [Petitioner Exhibits 11 and 12], Mr. Breton said, he looked into the respondent's claim that she was on an FMLA leave, found it not to be so but did not contact her and did not know if anyone else in the district did [Tr., pp. 190-191].

In quick succession after her return, the respondent underwent three observations, in which she was rated "ineffective." The last was signed on the same day that she received one of those ratings as her annual evaluation:

17. A Long Observation Summary Form, dated May 9, 2014, wherein Respondent was rated "ineffective" (*SOE Exhibit 8*) [Petitioner Exhibit 83].
18. Respondent was advised in this Long Observation Form that, among other things, she did not plan the lesson and prepare the necessary components for effectiveness and as a result did not have a clear understanding of the objective. Respondent was also informed that some new students sat idle without instructions, that she experienced difficulty maximizing learning times and that classroom values and norms were inconsistently reinforced (*SOE Exhibit 8*) [Petitioner Exhibit 83].
19. A Short Observation Summary Form dated May 13, 2014, wherein Respondent was rated as "ineffective" (*SOE Exhibit 9*) [Petitioner Exhibit 41].
20. The Short Observation Summary Form notes that, among other things, Respondent's instructional strategies did not challenge the students (*SOE Exhibit 9*) [Petitioner Exhibit 41].
21. A Short Observation Summary Form dated May 15, 2014, wherein Respondent was rated as "ineffective" (*SOE Exhibit 10*) [Petitioner Exhibit 38].
22. The Short Observation Summary Form notes that, among other things, that Respondent needed to maximize student learning time and that her lessons may not be met as a result of pacing and momentum (*SOE Exhibit 10*) [Petitioner Exhibit 38].

A major criticism of observer Williamson-Green was that the teacher "spent too much time on preparing for the lesson" and that "direct instruction" began after five minutes. However, "once order has been restored Ms. Ebert's lesson content and instructions are communicated clearly." The teacher's comments were as follows:

The observation was made following testing, I served as a hall monitor from 8:15 am to 11:55. I did not have a prep period. The art room had been used as a testing sight. All resources and placement of furniture have been disrupted. I have a letter from my Physician stating that for my health and well being I should not be in this work environment. The NPS Human Resource Department has chosen to disregard the letter and placed me back in this environment.

23. An Annual Evaluation Summary Form dated May 15, 2014, wherein Respondent was rated "ineffective" (*SOE Exhibit 11*) [Petitioner Exhibit 39].
24. Respondent was advised in this Annual Evaluation Summary Form that, among other things, Respondent needed to work on responsiveness and that her instruction was not shifted to meet the demands of the entire class, which led to disengagement and inability to master the lessons' objectives. It was also noted that Respondent often raised her voice and engaged in unproductive exchanges with her students (*SOE Exhibit 11*) [Petitioner Exhibit 39].

Throughout most of the year, the respondent lacked a functional CAP. After the "partially effective" rating for school year 2012-2013, she apparently did not collaborate with district administrators to create a plan. The teacher did not come forward because she was still disputing the prior year's evaluation [Petitioner Exhibit 33]. Waiting for her input, the principal did not suggest the steps she needed to include in her CAP. Creating a CAP is a joint responsibility. The SOE notes:

25. Corrective Action Plan IPDP and/or Corrective Improvement Plan Feedback Summary Form for School Year 2013-2014 dated May 15, 2014 (*SOE Exhibit 12*) [Petitioner Exhibits 30-34].
26. The Feedback Summary Form lists, among other things, dates and topics of reviews conducted with respect to Respondent and follow-up action steps taken thereafter (*SOE Exhibit 12*).
27. Corrective Action Plan IPDP and/or Corrective Improvement Plan Feedback Summary Form for School Year 2013-2014 dated May 30, 2014 (*SOE Exhibit 13*).
28. The Feedback Summary Form lists, among other things, dates and topics of reviews conducted with respect to Respondent and follow-up action steps taken thereafter (*SOE Exhibit 13*).

Charge One—Conclusion

The inefficiency charge has not been proven. Although the evaluation process in 2012-2013 satisfied the required elements, the respondent's first "partially effective" observation did not occur until May, just before the annual evaluation. In 2013-2014, the process was marred by other arbitrary timing decisions and serious deficiencies in the district's record-keeping.

The respondent had an “effective” observation in October, but there is no satisfactory record of a mid-year review, which is a required element. The district’s brief maintains that the “evaluation” or “observation” occurred on February 14, 2014, citing Petitioner Exhibits 28 and 34 [Brief, pp. 25 and 45]. The former exhibit is titled “Data Driven Instruction 2013-2014.” It includes the respondent’s CAP Feedback Summary Form, on which is an entry for February 14, 2014: “IPDP/Corrective Action Plan/Review Conference.” The second exhibit is the respondent’s CAP, signed on March 12, 2014. Neither provides any detail which establishes that a mid-year review was conducted, that it contained the required components, or that the respondent received a performance rating. When questioned about a mid-year review of the CAP, Ms. Williamson-Green said that she believed it occurred in March, 2014 [Tr., p. 326], which would seem to refer to Petitioner Exhibit 34. That exhibit contains little useful guidance and suffers in comparison to the 2012-2013 mid-year evaluation. In any case, the respondent’s brief correctly argues that it is an incomplete document, promising to “update by Monday, 3/17/14.” The brief notes: “No update was ever provided” [at p. 12]. By any measure, the record of the mid-year review is woefully inadequate.

The remaining observations for 2013-2014 followed the respondent’s return in May from a lengthy absence, even though, as the respondent’s brief correctly points out, the framework recommends a timeline for observations and evaluations that is front-loaded for teachers with a CAP [at p. 11, Petitioner Exhibit 27, p. A20]. Moreover, the series of observations came in rapid succession. No time was left in between for the teacher to improve her performance on the basis of each preceding observation. The final observation was signed on the same day as her annual evaluation. In a similar case, Arbitrator Gandel aptly commented that “there has to be a reasonable time period between evaluations to show improvement” [*Patsy Cuntrera, Passaic County Vocational School District, Agency Docket No. 223-8/15, November 27, 2015, p. 5*]. The respondent’s absence itself was so poorly managed by the district that it adversely influenced many elements of the observation and evaluation process.

Charge Two: Conduct Unbecoming

Charge Two focuses on a pattern of bizarre events, extending from about June, 2013, to May, 2014. The evidence, consisting primarily of SOE entries combined with testimony, begins to accumulate when the respondent received an annual evaluation of “partially effective” along with a critique of her approach to teaching. The SOE notes:

29. During the period from June 7, 2013 to the present Respondent has demonstrated unbecoming conduct. The following documents are relied upon to support the charges of conduct unbecoming and other just cause:

30. An Evaluation Summary Form dated June 7, 2013, wherein Respondent was rated "partially effective" (Exhibit 3) [Petitioner Exhibit 73].
31. Respondent was advised in this Evaluation Summary Form that, among other things, she needed to consider the population of students she is servicing and prepare lessons matching her students' learning styles and further that she needed to promote positive and productive teacher-student and student-student relationships. It was also noted that Respondent had filed 37 incident reports concerning the conduct of her students and that she had made statements to the effect that she would rather teach in a school where "the students are better behaved" and that the kids "are out of control" (*SOE Exhibit 3*) [Petitioner Exhibit 73].

Ms. Evans-Humes commented that the respondent's resort to Student Incident Reports was not typical "or an effective way of handling student behavior." She explained:

Most of the time I received a lot more Incident Reports from Ms. Ebert than anybody else. The Incident Reports, a lot of them were just basic kind of classroom management issues, not specifically, say, what would normally be considered an incident. So a lot of times the incidents as they came in, they were read, but they were kind of pushed to the side. I would go back to Ms. Ebert, I would ask her, Well, what did you do? And I said, You have to send me, you know, what you did in this process [Tr., p. 265].

Two further incident reports about her students were submitted by the respondent in December, 2013. The principal determined that they were unfounded:

34. Email dated December 5, 2013 from Maria J. Ortiz, Principal, to Respondent (Exhibit 14).
35. The email advises Respondent that a review of 1 of the incident reports she had filed with respect to alleged misconduct of a student was conducted and it was found that Respondent had attributed a witness statement to a teacher who reported that she did not, in fact, make the statement Respondent alleged she had made (*SOE Exhibit 14*) [Petitioner Exhibit 64].
36. An Incident Report dated December 9, 2013 filed by Maria J. Ortiz, Principal, wherein details of the investigation of the above-referenced incident report filed by Respondent were set forth and it was concluded the allegations were unfounded (*SOE Exhibit 15*) [Petitioner Exhibit 62].

Almost three months later, an incident report was filed against the respondent for "inappropriate dialog," involving students in one of the respondent's art classes. It resulted in a Letter of Warning:

37. An Incident Report dated March 12, 2014 filed by Rhonda Williamson-Green, Vice Principal, wherein allegations made by teachers against Respondent for having made inappropriate remarks were memorialized (*SOE Exhibit 16*) [Petitioner Exhibit 3].
38. The Incident Report attached notes from the teachers. Those notes included expressions of concerns wherein students reported to the teachers that they felt that Respondent did not like them and that they felt disrespected by her. The students identified these feelings as

being the cause of some of their disruptive behaviors. Students further reported having been called stupid, lazy and racist by the Respondent and one student was told by Respondent that she stinks. Students also reported that they have been kicked out of class and had nowhere to go (*SOE Exhibit 16*) [Petitioner Exhibit 3].

39. The Incident Report reflects that administrative action taken as a result of the investigation included a conference with the Respondent (*SOE Exhibit 16*) [Petitioner Exhibit 3].
40. An Incident Report dated March 13, 2014 filed by Al-Jathiyah Cannon, School Social Worker, wherein allegations made by students against Respondent for numerous inappropriate conduct were memorialized (*SOE Exhibit 17*) [Petitioner Exhibit 7].
41. The Incident Report described allegations made by students wherein students reported that Respondent called one student "retarded", that Respondent called students racist, crazy and stupid, that Respondent yelled "for no reason", and that Respondent said students act like "fools" and "wild monkeys" (*SOE Exhibit 17*) [Petitioner Exhibit 7].
42. Correspondence dated March 13, 2014 from Rhonda Williamson-Green, Vice Principal, to Respondent (*SOE Exhibit 18*) [Petitioner Exhibit 8].
43. The _ correspondence served as a letter of warning for conduct unbecoming for the inappropriate dialogue described in the March 13, 2014 Incident Report (*SOE Exhibit 18*) [Petitioner Exhibit 8].

The respondent gave art lessons to a fifth-grade class that included special needs students taught by Ms. Kaczka and Ms. Rhodes. The former acknowledged that some of the students presented behavioral issues but maintained that the co-teachers had equipped them with a check list of effective coping strategies. Their class received a single period of instruction each week from the respondent. Art was later changed to a double period on Wednesday afternoon [Tr., p. 38]. Ms. Kaczka said that problems followed the change [Tr., p. 63], prompting her to write Principal Ortiz on March 12, 2014:

[Ms. Rhodes] and I are concerned with our students' experiences in art class. On Wednesday afternoons, the students attend art class for two periods while Ms. [Rhodes] and I are at our OLC meeting. At the end of the day, our students return to the classroom and express their feelings about art class and Ms. Ebert. Students have reported that Ms. Ebert has called them stupid, crazy, and racist. In addition, one student was told that she stinks. Students have also reported that they have been kicked out of class and have no where to go. They feel Ms. Ebert does not like nor respect them.

We are concerned with our student's safety, emotional well-being and their academic growth.

Please let us know if you need an additional information. Thank you for your attention in this matter.
[Petitioner Exhibit 3]

That was the only time the students reported being called names, according to Ms. Kaczka [Tr., p. 66], but the students also faulted other aspects of the respondent's performance:

Every week the students would come back from art really upset. And it got to a point where my partner teacher and I, we used to have meetings with the students in class and try to explain to them that it was important that they go to art class. It's important that we attend our meeting while they're in art class. So we tried to figure out ways that they could cope with their feelings of going to art class, and we even made an anger chart, things like that. So things just kept recurring and recurring, the students would come back upset. So it got to the point where we felt that the students were getting hurt emotionally, it was harming them. So I decided to send this e-mail so that administration would be aware of what our students were expressing [Tr., p. 44].

The four students who complained met individually with Social Worker Cannon and submitted handwritten statements [Petitioner Exhibits 6 a-e]. Ms. Cannon also recorded their remarks in an incident report, dated March 13, 2015 [Petitioner Exhibits 7]. She testified:

I don't do fact finding. I only transfer information and statements. That's up to the administrator to do that.... I called parents to let parents be aware of the conversation that I'm having with their child. And then I write an incident report up. I give my incident report, and if I take statements from them, I give their statements to an administrator. And then I have a counseling session with the students based on if they want to continue talking with me or not [Tr. pp. 348-349].

The social worker's report documented the sentiments conveyed by the students:

- Mrs. Ebert calls me retarded when are one on one, she says we can talk then changes her mind and says mean things to us.
- Mrs. Ebert said I was a bad witness because I didn't see...put a kick me sign on her back; she said I stink; she said I have 2 stink attitude; she called us racist when Mrs. Brown walked in and said that we listen only to her; she calls us crazy and stupid.
- she yells for no reason.
- the boys pick on her and hurt her feelings; she said we act like fools; she said we act like wild animals and that we act like monkeys; When Mrs. Thompson is around she will come and say it to us so Mrs. Thompson can't hear her.

[Petitioner Exhibit 7]

Ms. Kaczka said she did not know if the students' negative learning experience in art influenced their general achievement level, but they

didn't look forward to going to art class. They really didn't want to go. They were often late, because it was difficult to get them lined up and ready to go. They were just really upset. They were crying, refusal to go, just very upset. We had special ed. kids, so, you know, they're already behind as it is a little bit in their academics, so the name calling, it just really hurt their feelings. It really hurt their failings [Tr., p. 51].

Although she never personally heard the respondent call the students abusive names, Ms. Kaczka did overhear her on the phone with a parent while the student was present, which Ms. Kaczka deemed inappropriate. The special education teacher also

believed that derogatory remarks

can almost be a self-fulfilling prophecy, where the student starts to internalize. If they just keep hearing it over and over again, they start to feel like, Oh, maybe it is true. So it's very harmful to the students and their growth, and especially their emotional and social [Tr., pp. 56-57].

Another allegation under Charge Two is that the respondent loudly irrupted into the main office. The details are given in the SOE:

44. Correspondence dated May 19, 2014 from Maria J. Ortiz to Respondent (*SOE Exhibit 19*) [Petitioner Exhibit 82].
45. The correspondence describes that Respondent, on even date [sic], walked into the main office during a class and began yelling how disruptive the 8th grade class was behaving. The correspondence further advised that it was imperative that she supervise students at all times (*SOE Exhibit 19*) [Petitioner Exhibit 82].

The next day, the respondent went to the Office of Health Services and Nursing. Mr. Breton's testimony pointed to the following statement, prepared by the office:

On Tuesday, May 20, 2014, Mrs. Ebert, Art Teacher, had a medical situation and went to the health office for attention. Mrs. Lara, our school guidance counselor attended to Mrs. Ebert after Mrs. Ebert requested for her.

Below is a brief description from Mrs. Lara;

"When I came into the nurse's office, Ms. Ebert was crying about apparently getting written up. She expresses frustration with not being able to handle the students. I was there to listen to her. I did not offer any advice or counsel. I was simply present [to] allow her to vent her frustrations.

Question: Is Mrs. Ebert able to continue her duties to teach Art in grades 2-8?

We believe that this educator is unfit for duty, and would like to evaluate to determine whether or not she is capable of leading instruction.

Mrs. Ebert claims that she is seeking a transfer to another school due to a hostile work environment

- We have investigated and our investigation has shown no evidence of a hostile environment
- She claims that she is traumatized -wakes up screaming in the middle of the night -as a result of working at the school
- She abandoned her classroom earlier this week because children were throwing markers at her
- She identified to the school nurse on or around Tuesday of last week that Mrs. Ebert felt like she was having a breakdown

If there are any further questions, we will send them on Tuesday, May 27, 2014.

[Petitioner Exhibit 22]

Charge Two–Conclusion

Viewed as a whole, the record portrays the deterioration of an elementary school art teacher over a period of less than 12 months. When the district was introducing a new evaluation rubric, coupled with a campaign to keep teachers aware of every student, the respondent initially was successful. In December, 2012, she collaborated with her principal and colleagues to adopt an approach that seemed to produce good results. In her first observation she was rated “effective.” One of the three components was even rated “highly effective.” The principal invited her to model her techniques, which she did. She was rated “effective” in her mid-year evaluation.

But she began showing signs of difficulty in controlling a class. The respondent filed frequent complaints about student misbehavior. The principal regarded the incident reports as trivial and an admission that the teacher could not manage students. In 2013-2014, the respondent sought a transfer out of the school—apparently to avoid anxiety linked to students. Transfers are not generally granted at mid-year, and she would have been assigned elsewhere in any event when the school closed. She refused to apply for disability accommodation that might have permitted a transfer, insisting that nothing was needed but better-behaved students.

In March, 2014, students turned the tables on the respondent. Four of them complained to their classroom teachers and the social worker that she had addressed them in demeaning, racially-tinged terms.¹⁵ She freely acknowledged that she was afraid of them, which was also taken to be an expression of racism.

The respondent began a two-month absence, to which the district seemed oblivious—a remarkable lapse in oversight—until discovering that she had never initiated the formal administrative procedure for leave-taking. The parties agreed not to make the absence a reason for discipline. Nevertheless, she was penalized in her summative evaluation for poor attendance without making clear which periods were involved.

The respondent’s return in May was followed by the outburst in the main office, which was apparently heard by visitors. The respondent had abandoned a classroom to reach the main office and the next day went to see the nurse because she was fearful that students would harm her. Although the Office of Health Services reported that the

¹⁵ The students’ own testimony was absent from the hearing, which means that their accounts are hearsay. Hearsay is generally admissible in arbitration but is accorded less weight than other types of evidence.

respondent might be experiencing an emotional breakdown, the district never demanded an independent medical examination that would focus on her psychological fitness.¹⁶

The respondent's sustained pattern of erratic behavior demonstrates that, at the very least, she "failed to manage student behavior" (Charge Two), an element of unbecoming conduct that corresponds with her loss of self-control when faced with unruly students. Taken together, her resort to degrading epithets, her outburst in the main office, her unexplained absence for months, and her desperate search for another school cast doubt on her fitness to teach. The most plausible interpretation of the record is that her judgment has been clouded by an inordinate fear of students.

Consequently, there is just cause to find that the respondent has committed conduct unbecoming a teacher. However, the district has not proven just cause for a penalty as severe as loss of tenure and discharge.¹⁷ She should be reinstated, but without back pay, at the beginning of the 2016-2017 school year, provided that an Independent Medical Examination (IME) finds her fit to teach and manage students. Failure to cooperate with the IME and to abide by its conclusions will be tantamount to constructive resignation. In the interim, she should strive to improve her inter-personal and professional skills, ensuring that she can succeed in any environment she may be placed in if she returns to work.


Tia Schneider Denenberg
Arbitrator

¹⁶ The district did not order the respondent to undergo a fitness examination until May 23. She refused by means of a lawyer's letter, which produced an offer of a hearing. She did not undergo an IME [Tr., p. 149].

¹⁷ For one thing, the district had already imposed a penalty short of discharge—a formal letter of warning—for the four-student incident. The same event cannot be used to justify discharge.

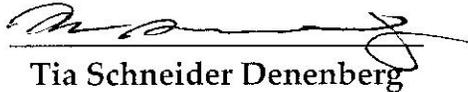
In the Matter of the Tenure Hearing of
Marie Ebert,
State-Operated School District
of the City of Newark
Essex County

Agency Docket No. 49-3/15

Arbitrator's Award

The undersigned arbitrator, having been appointed, pursuant to P.L. 2012, c. 26, to hear and decide the above-captioned matter, rules as follows:

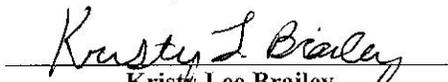
There is just cause to find that the respondent has committed conduct unbecoming a teacher. However, the district has not proven just cause for a penalty as severe as discharge and loss of tenure. She should be reinstated, but without back pay, at the beginning of the 2016-2017 school year, provided that an Independent Medical Examination (IME) finds her fit to teach and manage students. Failure to cooperate with the IME and to abide by its conclusions will be tantamount to constructive resignation. In the interim, she should strive to improve her inter-personal and professional skills, ensuring that she can succeed in any environment she may be placed in if she returns to work.


Tia Schneider Denenberg
Arbitrator

Dated: February 22, 2016

State of New York
County of Columbia

On this 20th day of February 22, 2015, before me personally came and appeared TIA SCHNEIDER DENENBERG, 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 the same.


Kristy Lee Brailey
Notary Public State of New York
No. 01BR6326865
Qualified in Columbia County
Commission Expires June 29, 2019