In the Matter of the **TENURE** Hearing	)	
	)	
of	)	
	)	**OPINION and AWARD**
ORLEANS SARMIENTO	)	
"Respondent"	)	
	)	
and	)	AGENCY DOCKET NO. 79-4/17
	)	
SCHOOL DISTRICT OF THE TOWNSHIP OF SADDLE BROOK	)	
"Petitioner"	)	
	)	

By letter dated May 17, 2017, M. Kathleen Duncan, Director of Bureau of Controversies and Disputes, determined that the charges were reviewed and "deemed sufficient, if true, to warrant dismissal or reduction in salary." Therefore, in accordance with the Teacher Effectiveness and Accountability for Children of New Jersey Act, ("TEACHNJ Act" or "Act") P.L. 2012, Chapter 26 signed into law by Governor Chris Christie on August 6, 2012 the undersigned was appointed as Arbitrator on May 18, 2017 of the dispute described herein.

The hearings were held on June 27, July 10, 17 and 18, 2017 at the Board of Education office, Saddle Brook, New Jersey. Both parties were afforded full opportunity to present all the necessary proofs and evidence. A verbatim transcript was made and all witnesses were sworn. Briefs were received as agreed.

BEFORE: Mattye M. Gandel, Arbitrator

APPEARING FOR PETITIONER:

Jessika Kleen, Esq.
Janelle Winters, Esq.
Machado Law Group

APPEARING FOR RESPONDENT:

Ty Hyderally, Esq.
Francine Foner, Esq.
Hyderally & Associates P.C.

BACKGROUND:

The matter arose as a result of tenure charges filed against Respondent, Orleans Sarmiento. On April 12, 2017 the Board of Education (Petitioner/District/Board/Administration) determined, by a majority vote of the whole, that there was probable cause to support the tenure charges filed on March 16, 2017 against Respondent for Conduct Unbecoming and Other Just Cause.

The sequence of events was as follows:

- November 1, 2016 Respondent called to a meeting with Administration
- November 4, 2016 Respondent suspended
- March 3, 2017 Respondent's attorney wrote a letter advising the District that Respondent intended to file a complaint against the District
- March 13, 2017 District notified Respondent that it intended to serve Respondent with tenure charges
- March 16, 2017 Interim Superintendent Anthony Riscica presented to the Board the tenure charges with eight (8) interviews, although the verbiage stated that there were ten (10) students interviewed
- March 17, 2017 Letter to Respondent and her attorney advising them that they have fifteen (15) days to respond in opposition to the charges
- April 12, 2017 Board met and determined by a majority vote that there was probable cause to credit the evidence in support of the tenure charges filed on March 16, 2017
- April 24, 2017 Board sent Department of Education certified tenure charges.

POSITIONS OF THE PARTIES:

The Petitioner's position is that Respondent had a responsibility to retain her cell phone as she knew there would probably be litigation, knew that her cell phone would be part of the tenure charges, which directly involved the text messages she sent student JB,[1] and knew that without the phone the District was precluded from questioning her relating to the phone and challenging Respondent's unsubstantiated

and self-serving claim that the phone was utilized to enter attendance, grades and to conduct lessons. Rather, Respondent disposed of key evidence just a few weeks prior to the first hearing in this matter and two months after receiving notice of this litigation. Respondent's destruction of evidence is prejudicial and should not be permitted and an inference in Petitioner's favor should be granted.

Further, it is Petitioner's position that Respondent violated the Family Educational Rights and Privacy Act (FERPA) and Board policy regarding the handling of student records; that the policy only permits access to student records for school district personnel who have "assigned educational responsibility of the pupil;" that she was not assigned educational responsibilities for these two students, MC and JV, and that despite the fact that they were not on her roster, she accessed their student records in clear violation of FERPA, state law and Board policy. For this her increment was withheld for the 2015-2016 school year.

It is the District's position that Respondent engaged in an inappropriate and harmful text conversation with a minor student; that Respondent, as a teacher, is held to a higher standard of behavior and that she failed to conduct herself according to that standard. She violated Board policy 3281 when she engaged in a series of personal text messages of an inappropriate nature with student JB. Further, it was not until the arbitration hearing that Respondent admitted using curse words, advising the student how to avoid and contest administrative discipline and denigrating the administration and indicated for the first time that she regretted using such language. While she

[1] All students are referred to only by their initials.

claimed to have no prior knowledge of the incident in which JB was involved, the text demonstrated otherwise. If she had no knowledge of the situation, as she admitted, she had no right to make a judgment regarding JB's discipline.

Respondent claimed at the hearing to regret most of her statements to JB but cited the impact on her personally as the reason she would not behave in such a manner again, rather than acknowledging that such statements were outright inappropriate and potentially harmful to JB. She claimed her responses to JB showed concern for her mental health but admitted she never told administration about her concerns. It is Petitioner's position that should Respondent feel certain conduct is necessary to assist a student in the future, she will act accordingly, even if it violates Board policy and the law.

Additionally, Respondent continued in her improper behavior as a Teen PEP/Health co-advisor and head coach of the volleyball team. The District asserts that she complained to her students that administration was punishing her for helping students; that administration was out to get her; that she was given the smallest classroom in the school as punishment; that she asked a student for a recommendation for a therapist because she was suffering from anxiety and depression; that she cried in front of students; that she failed to report an allegation of bullying and that she told students that an AIDs Day field trip was denied, when it was not even submitted for approval. All these incidents require Respondent's dismissal.

Moreover, Respondent failed since May of 2016 to demonstrate any authentic remorse for her conduct and, until the date of her testimony, she failed to ever express

remorse even to her own Union representative. It is Petitioner's position that Respondent was not truthful in her testimony, continued to claim that her comments in the text to JB was in her best interest and has refused to accept real responsibility and to acknowledge the gravity of Respondent's conduct.

As regards the TeenPEP curriculum, while there were ways that Respondent could have shared incidents or feelings with the students, her choice of topics including denigrating administration, advising students that she was depressed and sharing her personal sexual history to make them feel they can talk to her where inappropriate.

It is the District's position that there was no disparate treatment or retaliation in this matter; that there was no evidence that Respondent is being treated differently than any other employee; that Sandra Frazier, volleyball coach with Respondent, was disciplined for texting an adult during teaching time and that although other employees may have texted student athletes, there is no testimony that these employees contacted students in an impermissible way.

Further, Respondent's employment history is not dispositive. Her conduct herein is sufficiently flagrant and constitutes a series of incidents that justifies her termination, despite her history.

Finally, Respondent was not credible and had her testimony had numerous inconsistencies, unsubstantiated claims and was not truthful regarding her knowledge of JB's discipline. In contrast, the testimony of the District's testimony was credible and was not contradicted.

Therefore, Petitioner asks this Arbitrator to determine that Respondent is unfit to discharge her duties as an educational professional and is not fit to be entrusted with the care and custody of children; that Petitioner has proven by a fair preponderance of the evidence that Respondent will continue to both educationally and emotionally endanger District students; that the tenure charges be sustained and that Respondent be dismissed from her employment with the District.

Respondent's position is that "conduct unbecoming" is defined as conduct "which has a tendency to destroy public respect of government employees and confidence in the operation of public services" and that even if the purported conduct occurred, it still falls short of "conduct unbecoming." Further, Petitioner does not allege that Respondent engaged in any communications with a student that were of an inappropriate personal or sexual nature and does not allege that she favored players, only that some players perceived that. Petitioner's allegation that Respondent cried and that she shared personal experiences and expressed emotions should not serve as a basis for tenure charges as crying is human and a valuable lesson and as sharing emotions was required by the TeenPEP program. While the District alleges that Respondent encouraged JB to file an Harassment Intimidation Bulling (HIB) charge, she never did but same would not constitute a basis for tenure charges because under the Anti-Bullying Bill of Rights Act (N.J.S.A. 18A:37-13 *et seq.*), teachers have a duty to assist students who believe they are being bullied.

Further, it is Respondent's position that a review of the interviews conducted by the Administration reveals a lack of credible evidence to support the allegations of

Respondent's interaction with students. There was no evidence that Respondent engaged in any personal communications with players or students and, in fact, there was no clear policy prohibiting coaches from texting players but rather coaches were instructed to exchange contact information with players. Further, Respondent did not use her cell phone during class but when she left the room to get supplies or go to the bathroom she might have taken a call or received a text. When she used her cell in class it was to access TeenPEP curriculum, to post homework on Remind 101, to take attendance or to input grades because there were two teachers in the classroom but only one computer. Regarding communicating with players, there was no evidence to support that any communications were inappropriate or unrelated to volleyball matters or that Respondent exchanged any text messages with individual players. Some players complained that Respondent showed favoritism but others, including Respondent's assistant coach, testified to the exact opposite, that Respondent treated players inclusively, that she was well-liked and a fair coach and that she provided them with a very positive team experience.

Respondent asserts that there is virtually no support in the record that she cried on multiple occasions and was overemotional and even if it occurred, crying and showing emotion is no basis for tenure charges and if she cried during TeenPEP sessions, that is part of the sharing experience as testified to by Evelyn Moon, Project Manager for the Center for Supportive Schools. Moreover, teachers, who had worked with Respondent for ten years, a former superintendent and a former volleyball player, testified that they never observed anything inappropriate in Respondent's interaction with students. Finally, as to

the allegations by some students regarding Respondents complaining about her employment, the overwhelming testimony did not support that allegation and, in any event, whatever was said at the TeenPEP sessions was supposed to be confidential. Petitioner has failed to sustain its burden of proof regarding allegations that Respondent was overly emotional, that she engaged in any behavior that made students uncomfortable or that she complained about her employment and administrative staff.

It is Respondent's position that the real issue is whether the text message with student JB constituted conduct unbecoming. Several factors should be taken into account to determine conduct unbecoming including the nature and gravity of the offenses, evidence as to provocation, harm the teacher's conduct had on the proper administration of the school, the teaching record and ability of the teacher and the disciplinary record and the impact of the penalty on the teacher's career. Respondent contends that when each of these factors is examined, it must be concluded that Respondent's actions do not constitute conduct unbecoming and, therefore, the tenure charges should be dismissed and the penalty should be other than termination.

Additionally, Respondent asserts that previous tenure cases suggest that progressive discipline should be imposed before resorting to the harshest penalty and cited several much more egregious cases wherein progressive discipline was applied. In this District, there was testimony that when teachers have been caught texting in class, they were only given a write up for inappropriate conduct. Therefore, considering that Respondent has served her school with distinction over a lengthy career with an

unblemished and distinguished record and considering the nature of the alleged wrongdoing, she deserves the application of progressive discipline.

It is Respondent's position that though she may have had a lapse in judgment, her conduct does not rise to the level of conduct warranting termination. Respondent cited many prior arbitration decisions involving much more serious misconduct wherein the charges were upheld but dismissal was not the appropriate remedy.

Finally, Respondent asserts that dismissal of the charges is warranted based on procedural errors. The Board failed to provide written notification of its determination to Respondent within three (3) working days of its determination. The Board failed to provide a Certificate of Determination in the proper format and the charges were certified to by Riscica, who had no direct knowledge or participation in the investigation.

Therefore, Respondent asks this Arbitrator to reinstate her to her position and made whole for all losses in pay, seniority, benefits and all emoluments and to expunge her record of all disciplinary actions related to this matter. Alternatively, if suspension is warranted, Respondent asks this Arbitrator to impose the appropriate suspension of 120 days or less, which Respondent has served.

OPINION:

Respondent was charged with violating three specific Board Policies, which Petitioner claimed proved "conduct unbecoming." In fact, both parties cited the definition of conduct unbecoming in a similar manner as a tendency to destroy public respect for government employees, conduct that offends publicly accepted standards of

decency, destroys confidence in the operation of public services and conduct which adversely affects morale or efficiency for a public entity.

Board Policy and Regulation 3281, Inappropriate Staff Conduct, (Tab 1, P-14)[2] which stated in relevant part that

> The Board of Education recognizes its responsibility to protect the health, safety and welfare of all pupils within this school district. Furthermore, the Board recognizes there exists a professional responsibility for all school staff to protect a pupil's health, safety and welfare. The Board strongly believes that school staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district.
>
> In support of this Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.
> . . .
> School staff's conduct . . . shall be appropriate at all times. School staff shall not make inappropriate comments to pupils . . shall not engage in inappropriate language. . . shall not engage in inappropriate conduct toward or with pupils. School staff shall not engage or seek to be in the presence of a pupil beyond the staff member's professional responsibilities.
> . . .
> Inappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Therefore, school staff members are advised to be concerned with such conduct which may include, but is not limited to, communications and/or publications using e-mails, text-messaging, social networking sites, or any other medium that is directed and/or available to publics or for public display.
> . . .
> School personnel, . . . are required to report to their immediate supervisor or Building Principal any possible violation of this Policy. . . .

Board Policy 3282, Use of Social Networking Sites (Tab 2, P-15) stated in pertinent part that

> . . .

[2] "T" or "Tab" refers to the Board's document in its book of exhibits and "P" refers to the Arbitrator's identification of Petitioner's exhibit.

When using personal social networking and/or media sites, school staff members:

1. Should not make statements that would violate any of the district's policies, including its policies concerning discrimination or harassment;
2. Must uphold the district's value of respect for the individual and avoid making defamatory statements about the school district, employees, pupils, or their families;

Board Policy 3283, Electronic Communications Between Teaching Staff Members and Students (Tab 3, P-16) states in pertinent part that

> . . . the Board of Education adopts this Policy to provide guidance and direction to teaching staff members to prevent improper electronic communications between teaching staff members and students. The Commissioner of Education and arbitrators, appointed by the Commissioner, have determined inappropriate conduct may determine a teaching staff member unfit to discharge the duties and functions of their position. Improper electronic communications by teaching staff members may be determined to be inappropriate conduct.
> . . .
> Inappropriate content of an electronic communication between a teaching staff member and a student includes, but is not limited to:
> . . .
> 4. Communications which include the use of profanities, obscene language
> . . .
> 6. Communications requesting or trying to establish a personal relationship with a student beyond the teaching staff member's professional responsibilities;
> . . .
>
> The following acceptable protocols for all electronic communications between a teaching staff member and a student shall be followed:
> . . .
> 3a. Text messaging communications between a teaching staff member and an individual student are prohibited.
> . . .

The record established that staff members receive training in Board Policies and that Respondent received the Staff Handbook for the 2016-1017 school year (T 17, P-

3), which lists all the Policies including the three Policies Petitioner claimed Respondent violated. On page 3 of the Handbook, Bates stamped P 00249, it stated:

> **Policies Acknowledgement Form** – Please complete the Google Form linked below to acknowledge that you have read these policies no later than, Friday, September 9th.

Respondent acknowledged at the hearing that she was aware of these policies and stated that, as a teaching professional, it was her responsibility to know and understand the laws, rules and policies of the District. Further, when the Board implements these policies, it fulfills its obligation to its staff and students. The Board has a right and responsibility to promulgate reasonable polices so that the schools function smoothly and so that staff understands their employment expectations. In this day and age of social media explosion and ready access to cell phones and other electronic devices, the Board needs to keep the students and staff safe and has a right to expect that staff members will act professionally and responsibly when interacting with students.

The matter herein involved an exchange of text messages between Respondent, a Special Education teacher and Volleyball Coach, sent from her personal cell phone, September 28 through October 5, 2016, and student, JB, who did not testify. During its investigation, the Board determined that some of these messages were sent when Respondent was supposed to be teaching or prepping for other classes. Respondent's Daily Schedule for the 2016-2017 school year, (P-2, T-5), indicated that Period 2 extended from 8:56 a.m. to 9:45 a.m., Period 4 was from 10:40 to 11:29 a.m. and Period 7 was from 1:16 to 2:05 p.m.

When comparing the times on the text message (P-1, T-4) with the periods of the day, (P-2, T-5) it was concluded that on Thursday, September 29, Respondent was texting JB at 10:47 a.m. during Period 4, Respondent's Prep period, when she was supposed to be preparing for other classes; that on Friday, September 30 at 1:48 p.m. Respondent was texting JB during Period 7 when she was assisting special education students in Biology and that on Tuesday, October 4 at 9:09 a.m. and on Wednesday, October 5 at 9:11 a.m., Respondent was texting JB during Period 2 when she was assisting special education students in Biology. Further, it was undisputed that professional development days are part of the work day and that teachers are paid for that time. Therefore, it must be concluded that Respondent was texting a student during instructional time or time when she was supposed to be preparing for other classes.

Respondent was called to a meeting on November 1, 2016 with Interim Superintendent Anthony Riscica, High School Principal John W. Lawlor, and Union President Kimberly Salma at which time Principal Lawlor told Respondent that the Board had knowledge of the existence of a text message, (P-1, T-4), which it asserted violated the above three Board Policies. Further, by letter dated November 4, 2016, (P-17, T-6) Respondent was advised that she was suspended from her teaching and coaching responsibilities while the District completed a full review of the text messages between her and the student and Mrs. V's[3] concerns about the TeenPEP program.

[3] Ms. V is the parent who testified that she found the text message on her computer, was concerned and brought it to the attention of Administration along with her concerns about Respondent and the TeenPEP program. There was a legitimate concern as to whether the text messages were fond on Ms. V's computer because of the cracked glass marks on the text exhibit (P-1, T-4).

This Arbitrator signed a subpoena directing Respondent to submit her cell phone, which was used to text student JB, and the record of her phone records. In response, Respondent provided an eBay receipt indicating that Respondent sold her phone in early May 2017. Further, while this Arbitrator agreed that the initial subpoena for cell phone records was overly broad, the final subpoena was tailored to cover a limited time period prior to Respondent's suspension for phone and text data. Though multiple attempts were made to obtain texts usage from her cell phone or cell data usage for the year prior to the filing of tenure charges, the phone company notified Respondent that it could only go back ninety (90) to capture the information requested through a subpoena. Therefore, no text date was present at the hearing.

Petitioner asserted that it was prejudiced by the fact that the cell phone was not produced based on a claim of spoliation of evidence. This Arbitrator must agree that the timing when Respondent sold her phone was very concerning. She knew that tenure charges were filed on April 24, 2017 and she had hired an attorney in March 2017. Further, she clearly knew that her cell phone, along with the actual text, (P-1, Tab 4), were the central pieces of evidence in this matter. Therefore, in the opinion of this Arbitrator, Respondent had a responsibility to retain her cell phone until the proceedings were concluded. She did not and this Arbitrator can draw a negative inference from her actions. If she had nothing to hide, she would have wanted to present evidence that supported her assertion of not improperly using her cell phone except in this one instance with student JB. While the District has the burden of proof,

Respondent improperly prevented Petitioner from presenting all the relevant evidence against her.

As part of its investigation, the Riscica directed Lawlor and Middle School Assistant Principal Brenda Coffey to interview students regarding their interactions with Respondent as a teacher and coach. According to Lawlor, he randomly selected ten students from the roster of the TeenPEP class and the volleyball team and interviewed them along with Coffey during the first week of January 2017. The students answered questions from Lawlor and Coffey as identified in the record of the hearing as (P-4, T-7) through (P-11, T-14).[4] In addition to responding to questions from Lawlor and Coffey, Lawlor testified that the students were asked to write a statement based on his/her interactions with Respondent. Further, Coffey confirmed that the students were asked to write in their own words any additional information they would like to share. Further, seven of these eight students testified at the hearing.[5] This Arbitrator was convinced that in fact the investigators told the students as testified to by Lawlor and Coffey to write whatever supplemental information they wanted to share.

[4] Of the ten students that the District interviewed, it submitted these eight as part of the tenure charges against Respondent. However, two other interviews, R-9 and R-10, were not included in the tenure charges given to the Board for its consideration. While Riscica testified that he "believed" that all ten interviews were given to the Board prior to it certifying tenure charges, there was no proof of that happening and, in fact, the tenure charges, Joint Exhibit J-2, filed on April 24, 2017 only included eight interviews.

[5] JB's interview (P-10, T-13) and R-7, a statement by JB, which was not admitted into evidence, were not reviewed or taken into consideration in this decision because she did not testify. Each party was not able to question JB regarding these documents. Without JB's direct testimony this Arbitrator determined that these documents, which went to the very heart of this matter, were rank hearsay and not admissible even under the lenient hearsay rules applied in arbitration.

A careful review of these statements led this Arbitrator to conclude that the students made complimentary as well as critical statements about Respondent. Several recurring themes were

No individual texting, only group texting for games
Cries a lot/ in class and at practice
Did not tell us how to sneak out of school
Has favorites. "Either she really likes you or you are not there."
No private lunch/dinners with Respondent
Let's emotions get in the way. Opinionated
Did not say administration out to get her
Did not pressure kids to share secrets
Said administration out to get her
Said she was punished for helping students
Feels empty without her

Two additional students were interviewed, R-9 and R-10, which Lawlor testified he included with the other eight when he presented the interviews to Riscica. However, when Riscica submitted the packet of information to the Board to determine whether tenure charges were appropriate, these two interviews were not included. There was no definitive testimony as to whether they were ever given to the Board but clearly they were not included in the tenure charges, Joint Exhibit J-2.

The themes in R-9 and R-10 were

No private text messages, only group texts
Makes you feel comfortable
No negative talk about administration
Crying but just "normal stuff"
Never heard administration out to get her
R-10 acknowledged that she was not around a lot because worked after school but when there, never felt uncomfortable and never saw Respondent inappropriate.

While R-9 and R-10 were more positive regarding Respondent than those submitted with the tenure charges, there should have been no reason for Riscica to not

have included them in the tenure charges given to the Board. The Superintendent had a responsibility to give the Board a complete picture of the investigation and the reasons that tenure charges were contemplated.

However, the main reason according to Riscica that Respondent was brought up on tenure charges was because of the exchange of texts between Respondent and JB (P-1, T-4). When Riscica was asked if all Respondent's evaluations and observations were positive would it have changed his mind on filing tenure charges, he responded, "Absolutely not. Because it was the content of the text message . . ." He explained that a teacher should not have been commenting on an HIB investigation. However, in the opinion of this Arbitrator, even if the text was the overriding concern, certainly a fair investigation would have to include examining an employee's complete employment record.

All adult witnesses for both Petitioner and Respondent agreed that they would not curse in front of students, would not make a judgment on a HIB matter without having knowledge of that investigation and would not think that a student being bullied was petty or bullshit. In the instant matter, it was clearly the content of the text and not the fact that Respondent was texting a student that caused the Administration to file tenure charges.

Student JB initiated the text and, as stated above, all but one of the texts was exchanged during times when Respondent should have been teaching or preparing for another class.[6] All witnesses agreed that it is not appropriate to text a student during

[6] Respondent asserted that she had breaks during the professional development class and went to the bathroom during class, went to make copies during class, which would have given her the opportunity to

times when a teacher is supposed to be engaged in some form of educating students. Further, Lawler testified that staff is encouraged to use the Remind 101 app, which is a group text, to prevent one-on-one communications between students and staff. The record did establish that teachers and students have exchanged texts but the topics cannot be of a personal nature. Further, even when Respondent texted individual members of the volleyball team, it was established that those texts related to practice, scheduling and other team matters, which was agreed was completely appropriate.[7]

However, texting a student over a seven-day period from September 28 through October 5, 2016 during class time about subjects not related to school work but rather related to the student's discipline and actions by Administration was completely inappropriate. Respondent tried to explain that she interacted with JB the way she did because she was concerned about her mental health; that JB was an at-risk teenager and that she was trying to be supportive. However, if Respondent was so concerned about the student's well being, she should have alerted Administration sometime over those seven days. She did not contact administration and did not contact JB's mother during the period of the text exchange but rather took the matter into her own hands. While Respondent testified that she would act differently if this situation occurred in the future, her judgment was faulty.

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text. However, this was all speculation and simply excuses for her behavior. She submitted no proof that she was actually engaged in those activities when these text messages were exchanged.

[7] Clearly coaches were directed to exchange contact information with players as stated in the Coaches Handbook, R-6.

Of further concern to this Arbitrator was Respondent's repeated testimony that when she read these texts the only knowledge she had was what was contained in these messages. However, this Arbitrator was not convinced.

Based on JB's statement that she was suspended because she "called her (another student) a name" Respondent made a judgment that the discipline was bullshit and admitted that she made that comment without knowing the details of the interaction between JB and that other student. Further, Respondent was judging the way this Administration was handling the situation when she commented about how her husband would have handled the matter. Additionally, she texted that

> I would have asked him to see the camera footage and how can a camera show you called someone a name.

From this one comment two things were clear. First, there had to have been some conversation by text or in person after she texted "Are you kidding me???" and before she wrote "I would have asked him to see the camera . . ." because otherwise it makes no sense. JB did not tell her in the text in evidence that there was a camera shot of the event. Respondent must have known from another conversation. Second, her testimony that the only knowledge she had of the investigation was what was contained in the text was clearly not accurate.

Further, that Respondent was texting a student and getting involved in her discipline and questioning Administration's actions was unacceptable. Respondent acknowledged that she knew the rules and policies, which stated in relevant part that

> Inappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Therefore, school staff members are advised to be concerned with such

conduct which may include, but is not limited to, communications and/or publications using e-mails, text-messaging,

Improper electronic communications by teaching staff members may be determined to be inappropriate conduct.

Text messaging communications between a teaching staff member and an individual student are prohibited.

By any reading of these policies, it was clear that Respondent's conduct was inappropriate and violated the policies.

Respondent was hired for the 2001-2002 school year and was granted tenure in September 2004. The record established that Respondent's personnel file, R-1, contained observations and evaluations since she was hired but this Arbitrator focused on those observations/evaluations after she was awarded tenure beginning in the 2004-05 school year through the 2015-2016 school year. Additionally, Respondent's Coaches Evaluation, R-2 and Commendation TeenPEP, R-5, were also entered into the record of the hearing in support of Respondent.

It was clear that for some unexplained reason, there were no annual performance reviews for four of the years after Respondent became tenured, (2005-6, 2006-7, 2010-2011 and 2012-2013) and that there was only one observation per year from when Respondent was tenured through the 2012-2013 school year. Riscica testified that there should be a minimum of two observations per year on a tenured teacher.

Riscica testified that he believed that he reviewed Respondent's personnel file at some point but that he did not recall if some evaluations were missing. However, he stated that did not conduct any investigation to find the missing evaluations, he did not

ask anyone to find out why the evaluations were missing and did not give the Board any evaluations/observations to consider when they were reviewing tenure charges. Once again, a careful review of an employee's personnel record as part of a thorough investigation is a very important factor when determining the proper level of discipline.

Similar to the fact that Respondent sold her cell phone shortly before these hearings took place, which this Arbitrator questioned, there is a concern that several of Respondent's evaluations/observations were not submitted for this hearing and there was no effort made to locate them. Both actions, one by Respondent and one by Petitioner, hampered the full investigation of this matter.

From the documents submitted, this Arbitrator must conclude that Respondent was rated highly successful or successful in the years prior to the implementation of TEACHNJ. Further, for the 2013-2015 school year she received effective ratings and in 2015-2016 she was rated highly effective. Additionally, of the observations submitted, she was rated satisfactory to highly satisfactorily. The only negative comment appeared in the 2011-2012 evaluation, which stated that she was advised to go "through the chain of command to address concerns."

R-2 was the Coaches' Evaluation for which Respondent received mostly 5's in 2005 (outstanding) and mostly 3's and some 4's (average to good) in years 2006-2010. Beginning in the fall of 2012, the format changed and Respondent was rated "Meets Performance Standards" through the fall of 2015, the last evaluation included in R-2.

R-5 was a memo to Respondent from Lawlor dated November 13, 2015 in which he commends her for the TeenPEP program. "TeenPEP is a success because of you."

Therefore, it must be concluded that Respondent, a sixteen-year employee, was considered a good teacher and coach and her personnel record should have been considered when the Administration was determining a level of discipline to impose and that information should have been shared with the Board.[8]

Finally, a complimentary email regarding volleyball coaches, R-13; Respondent as Coach of the Year from the New Jersey Interscholastic Conference (NJIC), R-14 and plaque stating that this District was awarded the NJIC Meadowlands Division Volleyball Champions 2016, R-15, should have been reviewed as part of Respondent's personnel file.

One of the key elements in determining whether an employee is treated fairly and whether the employer acted appropriately is whether there was a fair and full investigation into the facts before a decision is made. In the instant matter, there were factors that concerned this Arbitrator.

For example, Respondent was never given a copy of the text in question though she and her Union representative, Salma, asked for it at the initial meeting on November 1, 2016 and at other times. Respondent's unrefuted testimony was that the

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[8] Respondent received discipline in the form of a withholding of an increment because of a violation of FERPA in March of 2016. However, while this incident was not part of the tenure charges, it was undisputed, and admitted by Respondent, that she accessed two students' records, who were not on her class rosters as students that she was responsible for. Board Policy 8330 states in pertinent part that

> Certified school district personnel who have assigned educational responsibility for the pupil shall have access to the general pupil record. .

As Respondent was not "assigned educational responsibility" for these students at the time she accessed their records, she was not authorized to access their records. Therefore, the only factor considered by this Arbitrator regarding the FERPA matter was that Respondent received discipline in the form an increment withholding for violating FERPA and Board Policy and the discipline is considered part of her employment history.
While Respondent initially stated that she had never received a reprimand, a warning or a suspension before these tenure charges were filed, she acknowledged on cross-examination that in May 2016 her

first time she saw a copy of the text was when she received the tenure charges in April 2017. Respondent had a right as early as November 1, 2016 to see the basis for being called into a disciplinary meeting and subsequently being suspended.

Additionally, as the Board was concerned about Respondent's behavior and interaction with students, part of a thorough investigation would have been to interview all persons who would have knowledge about Respondent's behavior. This would include teachers she co-taught with and her assistant volleyball coach. Riscica contended that he did not direct Lawlor to interview co-teachers because this was an issue between teachers and students and not between teachers and teachers. However, this Arbitrator cannot agree with that reasoning. If one is seeking information about Respondent's behavior in the classroom or on the volleyball field, it would have been perfectly reasonable to interview co-teachers and her assistant coach. These professionals would be the best people to evaluate what they observed on a daily basis and a credibility assessment could have been made as to their statements.

Further, Riscica testified that he did not ask Lawlor or Coffey to interview Respondent after the students' responses were reviewed to get her reaction and her side of the story. Riscica's position was that at the November 1, 2016 meeting he gave Respondent the opportunity to return at a later date with any other information she might have regarding this matter and that she never came to him. However, in the opinion of this Arbitrator, Respondent had a right to have known the evidence against her before she received the tenure charges and, to compile a full and complete

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annual increment was withheld due to what the Board determined was a violation of the laws and policies governing student records. Clearly, this is a form of discipline.

investigation, it was the Administration's responsibility to call Respondent in again after all the information was gathered to have fuller knowledge of her position.

Another factor was the selection of the students to interview. Respondent questioned how these ten (10) students were chosen from the forty-six (46) who were on the volleyball team and who participated in TeenPEP. Riscica testified that he did not tell Lawlor how many students to interview but Lawlor stated that he selected these ten students randomly from these programs. However, this Arbitrator noted that some of these students had curious connections to this incident. For example, the record established that one of the interviewees was Mrs. V's daughter, another was the child of a person who works for the District, another student did not make the varsity team and another was the student with whom Respondent texted in this matter. Therefore, at least 4 out of 10 students interviewed had a direct connection to this incident and might have had some biases against Respondent. While Lawlor testified that he randomly selected the participants, this Arbitrator was skeptical.

Additionally, when asked why two of the students' interviews were not included in the tenure charges presented to the Board, Riscica stated that "there's nothing there to support our case." However, when presenting a full and complete investigation to the Board, Administration should have given the Board all the facts so that it could have made a reasoned decision based on all the information learned during the investigation, favorable or unfavorable to the Administration's conclusion.

Therefore, this Arbitrator must conclude that the Board did not fulfill its responsibility to conduct a fair and through investigation, did not interview all

participants who would have had knowledge of Respondent's behavior in the class, did not give Respondent a copy of the text in question, did not contact Respondent after the investigation was completed as Riscica stated in his November 4, 2016 suspension letter to Respondent, did not select the students to be interviewed in a fair and impartial manner and did not supply the Board with all the interviews conducted or the evaluations/observations of Respondent with the tenure charges.

The final issue of concern for the Administration[9] regarded TeenPEP (Prevention Education Program)[10] and Respondent's involvement as co-teacher/advisor of the program. Lawlor testified that he recruited Respondent as he believed she would be effective. The record established that Lawlor commended Respondent in November 2015, R-5, for the success of the program. Specifically, Lawlor wrote that

> You went above and beyond by sacrificing time with your families to attend professional development and the retreat with students. Your efforts have paid off. The success of this program is a tribute to your commitment and organization skills. You have quickly established a rapport with students to provide an environment where they are comfortable to discuss these sensitive issues. TeenPEP is a success because of you.

Several of the students who were interviewed as part of this investigation participated in this program and made comments about Respondent's behavior during the classes and during the retreats. While she was complimented she was also criticized for being overly emotional, crying and for vocalizing her own anxieties, fears and secrets.

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[9] While the Board claimed in its brief that Respondent violated HIB by not reporting the alleged bullying against student MS, this was not part of the tenure charges and, therefore, is not before this Arbitrator for consideration.

An overview of the program, R-3, states that

> TeenPEP is a comprehensive sexual health program that utilizes peer-to-peer education to increase students' knowledge, attitudes, skills, and behaviors associated with healthy decision-making.

Additionally,

> Teen PEP is implemented in high schools as a course for-credit . . . Carefully selected junior and/or senior students are enrolled in the TeenPEP course and provided with educational training that addresses a range of topics related to sexual health. The peer educators, in turn, conduct a series of structured workshops with groups of younger peers . . .

A concise and detailed explanation of TeenPEP was testified to by Moon, the technical assistant assigned to this District. Respondent, along with Frazier, her co-advisor, received extensive training in how to run the program. Moon stated that the first year of the program, the District hit all the benchmarks and was certified and, according to Moon, Respondent and Frazier, "were behaving and creating an atmosphere where the program could run with fidelity."

Moon had observed Respondent in the classroom in the fall of 2015, at a workshop in November 2015, at family night in the spring of 2016 and made one other observation of Respondent. Additionally, Moon observed Respondent during six days of training for a total of 35 to 37 professional development hours and testified that during all her observations Respondent behaved appropriately and that she never received a complaint from students or from anyone in Administration and that Respondent provided an environment where students were comfortable discussing sensitive issues. In fact, an email attached to R-5 from Moon complimented the advisors and Lawlor for

[10] TeenPEP is a partnership between the NJ Department of Health, Center for Supportive Schools and a teen health organization in Princeton called HiTOPS.

the "wonderful job you are all doing." As related to Respondent, Moon stated that "Orleans really set the tone for the 9th graders, which I think made them, overall, a better audience."

Having listened to the testimony regarding this program and reviewed the program material, it was clear to this Arbitrator that this is a very sensitive program to successfully navigate. Two advisors are selected by the Administration and are trained by staff from the Center for Supportive Schools. Then members of the junior and senior classes are identified to participate and are trained in the program, which consists of retreats and classroom exercises. Subsequently, these students work with the freshman class as part of the health program in a peer-to-peer sexual health program. Sex education is a very sensitive, complicated and difficult course to teach and as Moon stated, "we advise them (the advisors) to participate authentically and . . . to use your best judgment." Of course, the advisors are to follow Board policies and are advisors, not peers with the students.

Advisors and participants are encouraged to open up and talk about their personal experiences without being forced to reveal anything they did not want to reveal knowing that there is a level of confidentiality when participating in this program. For example, the document entitled "Sharing at the 3-Day Retreat," part of R-4, the Advisor Resource, manual states that

> Sharing is one of the exercises we'll be doing at the retreat. It's a great opportunity for us to get to know each other better. Part of operating an effective group is mutual trust. One way to develop this trust is by allowing ourselves to open up to each other in a non-judgmental environment. . .
> . . . Maybe you've suffered a loss that was life changing. Maybe you took

> a journey that will forever alter your life. Maybe you are struggling with an aspect of your life and are willing to share that struggle with others.

Advisors and participants are given license to encourage bonding experiences, which if not handled properly can lead to difficult situations and in the wrong hands can make students feel uncomfortable resulting in a negative experience. Further, though there was a family night as part of the training, who attended and how much did they realize the impact on the students? In the instant matter, students came away with different experiences as reflected in their interviews.

However, when reviewing all the documents and testimony regarding the TeenPEP program, it is hard to make a judgment about Respondent's behavior in the program. Did Respondent share too much, did she cry too much? That depends on the situation and who was participating. Participants who were interviewed had varying opinions on how Respondent behaved. On the one hand, it was clear that participants were encouraged to open up and express their emotions, which was a goal of the program, but on the other hand, there is a delicate balance of sharing too much and sharing certain kinds of experiences. Certainly, there was no evidence to convince this Arbitrator that tenure charges should have been filed against Respondent regarding TeenPEP but would suggest that both advisors receive additional training to assure that they are being consistent with the program as envisioned by Moon and the Center for Supportive Schools and not stepping over that line of being inappropriate.

In conclusion, this Arbitrator has reviewed and carefully weighed all the evidence and arguments presented at the hearing and through briefs by both parties even though many facets were not referred to in the Opinion. Considering all the facts, this Arbitrator

must decide that that the Board did not prove by a preponderance of the evidence that Respondent's behavior rose to the level of "conduct unbecoming" to warrant removing her tenure. However, there was more than sufficient evidence in the record to convince this Arbitrator that Respondent was completely inappropriate in her interaction with student JB even without ever hearing JB's testimony.

The text messages, acknowledged by Respondent as to their accuracy, stand on their own in support of the Administration's conclusion that Respondent stepped over the line regarding language, comments about Administration and advice to JB. However, given Respondent's long employment with one discipline on her record and good to very good evaluations and while she shall retain her tenure and her position in the District, a lengthy suspension is the appropriate penalty. Respondent recognized that her behavior was unacceptable and that, as she stated, she will never engage in this type of behavior in the future.

In consonance with the proof and upon the foregoing, the undersigned Arbitrator hereby finds, decides, determines and renders the following:

A W A R D

1. The Board of Education did not prove that tenure charges of "conduct unbecoming" should be sustained for Respondent's behavior. However, a one-hundred twenty-day (120) suspension, with time served, and salary loss shall be imposed.

2. Given that Respondent was paid the entire time she was suspended, she shall reimburse the Board of Education for the one-hundred twenty-day (120) day suspension.

3. Respondent shall be reinstated to her former positions in the District with no loss of seniority or benefits.

Mattye M. Gandel

Mattye M. Gandel

Dated: August 31, 2017

State of New Jersey)
:SS
County of Essex)

On the 31st day of August before me personally came and appeared Mattye M. Gandel, to me known and known to me to be the person described herein who executed the foregoing instrument and she acknowledged to me that she executed the same.

Notary Public

LILIANA E. GUTIERREZ
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires July 30, 2019