

**STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION**

In the Matter of Tenure Charges

**BRIDGEWATER-RARITAN TOWNSHIP
REGIONAL SCHOOL DISTRICT, BOARD
OF EDUCATION, SOMERSET COUNTY**

Petitioner,

-and-

STEPHEN MICHAELE,

Respondent.

AGENCY DOCKET
NO.: 69/4-19

OPINION AND AWARD

BEFORE: RUTH MOSCOVITCH, Arbitrator

Appearances:

For the Petitioner:

Nicholas Celso, Esq.
The Busch Law Group, LLC
400 Main Street
Metuchen, New Jersey 08840

For the Respondent:

Edward A. Cridge, Esq.
Melik O'Neill
51 East Broad Street
Hopewell, New Jersey 08525

This matter comes before me on tenure charges brought under N.J.S.A. 18A:28-5 and N.J.S.A. 18A:6-10, et seq., by Petitioner Bridgewater-Raritan Township Regional School District, Board of Education, Somerset County (the "District") against Respondent Stephen Michael. The tenure charges at issue here were certified to the Bureau of Controversies and Disputes by the District on or about March 13, 2019. I was appointed the arbitrator to adjudicate this matter on May 2, 2019.

In this proceeding, I heard testimony from twelve witnesses over 3 days – June 5, 13 and 14, 2019 -- at the offices of the District in Bridgewater, New Jersey. Both sides

were represented by counsel and were afforded the opportunity to call witnesses, present evidence and to cross-examine witnesses offered by the opposing party.

The District presented the testimony of Superintendent Russell Lazovick, Principal Charles Ezell, eight students and one parent. The District placed 31 exhibits into evidence, consisting of documents and a video recording. Respondent testified in his own behalf and placed five exhibits in evidence. All witnesses were sworn and the testimony of all but one witness was recorded by a court reporter; the parties agreed to accept the Arbitrator's notes as the official record of the first witness' testimony. The parties submitted post-hearing briefs prior to July 26, 2019. No objection has been made to the fairness of this proceeding.

TENURE CHARGES

BACKGROUND INFORMATION COMMON TO ALL CHARGES

1. Mr. Michaele has been employed by the Board as a High School Business Teacher since on or about September 1, 2013. As a member of the teaching profession and an employee of this District, he is at all times expected to conduct himself professionally in accordance with the law, school policies, regulations and provisions; to exhibit high standards of ethical behavior and sound judgment, as well as to refrain from inappropriate socialization, contact and fraternization with students. Further, Mr. Michaele is obliged, among other things, to serve as a role model to this District's students and maintain a high degree of self-restraint and controlled behavior.

2. Board Policy 328I, *Inappropriate Staff Conduct*, states in relevant part:

... the Board recognizes there exists a professional responsibility for all school staff to protect a student'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 students 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 students. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.

The Board recognizes and appreciates the staff-student professional relationship that exists in a school district's educational environment. This Policy has been developed and adopted by this Board to provide guidance and direction to avoid actual and/or the appearance of inappropriate staff conduct and conduct unbecoming a school staff member toward students.

School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to students or about students and shall not engage in inappropriate language or expression in the presence of students. School staff shall not engage in inappropriate conduct toward or with students. School staff shall not engage or seek to be in the presence of a student 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 students or for public display.

A school staff member is always expected to maintain a professional relationship with students and to protect the health, safety and welfare of school students. A staff member's conduct will be held to the professional standards established by the New Jersey State Board of Education and the New Jersey Commissioner of Education. Inappropriate conduct or conduct unbecoming a staff member may also include conduct not specifically listed in this Policy, but conduct determined by the New Jersey State Board of Education, the New Jersey Commissioner of Education, an arbitration process, and/or appropriate courts to be inappropriate or conduct unbecoming a school staff member.

3. Board Regulation, 3281 - Inappropriate Staff Conduct, states plainly that "Inappropriate conduct by a school staff member will not be tolerated by the Board of Education. Policy No. 3281 and this Regulation have been developed and adopted by this Board to provide guidance and direction to avoid actual and/or the appearance of inappropriate conduct and conduct unbecoming a school staff member to pupils" (emphasis supplied). The Regulation also provides more specific guidance concerning the nature of "inappropriate conduct":

(5.) "Inappropriate comments" includes, but is not limited to, comments of a sexual nature, sexually oriented humor or language, inappropriate comments about a pupil's clothing or physical appearance, comments with sexual overtones, comments regarding a pupil's dating partner or comments about the staff member's personal life that are not relevant to the professional responsibility of the school staff member.

(6.) "Inappropriate conduct" includes, but is not limited to, sexual misconduct, a request by a school staff member to a pupil for a social relationship outside the school staff/pupil relationship, sexually harassing conduct, inappropriate touching by the staff member to a pupil or permitting a pupil to inappropriately touch a staff member, corporal punishment, requesting a pupil to expose private parts of their body, other than for school medical purposes, and a staff member exposing their own private parts of their body to a pupil. Inappropriate conduct also includes physical contact between a staff member and pupil that is beyond the staff member/pupil professional relationship. This contact includes, but is not limited to, kissing, touching or feeling private parts of the body, holding hands or arms, and other contact that typically shows a sign of affection beyond the staff member/pupil professional relationship. "Inappropriate conduct" does not include a hug initiated by a pupil as a sign of the pupil's appreciation to a school staff member at a school sponsored activity such as school banquets, school recognition programs, graduations, etc.

(7.) "Inappropriate language or expression" includes, but is not limited to, the use of any profanity, obscene language, public lewdness or the use of public lewdness, comments with sexual overtones, distribution and/or discussion of any pornography.

(8.) "Inappropriate staff conduct" is any conduct prohibited by this Policy and corresponding Regulation including any other conduct deemed by the Commissioner of Education, the State Board of Education, statute, administrative code, and/or the judicial case law to be inappropriate conduct and/or conduct unbecoming a school staff member.

4. Board Policy 3280, "Liability for Student Welfare" states in pertinent part that:

Teaching staff members are responsible for supervision of students and must discharge that responsibility with the highest levels of care and prudent conduct.

(2.) The exchange of gifts between staff members and students is discouraged. . .

(4.) Staff members will not knowingly socialize . . . verbally except on matters initiated by the staff member that pertain to school-related matters. . .

(15.) Staff members will not associate with students at any time in any situation or activity which could be considered sexually suggestive ...

Staff members must be cognizant of the intent of this policy and should not put themselves in any position that could be perceived as a violation of said policy. Any violation of this policy may result in disciplinary action up to and

including dismissal.

5. Board Policy 5751, and its cognate Regulation, make it plain that the Board of Education also will not tolerate sexual harassment of students by school employees.

6. All Board Policies and Regulations, including the foregoing, are available on the District's public website.

7. Importantly, as more fully set forth below, Mr. Michaele's conduct is not an isolated incident, but rather involves a pattern of inappropriate conduct directed at a number of female students at various points in time. The incident initially giving rise to the Administration's investigation herein, involved the unwanted and uninvited kissing of a female student, "J.M.", by Mr. Michaele. However, further investigation revealed that Mr. Michaele has been engaged in a pattern and course of conduct over a period of time in which he has engaged in repeated acts of misconduct in violation of the foregoing policies and regulations, as well as the standard of conduct imposed by the Commissioner of Education upon every public school teacher in this State.

FACTS COMMON TO ALL CHARGES

8. During the 2018-2019 school year, student "J.M." was enrolled in Mr. Michaele's macroeconomics class.

9. On or about September 17, 2018, in the lobby of the 100 Building, at approximately 2:20 p.m., Mr. Michaele placed his arm around the shoulders of "J.M.", pulled her towards him and kissed her on the cheek. This action was observed and anonymously reported by a "concerned staff" member.

10. The foregoing incident was recorded on the School security camera. The High School Principal, Charles Ezell, and Assistant Principal, Laura Zamrock, reviewed the video. Upon observing the reported conduct, the Principal contacted the New Jersey Department of Children and Families ("DCF"), as well as the police.

11. Following completion of the DCF investigation, Principal Ezell undertook his own administrative investigation, in which, among other things, several students were interviewed and provided the statements annexed to the accompanying Sworn Statement of Evidence.

12. When the Principal's investigation was completed, he determined that Mr. Michaele's conduct was consistent with hostile environment sexual harassment and unbecoming conduct, warranting dismissal, subject to completion of an affirmative action investigation.

13. On or about January 4, 2019, Mr. Ezell notified the District's affirmative action officers of what he had found.

14. In due course, an affirmative action investigation was initiated by Dr. Gina Villani and Ms. Karen Jones, the District's Affirmative Action Officers.

15. On or about January 29, 2019, Mr. Michaele and his attorney, Edward Cridge, Esq., participated in a meeting with the Affirmative Action Officers.

16. At the aforesaid meeting, after reviewing the information that had been obtained through Mr. Ezell's investigation and interviews with students, Mr. Michaele admitted to engaging in most of the conduct, and said he could not either confirm or deny the remainder of the allegations against him. The allegations are set forth in the Affirmative Action Officers' report to the undersigned which is annexed to the accompanying Sworn Statement of Evidence in support of the within Tenure Charges.

17. The Affirmative Action Officers' report to the undersigned, dated January 30, 2019, sets forth the investigation results and recommendations.

18. In the above referenced correspondence, the Affirmative Action Officers determined that there was evidence of hostile environment sexual harassment, and recommended that the Board consider tenure charges.

19. After giving due consideration to all of the evidence set forth in the Sworn Statement of Evidence, the reports and findings of Principal Ezell and the Affirmative Action Officers, I hereby charge Stephen Michaele with conduct unbecoming a teaching staff member and/or other just cause for dismissal, pursuant to N.J.S.A. 18A:28-5 and 18A:6-10. As more specifically set forth below, it is clear that Mr. Michaele has exhibited a careless disregard for the professional and ethical standards imposed upon him as a member of the professional staff and has been engaged in a pattern and course of conduct that demonstrates that he is no longer fit to perform his duties as a public-school educator and an employee of this Board. I simply cannot, in good conscience, return Mr. Michaele to the classroom and take the chance that Mr. Michaele will continue in the manner described or even worse.

SPECIFICATION OF CHARGES

CHARGE I

Unbecoming Conduct and/or Other Just Cause Warranting Dismissal (Student "J.M.")

20. All of the allegations and facts set forth in the Background Information and Facts Common to All Charges are incorporated by reference as if fully set forth herein.

21. On or about September 17, 2018, in the 100 Building lobby, at approximately 2:20 p.m., Stephen Michaele put his arm around student "J.M." As she attempted to pull away, he pulled her back towards him and kissed her on the cheek.

22. The foregoing physical contact was initiated by Mr. Michaele, was uninvited and unwelcomed by the student, and forced on her against her will.

23. The afore described conduct by Mr. Michaele violates Board Policy and Regulation 5751, Sexual Harassment of Students.

24. The afore described conduct by Mr. Michaele violates Board Policy and Regulation, 3281, Inappropriate Staff Conduct.

25. The afore described conduct by Mr. Michaele violates Board Policy 3280, Liability for Student Welfare.

26. The afore described conduct by Mr. Michaele constitutes unbecoming conduct and/or other just cause warranting dismissal.

CHARGE II
Unbecoming Conduct and/or Other Just Cause Warranting Dismissal
(Student "E.A.")

27. All of the allegations and facts set forth in the Background Information and Facts Common to All Charges are incorporated by reference as if fully set forth herein.

28. During the 2017-2018 school year, "E.A." was as student in Stephen Michaele's class.

29. On at least one occasion during the 2017-2018 school year, when "E.A." raised her hand to ask a question during class, Mr. Michaele approached and then put his hand on her shoulder while answering the question. She recalls observing Mr. Michaele do this with other students on various occasions.

30. On the day of the Advanced Placement Macroeconomics Exam, "E.A." extended her hand to "high five" Mr. Michaele prior to taking the Exam. In response, he "leaned in" and kissed her forehead.

31. "E.A.'s" friends were confused when they observed the kiss.

32. "E.A." describes Mr. Michaele as "super friendly."

33. "E.A." describes other "awkward" encounters with students, including "long handshakes" and compliments about appearances.

34. "E.A." states that, to "many," Mr. Michaele's displays of affection were "seen as creepy."

35. "E.A." states that Mr. Michaele bought candy for students.

36. The afore described conduct by Mr. Michaele violates Board Policy 3289, Liability for Student Welfare.

37. The afore described conduct by Mr. Michaele constitutes conduct unbecoming a teaching staff member and/or other just cause warranting dismissal.

CHARGE III

Unbecoming Conduct and/or Other Just Cause Warranting Dismissal (Student "J.G.")

38. All of the allegations and facts set forth in the Background Information and Facts Common to All Charges are incorporated by reference as if fully set forth herein.

39. During the present school year, in Career Exploration, Stephen Michaele approached student, "J.G." at the end of the period and stated, "You look good in basic black," or words to that effect.

40. "J.G." was taken aback and replied, asking, "What"?

41. Whereupon, Mr. Michaele moved closer and whispered in her ear, repeating the comment.

42. "J.G." felt "very uncomfortable," especially since Mr. Michaele is a male teacher to whom she never speaks.

43. "J.G." telephoned her mother who told her to report the incident to her guidance counselor.

44. "J.G." reported the foregoing incident to Guidance Counselor, Evan Seavy, the period following the incident.

45. The afore described conduct by Mr. Michaele violates Board Policy and Regulation 5751, Sexual Harassment of Students.

46. The afore described conduct by Mr. Michaele violates Board Policy and Regulation, 3281, Inappropriate Staff Conduct.

47. The afore described conduct by Mr. Michaele violates Board Policy 3280, Liability for Student Welfare.

48. The afore described conduct by Mr. Michaele constitutes unbecoming conduct and/or other just cause warranting dismissal.

CHARGE IV

Unbecoming Conduct and/or Other Just Cause Warranting Dismissal (Student "S.S")

49. All of the allegations and facts set forth in the Background Information and Facts Common to All Charges are incorporated by reference as if fully set forth herein.

50. During the course of the present school year, Mr. Michaelae frequently engaged in interactions with student "S.S." not directly related to his duties as a teacher.

51. During the relevant time period, Mr. Michaelae participated in conversations with "S.S." about other classes and "other things going on in ... [their] lives."

52. In or about the time of the Christmas Holiday, "S.S." and her friends bought Mr. Michaelae a onesie, so that they "... would all have matching animal onesies."

53. The afore described conduct by Mr. Michaelae violates Board Policy and Regulation, 3281, Inappropriate Staff Conduct.

54. The afore described conduct by Mr. Michaelae violates Board Policy 3280, Liability for Student Welfare.

55. The afore described conduct by Mr. Michaelae constitutes unbecoming conduct and/or other just cause warranting dismissal.

CHARGE V
Unbecoming Conduct and/or Other Just Cause Warranting Dismissal
(Student "M.L")

56. All of the allegations and facts set forth in the Background Information and Facts Common to All Charges are incorporated by reference as if fully set forth herein.

57. At some time in or about the beginning of the current school year, Stephen Michaelae commented to student M.L. that she was "looking healthy."

58. The afore described conduct by Mr. Michaelae violates Board Policy and Regulation 5751, Sexual Harassment of Students.

59. The afore described conduct by Mr. Michaelae violates Board Policy and Regulation, 3281, Inappropriate Staff Conduct.

60. The afore described conduct by Mr. Michaelae violates Board Policy 3280, Liability for Student Welfare.

61. The afore described conduct by Mr. Michaelae constitutes unbecoming conduct and/or other just cause warranting dismissal.

CHARGE VI
Unbecoming Conduct - Pattern and Course of Misconduct over a Period of
Time

62. All of the allegations and facts set forth in the Background Information and Facts Common to All Charges are incorporated by reference as if fully set forth herein.

63. The afore described misconduct of Stephen Michaelae has occurred with multiple

students over an extended period of time; it is not an isolated incident of poor judgment or a mistake.

64. It is well established that the Commissioner of Education and the Courts recognize that the totality of a pattern of conduct may constitute unbecoming conduct, even when the individual acts comprising it, standing alone, may not. See, e.g. Cowan v. Bernardsville Bd. of Ed; Tenure Hearing of Greg Young/South Plainfield Bd. of Ed., and Tenure Hearing of Donald Dudley/Neptune Bd. of Ed.).

65. The course of misconduct set forth herein constitutes such a pattern of conduct unbecoming a teaching staff member.

66. This pattern and course of unbecoming conduct during an extended period of time, manifestly demonstrates Mr. Michaele's unfitness to continue to serve in a position of trust as a public teaching staff member, warranting his immediate dismissal.

ISSUE PRESENTED

Whether the Board has demonstrated by a preponderance of the credible evidence that the Respondent has engaged in conduct unbecoming a teaching staff member. If so, what shall be the penalty?

FACTUAL BACKGROUND

These tenure charges were brought against Respondent, a tenured high school teacher, after the administration at Bridgewater-Raritan Township Regional School District (District) initiated an investigation of an incident that occurred on September 27, 2018. During the investigation, as will be described below, the District learned of other conduct on the part of Respondent during the 2017-18 school year. There is virtually no factual dispute about any of the charged conduct; there is, however, a substantial dispute about (1) the context of each of the charged incidents, (2) their effect on the student body, and (3) the content and extent of training provided to Respondent by the District. There is also substantial dispute about the appropriateness of the penalty imposed by the District upon this teacher. Accordingly, I review the allegations in some detail below.

Grievant. Grievant came to teach at the District as a second career. Having attended Catholic parochial schools in the Bronx in his youth (Tr. III at 84), he attended Manhattan College where he graduated in 1980 with a double major in computer information systems and finance. He did graduate work in these fields, receiving an MBA in computer information systems and marketing in 1985, also from Manhattan College, and an MSE in Management of Technology from Wharton in 1999. Finally, he got a graduate certificate in project management from George Washington University. (Tr. III at 3-4)

With this educational background, Respondent pursued a career in IT in the business world, starting as a programmer at AT&T, where he initially spent 9 years. He moved up in the company, eventually becoming a manager over a group doing IT architecture for consumer services. In 1989, he left AT&T and spent the next 4 years consulting. In 1993 AT&T called him back to continue some work on a project that he had been working on when he left. He stayed with A&T this second time until 2002, becoming director of strategy and innovation at AT&T Broadband. (Tr. III at 5-6)

After leaving AT&T for the second time, Respondent was employed between 2002 and 2013 as the chief information officer at Direct Marketing Association, a fairly large trade association in New York. Thereafter he worked briefly as the Chief Information Officer at a small consulting firm. (Tr. III at 6)

At some point Respondent made a decision to leave the corporate world and become retrained as a teacher. He and his wife no longer needed the income, since two of their children had graduated from college and the third had a scholarship, and he found the corporate world wasn't fun anymore: he felt worn out by the traveling and commuting. (Tr. III at 6) His wife suggested that he find something "less stressful" and

suggested teaching. Because he had enjoyed teaching in the corporate world but did not want to teach at the college level, he looked into high schools. The District had one of the largest business departments in the area, so he began to work as a substitute teacher there. When a business teacher retired from the high school, creating an opening, Respondent applied. (Tr. III at 7)

He pursued an alternative path to certification, enrolling in a program at Raritan Valley Community College on Saturdays. (Tr. III at 56) Initially he completed a 24-hour course to get a temporary certificate. Then he was sponsored by the District to take additional courses while going through a first year of teaching, at the end of which he received certification. (Tr. III at 8) Respondent was hired as a teacher by the District for the 2013-14 school year. He took an approximately 50% pay cut to work as a school teacher, starting with a salary of \$60,035 (SD. 19 at BRRSD 72) as compared with his salary in the private sector of \$130-140,000. (Tr. III at 7) He achieved tenure.

Personnel record. During the five years that Respondent worked for the District, he never received any form of discipline. Each year he received an overall rating as Effective; for 2017-18, (SD 19 at 206); 2016-17, (Id at 234); 2015-16, (Id. at 289); 2014-15, (Id. at 302); 2013-14, (Id. at 333). Each year, the rating was accompanied by praise, for example, for:

- his hard work “to build a professional and personal rapport with the students and staff of the district (See, e.g., Id. at 333);
- creating a warm, safe, and exciting learning environment for his students (See, e.g., Id. at 258);
- building a teacher/student rapport “based on his abilities, knowledge and natural authority” (See, e.g., Id. at 224);

- demonstrating “patience, compassion, and humor while interacting with students” (See, e.g., Id. at 231);
- communicating with students in a way that “was positive, encouraging and he demonstrated a genuine concern for the students and their well-being.” (See, e.g., Id. at 323)

Respondent is repeatedly described in his annual evaluations as a “kind and caring teacher.” (See, e.g., Id. at 224, 347) He is also repeatedly praised for “going above and beyond” both within his department and throughout the high school, for example, by sponsoring student activity groups. (See, e.g., Id. at 206.)

In a letter to Respondent dated February 2, 2018, Superintendent Russell Lazovick commended him for his contributions to school staff, by teaching a workshop during a District-sponsored professional development activity day on a technological solution – GoogleApps –that “promoted independent learning.’ Dr. Lazovick was effusive with praise for Respondent’s workshop that “spoke to the hearts and minds of those who took it.” He praised Respondent for throwing “caution to the wind and shar[ing] your passion with your colleagues,” and concluded by urging him to “continue to *take the lead*,” stating “thank you for sharing your light with the rest of us.” (SD 19 at 99)

Letters from students. Respondent placed in evidence thank-you notes from approximately 23 students over several years. The notes mention how much the students enjoyed his class (R. 3e), how much fun they had in class (R. 3-a), how supportive they found him in and out of class (R. 3d), how he reduced their stress levels (R. 3d), and how he was one of their favorite teachers. (R 3a-k)

The incident giving rise to the investigation and charges herein. On

September 24, 2018, District high school Principal Charles Ezell, who had just started as principal July 1, 2018 (Tr. II at 10), received an anonymous letter in his mailbox. (Tr. II at 14) The letter stated:

I feel that it is necessary for me to bring this insident [sic] to you as it still bothers me after a few days of thought. I do however wish to remain anonomous. [sic]

On Monday 9/17 I and another teacher witnessed a teacher, [Respondent], kiss a student. It was on the cheek, and it was clearly unwanted physical contact on the part of the girl student. This teacher pulled her in by the shoulders and she clearly looked like she already wanted to pull away. This happened in the 100 building lobby right by where the parents sell the food afterschool. It happened at approximately 2:20 pm. I feel extrememly [sic] uncomfortable [sic] with the situation.

I just wanted to bring it to light.

Thank you
Concerned staff

(SB 1)

Dr. Ezell went to his Assistant Principal, Dr. Godown, and asked him to locate the security video that would show this location. (Tr. II at 19) The video was found and watched by the two administrators. (Id. at 20) It was also produced in this hearing, played for me, and is in evidence as SB 31. (Tr. II at 113) The video shows a group of three students walking through the lobby and moving toward the building exit. There is a table nearby where adults are selling food. Respondent is seen walking through the lobby with a piece of pizza in one hand. He notices the students and walks over to them and greets them. He puts his free arm on the shoulder of one of the students and kisses her on the cheek. Watching the video again in preparing this Opinion, I did not observe that the student “clearly looked like she already wanted to pull away;” the author of the

anonymous letter may, however, have had a different vantage point. The students' testimony about this incident is discussed below.

After this encounter, the students left the building. (Tr. II at 23-4) There is a second piece of video tape that was provided to me on a flash drive as part of SB 31. It was not played in the hearing. It shows Respondent and the three students outside, together walking away from the building. Respondent still has his pizza in his hand. He and the three students are walking side by side, talking. There is no touching.

With the help of his Assistant Principals, Dr. Ezell was able to identify at least two of the three students in the video. Dr. Ezell deemed the video to corroborate an interaction between Respondent and a student that could be "understood to be institutional abuse." Accordingly, he called the police and contacted the Department of Children and Families (DCF). He also reported the incident to Superintendent Lasovick and suspended Respondent pending investigation. (Tr. II at 26)

The police conducted a quick investigation and declined to press charges. (Tr. II at 27) DCF's investigation took longer. By letter dated November 2, 2018, which was received by the District on November 12, 2018, DCF made a finding that "Sexual abuse/sexual molestation is not established." (Tr. II at 28, SB 30) Subsequent to our hearing, on July 2, 2019 DCF issued a letter stating that its finding in the investigation was changed from "not established" to "unfounded." That letter was entered into evidence, without objection, to supplement the record. (R. 5)

The District's investigation into Respondent's conduct. After receiving the results of the DCF investigation, Dr. Lasovick decided that the District needed to conduct its own investigation into Respondent's behavior. He discussed the matter with the principal, Dr. Ezell, who conducted the investigation.

Dr. Ezell began by asking the student who was kissed in the video to come see him. He asked one of his assistant principals, Laura Zamrock, the 12th grade administrator, to assist him because the student involved was a 12th grader. He followed up by asking every student who was named by another student to also come down and see him. He had each student, individually, write a statement about her interactions with Respondent. He did not tell the students what to write, but followed the same framework with each one: (1) He told them the teacher's name; (2) he stated that the student may have information that would be useful for us to know; (3) he asked if the student was aware of any interactions that would be unusual or noteworthy." Then the students sat by themselves and wrote their statements. Afterwards, he and Ms. Zamrock questioned the students to clarify their states of mind and impressions: what did you think, how did you feel. The interviews all took place in early December 2018. Altogether, Dr. Ezell collected statements from 8 students, all of whom testified before me; their statements were all entered into evidence. (SB 3-10)

At the conclusion of his investigation, Dr. Ezell wrote up his findings in a memorandum addressed to Superintendent Lazovick. (SB 11) Dr. Ezell's conclusions and recommendations formed the basis for the tenure charges at issue here.

Charged Misconduct. Below I review the specific charges. I group the allegations by similar conduct.

Kisses on the cheek. There are charges, supported by testimonial evidence, concerning three different times when Respondent kissed students on the cheek or forehead. Four students testified to these incidents.

JH. Age 17, Senior. This was the student seen in the video being kissed on the cheek by Respondent. Her testimony matched her written statement:

- Respondent was her teacher for AP macroeconomics during the 2017-18 school year. She sat in front of the class with her friend, AJ. She had a “normal teacher student relationship” with Respondent, engaging in “friendly conversation during the year.”
- At the end of the year, at the suggestion of AJ, the two took a photo with Respondent; after that Respondent kissed both her and AJ “on the cheek, quickly;” (SB 3, Tr. I at 74)
- JH was “surprised” by the kiss, but not “uncomfortable” or “alarmed;” (Tr. I at 76); she discussed it with AJ: “We both said that we were surprised but neither of us felt like anything wrong I guess had happened. Neither of us felt like anything bad was happening.” (Tr. I at 77) Her relationship with Respondent “is casual and normal, I was not uncomfortable at any point.” (SB 3)
- JH also wrote and testified that in her senior year, the fall of 2018, she saw Respondent walking to the parking lot while she was with SS; they had a “brief conversation” and he gave her a “kiss on top of the head.” (SB 3, Tr. I at 81-82) She does not recall that Respondent put his arm around her or touched her in any way. (Tr. I at 82) She testified that it was the first time she had seen Respondent this year, “so we said hello and it was just friendly like a greeting.” (Tr. I at 83)

AJ. Age 17, Senior. She had Respondent as her teacher for AP macroeconomics during her junior year. (Tr. I at 93) Her testimony matched her written statement:

- On the last day of school of her junior year (2017-18), she and her friend, JH, asked for a picture with Respondent. They took a “selfie” “it seemed pretty normal.” (SB 5)
- After the picture, Respondent kissed JH and AJ on the cheek “in that order. (SB 5, Tr. I at 96) “It was just a light peck” (SB 5)
- She and JM both agreed that “it was strange but we didn’t think too much about it at the time.” (Tr. I at 97) Her feelings about the kiss changed, and she came to regard it as “more serious” after school administrators questioned her about it. (Tr. I at 98)
- She thought Respondent had an arm around her and JM for the picture but does not recall him touching either of them during the kiss (Tr. I at 102-3);

EA. Age 18, Senior. She was in Respondent’s 2017-18 AP macroeconomics class.

- When the AP macroeconomic students were lined up outside the gymnasium to go in to take their AP exam, Respondent, like other teachers normally do, accompanied them, sending them off “like marching into war.” (SB 7, Tr. I at 23) Normally teachers will be saying “good luck” and answering last minute questions, and that is what Respondent was doing: giving students “high fives” and being encouraging. (Id.) EA “high fived” Respondent, and he then kissed her on the cheek. She thinks he said, “good luck on the test.” (SB 7, Tr. I at 23-4)
- To EA, “it wasn’t a big deal;” (TR. I at 23) She thought Respondent was trying to be “comforting.” (Tr. I at 42) She thought Respondent was “showing affection like a friendly grandpa but to many this was seen as creepy.” (SB 7) Her friends in the class “were a little confused about what just

occurred.” (SB 7) She did not tell anyone about what had happened. (Tr. I at 28) She continued to feel comfortable around him. (Tr. I at 44)

- EA enjoyed Respondent’s class: “I thought it was a fun class. He was a good teacher. (Tr. I at 42)
- EA was very anxious and emotional while testifying. She told us that she had started taking medication for her anxiety, which had gotten worse during high school; all of her teachers knew about this, and she thought Respondent was trying to be supportive of her. (Tr. I at 42) At more than one point during the hearing, she asked to be excused to regain her composure. One of those times, I went outside and spoke with EA and her father, after which I put their comments on the record (Tr. I at 30):

While I was with the student and her father in the hallway trying to get her calmed down, he said, so I wanted to report what he said, that she was very upset because she felt badly for the teacher. She thought he hadn’t done anything wrong and she felt badly about being called to testify.

JV, Age 17, Senior. She was another student in Respondent’s 2017-18 AP macroeconomics class. She is a friend of EA.

- The class was outside the gym where the AP exams take place waiting to be called in and Respondent, since he was their teacher, was there “wishing us luck giving us high-fives.” EA was there, and Respondent “just like kissed her, not on the lips, just like on the face. It was really brief. She didn’t really react to it.” (Tr. I at 56, SB 6)
- JA remembers this event clearly: “I found it very out of place and unexpected. EA brushed it off and did not make a scene. It was time to enter the gym and take our AP Exam, so that was basically the end of it.” (SB 6)

Respondent's testimony. Respondent testified that he has given students “what I would call a peck on the cheek.” (Tr. III at 26) He specifically recalled giving students JM and AJ kisses on the cheek after they asked to take a “selfie” with him. He kissed them as a way of saying “a thank you for a good school year and the selfie. I don't have a lot of students asking me to take selfies with them.” Tr. III at 31)

Respondent did not recall giving EA a kiss going into the AP exam, although he does not deny it. He recalls that EA was nervous about all the tests, and he told her “don't worry about it, you know, she will do fine.” (Tr. III at 35)

He watched the video of himself giving JM a kiss. As he recalls the incident, it was the end of the day; they were all leaving school. She had been his student the prior year and was a very good student. She had given him a gift of fountain pens, which he found very thoughtful, because he collects fountain pens. It was the first time he had seen her this year, so “that was just a, hey, JM, how are you doing? How was your summer? It was welcome back.” (Tr. III at 32-3)

When asked where he got the idea that it was appropriate to kiss students on the cheek, he stated there were two influences on him:

- (1) It was a part of his Italian upbringing: “growing up just in family situations and with friends, that was something that we regularly did. It was a sign of respect. It was a sign of sometimes affection, sometimes it's a hello, sometimes it's a good luck. That was my experience.” (Tr. III at 27)
- (2) Teachers gave students kisses on the cheek in his parochial schools, both elementary and high school. “As tough as they were, there were teachers that were very approachable, very kind to the students.” Twice each year, his French teacher would give each student kisses on both cheeks in celebration of the 6-month anniversary of Bastille Day and the anniversary of VE day. (Id.)

Touching students. The District presented evidence of two kinds of inappropriate touching of students: touching them on the shoulders or arms while talking to them and giving “long high-fives.”

2017-18 Macroeconomics class: placing a hand on students’ shoulders or arms while talking to them. More than one student observed JG place a hand on the shoulder or arm of a student while he stopped to address that student’s questions. Other students did not observe this behavior.

- SS testified that Respondent touches the shoulders of students and would linger with a hand on their shoulder when talking to them. (Tr. I at 136) This happened many times, when SS or other students had a one-on-one question. (Tr. I at 138, 151) Respondent did it with both male and female students. (Id. at 151) It did not make SS uncomfortable. (Id. at 150)
- JV recalls that during AP class Respondent would approach students to answer their questions “by putting his hand on their shoulder and then proceeding to answer their question. This happened to my classmates and me.” (SB 6, tr. I at 61-2) This happened to her and she observed it with one other female student a couple of times for each of them. No one ever commented about it; the other students never told her they thought it was weird. (Tr. I at 62-3)
- JH does not recall ever seeing Respondent put a hand on a student’s shoulder while addressing that student. (Tr. I at 85)
- JA never observed Respondent touching a student by placing a hand on the student’s shoulder while talking to the student and does not know of anyone complaining about that. (Tr. I at 104)

Respondent does not dispute the student accounts, but was unaware of this behavior. (Tr. III at 22)

Giving a long “high-five” to students. ML, a student in the AP macroeconomics class, wrote that during the 2017-18 school year, Respondent congratulated her for a soccer win “and he gave me a “long high-five” or a “lingering handshake.” (SB 4, Tr. I at 118) She testified that she added that comment to her written statement because “Dr. Ezell told me both of these things that I think he wanted me to write down.” (Tr. I at 118) She did not observe Respondent giving other students long high-fives or lingering handshakes. (Tr. I at 119) She testified that it was not something that stood out to her as “strange or out of the ordinary;” (Tr. I at 118) but when pressed further by counsel, she testified that she thought it was “weird but not really uncomfortable.” (Tr. I at 119).

Respondent, when asked about ML’s testimony, stated that “honestly, the first time I heard the phrase long high-five I didn’t even know what that meant. I give a lot of high-fives to students and athletes...” (Tr. III at 19)

Receiving a gift of a “onesie” from students and posing with them for pictures. SS, a 17-year-old Senior, was a student in Respondent’s AP macroeconomics class during the 2017-18 school year. She also had him for a summer night-school class on coding before she entered high school. (Tr. I at 130) She and three of her friends (one male and three females) in the macroeconomics class gave Respondent a “gag” present at Christmas 2017. The present was an animal “onesie” – a baggy one-piece monkey costume that can be used as sleepwear. “[W]e thought it would be fun to give [Respondent] because he was our favorite teacher.” (Id. at 131) She testified that she and her friends got the idea because they had worn their own “onesies” to school on

Halloween. (Id.) Respondent did not give SS a gift but wrote her a thank you note. (Id. at 133)

At the end of the school year, after the AP exam was over, the group of friends decided they wanted to take a picture with Respondent with all of them in their animal onesies. They planned what day this would happen and asked Respondent to bring his onesie back to wear in school. (Tr. I at 153-4) They posed for a picture with Respondent that was entered into evidence as R. 1. The students and Respondent are all standing with their arms around each other's shoulders, wearing the onesies over their regular clothing and smiling broadly. (R. 1, Id. at 153) This did not interfere with any teaching in the classroom. (Tr. I at 153, III at 25-6)

When asked by Principal Ezell to write about her experiences with Respondent, SS wrote "this was one of my more favorite classes I've taken." She went on at some length:

My friends and I always had fun in that class and always talked to [Respondent] about other classes and other things going on in our life. [Respondent] always cheered us up. In fact, after my friend died in January, he was the only teacher who talked about it and said something meaningful and it really helped me when I finally came back to school. Also, during Christmas, I gave him a box of cookies, like I do for all my teachers, and a letter because I wanted him to write my rec [recommendation] letter. My friends and I also bought him a onesie for Christmas so we would all have matching animal onesies. He was one of our favorite teachers.

(SB 10) She explained in this hearing that her friend had committed suicide in January of 2018, and Respondent asked her if he should say something to the class and then he did so. He also spoke with her privately, letting her know that she could talk with him if she needed to and suggesting that she talk with her counselor and the grief counselor provided by the school. (Tr. I at 135)

Hugging students. SS testified that she gave Respondent a hug when she and her friends gave him their Christmas gift. And at the end of the school year, “I initiated a hug with him saying good-bye.” (Tr. I at 144) SS described the hug as a “normal hug.” (Id.)¹ Her friends also hugged Respondent. (Tr. I at 145) The hugs did not make her uncomfortable; she regarded them as the kind of hugs she shares with her grandparents; they were not romantic in any way. (Tr. I at 151)

Providing candy for students. There is no dispute that Respondent kept candy in his classroom for his students and for anyone else, like teachers, who asked for it. (Tr. III at 20) Respondent bought the candy from students and other teachers selling it for fundraising purposes. (Tr. III at 19-20) He got the idea to have candy on hand from another teacher, Jean McAteer, who told him he used it sometimes as an incentive for students. (Tr. III 20-1) Student EA testified that Respondent bought candy from students selling it as fundraisers and gave it to students: “That was just a nice thing he did as a teacher.” (Tr. I at 35, SB 7)

Commenting on students’ personal appearance. There was evidence concerning two separate occasions when Respondent made comments to two different female students about their personal appearance.

June 2018 comment to JG. JG never had Respondent as a teacher. (SB 29 at 1)² However, Respondent shared a classroom with Ms. Stroka, who taught a career exploration class that JG was in. One day in June 2018, when JG was in class,

¹ SB’s attorney questioned SS at length about the hug, the extent of body contact, etc. I found those questions frankly disturbing, an effort to pull out of SS that there had been a sexual aspect to the hugs she initiated, even though that was clearly not her experience. (See Tr. I at 144-7) During this questioning, SS stated, “I’m a little sick.” (Tr. I at 146)

² Because the court reporter was late, no stenographic record was made of JG’s testimony. Instead, the parties have agreed to use my notes as the official record of JG’s testimony. It is identified as SB 29.

Respondent was at his desk in the back of the room doing his class prep; he had no teaching duties in the class. JG was wearing a black outfit that day. (Id.) Her mother testified that the outfit was a “black stomper and a cardigan” that had been “tacked” so that it was not low cut. (Tr. I at 12)

Toward the end of the class, Respondent was exiting the classroom and passed by JG’s desk. When he was still a “comfortable distance” away, Respondent told JG words to the effect that “You look good in basic black” (SB 8) or “Black’s your color” (SB 9). JG was taken aback and said, “What?” Respondent came closer to JG and repeated his comment. (SB 29 at 1) There is no dispute that Respondent did compliment JG that day about her outfit. (Tr. III at 48)

There is some dispute, however, about how close Respondent came when he repeated the comment. JG testified that he came close to her, touched her on the shoulder, and repeated the comment by whispering in her ear. (SB 29 at 1) In the statement JG wrote about this incident on December 12, 2018, she wrote that Respondent “got closer and whispered into my ear,” but she did not say that Respondent touched her. (SB 8)

Student RW sat next to JG and witnessed the interaction between Respondent and JG. RW wrote a statement (undated) and testified in this proceeding. She observed Respondent say something “in a quiet tone” to JG. She could not hear what he said. She testified that she did not see Respondent get any closer to JG than 3-4 feet and did not see him whisper in her ear. (Tr. I at 170-1)

Respondent testified that he was about 5-6 feet away from JG when he made the first comment and moved back 2-3 feet to repeat. He did not whisper in her ear, and doubts that he placed a hand on her shoulder. (Tr. III at 17)

It is not disputed that this interaction made JG uncomfortable. (SB 29 at 1) She told RW so right after class, as RW wrote in her statement (SB 9) and confirmed in her testimony. (Tr. I at 168) JG also called her mother right after the class. (SB 29 at 1) Her mother was at work but took the call. She testified that her daughter was uncomfortable and upset. JG told her mother what Respondent had said, that Respondent had whispered in her ear, and that he had touched her on the shoulder. (Tr. I at 11) The mother told her daughter to discuss the incident with her guidance counselor, Mr. Seavey, and not with any other students. (Tr. I at 11) The whole incident upset the mother. (Tr. I at 13) JG texted her mother a bit later, upset again because the administration seemed to be talking to other people – “it was becoming an incident which, you know, it wasn’t her intention.” (Id.) The mother exchanged emails with Mr. Seavey, who told her that the Principal, Dr. Morrell, wanted to know how she wanted this handled. She replied that she wanted the school to handle this “according to protocol,” and that she wanted to hear directly from Dr. Morrell, about what was being done. (Id.)

As evidenced by Dr. Morrell’s subsequent email to JG’s mother (SB 28), and confirmed by Respondent’s testimony (Tr. III at 48-9), Dr. Morrell talked to Respondent about the incident later the same day. Dr. Morrell sent Respondent an email asking to see him: Respondent testified about their conversation:

I had gone over to see him and he was actually exiting the 900 building at the time so we were standing in the lobby of the 900 building. He had asked me did you say something to a student like you look good in basic black? I said yes. He

said he had received a complaint about it. I didn't know actually until today, not today, this week that the complaint came from J[G]'s mother, that he had received a complaint about it. *He told me that statements like that could be misunderstood and I needed to be more careful in the future.* That was it.

Q. What was your reaction to that conversation?

A. It upset me. I had asked Dr. Morrell if I should go apologize to the student. He told me no, I should just let it be. I made certain, then, for the rest of the school year that I stayed out of second period class. So I went and took my prep somewhere else and I hadn't seen JG again until she came in to testify.

(Tr. III at 48-9 Emphasis added.)

Dr. Morell sent an email to JG's mother letting her know that he had spoken with

Respondent:

I wanted to let you know that I spoke with [Respondent] regarding the comments made. ... He indicated that he did make the comment as he left the room, but it was meant to be a compliment. I mentioned that students do not always perceive things that way and that it was not a comment that should've been made. He understood and agreed that he would comply. I'm not sure if he even knows your daughter's name and I know she doesn't have him as a teacher.

I'm confident that the matter has been resolved, but should anything else arise please don't hesitate to let me know. Thank you for reporting this incident. We want [JG] to feel comfortable on this campus and are here to support her.

(SB 28) Dr. Morrell did not report the incident to the Superintendent, and nothing was put in Respondent's personnel file.

Respondent gave two reasons for his compliment to JG that day. First, he often complimented students who were well dressed. He explained that the District does not have a dress code, and some students dress "atrociously," so he likes to compliment others who dress nicely, male and female alike, like basketball players in jackets and ties before a game, singers dressed for concerts, "things of that nature." Second:

[W]e are a school of business and business education and proper dress is important in the business world. I don't know if it is still the case, but part of a

rubric at one time for interviews, practice interviews for these students, included professional dress. So it is something that I notice.

(Tr. III at 16)

September 2018. ML is currently a senior. She is 18 years old. She was in Respondent's AP macroeconomics class in the 2017-18 school year. (Tr. I at 112) In the fall of the current year, she was on her way to the bathroom and passed Respondent, who was in the hall on bathroom duty. (Tr. I at 113) She said "hello" to Respondent, and he said, she was "looking healthy." (Id., SB 4) She did not know what he meant by the comment and thought it was "funny" "Just because of the oddity of it. ... It was a little strange." (Tr. I at 114) She could not recall his making any other personal comment, and it did not make her uncomfortable. (Id.)

Respondent recalled talking with ML at the beginning of this school year. She stopped by to say, "hi" while he was in front of his classroom, waiting for students to come in. (Tr. III at 18) He recalls the interaction this way:

I had asked her how her summer was. She said good. I asked her what she did. She said, well, I was playing soccer all summer. I said who do you play for. She told me she plays for a club team named PDA, Professional Development Academy. That is a very elite club team. I know that because my own daughter played for PDA for one year. So she had been playing all summer. I went ahead and I told her, well, you look healthy. The reason for that is the important thing to an athlete, in particular an athlete that wants to play in college, is staying healthy. Being injured hurts that. She was going into her senior year and I knew she wanted to play in college. I told her, well, you look healthy. I wished her a good season and that was the nature of the conversation.

(Tr. III at 18-19)

The recommendation of tenure charges. Both Principal Ezell and Superintendent Lazovick testified about their conclusions that the conduct at issue here was inappropriate and unbecoming as well as their conclusions that discharge was the appropriate penalty.

Dr. Ezell testified that after he finished the interviews described above and consulted with AP Zamrock, he concluded that “the behaviors that I saw and experiences students had were consistent with (1) sexual harassment, (2) hostile workplace, and (3) conduct unbecoming. He was “not comfortable having [Respondent] at campus any longer.” (Tr. II at 45)

Dr. Ezell had “concerns that this was not isolated this was a pattern of behavior;” he thought that a penalty less than dismissal would allow Respondent to go to another school and put other students at risk. (Tr. II at 47) He was also concerned by the students’ reports that they found Respondent’s conduct “not unusual” or “normal.”³ He explained that Respondent’s conduct would not be appropriate for any boss with a subordinate and “certainly not appropriate for a teacher with a student,” because there is an imbalance of power with younger subordinate students unable to say no. He thinks that it is “not appropriate for students to think that interactions like that are normal or regular because they are not. And if they are that is indicative of an expectation that is unhealthy and will have an impact the rest of their lives;” they may have bosses in the future to whom they are not comfortable saying no. “I think the younger you are the less likely you are to feel empowered to say no” (Tr. II at 51)

Asked about the practice of exchanging gifts with students, Dr. Ezell acknowledged that District policy allows teachers to accept gifts from students: “small gifts are not reason for concern.” (Tr. II at 53) Dr. Ezell, nevertheless, was concerned about Respondent giving candy to his students. His concern came out of his experience in a former school district where a teacher had a pattern over years of providing gifts

³ The District’s attorney asked Dr. Ezell about student use of the term “normalized;” to which he replied, “That was not my language.” (Tr. II at 50) I did not locate that term in any student statement. Students did use the terms “normal” about their relationship with Respondent (JH, SB3; AJ, SB5; SS Tr. I at 144).

and candy to students to whom he then made sexual overtures. That case resulted in 40 criminal counts against the teacher. The prosecutor in that case referred to the teacher's gift giving as "grooming behavior." (Tr. II at 52-3) When asked to review his notes (SB 18), his report to the Superintendent (SB 11), and the student statements (SB 3-10), he acknowledged that there is no report that Respondent gave any student a gift, and no report that he gave any particular student or students candy – only that he had candy available in his classroom. (Tr. II at 56-60) He further acknowledged that the district does not have a policy against teachers bringing cookies or candy or a treat in for a class. (Tr. II at 61)

In his formal report to the Superintendent dated February 26, 2019, Dr. Ezell stressed the following points:

- The student reports were credible, because they were consistent, verified by other witnesses, and not all the students are part of the same peer group;
- The evidence established "a pattern of behavior where he makes frequent physical contact with female students and comments on female students' physical appearance;"
- Respondent's conduct was unwelcome, "was severe and persistent" and adversely impacted the educational environment by "altering student's sense of security."

(SB 11) Dr. Ezell could not point to any specific student or students who were adversely impacted by Respondent's conduct: that was his deduction. (Tr. II at 96) It is his contention that students who witness or hear about an inappropriate act by a person in power toward another student are themselves likely to feel unsafe. (Tr. II at 104-5)

In addition to completing his own report, Dr. Ezell recommended that the District's Affirmative Action Officers conduct another investigation. The Officers

reviewed the statements of the students gathered by Dr. Ezell and also interviewed Respondent. In a report dated January 30, 2019, the officers recommended that Respondent “should receive consequences for his actions.” They recommended the District consider tenure charges; alternatively, if Respondent’s employment continued, “it must be made clear to him that any future deviation from district policy or misconduct will lead to additional discipline, up to and including termination.” (SB 12) Asked if he thought Respondent could be remediated, Dr. Ezell, who had been Respondent’s principal for less than one month, (Tr. II at 10) replied that he did not know the Respondent well enough to say; it would be speculation. (Tr. II at 111)

Dr. Lazovick reviewed the reports and recommendations from Dr. Ezell and the Affirmative Action Officers, as well as the student statements discussed above, which were appended by Dr. Ezell to his report. He concluded that Respondent’s conduct – the kissing of students, physical contact with them, and making personal comments about appearance – was inappropriate and violated Board policies against sexual harassment and inappropriate behavior. (Tr. II at 130-3) Dr. Lazovick asserted that the District follows progressive discipline. (Tr. II at 134) He summarized the evidence presented to him that he deemed inappropriate: Respondent “put his hands on a student in any way, shape or form” over a period of time, when there “had been a conversation in the middle of these documented incidents,” before he and Dr. Ezell had become aware of them. That conduct was “unacceptable.” (Tr. II at 134) By prior conversation, he was referring to the emails between the former Dr. Morrell and JG’s mother, documenting that the principal had spoken to Respondent. (SB 28, Tr. II at 135) When asked if those emails constituted a “warning,” he replied, “Not so much

warned.” He went on to state that in his view, simply putting hands on a student is grounds for termination:

[A]ctions sustained of this nature are on their own in any district I have been in grounds for termination. You do not put your hands on students The simple fact that he had already received a conversation in some way, shape or form didn’t change my mind in any way, shape or form.

(Tr. II at 136)

Dr. Lazovick was asked whether he regarded all touching of students, regardless of context, to be inappropriate. He said he did, but admitted that as a former coach, he has seen coaches slap student athletes on the back or put an arm around their shoulders. He stated that at the District high school “we work with coaches” to ensure that any physical contact is mutual.” (Tr. II at 143) Asked about student-initiated hugs, for example, at graduation, he replied,

That is where we have to be careful. Correct. We at times can’t physically restrain students, but it is about who is initiating in that respect.

(Tr. II at 146) District policy 3281(5) expressly exempts student-initiated, thank-you hugs. The Superintendent acknowledged it is possible for both parties to view hugs and kisses as non-sexual. (Tr. II at 161)

Dr. Lazovick testified that his concern was that “this pattern of behavior will not be broken and I cannot risk other students being put into an environment where we have this type of result.” (Tr. II at 150) Shown pictures from the school’s website of two teachers or staff members posing for pictures with their arms around the shoulders of students, the Superintendent was asked if those poses violated the District’s training. He replied that in both situations there had to be a conversation with the teachers; he was not aware there had been a formal complaint about this behavior, but he would have to have a conversation with those teachers. (R. 4a, b, Tr. III at 126) Shown

pictures of President Obama and Secretary Hillary Clinton hugging students at a graduation and at a school, he saw “no imbalance of power:” “I would hope this would be appropriate.” (Tr. II at 176)

The Superintendent testified regarding the state-mandated, annual training given to District employees about sexual harassment and related subjects. The District uses online training modules and videos. The District placed in evidence two screen shots identified as the particular training slides relevant to the issues in this case. The text of the two slides was:

1:01 Types of Staff-student Sexual Harassment

Teachers may also make harassing comments. Staff-to-student harassment might also include hugging students, complimenting them inappropriately, making sexual gestures, and suggesting they hang out outside of school. IN other words, staff-to-student sexual harassment is often much more subtle than the stories that are hyped up in the news.

1:49 Avoiding Accusations of Harassment Against you

In order to avoid any appearance of improper behavior, you should give students space by not standing too close. Avoid touching students for any reason. Avoid meeting one-on-one with students in a closed room. Compliment students only on merit, such as grades or accomplishments in sports, school-affiliated extracurriculars, or college acceptance. Never comment on a student’s actual or perceived sexual orientation, dating life, or relational partners. Never transport students in your own vehicles. Always be fully aware of how your comments or actions might be perceived.

(SB 31, Emphasis on original.)

The Superintendent identified the above slides as being from the 2019 training, after Respondent was suspended; he did not know whether those two slides were included in the training that Respondent took in prior years. (Tr. III at 123) While the Superintendent believed that Respondent had taken the training that included these two slides, (Tr. III at 112), the District’s records show only that Respondent completed

training modules on student issues with sexual harassment and staff to student sexual misconduct in August 2017 and July 2015. (SB 22 at 382)

Respondent's response to the charges. As noted above in the sections discussing interactions with particular students, in general Respondent admitted that the charged interactions took place. He acknowledged the remark about looking good in black to JG, and the remark "you look healthy" to ML. He also acknowledged the kisses on the cheek – what he called "pecks" on the cheeks – to students JH and AJ as well as to JM. He has kissed male students on the cheek, as well, in particular two students, who came to say goodbye at the end of the year. (Tr. III at 36-7) He does not recall, but also does not dispute, that he kissed EA on the cheek. (Tr. III at 35)

He testified that he was not aware that he put a hand on the shoulder of students when answering their questions, but does not dispute that, either. (Tr. III at 22) And he was not aware of giving "lingering" high-fives; he gives a lot of high-fives. (Tr. III at 19)

Asked if he ever stopped to think a student might not want a peck on the cheek from him, he said, he had not. "Probably because, to me, a peck on the cheek was – it was friendly. It was – it was a way to...maybe, you know, celebrate something, maybe say good luck, maybe say, you know, hello, haven't seen you in a while. It wasn't anything that was sexual in nature." (Tr. III at 36)

When Respondent was asked if he believed he had the ability to change his behavior if he was permitted to return to school, that is, if he thought he was capable of maintaining rapport with students without giving hugs or kisses or putting his hand on their shoulder, he replied, "I believe so. I mean I like to think – I believe in lifelong learning. When you make a mistake, you know, learn from it and do better, so, yes." (Tr. III at 41)

POSITIONS OF THE PARTIES

The District argues that it has met its burden to prove the tenure charges by a preponderance of the credible evidence in that (1) the District has established the facts alleged in the charges; these facts show that Respondent kissed students on the cheek on multiple occasions; the kisses were unwanted; the facts further establish that Respondent repeatedly engaged in other inappropriate behavior with sexual overtones, including making personal comments to two female students about their appearance, and touching students, including by placing his hand on their shoulders and hugging them; these actions violated Board Policies and Regulations, including policies prohibiting Inappropriate Staff Conduct (District Policy 3281, SB 15, 16), Liability for Student Welfare (District Policy 3280, SB 17), and Sexual Harassment of Students (District Policy 5751, SB 13, 14); (2) the District has further established that Respondent accepted an inappropriate gift of a “onesie” article of sleepwear, in violation of District Policy discouraging the exchange of gifts between staff members and students; (District Policy 3280, SB 17); he made matters worse by donning the onesie and posing for pictures with students during class time; the item has clear sexual overtones; (3) the District additionally proved that Respondent’s conduct was unbecoming, regardless of whether it violated Board policies or state law; (4) the conduct conveyed at least the appearance of impropriety and was inappropriate in any case, whether sexual or not; all of the conduct was uninvited by the students, and, although some of the students stated they were not offended or overly concerned, almost all of the students regarded the conduct as undesirable, weird, and confusing; (5) even if the conduct was not sexually motivated, the physical contact Respondent initiated with students clearly had sexual overtones, since the recipients of hugs were 16 and 17 year old attractive females, a fact

that can hardly have been a coincidence; Respondent was in a position of power vis-à-vis the students; this was the kind of conduct that students might come to believe later in life they could not say “no” to, teaching them negative lessons about how to deal with advances from supervisors as they enter the workforce; (6) the fact that the DCF made a finding of “unfounded” about these incidents is irrelevant; Respondent must adhere to District policies, and, as the District’s thorough investigation showed, he did not over a significant period of time; (7) the facts in this case are similar to other cases where Arbitrators and the Commissioner have sustained discharge for patterns of conduct by staff who thought they were acting in a fatherly or grandfatherly way and did not intend harm, but could not control their ingrained habits toward students; (8) Respondent was not only trained by the District to avoid the behaviors at issue here, but he was specifically warned after a student complained that he had made a personal comment to her about her appearance; his Principal spoke to him and admonished him to exercise caution in his interactions with students in the future; the admonition satisfies the District’s preference for progressive punishment, but even if it did not, the Respondent’s pattern of conduct of putting his hands on multiple students merits termination; (9) the evidence is clear that Respondent never really thought there was anything wrong about his conduct; indeed he was unaware of much of the touching; his assurances and promises that he will be able to refrain from such conduct in the future strain credulity; he should not be given any further opportunities to harm students by exposing them to further misconduct; rather, the District has a duty to protect the welfare of the students entrusted to its care. In sum, because Respondent has forfeited the trust of his Principal and the Superintendent and betrayed the public trust and that of the District who expect nothing less than the highest standards of professional behavior and avoidance of even

the appearance of impropriety, termination is appropriate; Respondent must be dismissed.

On the other hand, Respondent argues that the facts established on this record do not warrant Respondent's termination from his tenured teaching position in that (1) the interactions between Respondent and his students were not prurient, sexual, power-driven, or, with one exception, even unwelcome; rather they were expressions of fondness from a deeply committed teacher toward the students in his charge, and were so understood by the students who regarded Respondent with affection and esteem; (2) under the applicable legal standards, the Arbitrator in this case has no authority to rewrite or transmute the charges; this Respondent is charged with conduct unbecoming, not hostile work environment sexual harassment; moreover the Arbitrator is required to independently determine the appropriate penalty, if any, to be imposed and to give no consideration or deference to a District's decision to seek termination; (3) generally progressive discipline is applied to findings of unbecoming conduct; indeed, the District's own policies require progressive disciplinary measures, including verbal and written warnings as appropriate, providing for progressive penalties for repeated violations; failure to give prior warnings may be a reason used by an arbitrator to refuse to sustain disciplinary action, particularly termination; (4) termination is a draconian penalty, not always warranted even in the face of significant misconduct; arbitrators have refused to impose termination in cases involving significantly more serious misconduct than what is at issue here; this is particularly the case where a teacher's wrongful actions are not cruel, premeditated, or vicious; (5) Respondent had a record as an effective, caring and compassionate educator, coming to the profession after a career in the corporate world in information technology; he has received Effective ratings each

year and positive feedback for going above and beyond with students in the classroom and as advisor to student extra-curricular groups; he has also received notes and letters from his students thanking him for being kindhearted, caring, compassionate, sincere, resourceful and making the class fun; these sentiments were repeated in the written statements of the students and in their testimony in the hearing; (6) while Respondent does not dispute the incidents alleged, the evidence establishes that his conduct was not sexual or romantic, but rather friendly and supportive and was understood as such by the students; all but one of the students testified that they were and continued to be comfortable with Respondent after the conduct at issue; the one student who felt uncomfortable complained, and Respondent's principal spoke to him, telling him that his compliment of the student's dress could be misunderstood and Respondent should be more careful in the future; that interaction was very brief; there was no formal or informal admonition and nothing was placed in Respondent's file; (7) Respondent's use of kisses on the cheek comes from his Italian cultural background, where such gestures are signs of respect, affection, sometimes a "hello", sometimes "good luck;" the gestures were not sexual in nature, and Respondent had made such gestures with male as well as female students; (8) this has been a horrible experience for Respondent, he has learned from it, and he would diligently find other ways to support students in the future; he would be able to change his behavior; (9) Respondent did not violate District policies: the prohibition against physical contact is clearly directed toward romantic or sexual contact and does not apply to pecks on the cheek or a "grandpa hug;" moreover, District policies specifically exclude hugs that are initiated by students; further, while District policy discourages the exchange of gifts between staff and students, it specifically states that gifts from students may be accepted as long as they are of a nominal value and are

not encouraged; the only gift Respondent is charged with accepting is an animal onesie, not of particular value and given by a group of students; (10) the District has failed to prove that Respondent in fact received the sexual harassment training testified to by the Superintendent; the District's own records do not establish that he had that training annually, or that the training included the two slides identified by the Superintendent as advising staff to "avoid touching students for any reason;" (11) the District is unable to appreciate the distinction between prurient or power-driven contact between staff and students and perfectly normal physical expressions of fondness, empathy, celebration, or support; when shown photographs from its own website of District staff members with their arms around students' shoulders, the Superintendent claimed that such conduct might violate the District's policies, yet he has taken no action in the past where he has witnessed staff-student physical contact because no complaints had been made, no one was uncomfortable and the environment was "not unhealthy;" the Superintendent's conclusion that Respondent was making students uncomfortable is not supported by the record; indeed, the District's decision to pursue tenure charges against Respondent has caused more harm to the students than anything Respondent has done. Because Respondent's actions were not intended to and did not cause any appreciable harm, this is clearly the sort of case where progressive, remedial measures are appropriate. Accordingly, this much-loved teacher should be returned to the classroom; his removal would be a loss for the District's study body. For all of these reasons, termination is not warranted, and the Arbitrator should exercise her discretion to issue a penalty less than discharge.

DISCUSSION

This case involves a teacher who by all accounts was much beloved by his students. He engaged their interest and was friendly and supportive of them. His friendliness took a number of forms, some of which were appropriate and not outside the District's policies, while others involved physical contact that was not appropriate and violated District policies. There were three instances where he kissed students on the cheek, all in public settings and in specific contexts that might have been appropriate within Respondent's cultural upbringing and experience. The kisses were not intended as sexual and were not perceived by the students as such; no student complained about any of the kisses. Nevertheless, they were confusing and uncomfortable for some students involved either as recipients or witnesses, and they were inappropriate for a teacher in the District. These instances of kissing students constitute conduct unbecoming a teacher. There were also multiple times when Respondent placed a hand on students' shoulders while speaking to them. This conduct, too, was not intended by Respondent as sexual, and it was not perceived by the students as such; no student complained about these touches. Nevertheless, habitual touching of students while speaking to them is inappropriate for a teacher in the District and constitutes conduct unbecoming a teacher.

Finally, Respondent made two comments to female students about their appearance. The first was a comment about a student's clothing. This was inappropriate, despite the teacher's intention merely to compliment a business student on appropriate attire. The student found the remark uncomfortable both in content and the way it was delivered, and she complained about it to her mother, who complained to the District. Respondent was admonished by his principal and warned to be more

careful in the future; he was not disciplined for this remark. The second remark was to an athlete and consisted of an observation that she “looked healthy.” This remark was inartful – had he expressed the observation as a question, for example, there would not have been a problem. But the student remembered the remark: she thought it was “funny,” but it did not make her uncomfortable. She did not complaint about it, and, looked at objectively, it was, at most, a minor incident and should not be the basis of disciplinary charges.

The remaining incidents for which Respondent was charged were not inappropriate and cannot form the basis for any disciplinary action nor can they be considered in aggravation of the charges that were established as violating District policies. The evidence establishes that on two occasions, both at the end of school terms, a student initiated a hug with Respondent. There was nothing sexual about the hug, not on the part of the student nor on the part of the teacher. Hugs initiated by students are expressly exempted from the District’s policies. Likewise, a group of four students gave Respondent a gag present of an animal onesie. While the exchange of gifts between students and staff is discouraged, District policies expressly allow staff members to receive gifts of minimal value from students. There was nothing sexual or inappropriate about this silly article of clothing, even if can be regarded as sleepwear; it was not an item of great value. The hugs and the gift cannot form the basis of any tenure charges. Nor is there anything sexual about adults and students placing their arms around one another’s shoulders when posing for a picture. I cannot find that District policies forbid such commonplace gestures.

Finally keeping candy in a teacher’s classroom for students or others to take does not violate any District policy. Indeed, the evidence establishes that the school has a

culture of encouraging the selling of candy and pizza by students, teachers, and parents to support extracurricular activities. The District does not dispute that other teachers keep candy in their rooms and use it to reward students. There is no evidence that Respondent gave candy to particular students or in any particular way. Nothing about the candy violates District policies, and it cannot form the basis of any tenure charges.

In this era of evolving cultural expectations, conduct between teachers and students must be examined carefully and in context. Some conduct may be ill-advised but well-intentioned and not upsetting to students. It is just as important to identify that type of conduct and treat it with a measured response, as it is to expose and punish conduct that is prurient and predatory. I find that Respondent's kisses or pecks on the cheek and placements of his hand on students' shoulders fall into the former category: they are gestures of friendliness, given in particular contexts -- a greeting, a goodbye, a thank you for a good year or good luck on your exam -- meant to express support. They were not intended to be sexual in nature, and they were not seen as sexual by the students involved. They were, however, confusing to some students and perceived as "weird" by others. Such gestures have no place in a public school setting. They were misconduct, but neither "persistent" nor "severe;" they were not egregious misconduct.

In urging me to find Respondent guilty of all charges and uphold the penalty of discharge, the District cites a number of cases that it argues are precedent for the ultimate penalty based upon the facts here. Of the cases cited, the one most similar to the present case is that of *I/M/O Tenure Hearing of Marvin Davis and the SD of Asbury Park*, (Symonette, Arbitrator, 2014) Arbitrator Symonette upheld the discharge of a long term custodian who was charged with conduct unbecoming a school employee for touching and pulling the hair of several students and hitting them on their backs.

There were some similarities in that the touching took place in public areas of the school, such as in the cafeteria, in front of other students and adults, including in front of the mother of one girl. Further, the custodian testified that he came from a large family where such touching was seen as “natural” and an expression of affection.

Nevertheless, the differences are significant:

- The students involved were fourth graders;
- The incidents were unrelated to any legitimate interaction with the students; sometimes the Respondent would sneak up on the girls and punch them in the back (p. 6);
- Respondent pulled the hair on several girls so hard that their heads were bent backwards (p. 6);
- All of the students interviewed stated they felt uncomfortable with Respondent’s actions, which felt “very weird” (p. 10, 11)
- Respondent had a disciplinary history: he had been counseled about inappropriate contact with students during his probationary period (p. 22); he was reportedly involved in similar incidents at two other schools (p. 9); he was previously disciplined for an unrelated matter (p. 22)

Respondent argued that he was “just playing around” and being “ a very loving grandfather” (p. 12), and if reinstated, he would never touch a student again (p. 13). However, Arbitrator Symonette found that while his actions might be appropriate with family, there was an issue of “impulse control in the school environment.” (p. 23) He was unconvinced that Respondent would be able to refrain from the activity in the future and consequently upheld the discharge. (p. 22-3)

The evidence in the present case, presents quite a different set of facts from *Davis*. The students involved were high school, advanced placement students, rather than fourth graders; the actual physical contacts, were (1) a brief kiss on the cheek as one student was going into the AP exam with her classmates; (2) a brief kiss on the cheek by way of greeting in the school lobby as Respondent met a group of students; (3) kisses on the cheeks of two students after they asked for a “goodbye” selfie at the end of the school year. None of the four students complained about these kisses, which occurred in very specific contexts. By contrast *Davis*, the janitor, had no reason to interact with any of the young girls whose hair he touched and pulled vigorously; his touches had no explanatory context.

The District also cites the cases of *I/M/O Tenure hearing of James Dunckley and Rockaway Township BOE*, (McKissick, Arbitrator, 2016) and *I/M/O Tenure hearing of George McClelland and SD Washington Township* (Erickson, ALJ, 1983) as similar to the present case. I find both cases dissimilar and unhelpful. In *Dunckley*, the Respondent was accused of repeatedly touching two thirteen-year-old students on their legs, shoulders, collarbones, backs, and, in one instance, on the chest. The school psychologist testified to the traumatic harm this behavior caused the two students. The Respondent did not choose to testify or offer any evidence in his defense, although he made limited admissions in his written response to the charges. Finally, he had been counseled and warned of this type of behavior previously. In *McClelland* the teacher was accused of habitually and flagrantly “touching, caressing and hugging minor female” middle-school students. (p. 227) The allegations included the Respondent reaching his hand inside a girl’s slacks to touch her on her bare buttocks and inside another girl’s blouse, causing her bra to become undone. (p. 229) Respondent had been

cautioned about touching pupils in 1978 and again in 1983. The Hearing officer did not find all of the allegations to be credible and further found that Respondent's touching of pupils was "a father-figure type gesture, rising from an inner conviction that body contact has certain psychological values in the education process," (p. 238) and was "a reflexive habit deeply ingrained from his many prior years of teaching" (p. 239) He recommended that Respondent be reinstated, but the Commissioner ordered the Respondent terminated because of his "admitted inability to keep his hands off female pupils, even after the advice and direct order from his superiors." (p. 246) These two cases are not remotely similar to Respondent's conduct in this case.

I found the two administrators who led the investigation in this matter and recommended the tenure charges against Respondent to be sincere and well-intentioned. When they received a complaint about Respondent kissing a student on the cheek, they had a duty to investigate and they tried to be thorough and objective. They were justifiably concerned that such kisses could be perceived as power plays or sexual, if not by the students who received them, then possibly by others who observed them. They were also concerned to learn that the kisses and touches appeared to be habitual – conduct that Respondent was largely unaware of and thus would not be able to stop.

Nevertheless, the administrators over-reacted, piling on charges for conduct – accepting hugs and a humorous gift -- that was not only innocent but expressly permitted under District policy.⁴ Further, they put the students through an unduly long and upsetting process. The precipitating incident took place in September, at which time

⁴ Principal Ezell also appears to have been unduly influenced by his experience with serious and criminal sexual contact between a teacher and students in another district.

students learned that Respondent had been suspended; they were not interviewed until December; and they were called to testify before me in June. While some students expressed more emotion than others in their appearances before me, almost universally, the student witnesses expressed appreciation for Respondent as a teacher and testified they had not been particularly upset, if at all, by Respondent's gestures of friendliness and support. Several indicated they were upset by the process of having to testify against their teacher.

There was one student who had been upset and had complained in June 2018. Her complaint had been handled by the Principal at the time, who admonished Respondent and cautioned him that "statements like that could be misunderstood" and he "needed to be more careful in the future." The Principal did not regard the matter as serious enough to either report it to Superintendent Lazovick or to document it in Respondent's personnel file. Thus, contrary to the District's arguments, that incident did not put Respondent on notice in any way that his physical gestures of support were inappropriate or violations of District policy.

The District argues that any reasonable teacher should have known that kisses – even on the cheek – and habitual touches on the shoulder violated District policies against sexual harassment. I agree Respondent should have known such physical contact, even if non-sexual, was inappropriate.

But Superintendent Lazovick goes further, stating that all touching of students, regardless of context, is inappropriate – "You do not put your hands on students." The District has utterly failed to prove that its policy forbids any kind of touching of any student at any time. Dr. Lazovick acknowledged that the District does not forbid accepting a hug from students, for example, at graduation. For him the questions are:

who initiated the physical contact and was it mutual. He appears to have ignored the fact here that a student initiated the hugs, not Respondent.

When asked about the District's training on these matters, Dr. Lazovick could only produce two slides from the most recent training in 2019, which, he admitted, may not have been in previous years' training modules. (Tr. III at 123) The District's own records show that Respondent only received training on staff-to-student physical contact in 2015 and 2017. In any event, the training does not absolutely prohibit physical contact. One slide lists hugging students as among types of teacher conduct – along with harassing comments, complimenting students inappropriately, making sexual gestures, and suggesting hanging out outside of school – that *may* constitute sexual harassment. It does not discuss student-initiated hugs, which is what happened here. The other slide, rather than *prohibit* touching, advises teachers to *avoid accusations* of harassment by not standing too close to students and “Avoid touching students for any reason.” It does not train staff that every form of touching violates District policy. In short, the District failed to put Respondent on notice that his conduct, which I find, based on the overwhelming preponderance of the evidence, to have been non-sexual in nature, violated District policy. Likewise, the warning by Principal Morrell did not put Respondent on notice regarding non-sexual physical contact.

The District's own policies require progressive discipline, unless the conduct is so egregious that the staff member must be removed for the safety of the school community. The facts in this case do not establish egregious misconduct. This Respondent is entitled to an opportunity to learn from his mistakes and to correct his behavior, which, by the students' own testimony, did not cause them great harm.

Obviously, if Respondent does not change his behavior in the future and continues to kiss students on the cheek or touch them on the shoulder, further discipline up to and including termination may be appropriate.

With regard to the Charges, I make the following findings:

Charge I. The following allegations are **sustained**: Respondent did put his arm around student JM and kissed her on the cheek in the 100 Building lobby; Respondent did initiate this contact, which was uninvited by the student. The following allegations are **not sustained**: There is insufficient evidence that the contact was unwelcome or forced on the student against her will.

Charge II. The following allegations are **sustained**: Respondent did put his hand on EA's shoulder and that of other students while answering their questions. Respondent did kiss EA on the forehead or cheek as she and other students were waiting to go into their AP exam.

The following allegation is **not sustained**: Respondent did buy candy and had it available in the classroom for students and others; this does not violate any District policy. I find insufficient evidence that Respondent engaged in misconduct by giving students "long handshakes" as charged.

Charge III. This charge is **not sustained**. I find that Respondent did make a statement to JG "You look good in basic black" or words to that effect; that comment was inappropriate and violates District policy. However, Respondent was admonished and counseled about this remark by his Principal at the time, who did not report the incident or write it up for his personnel file. While the incident is relevant in terms of background, it cannot form the basis of a current tenure charge. Accordingly I do not sustain this charge.

Charge IV. This charge and the allegations that comprise it are **not sustained**.

Respondent did participate in conversations with SS about classes and other things going on in the students' lives. There is absolutely no evidence that any of those conversations was inappropriate or violated any District policy; indeed, some of the conversations had to do with helping the students cope with the suicide of one of their friends, and suggesting they talk to their counselors, all of which was entirely appropriate. It is undisputed that a group of students gave Respondent a humorous gift of an animal onesie and that, at their request, he posed with them all dressed in their onesies during class time, toward the end, if not the last day of class, when AP exams were over. This behavior did not violate any District policy; instead District policy explicitly allows staff to accept nominal gifts from students.

Charge V. I find that Respondent did make a comment to ML that she "looked healthy." However, I do not find that comment to have violated District policies. Accordingly this charge is **not sustained**.

Charge VI. I find that Respondent did engage in a pattern of inappropriate conduct with multiple students over an extended period of time, to-wit, he kissed four students on the cheek and placed his hand on the shoulders of many students while answering their questions. To that extent, I find this charge **sustained**.

Penalty. I find that termination is too harsh a penalty for a teacher based on the facts in this case. It is true that Respondent kissed four students on the cheek on three occasions and repeatedly, and apparently unconsciously, placed his hand on students' shoulders when answering their questions. All of these actions were inappropriate and unbecoming. However, they were minor incidents. No student complained about any of them.

Respondent was never counseled or disciplined for physical contact, only spoken to by his principal for a single comment made to a student in June 2018. No disciplinary memo was placed in his file. And it is important to recognize that type of misconduct was not repeated; I find Respondent's comment to a student athlete in September that she looked healthy may have been inartful but was not the kind of personal comment he had been warned to avoid. Finally, the District failed to prove by a preponderance of the credible evidence that District policy forbids every type of touching whatsoever, or that it communicated such a policy to Respondent through its training.

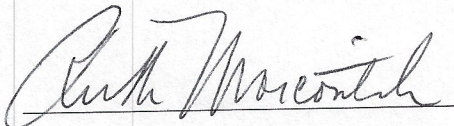
It is apparent that the District considered, in aggravation, conduct that was innocent, initiated by students, and expressly permitted by District policy. This included student-initiated hugs, accepting a humorous present from a group of students, and posing for a group photograph with students, with everyone placing their arms around the shoulders of others in the group. These incidents should not have been considered in any way.

Finally, the District appears to have given no consideration to the record of this teacher as a kind and caring, supportive educator, lauded each year he taught by those who evaluated him as well as by the students who were subpoenaed to testify in this hearing. Indeed, in early 2018 the Superintendent, with effusive praise, commended Respondent for "throwing caution to the wind and sharing his passions" with his colleagues in putting together a session teaching them how to use technology to promote independent learning. Dr. Lazovick urged Respondent to "continue to *take the lead*," and thank him for "sharing your light with the rest of us." (SB 19 at 99)

In sum, this is not an educator who should be dismissed without an opportunity to learn from his mistakes. Those mistakes were the result of misplaced energy and affection; there is absolutely no evidence that they derived from sexual, prurient or predatory impulses or that they were perceived as sexual by the students involved.

AWARD

As detailed above, the District has established some of the allegations in Charges One, Two, and Six. The District has not established the remaining allegations in Charges One and Two. The District has not established Charges Three, Four or Five. With regard to the proven charges, the District has failed to establish that such conduct warrants Respondent's dismissal from employment. Respondent has already been suspended for a full school year; he has already been penalized. Further suspension or other form of penalty would be excessive. This Opinion should be regarded as a formal reprimand and warning to refrain from casual physical contact with students in the future. Further, Respondent is ordered to complete training regarding appropriate physical contact between staff and students; that training must be through a program that is approved by the District; the District shall not unreasonably withhold approval of such a program.



Ruth Moscovitch, Arbitrator

Date: August 5, 2019

ACKNOWLEDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

On August 5, 2019, RUTH MOSCOVITCH, whom I know, came before me and acknowledged that she executed the foregoing as and for her Opinion and Award in the above-captioned matter.

CYNTHIA D FISHER
NOTARY PUBLIC, STATE OF NEW YORK
Registration No. 02FI6385519
Qualified in New York County
Commission Expires January 7, 2023

Notary Public
My Commission expires

[Handwritten Signature]
8/5/19

[Faint Handwritten Signature]

Ruth Moscovitch, Arbitrator

Date: August 5, 2019