STATE OF NEW JERSEY DEPARTMENT OF EDUCATION

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Agency Docket No. 234-9/22

In the Matter of Tenure Hearing
of Jeffrey Silberman, School District of
the Borough of Ridgefield,
Bergen County.

OPINION AND AWARD
[**Amended**][1]

Issued: July 6, 2023

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Arbitrator
Joseph Licata, Esq.

For The Petitioner
Frances L. Febres, Esq.
Cleary, Giacobbe, Alfieri, Jacobs, LLC

For The Respondent
Ronald J. Ricci, Esq.
Ricci and Fava, L.L.C.

INTRODUCTION

On September 8, 2022, Petitioner, Ridgefield Board of Education filed with the New Jersey Commissioner of Education a Statement of Tenure Charges and Statement of Evidence Under Oath, with supporting documents and Certification Supporting the Charges. Petitioner's filing included Respondent, Jeffrey Silberman's response to the Charges and a summary of anticipated witnesses and their testimony. The Sworn Tenure Charges, which define the permissible scope of this proceeding, state verbatim as follows:

[1] Pursuant to the requests of the parties for clarification, this Amended Opinion and Award replaces the June 5, 2023 Opinion and Award in order to change the names of students and parents which appeared verbatim in internal reports to initials and to clarify the duration of the suspension imposed. Respondent was on an unpaid suspension for 120 days during the 2022-2023 school year and a paid suspension for the remainder. The penalty imposed herein is in addition to that served during the 2022-2023 school year. Finally, refence to "winter break" in the June 5, 2023 Opinion and Award was clarified to reflect an intent to return Respondent to his position of employment after the winter recess and holiday recess, i.e., as of January 2, 2024. No other changes to the June 5, 2023 Opinion and Award have been made. The instant Amended Opinion and Award is intended to completely replace the June 5, 2023 Opinion and Award for all purposes, including publication. Finally, both Attorneys, *via* email of today's date, approved the amendments made herein.

Facts Common To All Charges

1. Jeffrey Silberman, has been employed by the Board as a Technology Teacher since September 1, 2003. As a member of the teaching staff, teachers at all times are expected to conduct themselves in a professional manner, in accordance with the law, District policies, regulations and provisions; and to exhibit high standards of behavior, integrity, and sound judgment, as well as to refrain from inappropriate behavior with students. In turn, Mr. Silberman is to maintain a high degree of self-restraint, composure, and controlled behavior in the classroom and especially serving students.

2. Board Policy 3281, 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 pupils attending the school district.
>
> In support of the Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.
>
> The Board recognizes and appreciates the staff-pupil 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 pupils.
>
> School staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments to pupils or about pupils and shall not engage in inappropriate language or expression in the presence of pupils. School staff shall not engage in inappropriate conduct toward or with pupils.
>
> A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety, and welfare of school pupils. 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. Mr. Silberman's Employment Contract dated August 27, 2003 states that he "accepts the employment aforesaid and agrees faithfully to do and perform duties under the employment aforesaid and to observe and enforce the rules prescribed for the government of the school by the Board of Education." See Dr. Pantoliano's Statement of Evidence, **Exhibit B** (J. Silberman Employment Contract, September 2003).

4. Mr. Silberman's Employment Contract dated July 12, 2021, for the 2021-2022 school year, similarly states that he "accepts the employment aforesaid and agrees faithfully to do and perform duties under the employment aforesaid and to observe and enforce the rules prescribed for the government of the school by the Board of Education." See Dr. Pantoliano's Statement of Evidence, **Exhibit C** (J. Silberman Employment Contract, July 2021).

5. Jeffrey Silberman is a tenured teacher with the District with over 19 years of employment with Ridgefield Public Schools.

6. He currently holds certifications as an Elementary School Teacher, Teacher of Business Administration/Office Systems Technology, Teacher of Business: Finance/Economics/Law, Teacher of Business: Keyboarding and Data Entry.

7. Despite his acknowledged duty to comply with Board Policy and faithfully perform the duties of his position, that require him to support, engage, motivate and protect the students in his care, on at least three occasions, Mr. Silberman displayed anger and frustration towards students, which manifested in inappropriate physical contact with students.

8. He has received reprimands for his conduct towards students in the past, however, his conduct persists despite interventions and reminders of the expectations for his position. The care and protection of students is one of the Board's most important responsibilities, and as such, Mr. Silberman's uncorrected pattern of conduct cannot be tolerated. The Board must be proactive in ensuring its students' protection and well-being; the Commissioner of Education should similarly place the care and well-being of students ahead of an adult, especially where Mr. Silberman has had several opportunities to correct his behavior but has shown an inability and failure to do so.

9. On November 14, 2007, Mr. Silberman received a ranking of "needs improvement" in the Learning Environment and Teacher/Student Interaction domains for the following categories: 1) creating and environment of respect and rapport; 2) treating students in a fair and consistent manner, 3) establishing an atmosphere of cooperation, mutual respect and concern, and 4) creating a learning environment in which others feel free to express themselves respectfully." See Dr. Pantoliano's Statement of Evidence, **Exhibit D** (November 14, 2007 Observation Report).

10. On May 1, 2015, then-Vice-Principal Gerard Angelo Bellizzi notified the principal of an incident that occurred during his second period Digital Photography class. The details of the events were summarized in a correspondence dated May 4, 2015. See Dr. Pantoliano's Statement of Evidence, **Exhibit E** (Correspondence dated May 4, 2015 from Principal John W. Coviello to Jeffrey Silberman).

11. In that correspondence, then-Principal John W. Coviello wrote to Mr. Silberman about an incident where a student made a claim that Mr. Silberman became angry and kicked his chair in order to have him comply with the teacher's directive to speak to him outside of the classroom. It was reported that the student became visibly upset and described that Mr. Silberman kicked the student's chair. See Dr. Pantoliano's Statement of Evidence, **Exhibit E** (Correspondence dated May 4, 2015 from Principal John W. Coviello to Jeffrey Silberman).

12. Similarly, and most recently, Mr. Silberman has displayed anger yet again towards two students in his technology class, which resulted in physical harm inflicted upon one of the students.

13. The most recent events giving rise to these tenure charges all relate to Mr. Silberman's conduct on or about April 27, 2022, during a lockdown drill that occurred in class. I memorialized my understanding of the events to Mr. Silberman in correspondence dated June 16, 2022. In that correspondence, I indicated that two students from the same class reported that, during or around the time of the lockdown drill, Mr. Silberman made inappropriate physical contact with them. One student reported that he was forcibly pulled out of his chair, with such force that a bruise was left on the student's arm. The other student reported that Mr. Silberman slapped his hand and pulled his hand off the computer mouse. See Dr. Pantoliano's Statement of Evidence, **Exhibit F** (Correspondence dated June 16, 2022 from Dr. Letizia Pantoliano to Mr. Silberman).

14. On April 28, 2022, Principal Timothy Yang had a parent meeting with the parents of two students from Mr. Silberman's technology class.

15. One student's parents lodged a formal complaint against Mr. Silberman on behalf of their son, a fifth grader.

16. The student was called into Mr. Yang's office and asked to describe the incident that took place on April 27, 2022. According to the student, during a lockdown drill on April 27, 2022, every student was told to be quiet. The student moved his chair back which made a loud squeaking noise. The student reported that Mr. Silberman came behind him and grabbed him by his upper left arm and ushered him forcibly up and moved his chair. Mr. Silberman made the student stand during the duration of the drill. See Dr. Pantoliano's Statement of Evidence, Exhibit G, (Slocum Skewes School Investigation Summary Report).

17. At the meeting, there was no bruise or laceration visible on the student's arm. However, the next day, on Friday, April 29, 2022, the student's parents returned to meet with Mr. Yang and showed there was a visible bruise consistent with Mr. Silberman's grabbing of the student's arm on April 27, 2022. See **Exhibit G**.

18. Thereafter, the student was sent to the nurse's office who confirmed that the student had an oval-shaped bruise consistent with the incident. See **Exhibit G**, photos of student's visible bruise on arm, attached to exhibit.

19. After meeting with the first student's parents, another student's father had a meeting with Mr. Yang and former Assistant Principal Lauretta Allen.

20. The second student's father also lodged a formal complaint against Mr. Silberman.

21. The second student was called into Mr. Yang's office and described that during the lockdown drill, as he was using his mouse, Mr. Silberman slapped the student's hand and pulled

his hand off the mouse. Mr. Silberman said to the student, "Why are you clicking so loudly? I'll see you in detention." See **Exhibit G**.

22. The second student told Mr. Yang that Mr. Silberman has a short fuse and is not a nice man. See **Exhibit G**.

23. Other students were interviewed as part of the administrative investigation.

24. Eight students observed and made statements that Mr. Silberman touched/hit/slapped the student's hand and moved it from the placement of the mouse. See **Exhibit G**.

25. Four students observed and made statements that Mr. Silberman "threw" another student's hooded sweatshirt onto another table. See **Exhibit G**.

26. Fourteen students observed and made statements that Mr. Silberman grabbed/touched the student's arm and lifted him from the chair. See **Exhibit G**.

27. Fourteen students observed and made statements that Mr. Silberman moved the student's chair. See **Exhibit G**.

28. During the investigation, Mr. Silberman claimed that he pulled the one student out of his chair because he had lifted two feet off the ground, however, fourteen students contradicted Mr. Silberman's account. See **Exhibit F**.

29. Mr. Silberman alleged that he was concerned for the student's safety and grabbed the back of the chair and the student, holding him up so he wouldn't fall. All students who observed the incident with Mr. Silberman and the student were asked if the student moved his chair or was leaning back on his chair. All students report that the student moved his chair. See **Exhibit G**.

30. The Department of Children and Families Institutional Abuse Investigation Unit ("IAIU") conducted an investigation after the incident and the findings were consistent with the administrative investigation. See Dr. Pantoliano' s Statement of Evidence, (Redacted IAIU Findings dated June 27, 2022) **Exhibit H**.

31. Pursuant to N.J.S.A. 9:6-8.11, the Department of Children and Families, IAIU generally conducts investigations into the allegations of abuse and neglect occurring in various out-of-home settings.

32. On or about April 29, 2022, the school nurse examined a student who alleged he was injured as a result of Mr. Silberman's actions. See **Exhibit G**, photos of student's visible bruise on arm, attached to exhibit.

33. On June 27, 2022, the IAIU submitted a findings report where they concluded: "IAIU has determined, in accordance with N.J.S.A. 9:6-8.21 that the child was not abused by Teacher Jeffrey M. Silberman. However, some information indicates that the child was harmed or placed at risk of harm." See Dr. Pantoliano's Statement of Evidence, **Exhibit H**, (Redacted IAIU Findings dated June 27, 2022).

34. This evidence that the child was harmed or placed at risk of harm is sufficient for a recommendation that the Board consider tenure charges for dismissal against Mr. Silberman, especially considering that Mr. Silberman has created a practice of inappropriate and reckless conduct with students that cannot be tolerated.

35. It is clear that Mr. Silberman disregarded the professional obligations imposed on him as a member of the professional teaching staff and has engaged in a pattern of conduct that demonstrates that he is not fit to perform the duties as a public school educator and an employee of the District.

36. Mr. Silberman cannot return to the classroom with the chance that he will continue to conduct himself in the manner described and harm another student.

37. Each child who comes to the school should feel a level of comfort where they feel safe from harm, especially in the supervision of teaching staff. The safety of every student is the school's priority and a teacher who digresses from this priority should be immediately removed from the classroom setting. School boards cannot take chances with students' safety, nor should the Commissioner of Education risk students' safety by allowing Mr. Silberman's return to the classroom.

CHARGE ONE

NEGLECT OF DUTY: VIOLATION OF BOARD POLICIES

38. The facts set forth above are hereby repeated and incorporated herein by reference.

39. Mr. Silberman, on at least three occasions, was reminded of his obligation to adhere to District policy and protocols.

40. On at least one occasion during the 2007 school year, Mr. Silberman was advised of the Board's concerns with his conduct and rapport with the students.

41. In 2015 and again in 2022, Mr. Silberman violated District Policy 3217 by his use of force or fear in the treatment of pupils in his classroom.

42. District Policy 3217 – Use of Corporal Punishment provides that "[t]he Board of Education cannot condone an employee's resort to force or fear in the treatment of pupils, even those pupils whose conduct appears to be open defiance of authority. Each pupil is protected by law from bodily harm and from offensive bodily touching. See Dr. Pantoliano's Statement of Evidence, **Exhibit I** (District Policy 3217).

43. District Policy 3217 also provides:

> Teaching staff members shall not use physical force or the threat of physical force to maintain discipline or compel obedience except as permitted by law, but may remove pupils from the classroom or school by the lawful procedures established for the suspension and expulsion of pupils.

44. A teaching staff member who 2) touches a pupil in an offensive way even though no physical harm is intended and . . . 4) punishes pupils by means that are cruel or unusual will be subject to discipline by this Board and may be dismissed. See Dr. Pantoliano's Statement of Evidence, **Exhibit I**.

45. Back in May 2015, the Board addressed concerns when Mr. Silberman first kicked a student's chair as a response to a student's defiance and insubordination. Mr. Silberman's response by kicking the student's chair is a violation of District Policy 3217. See **Exhibit E**.

46. Silberman was interviewed by then-Vice Principal Angelo Bellizzi and REA Representative Lauren Lavelle. When asked about your conduct in 2015, you stated that the

student was not completing his assigned work. You also noted that the physical contact with the chair was meant "to get [the student's] attention" and move the chair out the way because you were in a hurry to speak with him in order to remove the situation from your classroom. See **Exhibit E**.

47. Eight students were also interviewed as part of the May 2015 investigation. They noted that they witnessed Mr. Silberman kick the student's chair and the students all expressed concern when they observed Mr. Silberman's physical contact with the student's chair.

48. Kicking the student's chair, as a response to the student's defiance, is a direct violation of District Policy 3217.

49. Mr. Silberman's conduct in April 2022 led to physical harm to a student. This conduct is unacceptable and as stated in District Policy 3217 will lead to discipline and dismissal from the Board.

50. Mr. Silberman also failed to adhere to District Policy 3281. Mr. Silberman's actions run afoul of the Board's strong commitment to the public's trust and confidence of school staff and the protection of all pupils attending the school district.

51. Mr. Silberman's displays of anger and physical aggression towards students in his classroom does not provide for a healthy, safe educational environment for students.

52. Although the of the April 27, 2022 IAIU investigation related to Mr. Silberman's interaction with one student, the IAIU's findings revealed that Mr. Silberman placed students in harm.

53. During the District's investigation of the incident of April 27, 2022, two students also reported that Mr. Silberman made inappropriate physical contact with them. See Dr. Pantoliano's Statement of Evidence, **Exhibit F**.

54. When interviewed as part of the investigation, Mr. Silberman denied that he inappropriately touched students. Instead, he claimed that he was demonstrating the proper position of a hand on the computer mouse. Yet eight other students contradicted his account of the events in his classroom. See **Exhibit F**.

55. Accordingly, Mr. Silberman's conduct is not simply a result of an isolated incident or circumstance involving a de-escalation event requiring Mr. Silberman to make physical contact with students. Rather, Mr. Silberman has a pattern of displaying anger and frustration towards his students in an aggressive manner.

56. As explained herein, District Policy 3281 was violated on numerous occasions. See **Exhibit A**.

57. District Policy 3281 provides that [t]he 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 pupils attending the school district. See **Exhibit A**.

58. In support of the Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district. See **Exhibit A**.

59. Mr. Silberman has created a classroom environment where students do not feel safe or supported by him.

60. As a result, the next necessary step is to dismiss Mr. Silberman from employment with the Board.

CHARGE TWO

CONDUCT UNBECOMING: CREATING A RISK OF HARM TO STUDENTS

61. The facts set forth above are hereby repeated and incorporates herein by reference.

62. Mr. Silberman's physical contact with students in the manner reported by students and observed by other teaching staff demonstrates that he creates has created a risk of harm to students.

63. Mr. Silberman creates a risk of harm to students both physically and emotionally.

64. During the 2015 incident, students had expressed "genuine concern" when they observed Mr. Silberman kick a student's chair. See **Exhibit E**.

65. Additionally, both the students involved and the witnesses to the 2015 incident were reported to be "disturbed to varying degrees." See **Exhibit E**.

66. Mr. Silberman's behavior has been a concern to the Board and other administrative staff over the course of his time at the District.

67. Principal John W. Coviello warned Mr. Silberman that any subsequent actions involving physical contact with students may result in further discipline. See **Exhibit E**.

68. As noted in the June 16, 2022 correspondence to Mr. Silberman, this was not the first time that his anger and inappropriate physical conduct, creating a risk of harm to students, had been addressed. See **Exhibit F**.

69. It is well-established that the New Jersey Commissioner of Education recognizes that a pattern of conduct may constitute unbecoming conduct.

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

CHARGE THREE

OTHER JUST CAUSE: ABUSE OF POWER

71. The facts set forth above are hereby repeated and incorporated herein by reference.

72. The aforementioned misconduct of Mr. Silberman has occurred over multiple occasions over an extended period of time. As noted by reference to his actions in 2007, 2015, and 2022, this most recent event was not an isolated incident of poor judgment or a mistake, rather, it was yet another example of Mr. Silberman's abuse of power and inability to exercise self-control or restraint, to the danger of the students in his care.

73. Mr. Silberman engaged in unprofessional conduct and failed to properly discharge his responsibility for the supervision of pupils with the highest level of care and prudent conduct which resulted in a neglect of his duties and a violation of District policies as well as the standards of professional conduct.

74. For all the reasons set forth herein, Mr. Silberman's actions demonstrate that he is no longer able to perform the duties as a school teacher and dismissal is warranted.

On September 9, 2022, Respondent filed an Answer with the Commissioner.

On September 12, 2022, the Director, Office of Dispute and Controversies deemed the Tenure Charges, if true to be sufficient to warrant dismissal or other lower-level penalties and assigned Arbitrator Jay Goldstein to hear and decide the dispute pursuant to N.J.S.A. 18A:6-16.

On September 22, 2022, Respondent, through Counsel, filed a "Motion to Bar" certain documents and testimony from being admitted into the arbitration record. Petitioner filed an opposition brief on September 30, 2022. Respondent filed a reply brief on October 3, 2022.

However, after Arbitrator Goldstein informed Counsel that he would defer ruling on Respondent's motion until Petitioner attempted to introduce the evidence at arbitration and Respondent raised an objection, he returned the file to the Office of Bureau and Controversies and removed himself from the matter. Thereafter, on December 28, 2022, the Director assigned the undersigned Arbitrator to hear and decide the dispute pursuant to N.J.S.A. 18A:6-16.

In advance of the first day of hearing, I decided Respondent's motion on January 30, 2023, and filed the decision with the Director of the Bureau of Controversies and Disputes, Office of the Commissioner, New Jersey Department of Education. The January 30, 2023 motion decision is incorporated herein by reference. Subsequently, hearings were held on February 23, 27 and March 6, 2023. The proceedings were transcribed before a certified court reporter and both sides and the undersigned received the transcripts for use in this proceeding.

On February 23, 2023, Petitioner called as a witness, A.H., a police officer employed by the Borough of Ridgefield, and father of M.H.. A.H.testified that his son informed both him and his wife that Respondent grabbed M.H. by his arm out of a chair from a seated position and then made him stand for the remainder of a lockdown drill on April 27, 2022. It is alleged that

Respondent believed that M.H. intentionally screeched his chair by moving backward on the floor during the lockdown drill. On the same day, Petitioner called as a witness, Timothy Yang, Principal of Slocum Skewes School, who testified about his conversations with students M.H. and M.V., their parents and Respondent. On the same day, Petitioner called John Coviello. Coviello is the former Principal of Slocum Skewes School who testified about a letter of reprimand he issued to Respondent on May 4, 2015 for kicking the chair of a student.

On February 27, 2023, Petitioner called Hiyoung Kim, who is the school nurse at Slocum Skewes School. Ms. Kim examined M.H. on April 28, 2022, and then again on April 29, after being advised by M.H.'s parents that on the eve of April 28 they noticed a bruise on the inside of M.H.'s upper arm. Petitioner also called D.V., the father of student M.V. D.V. testified that Respondent slapped M.V.'s hand, roughly pulled his hand off the computer mouse, and yelled at him for allegedly smacking the mouse down on the desk during the lockdown drill.

Petitioner next called Lauretta Allen, Vice Principal of Slocum Skewes School who testified that she overheard students talking about Respondent's actions during the lockdown drill and that she sat in and took notes of Principal Yang's interviews of the parents of M.H. and M.V. and M.V. Lastly, Petitioner called Dr. Letizia Pantoliano, Superintendent of Schools, who testified about her review of all the reports and notes gathered about Respondents' behaviors during the lockdown drill and the factors she took into consideration in recommending the filing of tenure charges to the Board of Education.

After the testimony of Dr. Pantoliano, Petitioner rested its case, at which time Respondent made a Motion for Directed Verdict (or judgement) due to the failure of Petitioner to introduce the testimony of any witness having firsthand knowledge of the events of April 27, 2022, and the

alleged deprivation of Respondent's right to confrontation under the Sixth Amendment to the United States Constitution (to be discussed in more detail).

On March 6, 2023, Respondent called Darla Ferdinand, President of the Ridgefield Teacher's Association. Ms. Ferdinand testified that she began teaching the same year as Respondent, and has known him for the entirety of his career as a teacher as Slocum School. Ms. Ferdinand also testified that she accompanied Mr. Silberman to the investigatory meeting conducted by Principal Yang and Vice Principal Allen on April 28, 2022.

Lastly, Respondent testified on his own behalf.

The following exhibits were entered in the record:

Petitioner's Tenure Hearing Exhibits

P3 Police Report (A)

P3A Photograph 3289 (A)

P3B Photograph 3289(2) (A)

P4 E-mail dated May 3rd. (A)

P5 Students' Statements (A)

P6 Certification of T. Yang prepared by the district's attorney (A)

P7 John Coviello's Report (A)

P8 Instructions for Drill, Incident Procedure Sheet (A)

P9 Resume of Dr. L. Pantoliano (A)

P10 Agenda – Opening Day (A)

P11 Faculty Meeting Schedule (A)

P12 Letter of Reprimand (A)

P13 Inappropriate Staff Conduct Board Policy (A)

P14 Use of Corporal Punishment Board Policy (A)

P15 IAIU Findings (A)

P16 Tenure Charges (A)

P17 Statement of Evidence(A)

P18 Crisis Management Training Powerpoint (M)

Respondent's Tenure Hearing Exhibits

R2 Certification of A.H.(M)

R3 Photo of Technology Classroom

R4 Certification of T. Yang prepared by the district's attorney (M)

R5 Notes of L. Allen

R6 Evaluations

The parties filed post-hearing briefs whereupon the record was closed.

Finally, the undersigned's Opinion and Award is issued in accordance with N.J.S.A. 18A:6-17.1 and the American Arbitration Association Labor Arbitration Rules.

THE ISSUE

> Did Petitioner have just cause to support the tenure charges for dismissal of Respondent, Jeffrey Silberman or, in the alternative only, to suspend him for six months without pay based upon his conduct during an April 27, 2022 active shooter lockdown drill?

FINDINGS

Respondent, Jeffrey Silberman is a tenured teacher with the District with over 19 years of employment with Ridgefield Public Schools. He currently holds certifications as an Elementary School Teacher, Teacher of Business Administration/Office Systems Technology, Teacher of Business: Finance/Economics/Law, Teacher of Business: Keyboarding and Data Entry. The only discipline on his record, albeit potentially significant in relation to this proceeding is the letter of reprimand issued on May 4, 2015 by former school principal John Coviello.[2]

[2] In the undersigned's January 30, 2023 decision on Respondent's Motion to Bar evidence, I held that the letter of reprimand may be relied on by either party to establish whether and to what extent the letter of reprimand placed Respondent on notice as to what conduct he must improve, and whether or not the notice provided is sufficient to have encompassed the alleged misconduct for which Respondent has been currently charged. Due to a lack of

Dr. Letizia Pantoliano, who has attained her doctorate in Educational Leadership from Columbia University in 2005, has been serving as the Interim Superintendent of Schools for the Ridgefield School District since 2020.

Dr. Pantoliano recommended to the Ridgefield Board of Education the filing of tenure charges against Respondent based on incidents transpiring on April 27, 2022 inside Respondent's computer and technology class/lab during an approximate five-minute, annual active shooter lockdown drill. Given the importance of the drill in this day and age, both staff and students are expected to take it seriously, i.e., as if it was the real thing. The Ridgefield Police Department had previously visited the school and provided a list of instructions for a Lock Down, dated November 21, 2018:

Lock Down

1. Announcement will be made over the public address system

   "Lock Down, Lock Down, Lock Down"

2. Quickly evaluate hallway are outside room door
3. Shelter any occupants in hallway near doorway inside room
4. Remove "Sorry-Pin" from door jam, confirm door is locked and close door
5. Place the door shade to the **DOWN** position
6. Quietly move items to block the interior doorway
7. Turn all room lights **OFF** and all computer monitors **OFF**
8. Move all occupants inside room to the **Hard Corner**

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closure on the duration of the letter (related to Mr. Coviello's apparent failure to close it out before leaving the District), the weight to be accorded the letter is the same as one issued with an intent to remove it in two years. It cannot be deemed expunged, however, because the letter still remained in Respondent's file and any dispute over that fact should have been processed through the contractual grievance procedures.

9. Turn all cell phones to **Silent** or **Vibrate**

10. Check attendance

11. Keep all occupants as quiet as possible

12. Prepare the "Shelter-In-Place" Bucket to be used

13. Wait for further instructions over public address system

14. Be prepared for Law Enforcement to enter the room utilizing the door key

If in a **LOCK DOWN** condition and the **FIRE ALARM** is activated, **Remain** in the **LOCK DOWN** until advised by Administration (Ex. P8).

Principal Timothy Yang testified that there is no specific policy in the Ridgefield School District regarding the technology lab procedure. Rather, the principal confirmed that Mr. Silberman was supposed to make his own lockdown drill because his classroom is different than other classrooms. Unlike other classrooms, Respondent's classroom is much larger and does not have a "hard corner" for students to take cover. Exhibit R3 is a color photograph of Respondent's classroom, which shows a line of desks to one side facing computer monitors and backed by a wall. Across the classroom are other student desks, observed not in a linear row but, rather, adjacent to one another on a 45-degree angle. At the bottom center of the photograph are monitors on top of Respondent's desk were he can see the entire classroom and monitor the work of students accordingly.

Although the tenure charges did not include criticism of Respondent's method of conducting an active shooter drill, Respondent testified that he has his students work quietly through the drill and some even wearing headphones. Regarding whether or not the students know they are supposed to be quiet, Principal Yang said he assumes they do. He indicated that lockdown drills are short, about five, ten minutes, so all of the facts related to this investigation would have occurred in that short period of a few minutes. Principal Yang testified, and common sense

dictates, that students are to remain quiet during the active shooter lockdown drill. Since the events in question took place within the confines of the active shooter lockdown drill on April 27, 2022, it was a relatively short duration in which Respondent's alleged misconduct occurred.

Moving past the end of Respondent's class on April 27, 2022, at approximately 2:45 p.m., Vice Principal Lauretta Allen stood at the 5th grade door during dismissal and students approached her asking if she heard what happened. Principal Yang received an e-mail the night of the incident around 8:00 p.m. from Inase Mansour, mother of M.H. On April 28, 2022, parents of M.H. arrived to make a complaint against Respondent. The parents complained about Respondent's treatment of their son during the active shooter lockdown drill. During the April 28, 2022 meeting with the H. family, Vice Principal Allen took notes. A.H. testified that on April 27, 2022, M.H. came home from school and asked his dad, "If a teacher touches you inappropriately, can you sue?" A.H. responded, "Well, depending on how he touched you. Please further elaborate what had happened… That's when he told me that his teacher grabbed him out of the chair without any due cause" (Tr. 1, p. 17).

During the meeting, Principal Yang and Vice Principal Allen called M.H. to join the meeting with the parents. M.H. explained that during the lockdown drill, M.H. moved his chair. Respondent became annoyed, grabbed M.H. by his arm, lifted him up, moved the chair, and placed him up against the wall to stand during the rest of the drill. Vice Principal Allen had M.H. demonstrate the incident on her, and show her from his point of view what happened. During the meeting with M.H. and his parents, Principal Yang asked A.H. to inspect M.H. for any bruises or signs of injury. A.H., a police officer, checked his son for any signs in the presence of Principal Yang. There were no physical marks seen on M.H.

In Principal Yang's May 3, 2022 disposition of the investigation, based on Vice Principal Allen's notes primarily, Yang recorded the following statements from M.H.:

- During the lockdown drill about 2 pm on April 27, 2022, every student was told to be quiet.
- M.H. moved his chair back which made a loud squeaking noise.
- According to M.H., Mr. Silberman came behind him and grabbed him by his upper left arm-ushered him "forcibly" up and moved his chair, and had him stand during the duration of the drill.
- According to M.H., Mr. Silberman didn't say a word or gave a warning.
- During the meeting, Ms. Allen and M.H. re-enacted the incident in front of Mr. Yang and Mr. and Mrs. H.
- M.H. demonstrated how he was grabbed on his arm ushered to stand and removed from the chair.
- During this meeting, M.H. was checked by A.H. to see if there were any bruises or lacerations to his arm. There were no visible marks during this meeting.

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In addition, D.V., father of M.V., recalls going to the school on or about April 28, 2022 and speaking with Principal Yang about what happened to M.V. D.V. testified that he initially learned that there was a situation with M.V. and his teacher from his wife. He then went to meet with the Principal and he learned that there was a lockdown and the children were continuing their work and Mr. Silberman struck M.V. in his hand. D.V. testified that he reported the incident because "he struck my son."

However, D.V. conceded that he had never seen M.V.'s statement prior to his testimony. A part of M.V.'s statement was read to D.V. which stated that "[Mr. Silberman] randomly smacked my hand and roughly pulled my hand up," "then he yelled at me for smacking the mouse." D.V. did not recall M.V. saying that Mr. Silberman yelled at him when he first reported the incident to

his parents. Rather, D.V. testified that M.V. said that M.V. told him Mr. Silberman approached him and said not to click his mouse.

Principal Yang called M.V. down to the office to provide his description of the incident. Principal Yang testified that M.V. said he was using his computer mouse loudly, then Mr. Silberman slapped his arm and removed M.V.'s hand from the mouse, demonstrating on his father that Mr. Silberman placed his hand over M.V.'s hand. Yang brought his mouse over and M.V. demonstrated what happened using his father as himself in the demonstration. During the demonstration, it was noted that Respondent made contact with his hand that made a "pop". M.V. also demonstrated the forcefulness he experienced by using his father's hand.

In Principal Yang's May 3, 2022 disposition report, he more contemporaneously memorialized (as contrasted with his testimony) as to what M.V. and his father reported during the meeting with both himself and Vice Principal Allen.

On April 28, 2022, at 10:30 am, D.V. had a meeting with Mr. Yang and Vice Principal Allen lodging a formal complaint against Mr. Silberman (Technology Teacher) on behalf of his son M.V. (5th grade). D.V. had several questions regarding Mr. Silberman.

- D.V. stated there was an incident with his son M.V. (5th grade) in the same class as M.H..
- Curious was this a recurring incident?
- Mr. Yang and Vice Principal Allen at this time stated we were not aware of any prior incidents.

M.V. was called into Mr. Yang's office and was asked to describe the incident that took place on April 27. D.V. was present during the interview as per his request. According to M.V.:

- During the lockdown drill, Mr. Silberman told the students to continue working. He walked around the room locking the door and pulling the window shades.
- M.V. said he was using his mouse and Mr. Silberman said he was clicking it loudly and Mr. Silberman slapped his hand and pulled his hand off the mouse.
- Mr. Silberman said, "Why are you clicking so loudly? I'll see you in detention."

- Mr. Silberman never assigned a date or time for detention and M.V. stated he would not attend either way.

- M.V. was hit on the right hand however, there were no markings or bruising.

- Mr. Yang, asked, “Do you have a different mouse than everyone else?”

- M.V. responded, “No, Mr. Silberman said I was slapping the mouse not clicking the mouse.”

- M.V. demonstrated to D.V. how Mr. Silberman slapped and grabbed his hand.

- M.V. stated Mr. Silberman has a short fuse, not a nice man. D.V. stated he has heard other students say the same thing.

- M.V. was shocked about what happened he didn’t expect a teacher to do that nowadays.

- M.V. stated the last 20 min. of class, the students were chatting during the period as normal.

- M.V. stated that students were holding in their laughter they thought it was funny that he got hit and M.H. was standing.

- It is also noted that “E.” hooded sweatshirt was thrown across the room by Mr. Silberman .

- It was asked, “Before the drill was Mr. Silberman upset?” M.V. responded, “No, he was normal.”

- M.V. stated after the drill, Mr. Silberman tried to explain to him the importance of the drill.

- Mr. Silberman told M.V. to be quiet and do what was practiced. It was asked what does that look like? M.V. stated he doesn’t remember because they only practiced it once at the beginning of the school year.

- D.V. asked M.V., “Have you ever seen him strike another student?”

- M.V. responded, “No, never.”

Principal Yang and Vice Principal Allen next called Respondent to be questioned.

Respondent's statements made during the investigation

On April 28, 2022, Principal Yang and Vice Principal Allen next asked Respondent to report to the main office for an interview. Respondent, together with Union Representative Darla Ferdinand, arrived to the main office at approximately 11:30 a.m. Vice Principal Allen testified that Respondent described that M.H. was leaning back in his chair with two of the four legs of the chair being off the ground. Respondent claimed to have feared for M.H.'s safety, so he went behind M.H., grabbed the back of the chair and M.H.'s arm, and "lifted" M.H. out of the chair, holding him up so that M.H. would not fall. Principal Yang echoed Vice Principal Allen's testimony with respect to what Respondent told him during the interview.

During the interview, Respondent insisted that he did not hit M.V.'s hand. Instead, as M.V was "swatting" the mouse, Respondent covered his hand in order for him to stop and then reposition it to show him how to properly use the computer mouse.[3]

Taken from Principal Yang's May 3, 2022 disposition report, which was informed, in large part, by Vice Principal Allen's notes, Respondent provided the following input:

April 28, 2022, at 11:25 am Mr. Silberman, Mrs. Ferdinand(Union Rep), Mrs. Gryotoo(Union Rep), Mr. Yang and Vice Principal Allen met.

- It was stated two parents the H's and V's were lodging a complaint concerning an incident that took place in Technology class on April 27, 2022, during the drill.
- Mr. Yang summarized A.H.'s version.
- Mr. Yang summarized D.V.'s version.

Mr. Silberman 's account of events:

- When the drill was announced students have 15 seconds to get chairs in place and for him to pull the pin from the door.

[3] Vice Principal Allen testified that unless the students have special needs or other type of handicap, it is not appropriate for a teacher to physically model anything, especially in a lockdown drill when everyone is supposed to be quiet. No work should be occurring but rather, students should be quietly waiting for the next announcement.

- Mr. Silberman stated M.V. was swatting the mouse-demonstrated how hard and loud M.V. was swatting the mouse.

- Mr. Silberman stated he repositioned M.V.'s hand.

- Mr. Silberman stated, M.V. looked confused-he was swatting the mouse. Mr. Silberman repositioned M.V.'s hand to stop.

- Mr. Silberman asked, "Do you know what you're doing?" M.V., stopped, and responded, "No what am I doing?"

- This is where Mr. Silberman took his wrist and showed M.V. how to place his hand on the mouse.

- Mr. Silberman stated, "M.H." was kicking off the wall in the chair, leaning back on the chair, the two front legs of the chair were in the air. (Demonstrated).

- Concerned for his safety-grabbed the back of the chair and M.H., holding him up so he doesn't fall.

- To support M.H., Mr. Silberman grabbed his arm and the back of the chair. He lifted M.H. out of the chair and told him to stand until the end of the lockdown drill. According to Mr. Silberman M.H. was standing no more than a minute.

- It was asked did you contact the parents?: "Mr. Silberman said didn't think I needed to call parents."

- This is the 1st incident for both students and he felt since he addressed the behaviors with the students it didn't have to go further.

- Mr. Silberman stated he didn't notice anything, did not notice students laughing, making fun of, etc.

- Mr. Silberman was told to go home until further notice. He will get a call to return once the investigation is completed.

Principal Yang and Vice Principal Allen then had the students come to the main office individually to be questioned and to provide a written statement as to what transpired during the April 27, 2022 active shooter lockdown drill. Set forth in the header to Principal Yang's May 3, 2022 disposition report is the following:

Student interviews began on Thursday, April 28, 2022, and concluded on Friday, April 29, 2022. Every student in Ms. Mendoza's homeroom was interviewed except for J.C. who was absent on the day of the incident and E.P. was as absent on the day of the interview.

All students were asked if they observed any interaction between Mr. Silberman and M.V., and Mr. Silberman and M.H. on April 27, during the lockdown drill. Students filed out a statement if they observed an interaction between Mr. Silberman and M.V., and/or Mr. Silberman M.H..

A verbatim summary of the student statements provided to Vice Principal Allen are set forth below, with the exception that initials have been substituted by the undersigned for actual student names in order to protect their privacy.

MH 4/28/2022
So, the lockdown started, and before that the class was loud and everybody was laughing. Mr. S. was in a bad mood because everone was fooling around. During the drill Mr. S was roaming the classroom, making sure everone was doing work, And he said, "guys make sure your quiet." Then about 20 seconds later I adjust my chair and then it squeaked. I heard loud foot steps running toward me the he grabbed me by my arm and takes me out of my seat and, drags my chair to the door and, says "since you don't know how to act on a chair your standing for the rest of the drill." I was confused because he did not even say anything he just grabbed me out of my chair. Then after the drill I sat back down.

FJ 4/28/2022
Taped, or tuched mee for him to ect up and took his chair, then threw erics hudey by the door then talked to M.V..

RK 4/28/2022
I was doing my work then mr Silberman grabbed M.H.s shoulder and made him stand up and he takes his chair and he stood till the end of the dril

LC 4/28/2022
I didn't hear anything but after the drill I heard Mr. silberman telling M.V. not to slap the mouze while clicking it.

MBK 4-28
M.V. was doning his work, then out of no where mr. silberman comes and takes M.V.s hand off his mouse and hit is hand about 2 times. A few minutes later M.H. was to tight in his chair so he moved back but on acident it made noise then mr. Silberman comes really angry and pick M.H. up with 1 arm the M.H. was confused so he just got up then Mr. Sm said "stand for the rest of the class"

AMF
mr. Silberman grabed M.V. by the hand and hit him 1 or 2 and then took M.H. by the arm and pushed his chair and told him to stand for the rest of the Lockdown.

ZMT 4-28-22
M.V.: Mr. Silverman grabed M.V.'s hand and started hitting his hand for tapping his mouse.
M.H.: Mr. Sliberman picked up M.H. from his arms and made him stand for the rest of the lockdown for moving his chair a bit.

EO 4/28/2022
I saw Mr. Silverman pick up M.H. his arm and pull back his chair. I heard him (Mr. Silberman) scream at him for making noise. I also saw Mr. Silberman grab M.V. by his hand or arm. It seemed a bit aggressive to me.

TC 4/29/2022
What I saw was mr. Silberman pulling M.H. chair backwards while [illegible] standing Then M.H. had to stand for the rest of the lockdown.

JPP 4/29/2022
When my class were in technology class, there was a lockdown. When M.V. was on the computer he was smacking the mouse or something like that. And then M.V. went under his desk. Mr. Silberman was kind of mad but he just told him to go back to his seat. After that happened, M.H. accidentally squeaked his chair and mr. silberman got mad so he lifted M.H. up with one hand.

ER 4/29/22
I saw Mr. Silberman throwing my sweater across the room. Next, I saw Mr. Silberman slapping M.V.'s hand and putting his hand away from the mouse because M.V. was playing with the mouse. Lastly, I saw Mr. Silberman grabbing M.H.'s arm and liftin him up, and putting his chair to another table.

ZMZR 4/29/22
So there was a lockdown and M.V. hid under the desk mr s got a little mad and told him to sit back to his desk then M.H. scoted his chair and MR S grabed him and pick him up by the hand and put his chair to the side then M.V. was clicking his mouse agresively and MR S came and I heard a slapping sound also he threw E. hoodie.

SRM 4/29
I saw Mr Silberman grab M.V.'s hand and started hitting him. Mr Silberman ___ lifted M.H. up and took his chair away.

AS 4-29-22
I saw M.V. click his mouse so mr. silverman smaked M.V.s hand and throw E. hoodie across the room and M.H. moved his chair back and mr. silvieman picked M.H. up and took his chair.

MV 4/29/
The announcement for the drill had gone off and Mr. S said to continue with our work. He went off to lock the doors and we were doing brainpop. Then a little later, he got up and randomly smacked my hand and roughly pulled my hand up. He then yelled at me for "smacking the mouse

and interupting the class." He then said "see you in detention." After that he blabbled some other stuff that I didn't really puck up and went back to his seat.

A little later, Mr. S got up and picked up M.H. by the arm out of His seat for "making noise during the drill." The rest of that class it was only just whispers and other little noises.

KV 4-29-2022
So when there was a lock down and my friend M.V. was sitting next to me and he was clicking his mouse and mr. Silberman grab his hand really hard and lift it up. The lockdown was almost done M.H. tryed fixing his seat mr. Silberman came from behind and grabe his arm and lift M.H. and took hes chair.

TWSM 4/29/22
All I saw was mr s slid the chair back from M.H.

DY 4/29/22
When the lockdown started Mr. Silberman walked out of the room and closed the door. Then M.V. went under the table and stayed there. Then mr silberman told him to get up, and he went up and sat back down. Then later on M.H. accidentally squeaked his chair and mr silberman went to M.H. and picked him up and took his chair so M.H. had to stand up and do his work.

JY 4/29/22
When I was doing brainpop with my friend next to me, the speaker announced that there was a lockdown. Mr. Silberman started unrolling the thing on the door for so people cannot see in. After we continued to do the brainpop, when Mr. Silberman started walking around. When M.H., my friend, moved his chair making a squeak, Mr. Silberman grabbed M.H. by the shoulders a little forcefully he moved the chair. After around 4 minutes, he got back his chair to M.H.. After M.V. started to click his mouse, which made Mr. Silberman very mad. After the lockdown he said to log out of the computer, then the bell rang (Ex. P-5).

On April 29, 2022, M.H.'s family returned to the school to report that M.H. had a bruise in the general area as to where he claimed Respondent grabbed him. A.H. testified that on the preceding evening, they filed a report with the Ridgefield Police Department after discovering the bruise. A.H. is employed as a police officer by the Borough. As it turns out, members of the Police Department came to A.H.'s home and took the report from M.H. (Ex. P3). In the report, M.H. told the investigating police officers that he was unsure as to whether the bruise was caused by Respondent. The bruise in the photo introduced in this proceeding reflected a yellowing, as opposed to dark blue, appearance.

School Nurse Hiyoung Kim testified that on the morning of April 29, 2022, that the parent of M.H. reported there was a marking on his son's arm and they asked the nurse for it to be documented. Ms. Kim examined M.H. Principal Yang requested that Ms. Kim document everything and photograph the bruise, which she did (Ex. P3A and B). Ms. Kim testified that her notes contain information as to the details MH provided pertaining to the bruise. Namely, that M.H. told Ms. Kim that the teacher grabbed his left upper arm that Wednesday. Ms. Kim testified the bruise was yellow and thus appeared to be healing at the time of her examination.

During the hearing, Respondent's counsel questioned Principal Yang and Vice Principal Allen with respect to potential limitations on the accuracy of students' statements. Principal Yang was aware that Respondent had students working at their computers during the drill. However, Principal Yang was not aware whether or not students were working with headphones or using a software program, known as "BrainPOP" during the incident. In addition, viewing the aforementioned photograph of Respondent's classroom, Principal Yang noted that the students face the wall at their computers and he was unaware as to where in the classroom each of the students interviewed actually sat. In other words, he did not verify the vantage point that each student had, including potential obstructions, to make the observations they reported.

During her testimony, Superintendent Pantoliano testified that, in her experience, middle school students are aware of everything that is going on around them, especially the teacher and that students could have seen behind them through reflections on their computer monitors.[4]

Although the undersigned has previously set forth sections of Principal Yang's May 3, 2022 disposition report, Yang's analysis of the interviews and written statements is as follows: After interviewing the students the following statements were consistent:

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[4] It is not clear from Dr. Pantoliano's testimony as to whether a reflection would be present when a software program or document is up on the screen in comparison to a monitor that has been turned off.

- **Two students** observed and made statements that M.V. was hitting, banging, using the mouse improperly

- **Two students** observed and made statements M.V. went under the desk/table when the lockdown drill was announced

- **Eight students** observed and made statements Mr. Silberman touched/hit/slapped M.V.'s hand and moved it from the placement of the mouse.

- **Four students** observed and made statements Mr. Silberman "threw" E. hooded sweatshirt onto another table.

- **Fourteen students** observed and made statements Mr. Silberman grabbed/touched M.H.'s arm and lifted him from the chair.

- **Fourteen students** observed and made statements Mr. Silberman moved M.H.'s chair.

All students who observed the incident with Mr. Silberman and M.H. were asked if M.H. moved his chair (making noise) or was leaning back on his chair (with the two front feet off the ground). All students reported that M.H. moved his chair.

Pictures of the bruising (M.H.), the nurse's report, and student statements (including M.H. and M.V.), are attached to this report.

Timothy Yang **5/3/2022**

Signature of Principal **Date[5]**

On or about April 29, 2022, Petitioner reported the incident, as is required to do so, to the Department of Children and Families, Institutional Abuse Investigation Unit ("IAIU").

It is noted that the above May 3, 2022 disposition report by Principal Yang was forwarded to Dr. Pantoliano. It was not provided to Respondent. On June 3, 2022, Dr. Pantoliano met with Respondent and Union representative, Darla Ferdinand. Dr. Pantoliano testified that Respondent

[5] Importantly, the statistical synopsis provided by Principal Yang, as set forth above, was relied upon by the administration, Superintendent Pantoliano and the Board for the purpose of according significant weight to the hearsay statements made against Respondent's interest.

and Ferdinand attended the meeting of June 3, 2022 and "Kara Doviak" attended as a representative of the Superintendent/Board of Education.

Dr. Pantoliano testified as to Respondent's explanation as to what occurred on April 27, 2022. Regarding M.H., Respondent explained to Dr. Pantoliano that M.H. was falling back in his chair, that he grabbed the chair and the student to prevent him from falling. At Dr. Pantoliano's request, Respondent demonstrated what happened using Ms. Ferdinand as M.H. Respondent, standing behind Ms. Ferdinand grabbed her upper body to prevent her from falling in the chair. Conversely, Dr. Pantoliano insisted that Respondent did not demonstrate lifting Ms. Ferdinand out of the chair.[6] Equally more puzzling to Dr. Pantoliano is why Respondent would not have opted for simply grabbing the back of the chair and moving the student forward so that all four legs of the chair were touching the floor.

In addition, Dr. Pantoliano testified as to Respondent's explanation concerning his interaction with M.V. Respondent explained that the student was improperly clicking the mouse and he wanted to demonstrate the proper use of the mouse. Dr. Pantoliano opined that she did not understand how covering the student's hand would demonstrate the proper use of the mouse. Dr. Pantoliano questioned Respondent as to other ways he could have helped M.V. to properly use the mouse without touching him, i.e., by demonstrating himself how to use a mouse in M.V.'s presence. In other words, to Dr. Pantoliano there was no need to have the child's hand in between my hand and the mouse.

Dr. Pantoliano opined that instructing students how to use a mouse during and active shooter lockdown drill was not an appropriate exercise. At page 135 of the transcript of February 27, 2023 proceeding, Dr. Pantoliano elaborated upon her concern:

[6] Dr. Pantoliano opined that she did not believe that it was possible to pull the student out of the chair and up into a standing position while standing behind the chair.

> "The students were supposed to be as quiet as possible. The lights are supposed to be off. The computer monitors are supposed to be off, and whole goal behind that because if there was an active shooter or intruder in the building, you want them to believe that no one is in that classroom, so doing any kind of active, direct instruction with one student, would one, distract all of the other students from what they're supposed to be doing, which is being quiet during a lockdown drill because this is 5th grade, every student is going turning around, looking at why the teacher is near one particular student with their hand on them… And that's where their attention and focus is going to be when it should be on the lockdown drill and practicinge." (Tr. 2, p. 135).

Dr. Pantoliano, in the same vein, commented on Respondent's alleged explanation concerning M.H. in the context of an active shooter lockdown drill:

> "I believe there was a discussion on how long that he left him standing so he believed that he made him stand, was in a matter of seconds in time. How long was a part of the conversation. You know, he was only standing a minute, less than a minute. My feeling as a former teacher and the Superintendent of Schools, if there were an active shooter and it was a dangerous situation, as soon as he made that one child stand, he made that one child a target. If there was a shooter going to come to the door, the first person that was going to be shot was the child standing because again, everyone else is sitting down, that child is standing up so that student becomes a target so at no time do I believe that child should have been made to stand…" (Id., p. 136).

Ms. Ferdinand testified that she also accompanied Respondent to the meeting with Dr. Pantoliano on June 3, 2022. She confirmed that at no time prior to the meeting was Respondent provided with the investigation report and that the report was not provided to him by Dr. Pantoliano until the end of the meeting. Ms. Ferdinand testified that Respondent, just as he was during the April 28, 2022 meeting with Principal Yang and Vice Principal Allen, was shocked and sincerely believed that he was trying to keep the room safe.

On June 16, 2022, Dr. Pantoliano issued a letter to Respondent entitled, "Notice of Discipline & Increment Withholding" (Ex. P. 12). The version of events attested to by the students and Respondent's responses were briefly discussed in the letter by Dr. Pantoliano. In pertinent part, implicitly discrediting Respondent's version, Dr. Pantoliano noted with respect to M.H., "One

student reported that he was forcibly pulled out of his chair, with such force that a bruise was left on his arm… Though you claimed that you pulled the one student out of his chair because he had lifted two feet off the ground, that was contradicted by fourteen students… The other student reported that you slapped his hand and pulled his hand off the computer mouse… Though you claim you were demonstrating the proper position of a hand on a computer mouse to the other student, that too was contradicted by eight other students." (Id.). Lastly, Dr. Pantoliano refers in her June 16, 2022 letter to the 2015 letter of reprimand issued by former Principal John Coviello (Ex. P. 7) and the 2007 observation report where in it was stated that Respondent received a ranking of "needs improvement" and "creating an environment of respect and rapport"; "treating students in a fair and consistent manner"; "establishing an atmosphere of cooperation, mutual respect and concern"; and "creating a learning environment in which others feel free to express themselves respectfully."

Dr. Pantoliano's letter notified Respondent of her rationale underlying her intent to recommend withholding salary adjustments and increments and tenure charges seeking his dismissal:

> "Your conduct demonstrates that you're unable to correct your behavior and implement appropriate, alternative strategies for classroom management and student behavior. Your actions endanger students physically and emotionally, which is in direct contravention to your role as Teacher. Teachers are expected to model appropriate behavior and provide safe learning spaces for students. Students should not fear their teachers or going to class. Classrooms should be welcoming environments that promote learning; not hinder learning or student engagement." (Id.).

In a report dated June 27, 2022 (after Dr. Pantoliano referred the matter to the Board to consider Tenure Charges against Respondent), IAIU entered the following findings:

- The allegation of physical abuse/physical impairment – cut, bruise, welt, abrasion, oral injury is not established in accordance with N.J.SA. 9:6-8.21.

- However, some information in the case of the child was harmed or placed at risk of harm (Ex. P3).[7]

- Notably, findings of "not established" are not disclosed in a Child Abuse Record Information check, but they are maintained in agency records.

RELEVANT BOARD POLICIES

Board Policy 3281, Inappropriate Staff Conduct

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 pupils attending the school district.

In support of the Board's strong commitment to the public's trust and confidence of school staff, the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils. Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.

The Board recognizes and appreciates the staff-pupil 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 pupils.

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

A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety, and welfare of school pupils. 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.

[7] The IAIU report does not specify what information indicated that the "child" was harmed or placed at risk of harm.

Board Policy 3217, Use of Corporal Punishment

The Board of Education cannot condone an employee's resort to force or fear in the treatment of pupils, even those pupils whose conduct appears to be open defiance of authority. Each pupil is protected by law from bodily harm and from offensive bodily touching.

Teaching staff members shall not use physical force or the threat of physical force to maintain discipline or compel obedience except as permitted by law, but may remove pupils from the classroom or school by the lawful procedures established for the suspension and expulsion of pupils.

This policy derives from State law that prohibits corporal punishment with limited exceptions of when force can be used on a student. That statute provides: No person employed or engaged in a school or educational institution, whether public or private, shall inflict or cause to be inflicted corporal punishment upon a pupil attending such school or institution; but any such person may, within the scope of his employment, use and apply such amounts of force as is reasonable and necessary:

(1) to quell a disturbance, threatening physical injury to others;

(2) to obtain possession of weapons or other dangerous objects upon the person or within the control of a pupil;

(3) for the purpose of self-defense; and

(4) for the protection of persons or property; and such acts, or any of them, shall not be construed to constitute corporal punishment within the meaning and intendment of this section. Every resolution, bylaw, rule, ordinance, or other act or authority permitting or authorizing corporal punishment to be inflicted upon a pupil attending a school or educational institution shall be void.

RELEVANT STATUTE

N.J.S.A. 18A:6-10.

No person shall be dismissed or reduced in compensation,

(a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state, or

(b) if he is or shall be under tenure of office, position or employment during good behavior and efficiency as a supervisor, teacher or in any other teaching capacity in the Marie H. Katzenbach school for the deaf, or in any other educational institution conducted under the supervision of the commissioner;

except for inefficiency, incapacity, unbecoming conduct, or other just cause, . . .

DISCUSSION

In the State of New Jersey, a tenured teacher shall not be dismissed from his position or reduced in compensation "except for inefficiency, incapacity, unbecoming conduct, or other just cause." N.J.S.A. 18A:6-10. The TEACH NJ legislation, enacted in 2012, led to the replacement of the Office of Administrative Law and the Commissioner of Education with labor arbitrators required to be members of the National Academy of Arbitrators. It must be presumed that the legislature was aware of how arbitrators address and analyze just cause disciplinary cases, especially in the context of removal or dismissal. Consistent with the legislative enactment, it may be expected that the traditional arbitral factors relied on to evaluate the propriety of the removal or dismissal of a public employee will be brought to the table in addition to the precedent developed over the years by the Commissioner of Education prior to 2012. In fact, the only evidence of the legislature issuing substantive directives to the arbitration panel occurred in 2019, whereby arbitrator training was required on conduct unbecoming an employee, including, but not limited to, issues related to allegations of sexual assault and child abuse. N.J.S.A. 18A:6-17.1(a):

> (1) A review of tenure charge cases concerning conduct unbecoming by a school employee, including cases decided both before and after the enactment of P.L.2012, c. 26 (C.18A:6-117 et al.); and
>
> (2) A review of the factors to be considered by arbitrators in deciding tenure charge cases concerning conduct unbecoming by a school employee including, but not limited to, the nature of the alleged offense and the impact, or potential impact, of the employee's conduct on the health and safety of students within the context of the school environment.[8]

[8] The undersigned filed a certification with the Commissioner on September 17, 2020 acknowledging the completion of such training. Subsequently, supplemental training was required for cultural diversity and bias. The undersigned completed such training on October 4, 2022.

In considering both arbitral and education law precedent, I note first that Petitioner must prove, by a preponderance of the credible evidence, that Respondent is guilty of some or all of the disciplinary allegations contained in the charges. See, West New York v. Bock, 38 N.J. 500 (1962); Cumberland Farms, Inc. v. Moffett, 218 N.J. Super. 331, 341 (App. Div. 1987); Atkinson v. Parsekian, 37 N.J. 143 (1962); *Elkouri and Elkouri*, How Arbitration Works, 5th Edition, pages 930, et. seq. Importantly, the statutorily permitted scope of the instant tenure proceeding is limited to the Charges and specifications actually expressed in the Sworn Tenure Charges. Pursuant to N.J.SA. 18A:6-17.1(3)(b), Petitioner is also obligated to provide full disclosure of its evidence upon filing the Charges with the Commissioner of Education and may not present any additional evidence, save for rebuttal, or impeachment, at the hearing.

N.J.A.C. 6A:3-5.1(b) (1), in pertinent part, specifically states:

> **Charges shall be stated with specificity as to the action or behavior underlying the charges** and shall be filed in writing with the secretary of the district board of education or with the State district superintendent, accompanied by a supporting statement of evidence, both of which shall be executed under oath by the person(s) instituting such charges. Complete copies of all documents referenced in the statement of evidence shall be attached as part of the statement [emphasis supplied].[9]

[9] Similarly, in the analogous context of civil service cases, where the ALJ/Commissioner dichotomy is the same as it was in the education context prior to 2012, an employee cannot be legally tried or found guilty on charges of which s/he has not been given plain notice by the Appointing Authority. Indeed, the *de novo* hearing following an administrative appeal is limited to the charges and specifications contained in of the Final Notice of Disciplinary Action. West New York v. Bock, 38 N.J. 500, 522 (1962), Dept. of Law and Public Safety, Division of Motor Vehicles v. Miller, 115 N.J. Super. 122 (1971); Borough of HohoKus v. Menduno, 91 N.J. Super. 482, 487-488, 221 A.2d 228 (App.Div.1966)(noting that a public employer can only find an employee guilty of offenses specifically mentioned in the charges); Hammond v. Monmouth County Sheriff's Dep't, 317 N.J. Super. 199, 206 (App. Div. 1999)(noting that an Appointing Authority's broadening of local-level charges on subsequent appeal would "surcharge the right to appeal with a cost which violates any decent sense of due process or fair play"); Grasso v. Borough of Glassboro, 205 N.J. Super. 18 (October 16, 1985) (the original charges may not be amended at a trial de novo so as to include new charges); Accord, Fabian vs. Town of North Bergen, (CSV 3198-97, Initial Decision (August 24, 1998), adopted, Merit System Board, (December 2, 1998). Finally, arbitrators follow similar tenets of due process when addressing just cause in a disciplinary dispute. See, *Elkouri & Elkouri*, How Arbitration Works, 5th Edition, page 918; *Koven & Smith*, Just Cause -- The Seven Tests, 2d Edition, page 397.

The requirement imposed on the employing board of education is not so onerous when it is realized that the board can take as much time as it desires to ensure it has "all its ducks lined up in a row." Conversely, a tenured school teacher had comparatively less time to file a response to the charges, specifically, 15 days under N.J.S.A. 18A:6-16. Therefore, once a board of education files with the Commissioner tenure charges, it is bound by the specifications it articulated.

In light of the foregoing, I first find that the scope of this proceeding is inextricably tied to, and limited by, Petitioner's wording of the Tenure Charges and supporting specifications. Notably, in this case, as it turned out, there were two potential alternative set of findings which could have been made **if the Sworn Tenure Charges permitted**: (1) Petitioner sufficiently demonstrated that Respondent abused his power as a teacher, acted with physical aggression as form of discipline or compelling obedience in his classroom (similar to the 2015 allegations), and/or physically and/or emotionally harmed M.H., and/or M.V. in the presence of other students; or (2) Respondent interacted with M.V. and M.H. by touching them physically, thereby showing poor judgment, even if his intent was pedagogy and student safety, respectively. Having said this, however, any fair reading of the factual specifications contained in the Sworn Tenure Charges unambiguously shows that Petitioner rested its Charges on the former, while expressly discrediting the latter.

In fact, Respondent's version of events, (2), above, sans the legal conclusion, were presented to Principal Yang and Vice Principal Allen as early as their April 28, 2022 interview of Respondent. And, whereas Petitioner had every opportunity to file its pleadings in the alternative, it instead sought Respondent's removal based on the version(s) of events set forth by M.H., M.V., the other student witnesses, and the finding of the IAIU that students may have been harmed. To illustrate, specifications from the Sworn Tenure Charges demonstrate Petitioner's rejection of what

could have formed the basis of pleadings in the alternative while instead favoring only a singular line of accusations:

> During the investigation, Mr. Silberman claimed that he pulled the one student out of his chair because he had lifted two feet off the ground, ***however, fourteen students contradicted Mr. Silberman's account*** [See par. 28,**Exhibit F**].
>
> Mr. Silberman alleged that he was concerned for the student's safety and grabbed the back of the chair and the student, holding him up so he wouldn't fall. ***All students who observed the incident with Mr. Silberman and the student were asked if the student moved his chair or was leaning back on his chair. All students report that the student moved his chair*** [See par. 29,**Exhibit G**].
>
> In 2015, and again in 2022, Mr. Silberman violated District Policy 3217 ***by his use of force or fear in the treatment of pupils in his classroom*** [See par. 41].
>
> ***Mr. Silberman's conduct in April 2022 led to physical harm to a student.*** This conduct is unacceptable and as stated in District Policy 3217 will lead to discipline and dismissal from the Board [See par. 49].
>
> During the District's investigation of the incident of April 27, 2022, two students also reported that Mr. Silberman made inappropriate physical contact with them [See par. 53, **Exhibit F**].[10]
>
> When interviewed as part of the investigation, Mr. Silberman denied that he inappropriately touched students. Instead, he claimed that he was demonstrating the proper position of a hand on the computer mouse. ***Yet eight other students contradicted his account of the events in his classroom*** [See par. 54, **Exhibit F**].
>
> Mr. Silberman has created a classroom environment where students do not feel safe or supported by him [See par. 59].
>
> As a result, the next necessary step is to dismiss Mr. Silberman from employment with the Board [See par. 60].
>
> ***Mr. Silberman's physical contact with students in the manner reported by students and observed by other teaching staff demonstrates that he has created a risk of harm to students*** [See par. 62].
>
> As noted in the June 16, 2022 correspondence to Mr. Silberman, ***this was not the first time that his anger and inappropriate physical conduct, creating a risk of harm to students, had been addressed*** [See par. 68, **Exhibit F**].

[10] Referring to Dr. Pantoliano's June 16, 2022 Notice of Discipline and Increment Withholding correspondence to Respondent which, in turn, is referencing the verbal and written statements of M.H. and M.V. and Principal Yang's and Vice Principal Allen's Summary of Investigation Report, dated May 2, 2022.

> The aforementioned misconduct of Mr. Silberman has occurred over multiple occasions over an extended period of time. As noted by reference to his actions in 2007, 2015, and 2022, ***this most recent event was not an isolated incident of poor judgment or a mistake, rather, it was yet another example of Mr. Silberman's abuse of power and inability to exercise self-control or restraint, to the danger of the students in his care*** [<u>See</u> par. 72].
>
> For all these reasons set forth herein, Mr. Silberman's actions demonstrate that he is no longer able to perform the duties as a school teacher and dismissal is warranted [par. 74].

Plainly, Petitioner elected in the Sworn Tenure Charges to squarely discredit Respondent's admitted actions of laying hands on M.H. to prevent him from falling and on M.V. to show him how to properly use a computer mouse. Thus, while Respondent's version of events may be the subject of a credibility dispute, once discredited by Petitioner within the Charges itself, it cannot be fairly resurrected as "Plan B" as the hearing moved along.

Consistent with the above finding, therefore, I cannot consider as within the permissible scope of this proceeding – other than for potential credibility resolutions – the following testimony adduced from Dr. Letizia Pantoliano on February 27, 2023 (months after the filing of charges):

> "[e]ven with the best of intentions," teachers should not be laying their hands on students because we are dealing with intent versus perception and again, this is the perception of the student." (Tr. 2, pp. 153-154);
>
> "Even if I took everything he said in the most favorable, positive light to him, I don't know why you would touch anyone if they were falling because they are in a chair with a solid back so why don't' you just grab the back of the chair and upright them. It didn't make sense having to touch the student at all." (<u>Id</u>., p. 130).
>
> "[L]ooking in the most favorable light for Mr. Silberman, his decisions didn't make any sense when you're looking at the health, safety and welfare of the children in his class." (<u>Id</u>., p. 137).
>
> Whether physical harm was not intended is of no regard, it still violates the policy (<u>Id</u>., pp. 163-164).
>
> Mr. Silberman exhibited poor judgment in grabbing M.H. instead of up righting the chair, and also by making M.H. stand up. Mr. Silberman also exhibited poor

> judgment when he put his hand on M.V.'s to demonstrate how to use a mouse, especially during a lockdown drill, which he claimed he wanted to take seriously. This poor judgment led to the inappropriate touching of students and conduct unbecoming (Id., p. 180).
>
> The bruise was immaterial to her decision to file tenure charges, though it supported her decision later on, as she could not confirm whether Mr. Silberman caused it or his intent, but she could confirm that his conduct was inappropriate for the situation (Id., p. 212).

In sum, Petitioner must be held to the Charges/specifications it actually filed, and may not now resurrect those it expressly rejected.

Also, consistent with the undersigned's January 30, 2023 ruling, the Tenure Charges must be dismissed to the extent they seek to bundle the 2007 non-disciplinary Observation and 2015 Letter of Reprimand as evidence in support of Tenure Charges filed in 2022. Rather, as disposed of in the undersigned's January 30, 2023 ruling, the 2015 Letter of Reprimand and the 2007 Observation are relevant to the issue of prior discipline (2015 letter of reprimand) with an intent to remove the discipline upon two years of good behavior and notice imparted to Respondent by both documents that physical aggression or inappropriate physical contact is prohibited and could lead to discipline, or further discipline. The past incidents cannot, however, be resurrected and weighed differently in this 2022 Tenure proceeding, i.e., Respondent cannot be disciplined twice for the same offense. See, e.g., IMO Randolph Board of Education and Jill S. Buglovsky, Agency Docket No. 265-9/12 (Licata), confirmed, Buglovsky v. The Randolph Township Board of Education, Morris County, Docket No.: C13-13 (P.J. Ch. Stephan C. Hansbury); and In the Matter of Arbitration of John Carlomango, School District of the Township of Hillside, Agency Dkt. No. 450-13 (Melissa Biren).

Lastly, to the extent that there are similarities between the facts underlying the 2015 Letter of Reprimand and the 2022 allegations, this does not mean that the 2015 misconduct, in and of

itself, can be used to prove that Respondent committed the charged 2022 alleged misconduct. See, N.J.R.E. 404(b) and Rule 404(b) of the Federal Rules of Evidence:

> "(b) Other Crimes, Wrongs, or Acts -- Evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that he acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute." [see, e.g., State v. Redick, 181 N.J. 553(2004); State v. Abdullah, 372 N.J. Super 252 (2004).[11]

Next, having defined the permissible scope of this proceeding, I will address Respondent's motion for a "Directed Verdict". Respondent has the burden to prove that it was entitled to judgment at the conclusion of Petitioner's case, i.e., on February 27, 2023. Petitioner has the burden to prove the Sworn Tenure Charges by a preponderance of the credible evidence. Claiming that it did not, Respondent moved on February 27, 2022 (at the conclusion of Petitioner's case) to dismiss, or seek judgment in its favor regarding the Charges. Respondent asserted that he was entitled as a matter of due process to have the motion decided before having to put on his case. Armed with a stack of caselaw, while Respondent was ready to go on February 27, 2023, neither counsel for the Petitioner nor the undersigned had sufficient notice of the motion to address it at that time.

Instead, it was agreed, primarily off the record, (1) to finish the case in its entirety instead of holding the hearing in abeyance pending a decision on the motion; and (2) to bifurcate the record and decision to allow the parties a full opportunity to address the motion based on the record which

---

[11] See also, Gredone, Department of Corrections, 1999 WL 118100 (Administrative Law Judge Kathleen Duncan refused to admit evidence of an employee's prior disciplinary record in 1993 for falsifying an attendance record as proof that the employee intentionally falsified reports in the case then before her); and Hart v. County of Camden, 2001 WL 875795 (Administrative Law Judge Martone rejected evidence of a correction's officer's demeanor toward inmates as corroborating proof of a specific incident of the correction's officer's intimidating and antagonizing inmates).

concluded February 27, 2023. In practical terms, the parties agreed to address the motion as the first point of their post-hearing briefs. The parties also agreed, if the matter was not disposed of by motion, to address the merits of their respective arguments thereafter based on the entire record, including the evidence adduced at the March 6, 2023 hearing. Thus, in the end, the procedure put in place preserved Respondent's right to move for dismissal at the conclusion of Petitioner's case while giving counsel for the Petitioner and the undersigned a full opportunity to get caught up to speed with Respondent.

As to the merits of the motion, Respondent specifically contends that Petitioner failed to present the testimony of any witness having firsthand knowledge of the events which transpired inside Respondent's Computer and Technology classroom on April 27, 2022. The legal grounds for Respondent's motion is that Petitioner disregarded Respondent's alleged constitutional right to confront witnesses and/or disregarded the hearsay rules of evidence by bringing Tenure Charges to a hearing based purely on hearsay evidence; more specifically, by failing to present the testimony of M.H., M.V. or any other witness who had firsthand knowledge of what actually transpired inside Respondent's classroom on April 27, 2022 during the active shooter lockdown drill.

Initially, I do not find that Petitioner deprived Respondent of a constitutional right to confront witnesses under the Sixth Amendment to the United States Constitution or the New Jersey State Constitution analogue. This is so because the constitutional guarantees apply to criminal as opposed to civil proceedings, with the exception of the Fifth Amendment right against self-incrimination. See, Dolan v. City of Orange, 287 N.J. Super. 136, 144 (App. Div. 1996) (explaining that, in disciplinary hearings, "the right of confrontation and cross examination is not part of the panoply of procedural safeguards required by federal or state constitutions"); Borough of Franklin

v. Smith, 466 N.J. Super. 487 (App. Div. 2021) (Borough subpoena requiring police officer to testify for the Borough in his disciplinary appeal did not deny him due process; Fifth Amendment concerns do not constitute categorical justification not to comply with subpoena; rather, Fifth Amendment must be invoked, if at all, on a question-by-question basis); See, also, IMO Randolph Board of Education and Jill S. Buglovsky, Agency Docket No. 265-9/12 (Licata, 2013), confirmed, Buglovsky v. The Randolph Township Board of Education, Morris County, Docket No.: C13-13 (P.J. Ch. Stephan C. Hansbury) (recognizing that while the constitutional prohibition against double jeopardy does not apply to a tenure case, the principles underlying the constitutional principle may extend by analogy under just cause). Thus, I initially find that Petitioner did not deprive Respondent of a constitutional guarantee by failing to call, in its case-in-chief, any witness who was inside Respondent's classroom on April 27, 2022 when the alleged incidents took place.

Instead, Respondent's motion is more properly characterized as a hearsay challenge to the evidence presented by Petitioner. Petitioner maintains that there is sufficient competent evidence which, in conjunction with the reliable hearsay evidence, supports the Charges as well as Respondent's dismissal from employment, including, but not limited to, (1) the relatively consistent, but independent statements of 14 students, none of whom filed a complaint against Respondent in the past; (2) the honesty of their parents; (3) the reporting of the incident to police officers, administrators, the school nurse; (4) participation in the DCF/IAIU investigation, etc.; (5) The IAIU's finding that a student may have been harmed; (6) the bruise which surfaced on M.H.'s arm; and (7) the alleged fanciful explanation by Grievant as to what occurred, i.e., that he went off script during an active shooter drill to prevent M.H. from falling and to model the proper use of a mouse to M.V. Respondent replies that Petitioner's proofs fall far short of satisfying the residuum rule. For the reasons which follow, I am satisfied that with one exception pertaining to

compelling M.H. to stand in front of the class, Petitioner has failed to presented sufficient competent evidence to support the Charges. An appropriate disciplinary penalty will be discussed, *infra.*

In addressing the record before me, an understanding of the hearsay and residuum rules of evidence is necessary. Hearsay evidence is generally admissible in arbitration proceedings and in administrative proceedings in New Jersey. It is subject to whatever weight accorded to it by the decision-maker. See, *Elkouri and Elkouri*, How Arbitration Works, Eight Edition, Ch. 8.4 C. (8-33), citing, Kagel, Practice and Procedure, in the Common Law of the Workplace: The Views of Arbitrators 37 (St. Antoine ed., BNA Books, 2d ed. 2005). Indeed, arbitrators generally admit hearsay evidence, but qualify its reception by informing the parties that it is admitted only "for what it is worth". In most cases, very little weight is given to hearsay evidence and it is exceedingly unlikely that an arbitrator will render a decision by hearsay evidence alone. *Elkouri & Elkouri, supra,* at 449-451. Perhaps the most comprehensive review of the arbitral treatment of hearsay evidence is set forth by Arbitrator Stanley Kravit in Barton Center, Senior Health Management, LLP and UFCW Local 1425 (Kravits 2005), FMCS Case No. 040715/56271-3, 2005 WL 7084765.

In the matter before Arbitrator Kravit, the grievance challenged the discharge of two certified nurse's aides for verbally abusing and failing to reposition the pillow of an elderly resident. Similar to the student-teacher paradigm, the facts involved a common occurrence in the industry whereby the employer and the family of the resident did not wish to present the testimony of the resident against her caretakers. Arbitrator Kravits provided the following historical recitation of the hearsay rule, as addressed by arbitrators (footnote annotations appear in full in Barton Center, Senior Health Management, LLP but are omitted here for brevity):

> Hearsay is defined, simply, as a statement made outside the hearing by a person other than the testifying witness, offered in evidence to prove the truth of the matter

asserted. The probative value of such evidence depends on the credibility of someone who cannot be cross-examined.

The issue of whether such evidence should be admitted at all, assuming it does not fall within the many categories of admissibility, must be separated from the weight to be given. The absence of cross-examination denies the grievants of the right to test whether the actual declarant is lying, remembering inaccurately, or simply wrong. Possible motivation of a declarant is a critical element where there is evidence of conflict, e.g., between accuser and grievant, or between the accuser and other accused in the same setting.

Since arbitrators are not bound by the strict rules of evidence applicable in court, there originally developed a practice of admitting hearsay "for what it is worth". As various texts and many arbitrators have stated, "Rarely do the parties know what it is worth, at least not at the hearing." I would add, nor in the preparation of their briefs.

As far back as 1967 a prominent group of arbitrators concluded:

"Unless corroborated by truth-tending circumstances in the environment in which it was uttered, it (hearsay) is unreliable evidence and should be received with mounting skepticism of its probative value as it becomes more remote and filtered."

This statement strengthened the underpinnings of the practice of receiving hearsay, but limiting its probative value. It is reflected, e.g., in the following comment on the "for what it is worth", if anything, concept:

"In accepting it, however, the arbitrator is expected to have the expertise and experience to properly evaluate the evidence and to accord it the appropriate weight dependent upon the corroborating support for the evidence and the circumstances surrounding it." <u>Wisconsin Dept. of Health & Social Services</u>, 84 LA 219, 222 (Imes, 1985)

There have been many cases in which hearsay has been offered in lieu of testimony of bus passenger complaints against drivers; undercover agent or security guard allegations against employees; and nursing home patients' allegations of abuse against CNAs. In the great majority of these cases, of which this Arbitrator has made an extensive review, arbitrators have refused to sustain discharges based **solely** upon hearsay evidence. This caution is well stated by the following holding:

"I am very conscious of the fact, which the Union stresses in its brief, that it has been deprived of the opportunity to cross-examine the [security officer] and thereby perhaps to impeach his very serious accusations against the grievant. All that a fair and conscientious arbitrator can do under these circumstances is to scrutinize the hearsay evidence very closely, and to give it little or no weight if there is any indication that the evidence is untruthful, misleading or biased." <u>Baker-Marine</u>

Corp., 77 LA 721, 723 (Marlatt, 1981)

Perhaps the definitive statement on the issue of admissibility versus weight was made by Arbitrator Glushein in Bambergers, 59 LA 879 (1972). In that case an undercover detective reported to a Company official that he had purchased marijuana from an employee. He produced the purchase and later gave a statement to the police. At the hearing the Company did not produce the agent, but relied upon the hearsay testimony of its security manager. The union objected to the testimony and asked that it be stricken. In his award overturning the discharge, the Arbitrator held:

> "Whether or not I now strike his testimony from the record, the result is the same. As will appear in a few moments, I find the hearsay recital to be an entirely inadequate basis on which to destroy a man's career, job rights and essential livelihood, not to mention the stain upon his reputation and the resulting difficulty of finding another job."

"The general rule in arbitration, and one to which the arbitrator subscribes, is that hearsay testimony may be admitted in some circumstances where the customary rules of evidence in court proceedings would exclude it. Such hearsay may lend a degree of support to facts otherwise established by first-hand, competent, reliable and probative evidence. But to rely absolutely and exclusively on pure hearsay is a proposition far beyond what the arbitrator is prepared to accept, and one which is wholly unsupported in the arbitration literature."

"Some kinds of hearsay no doubt are more compelling than others and carry a certain degree of probability. But in all or substantially all cases which the arbitrator can envisage, there must be apart from the hearsay a core of competent, reliable and credible evidence which the hearsay corroborates."

"Especially is this standard mandatory where the contested issue is such a serious one as here, on which turn a man's livelihood and reputation." (Id. at 881-882)

These citations reflect my reasons for admitting the hearsay complaints against the grievants, as well as my view of the appro-weight these exhibits may be given.

In a case similar to Bambergers, Arbitrator Gallagher overturned a discharge for drug use on company premises where the sole evidence was the report of an undercover agent who did not testify. Stating that:

> "Consistent with prior arbitral decisions related to discharge for alleged alcohol or drug usage, the Arbitrator holds the opinion that the burden of proof placed upon the Company in cases of this type must meet the standard of 'clear and convincing' evidence to support the 'just cause' basis for the discharge" (citations omitted).

> The Arbitrator held that, in the absence of the testimony of the agent, "the Company's case is lacking a central and crucial element." Tarmac Virginia, 95 LA 813, 818 (1990)

Because patient abuse is so serious an offense, and because complaining patients or patient-witnesses are unavailable to testify for medical reasons, nursing home cases are the most difficult in which to apply the standard of just cause against allegations based on hearsay.

In Ambassador Convalescent Center, Inc., 83 LA 44 (Lipson, 1984) the Arbitrator upheld the discharge of an orderly accused by a helpless but mentally alert patient who died before the hearing. The patient repeated the accusation on the day it allegedly occurred to a visitor and several staff and had a discoloration on his left eye. The orderly was accused by the patient of striking him.

The patient also accused the grievant in front of an investigating nurse. The grievant testified and denied the allegations. Another employee disputed a portion of the patient's account of events. The employer's case was based solely on the hearsay testimony of those who had heard the patient's complaints.

The Arbitrator first acknowledged the reasons for admission of the hearsay and the necessary caution in receiving it.

> "Frequently, hearsay is the only evidence available in the work place setting, and the automatic exclusion of same could result in an incomplete record and a failure to accomplish a just result. On the other hand, an arbitrator must carefully bear in mind the inherent weaknesses in hearsay evidence, particularly in the context of a discipline case where the employer has the burden of proving just cause." (Id. at 46)

The Arbitrator admitted the hearsay on the basis of the following sections of the Federal Rules of Evidence:

"Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial …

(1) Present sense impression.--A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.

Excited utterance.--A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition …"

"Rule 804. Hearsay Exceptions; Declarant Unavailable ….

(b) Hearsay exceptions.--The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(5) Other exceptions.--A statement not specifically covered by any of the foregoing exceptions, but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

In addition to finding that the circumstances before him met the criteria of these sections, the Arbitrator found the hearsay far more credible than the testimony of either the grievant or co-worker, stating:

> "While great weight must be given to the sworn testimony of the Grievant and the co-worker Long, in which misconduct was denied, it must be recognized that said testimony cannot be deemed impartial. The Grievant certainly has an interest in a decision that would result in his reinstatement and back pay, and it is understandable that a friend or co-worker would tend to support his assertions." (Id. at 47)

Since there was no apparent motive for the patient to have falsely accused the grievant, the Arbitrator found "that the Employer has made a clear and convincing case that [grievant] struck patient "D"." (Id.)

Arbitrator Lipson was strongly motivated by the fact that "patient abuse cannot be tolerated in a health care facility" and his finding that the patient had suffered an eye injury. The question is whether the Arbitrator's analysis represents a sound arbitral response to nursing home situations or merely indicates that, once admitted, hearsay gains in credibility to an inappropriate degree by the simple fact of admission.

The challenge for arbitrators lies in the admonition to "carefully bear in mind the inherent weaknesses of hearsay evidence," especially when the hearsay is contradicted by the grievant's testimony; and considering that a grievant in an unwitnessed situation has little hope of proving himself "not guilty" and that such a requirement runs counter to due process.

In Ambassador the Arbitrator accepted the hearsay accusation as both a present sense impression and an excited utterance while stating that

> "There can be no debate that the 'interests of justice will best be served by admission of the statement into evidence,' since otherwise there can be no inquiry into an accusation of patient abuse, a serious

> matter in the nursing home context."

However, the accusation should and does trigger investigation, as is required by Florida law. The need to investigate and prevent abuse must be viewed separately from the issue of the weight to be given to hearsay evidence.

In Wisconsin Dept. of Health & Social Services, *supra*, Arbitrator Imes confronted a situation very similar to that in Ambassador, including a discharge based solely on hearsay accusation by a non-testifying witness/patient. This also included admission of the accusation "for its probative value since without admission of the statements into evidence, there would be no inquiry into the accusation of patient abuse." (Id. at 222)

Acknowledging that patient abuse is intolerable "because patient care, custody and protection is the very core of the institution's reasons for being," she cautioned employers against the risk of not having patients testify in the absence of medical verification of their inability to do so. (Citing the requirements that would apply in court, at 222) The Arbitrator concluded:

> "… it is incumbent upon the arbitrator to carefully weigh the evidence submitted and reach a reasonable decision based upon the reliability and credibility of the evidence. In so doing, it is concluded the employer failed to establish clear and convincing proof that the grievant had physically abused one of the Center's residents." (Id. at 223).

This case is noteworthy for several other conclusions expressed in the opinion. First, that hearsay cannot be corroborated by hearsay in the form of additional statements taken from other witnesses who do not testify. Second, the Arbitrator rejected both the excited utterance and startling event exceptions based on the facts. There, as in the case before me, the patient's accusation was not spontaneous with the event alleged. Neither of these concepts are any guaranty of weight being accorded to testimony. And, underlying facts must be carefully scrutinized as to a resident's mental state, particularly where the sole evidence is hearsay.

In City of Pontiac, 92 LA 780 (1989) Arbitrator Roumell commented at length on the awards cited above, there an employee was discharged for failing to comply with a last chance agreement by not regularly attending aftercare therapy for alcohol dependency. The evidentiary issue was the admission of and the weight to be given to two letters from the therapist, offered in the absence of his testimony, stating the grievant's failure to attend.

The admission of the letters and the denial of the grievance were clearly predicated on the testimony of the City's Human Resource coordinator that, in three meetings with her, the grievant admitted that he had not attended all of the required sessions with the therapist. Such admissions against interest are exceptions to the rule

against hearsay.

> Each of these cases is a well-researched and thoughtful analysis of the distinction between admissibility and weight to be given to hearsay evidence. Each stresses the reasons why arbitrators may be expected to admit hearsay, but cautions against relying solely upon hearsay in discharge cases. The caution for arbitrators is that, once admitted, hearsay may take on a degree of credibility in nursing home cases where there is no other apparent way of preventing patient abuse.

In sum, hearsay evidence must be evaluated as to its "truth lending" circumstances. The bias or lack thereof of those making the out of court declarant must be measured. Hearsay evidence is a common occurrence where there is an understandable reluctance on the part of the declarant to testify, such as, patient-provider, bus passenger-driver, employee-security guard and, I add to the list, student-teacher. However, the existence of the dependent relationship alone does not excuse the employer from backing the hearsay statements of the dependent witnesses with competent evidence. Indeed, in serving on several hospital arbitration panels, I point out that the balance is often contractually struck so as to preclude an arbitrator from drawing "an adverse inference" against the patient who does not participate in the arbitration hearing. Additionally, hearsay cannot be deemed competent evidence to support other hearsay. Rather, hearsay may be credited to support competent evidence, and *vice versa.* Admissions against interest constitute competent evidence, as does a lack of credibility on the part of the alleged offender when competent evidence allows the hearsay evidence to be equally weighted.

Finally, the arbitrator must review whether or not an exception(s) to the hearsay rule exists which, in that circumstance, may be deemed competent evidence in and of itself.

Next, I observe, New Jersey administrative law also follows the same principles relied upon in the arbitration context. Pursuant to N.J.A.C. 1:1-15.5, "Hearsay evidence; residuum rule", the following hearsay principles are codified.

> (a) Subject to the judge's discretion to exclude evidence under N.J.A.C. 1:1-15.1(c) or a valid claim of privilege, hearsay evidence shall be admissible in the trial of contested cases. Hearsay evidence which is admitted shall be accorded whatever weight the judge deems appropriate taking into account the nature, character and scope of the evidence, the circumstances of its creation and production, and, generally, its reliability.
>
> (b) Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness. [emphasis supplied].

Consistent therewith, the New Jersey Supreme Court stated:

> [A] fact finding or a legal determination cannot be based upon hearsay alone. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony. But in the final analysis for a court to sustain an administrative decision, which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it. [Weston v. State of New Jersey, 60 N.J. 36, 51 (1972).]; see, also, David v. Strelecki, 97 N.J. Super. 360, rev'd 51 N.J. 563, cert. den., 390 U.S. 933; Matter of Tenure Hearing of Cowan, 224 N.J. Super. 737 (App. Div.1988).

The residuum rule does not require that each fact be based on a residuum of legally competent evidence but rather focuses on the ultimate finding or findings of material fact. See, Rurorede v. Borough of Hasbrouck Heights, 214 N.J. 338, 359 (2013), citing, Mayflower Sec. Co., Inc. v. Bureau of Sec., 64 *N.J.* 85, 92–93 (1973). The underlying rationale of the rule is that an administrative determination should "not rest upon evidence which the unsuccessful party was incapable of impeaching or rebutting." Application of Howard Savings Bank, 143 N.J. Super. 1, 9 (App. Div. 1976).

Consistent with the foregoing, Respondent presents the following persuasive case law. In Dolan v. City of East Orange, *supra*, the city sought removal of a public employee based on charges of conduct unbecoming arising out of a physical altercation between Dolan and a subordinate employee, Caldwell. The hearing officer recommended removal based solely on a

letter produced by Caldwell, who did not testify. On review, the Court held that "traditional notions of fairness require that Dolan have opportunity to confront and cross-examine Caldwell." Id. at 145-146. The Law Division's finding that a new hearing was required since no substantive evidence existed to support the removal was upheld by the Appellate Division (reasoning that the charges were not sustainable in the absence of affording Dolan an opportunity to confront his accuser) [Resp. Brief, page 30].

Respondent also correctly notes the rejection by administrative law tribunals of discipline based solely on hearsay. Hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added probative force by hearsay testimony; however, in order to support an administrative decision, "which affects the substantial rights of a party, there must be a residuum of legal and competent evidence in the record to support it." [Resp. Brief, p. 30].

Respondent also aptly observes that arbitrators on the TEACH NJ Panel similarly adhere to the above principles. In the Matter of the State Operated School District of the City of Paterson v. Richard Vincenti, 255-14 (Edelman, June 11, 2014) involved tenure charges brought against Vincenti citing unbecoming conduct, incapacity and other just cause for a variety of alleged offenses, including egregious allegations of verbal abuse of his students. The district relied on the testimony of the principal, letters received by teachers, the school secretary's testimony, written statements by students, and testimony of the assistant principal. Vincenti asserted the district had not met its burden and argued that hearsay evidence and allegations not founded on the charges must be accorded no weight.

Arbitrator Edelman noted that hearsay evidence is admissible, however, standing alone it is not sufficient to prove the charge. He reasoned that Vincenti had a fundamental due process right to face his accusers and to cross-examine in order to discredit the accusations. Arbitrator

Edelman held that to the extent that anonymous letters for the sole basis of a charge, they have no probative value and that unsigned letters or second or third hand reports regarding misconduct are insufficient to demonstrate he committed the infractions charges. Particularly instructive to this matter, Arbitrator Edelman held that hearsay statements from other students are not sufficient to demonstrate that Respondent made the remarks attributed to him.

In the Matter of the Tenure Hearing of Michelle Gates, Case No. 144-5/16 (Gerber, September 8, 2016) involved charges all stemming from allegations that Respondent gave answers to and assisted students during state testing. An investigation was undertaken by the State, two investigators testified, the recordings and transcripts of statements made by twenty-seven students were admitted into evidence at the hearing. The students were not under oath at the time of their statements, nor was Respondent or a representative present during the interviews. Thus, Respondent had no opportunity to cross-examine. Upon reviewing the reports of the investigation, tenure charges were brought. The District rested its case without ever calling any of the twenty-seven students that were interviewed.

Respondent moved to dismiss contending all of the evidence presented constituted hearsay evidence and that evidence was not supported by a residuum of competent admissible non-hearsay evidence. Arbitrator Gerber reserved ruling, and asked the parties to file written summations on the motions. Thereafter, citing Dolan v. East Orange, supra., Arbitrator Gerber found that Respondent was denied the opportunity to cross-examine the witnesses – and that no evidence was even presented that the students were unavailable. Indeed, all of the cases cited by the Petitioner acknowledged that a case cannot turn on hearsay alone; that there must be a residuum of competent, credible evidence before sustaining a tenure charge. As such, Arbitrator Gerber held that the evidence presented by the district constituted hearsay evidence and there was not one piece

of direct, non-hearsay evidence to support the allegations as the only witnesses had no direct knowledge of the alleged conduct. Accordingly, Arbitrator Gerber entered judgment in favor of Respondent and dismissed the charges against her with prejudice [Resp. Brief, pp. 32-33].[12]

In the Matter of the Tenure Hearing of Thomas Strassle, Agency Dkt. No.: 131-5/16 (Biren, October 5, 2016), multiple charges were brought against Strassle, one involving allegations of sexual contact with a student, N.C. At the hearing, N.C. did not testify. Rather, other witnesses testified, without any first-hand knowledge, based on the allegations set forth in N.C.'s statements. Because there was no competent reliable evidence proffered, Respondent moved to dismiss at the close of the district's case in chief.

Arbitrator Biren held that while admissible, hearsay evidence alone is insufficient to prove an allegation, finding this is especially true, where, as here, a tenured teacher is subjected to termination. Citing Vincenti, Arbitrator Biren noted that "Respondent has a fundamental due process right to face his accusers at trial." Id. Though N.C.'s statement was sworn to police, N.C. was not subject to cross-examination when providing her statement, thus the Arbitrator found that Respondent was unable to question her veracity, about inconsistencies, about possible bias, improper motivation, and any other facts that might indicate the allegations were fabricated. Significantly, Arbitrator Biren reasoned that she was without the opportunity to assess N.C.'s credibility.

In addition, Arbitrator Biren determined that there was no competent evidence in the record because no witness had direct knowledge of the claims. Arbitrator Bien also observed that while the police and the IAIU investigated the allegations, no criminal or other charges were filed against Strassle resulting from N.C.'s statements. Ultimately, Arbitrator Biren found that due process

[12] Cf. I/M/O Woodbridge Township Board of Education v. John Radzik, Dkt. No. 368-12/12 (Licata, 2013) (hearsay written statements and OFAC report supported by the testimony of two eyewitnesses).

required the school district to prove these serious charges by a preponderance of the evidence before the 12-year tenured teacher with no evidence of prior discipline is dismissed. It was held that "[t]o uphold these charges in the total absence of competent and reliable evidence to support them would result in the type of miscarriage of justice that these tenure proceedings are intended to prevent." Id. The charges were therefore dismissed at the conclusion of the district's case in chief.

In the instant case, Respondent observes, Petitioner presented hearsay statements made by the alleged student victims, M.H. and M.V., as well as from the students claimed to have witnessed the interactions between Respondent and M.H. and Respondent and M.V. Thus, like Vincenti, Respondent reasons, Petitioner offered solely hearsay evidence, and has failed to proffer any competent credible evidence to corroborate the hearsay statements. Like Gates, Petitioner presented witnesses with no direct knowledge of the alleged conduct and relied solely on investigation reports, testimony of investigators, and out of court statements of student witnesses. Like Strassle, Respondent points out, the IAIU investigation in this matter resulted in no established findings. Moreover, in addition to Respondent being without the opportunity to cross-examine, in the same vein of Strassle, Respondent submits that the undersigned is deprived of the opportunity to assess the credibility of the only witnesses with direct knowledge of the allegations.

In sum, Respondent submits there was no evidence that the students were not available to be called as witnesses. Because the student witnesses were not called, Respondent asserts that he was denied the opportunity to cross-examine. Additionally, the statements made by the students admitted into evidence in this case were not sworn statements nor made under oath. Like Gates, Respondent submits, the only evidence produced in this case is uncorroborated hearsay evidence. To uphold the charges in this case, in the total absence of competent and reliable evidence and

remove a twenty-year veteran teacher would result in a miscarriage of justice. Thus, Respondent asks the undersigned to grant its motion, to dismiss the Sworn Tenure Charges and to make Respondent whole for any and all losses.

As for Petitioner's reply, Petitioner believes that the hearsay evidence is entirely reliable based upon the circumstances which inform its origins. For example, Petitioner suggests that in support of the student statements, the undersigned should consider the "firsthand accounts of the initial investigators in this case" – referring to the parents of the students and Principal Yang and Vice Principal Allen (Pet. Brief, pp. 38-39). However, in terms of the hearsay rule, I note, Petitioner incorrectly refers to secondhand accounts as firsthand accounts. In the end, it seeks to support hearsay with hearsay. Petitioner asks the undersigned to credit the consistency of all 14 statements, the willingness of M.H. and M.V. to participate in investigations, a lack of bias on their parts, and Respondent's past behaviors.

While I agree that the hearsay here does have significant elements of reliability, it must be remembered that Respondent would have had the right to cross examination had Petitioner put forth the student/eyewitnesses to testify. Just as any attorney's case would look unbeatable if only direct examination was permitted (but not cross), so too, I find, any attorney's case would look insurmountable if only required to introduce the investigatory file to prove its case. In the end, Respondent, through skilled counsel, may have poked numerous holes in the observational capabilities of each student, whether those interviewed on April 28 spoke to those before their April 29 interview, among other possibilities. For these very reasons, and as the overwhelming majority of arbitration and administrative law cases support, I cannot accept hearsay alone as a basis to severely penalize Respondent. Indeed, Petitioner itself notes that hearsay may be employed to corroborate competent proof, or competent proof may be supported or given added

probative force by hearsay testimony." Weston v. State, 60 N.J. 36, 51 (1972). Implicitly, therefore, Petitioner understands (or should understand) that hearsay evidence cannot fairly constitute "competent evidence" to corroborate other hearsay evidence under the residuum rule.

Having said this, however, Petitioner's reliance on Ruroede v. Borough v. Hasbrouck Heights, 214 N.J. 338, 359-60 (2013) does aid Petitioner's charges with respect to Respondent's act of forcing M.H. to stand for the remainder of the active shooter lockdown drill in front of the class. Ruroede involved a police officer who was placed on temporary sick leave and suspended without pay due to charges stemming from an off-duty verbal and physical altercation at a bar; there was no live testimony of the complaining witness or other eyewitnesses; and there was an internal investigation conducted by the Police Department and preparation of a report presenting the summaries of the police rules and regulations violated as well as the summary of witness statements.

In my opinion, however, the most critical part of the Supreme Court's rationale in Ruroede is that competent evidence, in the form of Rurorede's admissions was not hearsay. Rather, there was sufficient probative, non-hearsay evidence to meet the residuum rule test and support the disciplinary charges as filed by the Police Chief.

As to the Charges:

> Following the internal investigation, the Police Department issued to Ruroede a Notice of Immediate Suspension and Disciplinary Charges (Notice). The Notice alleged that Ruroede violated eleven Police Department Rules and Regulations, including: 3:1.1 (Standard of Conduct), 3:1.11 (Conduct toward Superiors and Subordinate Officers and Associates), 3:1.12 (Obedience to Laws and Regulations), 3:1.29 (Withholding Information), 3:9–1 (Handling of Firearms), 3:9.3 (Off Duty or Secondary Firearm), 3:10.1 (Conduct Towards Public), 3:12.4 (Departmental Investigations–Testifying), and 4:8.4 (Unauthorized Absence). It charged Ruroede with conduct unbecoming a police officer, conduct unbecoming a public employee, disorderly conduct, willful violation of rules and regulations, dishonesty and untruthfulness, and withholding information. The Notice concluded that Ruroede

> had "violated the implicit standard of good behavior which devolves upon one who stands in the public eye as an upholder of that which is morally and legally correct," and recommended that Ruroede be suspended immediately without pay pending his termination. . .

As to the sufficiency of evidence, the Court relied upon Ruroede's admissions and his proven guilt to the charge of dishonesty:

> He was at Blarney Station while he was supposed to be on sick leave; he was at the scene of the altercation with Egbert; due to whatever verbal exchange ensued, he conceded that he became involved in a public altercation with Egbert; and he conceded that he displayed his official police badge and that he was carrying a weapon. Although he admits to carrying a knife rather than a firearm, he nonetheless admitted to carrying a weapon under his shirt and to lifting his shirt in a display toward Egbert during the dispute. And, he conceded making threatening comments to Egbert, "br[eaking] his hold," "grabb [ing] his jacket," and "push[ing] him away." That evidence was competent, and it was sufficient to support the ultimate facts necessary to sustain the Borough's charges that Ruroede engaged in inappropriate conduct unbecoming a police officer. The evidence supported that Ruroede violated departmental rules and regulations governing the behavior of police officers. *See* Police Department Rules and Regulations 3:1.1 (Standard of Conduct), 3:1.12 (Obedience to Laws and Regulations), 3:10.1 (Conduct Towards Public); Conduct Unbecoming a Police Officer; Disorderly Conduct; Willful Violation of Rules and Regulations; Dishonesty and Untruthfulness.
>
> It is not material whether we accept Egbert's or Ruroede version of how the altercation began. The differences between the two pale in comparison to the bigger picture: the proofs in this record establish that Ruroede acted inappropriately for a person holding the public trust as a police officer and public employee. Ruroede had more than twenty-three years of experience with the Police Department. He had been a superior officer. We can reasonably infer that he had enough experience working under relevant police rules and regulations to avoid physically grabbing anyone, displaying his police credentials during such a dispute, or carrying a weapon, all while on sick leave. Additionally, Ruroede knew, or should have known, not to make inconsistent statements during the course of the internal affairs investigation, calling into question his honesty, integrity, and truthfulness, essential traits for a law enforcement officer. His dishonesty—providing conflicting statements to investigators about the altercation is significant. In sum, the Borough's proofs were sufficient to prove the charges by a preponderance of the evidence, and the charges support the termination of his employment as a police

officer (Id., at pp. 362-363).

In sum, with the exceptions that Ruroede claimed not to be the aggressor, and that he was carrying a knife, and not a gun, he admitted to most of the charged misconduct and his inconsistent statements made to investigators spoke for themselves.

In this matter, regarding M.H., Petitioner expressly averred, under paragraph 16 of the Sworn Tenure Charges:

> The student was called into Mr. Yang's office and asked to describe the incident that took place on April 27, 2022. According to the student, during a lockdown drill on April 27, 2022, every student was told to be quiet. The student moved his chair back which made a loud squeaking noise. The student reported that Mr. Silberman came behind him and grabbed him by his upper left arm and ushered him forcibly up and moved his chair. ***Mr. Silberman made the student stand during the duration of the drill.*** See Dr. Pantoliano's Statement of Evidence, Exhibit G, (Slocum Skewes School Investigation Summary Report).

Consistent with Rurorede, I find, Respondent admitted, in pertinent part, to making M.H. stand for the remainder of the lockdown drill.

In my experience, making a student stand in front of the class (or in a corner) for even a minute or less was a time-honored form of discipline *via* humiliation in the olden days, one not countenanced as an acceptable form of discipline in these days of enlightenment. However, the act itself does not, in my view, meet the statutory definition of "corporal punishment" or Board Policy 3217, as Dr. Pantoliano submits (Tr. 2, p. 136). It does, however, invoke a violation of Board Policy 3281, "Inappropriate Staff Conduct", which 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 pupils attending the school district.
>
> In support of the Board's strong commitment to the public's trust and confidence of school staff, ***the Board of Education holds all school staff to the highest level of professional responsibility in their conduct with all pupils.***

> ***Inappropriate conduct and conduct unbecoming a school staff member will not be tolerated in this school district.***
>
> The Board recognizes and appreciates the staff-pupil 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 pupils.***
>
> ***School staff shall not engage in inappropriate conduct toward or with pupils***.
>
> A school staff member is always expected to maintain a professional relationship with pupils and to protect the health, safety, and welfare of school pupils. 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.***

In finding that Petitioner sufficiently met its burden as to the above charge, paragraph 16, based on competent evidence, i.e., Respondent's admission, I deem incredible Respondent's assertion that this act may have been a safety precaution. On the contrary, Respondent, by clear implication, conceded in his April 28, 2022 commentary to Principal Yang and Vice Principal Allen that he viewed M.H.s conduct as misbehaving, but not warranting parental notification. In other words, in real time, because Respondent judged M.H.'s act of allegedly pushing off his desk and "popping a wheely" as misbehaving, he ended up making M.H. stand in front of the class, and did not believe that parental notification was necessary.

Lastly, Respondent took this action in the context of an active shooter lockdown drill which he, himself, acknowledged was supposed to replicate the real thing. As Dr. Pantoliano aptly observed, in an active shooter situation, Respondent made the standing student a target who would be the first person being shot. (Tr. 2, p. 136). In other words, unless I am to conclude that

Respondent was clueless about the danger of making a student stand during an active shooter occurrence, which the drill is designed to replicate, I must reject his explanation that the act of making M.H. stand was non-disciplinary. Thus, for these reasons, I credit Petitioner's allegation, as expressed in the Sworn Tenure Charges, that Respondent improperly made M.H. stand for the remainder of the lockdown drill as a form of discipline, and thereby objectively humiliated him in front of the rest of the class.

Having said this, however, the remainder of Petitoner's case against Respondent is undoubtedly without competent evidence (or sufficient competent evidence). Respondent chose to provide the following explanation to Principal Yang and Vice Principal Allen on April 28, 2022.

- Mr. Silberman stated, "M.H." was kicking off the wall in the chair, leaning back on the chair, the two front legs of the chair were in the air. (Demonstrated).
- Concerned for his safety-grabbed the back of the chair and M.H., holding him up so he doesn't fall.
- To support M.H., Mr. Silberman grabbed his arm and the back of the chair. He lifted M.H. out of the chair and told him to stand until the end of the lockdown drill. According to Mr. Silberman M.H. was standing no more than a minute.

Here, I note, there was no competent evidence to support crediting a different version than what Respondent admitted to. Next, with respect to the balance of the M.H. incident and the M.V. incident in its entirety, this record does not contain the requisite competent evidence to support according outcome-determinative weight to the hearsay statements. There is no exception to the hearsay rule, e.g., present sense impression, excited utterance, other exception where the hearsay is the best or only evidence which could be proffered, and no admission against interest, as was the case with respect to Respondent forcing M.H. To stand in front of the class for allegedly "popping a wheely." Also, with respect to M.V., Respondent's explanation was also relatively consistent during both his April 28, 2022 interview and his June 3, 2022 meeting with Dr.

Pantoliano:

Mr. Silberman 's account of events: (April 28, 2022):

- Mr. Silberman stated M.V. was swatting the mouse-demonstrated how hard and loud M.V. was swatting the mouse.
- Mr. Silberman stated he repositioned M.V.'s hand.
- Mr. Silberman stated, M.V. looked confused-he was swatting the mouse. Mr. Silberman repositioned M.V.'s hand to stop.
- Mr. Silberman asked, "Do you know what you're doing?" M.V., stopped, and responded, "No what am I doing?"
- This is where Mr. Silberman took his wrist and showed M.V. how to place his hand on the mouse.

Therefore, I find that, with a limited exception involving M.H., there is a lack of admission by Respondent that he engaged in the charged acts of misconduct, and thus, hearsay does not corroborate any competent evidence and competent evidence, i.e., Respondent's statement does not corroborate Petitioner's hearsay evidence. Weston v. State, 60 N.J. 36, 51 (1972).

Moreover, the limited findings concerning M.H. do not amount to competent evidence concerning M.V., especially when M.V.'s actions preceded M.H.'s. And, although it may be improper for a teacher to demonstrate use of a mouse by touching, I do not find that Petitioner charged Respondent with such an offense, in fact, it rejected Respondent's explanation in the Charges itself. Nor do I deem the admitted act to be discipline, however unwise it may have been.

Also, unlike Rurorede, Petitioner did not charge Respondent with dishonesty. On the contrary, Petitioner simply does not believe Respondent's explanations, indeed, it stated so in the Charges. However, Petitioner's disbelief of Respondent's version(s), standing alone, or in combination with a dispute over what the physical reenactments looked like do not amount to competent evidence which would enable giving hearsay determinative weight. In fact, in just

about every discipline case, the employer does not believe the employee's alternative version of events. Certainly, this cannot be accepted as an excuse to allow the employer to support its case with hearsay evidence alone or else the rule would be meaningless.

Additionally, I am not persuaded by Petitioner's reliance on In the Matter of the Tenure Hearing of M. William Cowan, School District of the Borough of Bernardsville, 224 N.J. Super 737 (App. Div. 1988). In that matter, the Appellate Division affirmed the dismissal of a tenured teacher who was accused of various acts of misconduct. Evidence of an incident of an alleged assault consisted of testimony of the high school principal and his memorandum of the incident which included facts the principal had learned from alleged eyewitnesses. The principal was not a witness to the event. The student who was the victim of the alleged assault did not testify at the hearing, nor was there any other direct or eyewitnesses of the assault. The Court held that there "need not be a residuum of competent evidence to prove each act considered by the Commissioner so long as the combined probative force of the relevant hearsay and relevant competent evidence" sustains the Commission's finding of unbecoming conduct. Id. at 751.

However, what Petitioner critically omits is the fact that the one charge premised on hearsay alone stemmed from a 1974 incident, whereas the Court found competent evidence to sustain charges involving conduct occurring in 1975, 1980, 1982 and 1984 which, in the end, were sufficient to justify the Tenure Charges. This matter bears no such similarity. The events properly charged involve two incidents on April 27, 2022. Importantly, I cannot find that the competent proof regarding the limited, proven misconduct of Respondent toward M.H. constitutes competent proof regarding the balance of the charges involving M.H. and all of the charges involving M.V. Stated differently, I do not concur that Cowan stands for the proposition that proof of a relatively

isolated act through competent evidence means proof of the remaining 80-90% of Petitioner's case against Respondent without more.

Also, I reject Petitioner's argument that Respondent cannot now challenge on hearsay grounds Petitioner's failure to produce competent evidence since it had the ability to subpoena M.H. and M.V. (or any other student/eyewitness). As a general proposition, I agree with Petitioner that it did not have a constitutionally mandated duty or otherwise to present the testimony of any student/eyewitness. Indeed, this was put to rest previously. I further agree that Respondent could have subpoenaed the students. However, while Petitioner may have had no duty to call the students to testify, Petitioner bears the burden of proof and, hence, is ultimately accountable for what its case against Respondent looks like in the absence of calling the students to testify; and, in this matter, regarding the balance of the allegations involving M.H., and all of the allegations against M.V., it does not look very good.

In light of the foregoing, I find that Petitioner's case was not made via competent evidence against Respondent in the absence of the student/eyewitness(s), save for Respondent's act of forcing M.H. to stand. Notably, all student/eyewitness were "available", in the legal sense of the term, to testify at arbitration. There was no assertion that any student lacked competency to testify. See, State v. Busco, 255 N.J. 193 (2016) and ensuing, "Assessing the Competency of Child Witnesses Report and Recommendations to the Supreme Court" (December 23, 2020). In fact, all students were implicitly viewed as competent to speak to Principal Yang and Vice Principal Allen and to write out a witness statements. Rather, the dilemma Petitioner ostensibly found itself in appears to be attributable to the reluctancy of the parents of the students to allow their children to testify.

However, I observe, Respondent, as of April 28, 2022, and certainly by the filing of the Statement of Evidence in September, 2022, knew that the statements of M.H. and M.V., in combination with the input of their parents, served as the factual basis for this matter to proceed to a District investigation, an official police report, an IAIU investigation, and eventually the issuance of Tenure Charges. Thus, in my opinion, as to the concern that Respondent would know the identities of the derivative complainants, that "horse had already left the barn." I further observe that there certainly could have been buffers put in place to ameliorate any anticipatory anxiety which any student (and/or their parents) may have been experiencing about the students testifying. Such arrangements could have included allowing the parents to be in the hearing room and/or taking the testimony of M.H. and M.V. or any other student/eyewitness via Zoom. Neither of these accommodations, in my opinion, would have deprived Respondent of due process and could have potentially bolstered or perhaps greatly bolstered Petitioner's case against Respondent involving M.V. Nonetheless, the matter was heard to a conclusion without any firsthand witness testimony presented by Petitioner.[13]

Based on the foregoing, I find and conclude that Respondent's motion for judgement based on Petitioner's failure to sufficiently support the Charges, through competent evidence, must be granted with respect to M.H., save for the finding that Respondent improperly forced M.H. to stand for the remainder of the drill in violation of Board Policy 3281 and with respect to M.V. in its entirety.

[13] I note that M.H.'s father is a police officer who must have known the pitfalls of trying to prove a case through hearsay evidence. Presumably, he knows that convictions secured through his testimony would not have been secured based on his police reports alone. Lastly, with the police department on his side, I am not sure why he believed Respondent would not be deterred by that fact when dealing with M.H. or his siblings in the future.

The Appropriate Penalty

In addressing the appropriateness of the penalty in cases involving tenure charges, relevant factors "include the nature and circumstances of the incidents or charges, any evidence as to provocation, the teacher's prior record and present attitude, the effect of such conduct in the maintenance of discipline among the students and staff, and the likelihood of such behavior recurring." In the Matter of the Tenure Hearing of Erroll Goodwater, School District of the City of Camden, Agency Docket Nos. 185-7/11 and 187-7/11 (April 27, 2012), quoting, In re Tenure Hearing of Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). In In re Tenure Hearing of Fulcomer, 93 N.J. Super. 404 (App. Div. 1967), the Court established a number of factors that should be considered when deciding whether a teacher should be dismissed for unbecoming conduct. Those factors include: 1) the nature and gravity of the offenses under all the circumstances involved; 2) the teacher's attitude – i.e. whether the acts were premeditated, cruel, or done with intent to punish; 3) any evidence as to provocation, extenuation or aggravation. Mitigation factors that the Fulcomer Court include: 1) the educator's ability, record and length of service, 2) the educator's disciplinary record; and 3) the "impact of the penalty on the [educator]'s career, including the difficulty which would confront her as an [educator] dismissed for unbecoming conduct, in obtaining a position in the State.

Initially, I find that Respondent's act of forcing M.H. to stand for even one minute due to his immediately preceding behavior does constitute conduct unbecoming and/or a violation of Board Policy 3281, as discussed previously. However, in my opinion, the act is not in the same category in terms of severity of the offense as compared with numerous prior cases decided by arbitrators and the Commissioner prior to 2012.[14] In other words, it does not amount to an

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[14] See, e.g., Bd. of Educ. of City of New Brunswick v. Murphy, 92 N.J.A.R.2d (EDU) 527 (N.J. Adm. Aug. 27, 1992) (copy attached); and In the Matter of Tenure Charges against Leonard Yarborough, Agency Dkt. No. 259-

egregious or sufficiently flagrant violation to justify removal as a single-incident offense. Nonetheless, while I do not find that the act meets the definitions of "cruel" or "premeditated", I do find that it was done with the intent of punishing M.H. for, as Respondent admits, popping a wheelie with his chair during the drill. Nonetheless, Respondent obviously caused emotional harm and humiliation to M.H. or created the potential for that harm, and he created at least the potential of harm to other students.[15]

In addition, as ruled upon in the undersigned's January 30, 2023 decision, I do find that the 2015 letter authored by former Principal Coviello constitutes prior discipline with an intent to remove the letter from Respondent's personnel file for two years of good behavior, which Respondent met. More importantly, however, the letter of reprimand imparted notice to Respondent regarding improper forms of discipline and the impact on students.

> General findings indicate that during a verbal altercation with Brandon Quintero, you approached Brandon's seat, stopped in front of his seat, and told him to "get up." When Brandon did not comply with your directive, you made physical contact with his chair while he was seated in it by hitting the leg of the chair with your foot. The difference between "kicked" and "tapped" in this case is not nearly as significant as the fact that you made

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9/15-12/14, Comm'r Dkt No. 198-16 (May 24, 2016). See In re Doyle, 201 N.J. Super. 347 (App. Div. 1985); IMO Tenure Hearing of Claire Miller OAL Dkt No. EDU 5812-01, Agency Dkt. No. 240-7/01/99 (Decided December 7, 2001); School District of the Borough of Red Bank v. Portia Williams 2 NJAR 237 (Decided July 10, 1981); In re Tiefenbacher 1983 SLD 1648, In Re Harrell, 1979 SLD 479; Tenure Hearing of Adam Mierzwa, EDU 8220-07 (May 6, 2008), modified in part Comm'r (June 23, 2008); Tenure Hearing of Barbara Emri, EDU 4579-00 (Aug. 30, 2002) modified Comm'r (October 21, 2002), modified State Bd. Of Exmainers (December 3, 2003).

[15] That Vice Principal Allen testified that M.H. and M.V. laughed off the incidents (Tr. 2, pp. 47-48) cannot be disregarded; neither, however, can the potential for harm caused by Respondent. See, I/M/O Tenure Hearing of Blanca Godinez, School District of the City of Paterson, Passaic County, Agency Docket No. 239-9/19 (Licata, 2020) (teacher improperly physically restraining student in gym class caused actual harm to student being restrained and potential harm to other student onlookers), see, also, In re Converters Paperboard Company, Division of Midwest Folding Carton, Inc. [Rockford, Ill.] and United Paperworkers International Union, Local 1050, 99 LA 430 (Borland 1992)(just cause existed to discharge cutter man who placed smoke bomb outside foreman's office, even though no damage resulted where he knew that lighting any incendiary device in highly combustible environment created serious potential for fire. "The grievant's plan to light smoke bomb reveals total lack of concern for safety, even though there was no proof that he intended to start fire.").

> physical contact with his seat during the altercation to elicit his compliance with your directive. What you presented as "tapping" the chair was perceived and described by all ten students as "kicking."
>
> Brandon Quintero was understandably upset by this altercation. At no time should you have made physical contact with this student, directly or indirectly through his chair, especially during an altercation. Aside form that reality, perception of children and adolescents are not to be taken lightly in situations like these. All who witnessed the even were disturbed to varying degrees. Please know that any subsequent actions involving physical contact with students may result in further disciplinary action (Ex. P7).

In my opinion, Respondent was placed on notice that his improper actions toward one student, at the very least, carries the potential for upsetting other students in the classroom. Therefore, consideration of Respondent's April 27, 2022 act of improper discipline which was objectively humiliating toward M.H. and carried the potential of emotionally harming other students must be deemed a similar offense to the one in 2015. By the same token, however, I acknowledge that the relatively mild form of discipline meted out by Principal Coviello likely did not send a forceful enough message to Respondent. As such, there is only so much mileage that can be achieved in reliance on the 2015 discipline with respect to affixing a penalty in this case.

Lastly, I deem relevant Respondent's twenty years of employment. It cannot be overlooked or disregarded as Superintendent Pantoliano apparently did. Respondent was well liked by his colleagues, very helpful in the IT context and received satisfactory evaluations. More importantly, it must be inferred that for most of his career, Respondent did not pose a threat of harm to any student or otherwise improperly discipline students (save for 2015). It also is recognized that seven years elapsed between the 2015 and 2022 incidents.

Based on a balancing of factors, I believe that a fair and appropriate penalty must be one which recognizes the seriousness of the offense, albeit not sufficiently egregious as a single incident to warrant dismissal, including the harm to M.H. and the potential harm to other students, the fact that Respondent did not heed the general message imparted by the 2015 letter, the countervailing fact that the 2015 letter did not meet the seriousness of the offense, and Respondent's length of employment. In my opinion, the loss of adjustment and salary increments for the 2022-2023 school year and a suspension without pay from the beginning of the 2023-2024 school year for staff, September 1, 2023 to the end of Holiday Recess, January 2, 2024 (so as to minimize disruption to the class) is an appropriate penalty. Plainly, there is no room left for Respondent to again venture outside the parameters of proper student engagement and discipline. The Charges are adjusted in accordance with this Opinion, and the instant appeal is decided accordingly.

Respectfully submitted,

Joseph Licata, Arbitrator

Dated: July 6, 2023

State of New Jersey)
) :SS
County of Bergen)

On the 6th day of July, 2023, before me personally came and appeared Joseph Licata, to me known and known to me to be the person described herein who executed the foregoing instrument and he acknowledged to me that he executed the same.

Notary Public