

STATE OF NEW JERSEY  
DEPARTMENT OF EDUCATION

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In the Matter of the Tenure Hearing of  
KEVIN CUSHING  
and  
SCHOOL DISTRICT OF THE CITY OF ORANGE  
ESSEX COUNTY, NEW JERSEY

Agency Docket No. 209-8/19

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AWARD OF ARBITRATOR

The undersigned Arbitrator, having been designated pursuant to NJSA 18A:6-16, and having been duly sworn, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

Based on the evidence submitted, the tenure charges brought by the School District of the City of Orange against the Kevin Cushing cannot be sustained. The evidentiary record mandates that the annual rating of Respondent Cushing's teaching and job performance in the 2017-2018 School Year as Partially Efficient be discounted as a basis for revoking his tenure because of substantial procedural flaws that rendered the annual rating arbitrary and that materially affected the rating. Respondent Cushing's annual rating of Partially Efficient for the 2018-2019 school year shall remain valid and undisturbed.

Respondent Cushing shall be entitled to another year of employment by the School District of the City of Orange as a teacher, subject to a new Corrective Action Plan to be developed collaboratively with Respondent before the commencement of the 2020-2021 school year. This CAP shall be tailored to Respondent's teaching assignment for the 2020-2021 school year. Respondent's specific grade level and school assignment shall be conveyed to Respondent not less than thirty calendar days before the first day that Respondent is scheduled to report back to work at the beginning of the school year so that he can adequately prepare for such assignment. Respondent Cushing shall be afforded ample support as contemplated by the TEACHNJ statute, including periodic personal coaching specific to his assignment on an ongoing basis by supervisors and master teachers.

The Arbitrator hereby retains jurisdiction to resolve any dispute that may arise regarding the implementation of this Award or the remedy ordered pursuant to this Award.

May 26, 2020



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Daniel F. Brent, Arbitrator

State of New Jersey  
County of Mercer

On this 26th day of May, 2020 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.



Kathryn Gallagher

**KATHRYN GALLAGHER**  
**NOTARY PUBLIC OF NEW JERSEY**  
My Commission Expires 2/18/2021

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Pursuant to NJSA 18A:6-16, the undersigned was appointed as Arbitrator in the above-entitled matter by the Department of Education Office of Controversies and Disputes on August 30, 2019. Hearings in the above-entitled matter were held at the Administrative Offices of the Orange Board of Education in Orange, New Jersey on November 5, 2019, January 13, 2020, and February 24, 2020. Both parties attended these hearings, were represented by counsel, and were afforded full and equal opportunity to offer testimony under oath, to cross-examine witnesses, and to present evidence and arguments. Both parties submitted post-hearing briefs, and the record was declared closed on April 12, 2020.

APPEARANCES

For the Orange Board of Education:

Jessika Kleen, Esq., of The Machado Law Group

Kyle Ulscht, Esq., of The Machado Law Group

Glasshebra Jones-Dismuke, Executive Director of Human Resources

Dr. Myron Hackett, Principal, Park Avenue School

For the Respondent, Kevin Cushing:

Ronald J. Ricci, Esq., of Ricci Fava, Esqs.

Maryssa P. Geist, Esq., of Ricci Fava Esqs.

Kevin Cushing, Respondent

ISSUE SUBMITTED

What shall be the disposition of the tenure charges against Kevin Cushing?

RELEVANT STATUTORY PROVISIONS

NJSA 18A:6-17.2-- Considerations for arbitrator in rendering decision.

23. a. In the event that the matter before the arbitrator pursuant to section 22 of this act is employee inefficiency pursuant to section 25 of this act, in rendering a decision the arbitrator shall only consider whether or not:

(1) the employee's evaluation failed to adhere substantially to the evaluation process, including, but not limited to providing a corrective action plan;

(2) there is a mistake of fact in the evaluation;

(3) the charges would not have been brought but for considerations of political affiliation, nepotism, union activity, discrimination as prohibited by State or federal law, or other conduct prohibited by State or federal law; or

(4) the district's actions were arbitrary and capricious.

b. In the event that the employee is able to demonstrate that any of the provisions of paragraphs (1) through (4) of subsection a. of this section are applicable, the arbitrator shall then determine if that fact materially affected the outcome of the evaluation. If the arbitrator determines that it did not materially affect the outcome of the evaluation, the arbitrator shall render a decision in favor of the board and the employee shall be dismissed.

c. The evaluator's determination as to the quality of an employee's classroom performance shall not be subject to an arbitrator's review.

d. The board of education shall have the ultimate burden of demonstrating to the arbitrator that the statutory criteria for tenure charges have been met.

e. The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case. The arbitrator shall render a written decision within 45 days of the start of the hearing.

NJSA 18A:6-17.3 Evaluation process, determination of charges.

25. a. Notwithstanding the provisions of N.J.S.18A:6-11 or any other section of law to the contrary, in the case of a teacher, principal, assistant principal, and vice-principal:

(1) the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency whenever the employee is rated ineffective or partially effective in an annual summative evaluation and the following year is rated ineffective in the annual summative evaluation;

(2) if the employee is rated partially effective in two consecutive annual summative evaluations or is rated ineffective in an annual summative evaluation and the following year is rated partially effective in the annual summative evaluation, the superintendent shall promptly file with the secretary of the board of education a charge of inefficiency, except that the superintendent upon a written finding of exceptional circumstances may defer the filing of tenure charges until after the next annual summative evaluation. If the employee is not rated effective or highly effective on this annual summative evaluation, the superintendent shall promptly file a charge of inefficiency.

b. Within 30 days of the filing, the board of education shall forward a written charge to the commissioner, unless the board determines that the evaluation process has not been followed.

c. Notwithstanding the provisions of N.J.S.18A:6-16 or any other section of law to the contrary, upon receipt of a charge pursuant to subsection a. of this section, the commissioner shall examine the charge. The individual against whom the charges are filed shall have 10 days to submit a written response to the charges to the commissioner. The commissioner shall, within five days immediately following the period provided for a written response to the charges, refer the case to an arbitrator and appoint an arbitrator to hear the case, unless he determines that the evaluation process has not been followed.

d. The only evaluations which may be used for purposes of this section are those evaluations conducted in accordance with a rubric adopted by the board and approved by the commissioner pursuant to P.L.2012, c.26 (C.18A:6-117 et al.).

18A:6-119 Definitions relative to the TEACHNJ Act.

3. As used in sections 12 through 17, 19 through 21, and 24 of P.L.2012, c.26 (C.18A:6-117 et al.):

"Corrective action plan" means a written plan developed by a teaching staff member serving in a supervisory capacity in collaboration with the teaching staff member to address deficiencies as outlined in an evaluation. The corrective action plan shall include timelines for corrective action, responsibilities of the individual teaching staff member and the school district for implementing the plan, and specific support that the district shall provide.

"Evaluation" means a process based on the individual's job description, professional standards and Statewide evaluation criteria that incorporates analysis of multiple measures of student progress and multiple data sources. Such evaluation shall include formal observations, as well as post conferences, conducted and prepared by an individual employed in the district in a supervisory role and capacity and possessing a school administrator certificate, principal certificate, or supervisor certificate.

"Individual professional development plan" means a written statement of goals developed by a teaching staff member serving in a supervisory capacity in collaboration with a teaching staff member, that: aligns with professional standards for teachers set forth in N.J.A.C.6A:9-3.3 and the New Jersey Professional Development Standards; derives from the annual evaluation process; identifies professional goals that address specific individual, district or school needs, or both; and grounds professional development activities in objectives related to improving teaching, learning, and student achievement. The individual professional development plan shall include timelines for implementation, responsibilities of the employee and the school district for implementing the plan, and specific support and periodic feedback that the district shall provide.

"Ineffective" or "partially effective" means the employee receives an annual summative evaluation rating of "ineffective" or "partially effective" based on the performance standards for his position established through the evaluation rubric adopted by the board of education and approved by the commissioner.

NATURE OF THE CASE

Kevin Cushing (hereafter, Respondent) has been employed by the Orange School District (hereafter, the Employer or the District) since the 2007-2008 school year. He was subsequently granted tenure, and successfully taught without incident until the 2015-2016 school year, following which he was rated Ineffective. As a result, the District was obligated under applicable New Jersey Education law to provide Respondent Cushing with an appropriate Corrective Action Plan (CAP) for the 2016-2017 school year. Respondent met with his District supervisors to create a Corrective Action Plan applicable to the teaching assignment he had been given for the 2016-2017 school year. This plan, developed in collaboration with Respondent, was designed to address his documented performance shortcomings and to improve his classroom teaching and administrative compliance. Shortly after the beginning of the 2016-2017 school year, Respondent applied for and was granted a leave of absence pursuant to the Family Medical Leave Act. He did not teach for the District for the balance of the 2016-2017 school year.

When the Respondent returned to work at the beginning of the 2017-2018 school year, he was assigned immediately before the opening of school to teach a kindergarten class for the first time in his career. The CAP implemented by the parties a year earlier was “carried over” into

the 2017-2018 school year. At the end of the 2017-2018 school year, the annual evaluation produced by the Respondent's supervisors and District administrators was based on their collective evaluation using the Danielson Rubric to calculate an Annual Summative score of 2.41. This score categorized Respondent Cushing as a Partially Effective teacher for the 2017-2018 school year.

The District concluded that the Respondent had "failed to make appropriate progress towards the goals outlined in his CAP. As a result, Respondent's CAP was again carried over into the 2018-2019 school year." According to the District, Respondent's performance deteriorated during 2018-19, resulting in an Annual Summative Score of 2.08, which also mandated an annual rating of Partially Effective. Respondent did not exercise his right to submit a written rebuttal of the allegations underlying his Partially Effective rating in 2017-2018 or in 2018-2019. Because he received Partially Effective ratings in two consecutive school years, the District filed tenure charges dated August 2, 2019 pursuant to NJSA 18A:6-17.3(a)(2).

After the tenure charges were filed, the Respondent asserted that the charges were improperly predicated on animus created because the Respondent had spoken out repeatedly at Orange Board of Education meetings, publicly describing the flaws he saw in the manner in which

educational services were provided to the District's students and protesting the stagnant wage rates paid to teachers. The District denied these allegations, contending that the two consecutive annual summative evaluations were consistent with the rating of Ineffective that the Respondent had received in the 2015-2016 school year, and were based solely on the number of formal observations mandated by the statute, properly augmented by periodic informal evaluations of his teaching performance. The District also cited multiple written and oral admissions by the Respondent in interviews and other interactions with District supervisors expressing his recognition that his job performance was substandard. Mr. Cushing did not deny having made these remarks.

The undersigned Arbitrator was appointed to adjudicate the propriety of the tenure charges and to evaluate Respondent's assertion that the tenure charges were inaccurate and unfounded. Hearings were held in the above-entitled matter on November 5, 2019, January 13, 2020 and February 24, 2020 at the Administrative Offices of the Orange Board of Education. The parties submitted sixty-five joint exhibits. Respondent Cushing submitted seventeen exhibits, and the District submitted one additional exhibit.

In assessing whether the criteria set forth in NJSA 18A:6 for revoking tenure have been satisfied by the District, and thus determining that Respondent Cushing's tenure should be revoked and his employment terminated, the Arbitrator thoroughly examined and carefully considered all of these exhibits, the testimony adduced at the three arbitration hearings, and the arguments propounded during the arbitration hearings and presented in the parties' post-hearing briefs as the basis to apply the applicable statutory criteria.

#### DISCUSSION AND ANALYSIS

The documentary evidence and testimony submitted by the District chronicling the Respondent's shortcomings in the two years at issue, 2017-2018 and 2018-2019, demonstrated persuasively that the Respondent's performance during the three evaluations mandated each academic year by New Jersey statute accurately portrayed his teaching performance during these evaluations as inadequate. Although the Respondent achieved tenure in the District and thereafter taught elementary grades 3 and 5 without incident until the 2015-2016 school year, his performance during periodic formal evaluations conducted in 2017-18 and 2018-2019 was insufficient to satisfy the District's reasonable teaching standards.

The District further established that Respondent did not adequately comply with reasonable District requirements that he submit detailed lesson plans in a timely manner. Nor did Respondent avail himself of the ongoing professional education materials available to him and his colleagues until well into in the 2018-2019 school year. Respondent also had persistent attendance issues.

As a consequence of his annual evaluation of Ineffective for 2015-2016, the Respondent was placed on a Corrective Action Plan (CAP) for 2016-2017. Shortly after the beginning of the school year, the Respondent was granted a leave of absence in order to attend to a family situation. His approved leave extended to the end of the school year.

Almost immediately before he returned to work in September 2017, Respondent was told that, for the first time in his teaching career, he would be assigned as a kindergarten teacher. Respondent testified credibly and without refutation that he was told of his new kindergarten assignment only days before the beginning of the 2017-2018 school year; that he was assigned to teach his class in an empty classroom, completely devoid of appropriate furniture and kindergarten teaching or supplemental materials; and that he struggled to locate and obtain the necessary materials to furnish his classroom well after the school year began. The evidentiary record established persuasively not only that

Respondent was expected to assume a wholly foreign area of specialized teaching at the kindergarten level, but also that the Respondent was not provided materials, meaningful peer or supervisory support, or supplemental in-person coaching to help him succeed in this new and challenging assignment at the beginning of the year or on a continuing basis throughout the school year.

District officials testified that the Corrective Action Plan that had been implemented at the beginning of the 2016-2017 school year, under which the Respondent had ostensibly worked for only a few weeks, was simply “rolled over” into the next school year. No effort was made to tailor the plan to his new and unprecedented kindergarten assignment or to recast the support and guidance necessary to comply with the minimal levels of appropriate resources and remedial coaching or supervisory support tailored for a tenured teacher on a CAP. These arbitrary and capricious omissions materially and adversely affected Respondent’s teaching performance, especially early in the school year when he foundered coping with inadequate orientation or assistance, insufficient age-appropriate equipment and resources, cursory ongoing supervisory support, and professional development coaching and modeling that was sparse at best. The first two of the mandatory three formal observations occurred in October and November 2017.

Read in isolation from the other documents and testimony comprising the evidentiary record, the annual evaluations of the Respondent's teaching performance for the two contiguous school years at issue in the instant matter at first appear to substantiate the District's conclusion that Respondent failed to respond to the remedial intervention provided by the District under the Corrective Action Plans implemented after the 2015-2016 school year, which commenced in September 2016 and was subsequently carried over without material alteration or updating after Respondent's protracted leave of absence, into the 2017-2018 school year. Although Respondent failed to achieve a satisfactory level of job performance, the reality of the Respondent's situation is more complicated and nuanced, requiring additional scrutiny to achieve a comprehensive and accurate analysis of the record to determine if the annual ratings form a valid basis to revoke Respondent Cushing's tenure.

While the District was entitled to require that Respondent work an additional year under an appropriately crafted Corrective Action Plan in 2017-2018 because he was absent for almost all of the 2016-2017 school year, the District did not engage in meaningful collaborative dialogue with Respondent to modify or create a Corrective Action Plan reasonably tailored for a novice kindergarten teacher. Nor did the District provide

sufficient or meaningful ancillary professional development support to Respondent at the outset or throughout 2017-2018.

Whether his assignment to a specialized kindergarten teaching position, for which Respondent was technically qualified on paper by virtue of his K-6 elementary teaching license, and the subsequent failure to provide access to appropriate materials, furniture, and supplies were retaliatory need not be definitively addressed, as the pertinent statutory criteria mandate analysis of whether the assistance provided under a properly formulated and administered CAP satisfied the fundamental balance between providing a Partially Efficient teacher on a CAP with remedial aid and relevant coaching and the dire consequence of losing tenure if teaching performance does not achieve the requisite level of competence after ample, sustained and focused coaching and feedback.

The substantial defect in not redesigning the holdover Corrective Action Plan implemented in 2017-2018 and not providing in-person guidance and remediation by a supervisor and/or a master teacher with expertise in teaching kindergarten created an adverse material impact on Respondent's teaching performance throughout 2017-2018. Simply rolling over a Corrective Action Plan to a subsequent year with a radically different teaching assignment, coupled with the minimal assistance to a teacher acclimating to an unfamiliar role, materially exacerbated the

ineffectiveness of a teacher assigned at the last minute to teach kindergarten. The absence of a reformulated CAP and accompanying meaningful in-person support must be considered together with the circumstances raised by Respondent when he finally disputed the propriety of the decision by the Orange School District to terminate his employment following the 2018-2019 school year.

Several aspects of Respondent's defense must be addressed in order to separate perceived mistreatment from potentially material improper factors, and thus focus the statutory and factual analysis on the crucial relevant elements underpinning the outcome of the instant case. During Respondent Cushing's employment by the Orange School District as an elementary school teacher since 2007, he was moved from grade or subject assignment to a different assignment and from school to school almost every year of his employment. Respondent testified that he was moved ten times in ten years. This lack of continuity may have impeded his achieving proficiency in teaching a particular grade level upon which Respondent could build from year to year. However, the Respondent's contention that his reassignment from school to school and from grade level to grade level constituted retaliation for his critical and disparaging public comments at School Board meetings regarding the manner in which the District was administered, his allegation that teachers were underpaid, and his assertion children were not adequately

served by the District was not supported by a preponderance of credible evidence linking them to the annual summative ratings, withholding of increments, or the District's decision to file tenure charges to Respondent's activism.

Respondent correctly asserted that he has a legally guaranteed right to express his opinions publicly without fear of retaliation. Respondent was entitled to convey directly to the Board of Education his observations about the manner in which children were educated in his school based on his front-line experience. However, as the old aphorism says, "You catch more flies with honey than with vinegar."

The wisdom of his making these public criticisms is irrelevant to the outcome of the instant case, as there is no evidence of direct official retaliation in response to Respondent's admitted candor. Although Respondent's contention that he was repeatedly moved, assigned to empty classrooms without adequate supplies, and left to fend for himself accurately described his circumstances over several years, the evidentiary record did not support a finding of a causal relationship between his earnest critical comments at School Board meetings and subsequent actions, or failure to act, by District administrators.

The record established that the District retained and exercised the managerial prerogative of re-assigning not only Respondent, but also other teachers, to fill vacant positions at different grade levels as the District's needs changed from year to year. Nevertheless, the lack of continuity in grade and building assignments, plus the absence of meaningful support under the 2017-2018 CAP admittedly tainted the Respondent's attitude towards his Employer. These challenges were exacerbated by the absence of adequate advance notice of changes in his teaching assignment, particularly being assigned for the first time as a kindergarten teacher; his shuffling annually among job assignments and schools within the District; and a District's failure to devise or implement suitably supportive and relevant remedial Corrective Action Plans reasonably designed to identify and rectify Respondent's manifest shortcomings as a teacher.

Respondent's testimony describing the manner in which he handled his frustrations after he returned from his extended leave of absence in 2016-2017 provided a reasonable basis to characterize the Respondent as a wounded teacher who did not adequately cope with the professional challenges he confronted. His resentful attitude leached into his teaching performance, adversely affecting his attendance and sapping the vigor of his preparation and performance, particularly in

2018-2019. Respondent's frustration was credibly described by District witnesses and recorded in the written evaluation forms in evidence.

Mr. Cushing did not dispute the accuracy of the District's portrayal of his comments at post-observation conferences or during meetings to review his annual evaluations, particularly in 2018-2019. This evidence supported the District's portrayal of Respondent as substantially less effective than he was earlier in his career teaching in Orange.

Respondent admitted that he floundered as a kindergarten teacher for much of the 2017-2018 school year and that he did not assertively seek more assistance. Teaching kindergarten requires specialized skills and experience significantly different from teaching elementary grades such as third and fifth grades. Thrown with only a few days notice into an empty classroom without prior opportunity to prepare himself during the summer for teaching kindergarten; left to scrounge for furniture, books, and educational resources to furnish his empty room; Respondent essentially was abandoned by his school and District administrators at the beginning of the 2017-2018 school year while he sought to accumulate the resources and skills necessary to be an effective kindergarten teacher. Even if not demonstrably retaliatory, these circumstances constituted capricious and arbitrary action to the demonstrated material detriment of Respondent in the performance of

his duties in 2017-2018 as reflected in his annual summative evaluation. These circumstances have been established clearly and convincingly by the testimony and the evidentiary record in the instant case.

NJSA 18A:6 requires school districts to evaluate teachers periodically with a minimum number of observations and to predicate the evaluation of a teacher's performance in annual summative scores derived by applying approved rubrics. Tenured teachers on a CAP must be evaluated formally three times during a school year in which a CAP is in effect. The District did evaluate Respondent three times in each of the two school years at issue-2017-2018 and 2018-2019.

The District defended its evaluation of the Respondent in the 2017-2018 school year as complying with the statutory requirements regarding assistance and evaluation. Careful perusal of the documents in evidence, including sixty-five documents placed in evidence by the District, including domain by domain examination of Respondent's pedagogic skills and teaching performance, supports a conclusion that the District reasonably applied the proper Danielson rubric and accurately computed a score based on the three observations performed by District administrators during the 2017-2018 school year and the 2018-2019 school year. Respondent's tepid responses during pre- and post-evaluation conferences, and the Respondent's repeated failure to

exert himself sufficiently to submit timely lesson plans or to participate in the available professional educational resources provided by the District throughout the school year to all teachers was reasonably considered in the summative evaluations, which were based primarily on Respondent's performance during his three annual observations.

Respondent Cushing is culpable for his failure to protest the absence of suitable intervention and coaching by master teachers and supervisors on an ongoing basis or to document the paucity of supplies and other resources with which he was provided. Furthermore, the interval between initial formal observations in October 2017 and 2018 and subsequent follow up observations many months later contributed materially to the Respondent's anger and dismay at his professional circumstances, particularly during the 2018-2019 school year, during which his attitude and attendance further declined.

This analysis, however, would be incomplete without also focusing on the reciprocal obligations imposed by the TEACHNJ Statute (NJSA 18A:6-119) on both school districts and teachers in formulating and implementing a collaboratively derived Corrective Action Plan providing a yearlong remedial program of support and guidance. The District secures the right to revoke tenure not simply by accurately recording three observations or sitting briefly with a teacher to formulate

a CAP outlining a theoretical plan to guide and remediate a teacher's previous inefficiency and manifest teaching deficiencies. More support and involvement is required to satisfy the threshold for revoking an experienced teacher's tenure other than for proven misconduct or conduct unbecoming.

The District admitted that it simply "rolled over" the Corrective Action Plan formulated for the Respondent at the beginning of the 2016-2017 school year and applied it again at the outset of the 2017-2018 school year, when the Respondent was assigned to teach kindergarten for the first time. This new teaching assignment required training to apply a substantially new set of pedagogical skills. Simply providing training videos and general reference works would not cure the patent defect of failing to implement a valid CAP under which Respondent's rehabilitation and remediation were to occur and thereafter to provide Respondent with reasonable coaching and support.

The District's summative annual evaluation of the Respondent's performance in 2017-2018, his first year as a kindergarten teacher, can be accepted as an accurate reflection of his teaching proficiency during the three observations. However, given the substantive and material adverse impact of the procedural defects in the implementation of a valid CAP, the summative annual score did not provide an accurate, fair, and

not arbitrary or capricious annual summative evaluation justifying rating Respondent Cushing as Partially Effective for 2017-2018.

Moreover, the TEACHNJ Statute provides two other standards that the District failed adequately to address. NJSA 18A:6-23 explicitly contemplates special circumstances. Testimony adduced at the arbitration hearing demonstrated clearly and convincingly that the Respondent was left to forage for supplies, to learn a new kindergarten curriculum and associated pedagogic techniques, and to deal for the first time in his career with the challenge of teaching a grade level where incoming students included many children who could not read. He did this without advance notice sufficient to study the kindergarten curriculum and absorb age appropriate techniques during the summer in order to prepare for substantially different duties. His resulting lack of preparedness to achieve the core goals of the Orange School District's kindergarten curriculum impaired his attempts to learn as he went along, especially given the evidence that the Respondent was not supplied with ongoing coaching by a master teacher.

Unrefuted testimony that Respondent sought help to provision his classroom, and documentation describing the cavalier manner and timing with which the mandated annual evaluations were conducted unambiguously supported a conclusion that the circumstances under

which the Respondent taught during the 2017-2018 school year, particularly regarding the first evaluation early in the school year and the substantial intervals between his receipt of meager useful feedback, particularly from January to May 2018, qualified as special circumstances. The CAP requirement cannot be satisfied by ignoring Respondent's changed circumstances. The manner in which the CAP was implemented and administered created a substantial procedural defect with clear material impact regarding Respondent's Partially Effective annual evaluation rating in 2017-2018 that cannot be ignored or discounted. The District's failure properly to consider these factors constituted additional arbitrary and capricious action that further supports the Arbitrator's determination that the totality of circumstances established by the evidentiary record outweighs an annual summative score that technically was correctly computed.

The rightful paramount concern of parents, professional educators, and citizens at large is that school children not be deprived of a thorough and efficient education by teachers who have objectively demonstrated their inability to perform successfully in this highly specialized and critical profession. Teachers such as the Respondent may achieve tenure and thereafter deteriorate in their job performance over a period of years. The Legislature addressed this circumstance by imposing a balanced system of evaluation and by further providing a process for removing

tenured teachers whose job performance declined to the detriment of their students. The TEACHNJ Act, NJSA 18A:6 created clearly defined mechanisms for weeding out inadequate tenured teachers.

A tenured teacher whose performance is judged Partially Efficient based on the application of an approved rubric for two consecutive years may have tenure revoked if the District not only evaluated the teacher with reasonable objectivity, but also implemented and supervised a Corrective Action Plan, collaboratively constructed with the teacher in each school year, that was reasonably designed to identify and address the tenured teacher's shortcomings and to provide relevant periodic assistance and guidance. This standard has not been met in the instant case.

The third element of the legislated process permitting revocation of tenure is that the procedural integrity of the mandated professional observations and evaluations and of the CAP development and implementation be assessed by an objective impartial professional arbitrator charged with independently determining whether arbitrary and capricious actions by a school district materially interfered with a fair evaluation of a teacher's performance or the provision of requisite CAP remediation.

A Corrective Action Plan that is not specifically designed to address and foster improvement in a tenured teacher's current teaching assignment during each academic year at issue cannot satisfy the requirement that tenured teachers be alerted to the specifics of their unacceptable performance, that they actively and repeatedly be afforded meaningful and appropriate guidance by professional teacher educators, and that they be provided ample timely feedback so that the teacher can improve his or her classroom performance. By simply "rolling over" a Corrective Action Plan based on the Respondent's teaching assignment in the 2016-2017 school year to govern his evaluation in his new and unfamiliar kindergarten assignment at the beginning of the 2017-2018 school year without revamping, supplementing and adjusting the Corrective Action Plan to support him while teaching kindergarten for the first time, the District acted in an arbitrary and capricious manner.

The District's assertion that any experienced teacher with a K-6 license should be able to step into a kindergarten class without prior notice and teach effectively was unpersuasive, as the skills described in testimony offered both by Respondent and by District witnesses, and the detailed observation documents in evidence, established the specialized pedagogical skills necessary to organize individuated lessons suitable for kindergarten students and to select and present materials for effective teaching in accordance with elaborately detailed standards of pedagogy

and sequences of teaching techniques particular to kindergarten level students described by District testimony.

The Arbitrator does not dispute the evaluators' scoring of their observations. A teacher who is provided with adequate corrective action--more than just a written plan and three evaluations--and who still cannot achieve a reasonable level of improvement through the course of the school year does not deserve to continue imposing an adverse impact on the lives of the children entrusted to the teacher's care. Conversely, a school district cannot assign a teacher to a novel and unfamiliar situation, as different from the teacher's prior experience as kindergarten is from other elementary grades, and essentially abandon the teacher to the vagaries of periodic observations halfway through the school year or near the end of the school year without meaningful coaching or other rehabilitative efforts.

To do so was arbitrary and capricious as contemplated under applicable statutory criteria. Respondent essentially was left on his own to create a suitable kindergarten classroom environment, to familiarize himself with the curriculum, and to adapt to the novel demands of teaching kindergarten without specialized training or on-the-job experience. Moreover, the District failed to offer Respondent a master teacher or learning supervisor to visit him in his classroom and offer

assistance, to review his lesson plans other than for timeliness and sufficiency, or to provide the level of supplemental assistance contemplated on a regular basis as the predicate for implementing a valid CAP and thereafter for declaring a tenured teacher unfit for future service. Thus, the rating of Partially Efficient for 2017-2018 cannot stand.

This situation was compounded after the District changed the Respondent's assignment for the 2018-2019 school year to second grade, again without sufficient prior notice to the Respondent for him adequately to prepare materials and curriculum for his new assignment. Removing Respondent following a substandard year as a kindergarten teacher was not demonstrably arbitrary or retaliatory. Respondent's new assignment afforded the District an opportunity to re-craft a valid Corrective Action Plan and to re-evaluate Respondent throughout the course of the 2018-2019 school year to determine whether his tenure should be revoked.

The evidentiary record, including Respondent's testimony, confirmed the District's assertion that Respondent was not without fault in exacerbating his teaching situation during 2018-2019. Respondent's attendance record, his spotty compliance with deadlines for submitting lesson plans, and his flagging dedication to improving his craft fell short

of the District's reasonable expectations. In his testimony, the Respondent earnestly and candidly described his bitterness about the manner in which he had been treated by the District and its administrators over the recent past and the impact of these circumstances on his professional performance. For reasons that appear to be a mixture of personal and professional, the Respondent was unable to rally his enthusiasm and to revamp his attitude sufficiently for him to participate as an equal partner in the formulation and implementation of the Corrective Action Plan for 2018-2019 or to achieve an Effective rating.

His testimony describing the reasons that his lessons plans were late, that he did not partake of the requisite level of professional education reasonably expected of teachers in the Orange School District until relatively late in the school year, and that he did not properly utilize his preparation periods provided ample evidence of an unprofessional attitude that cannot be countenanced by the District or ignored by the Arbitrator. Respondent Cushing may have ample reasons he views as justifying his response to the multiple assignments and chronic lack of meaningful support, but his job performance in the 2018-2019 school year, when he was assigned for the first time as a second grade teacher, was not unreasonably analyzed and scored by the District.

The TEACHNJ Statute provides that tenure may be revoked by a teacher who has properly been evaluated as Partially Efficient for two consecutive years of teaching performance. The Respondent's evaluation for the 2015-2016 school year is not at issue in the instant case. The Respondent left early in the 2016-2017 school year for approved leave to deal with a family situation.

The analysis of the District's evaluation regarding Respondent's performance as a kindergarten teacher during the 2017-2018 school year set forth above mandates disqualification of the District's evaluation for 2017-2018. However, the District's evaluation of Respondent's performance in 2018-2019 as Partially Effective was reasonable and accurate. Thus, the Respondent must be deemed to be a teacher who has demonstrated Ineffective or Partially Effective performance in alternate school years.

Given this conclusion, the Respondent is entitled by application of the standards set forth in TEACHNJ to one additional year of employment during which he shall be provided with a teaching assignment far enough in advance for him to prepare materials, study curriculum, and ready himself to be an effective teacher during the 2020-2021 school year. Respondent Cushing is hereby placed on notice not only that an evaluation as Inefficient or Partially Efficient during the

2020-2021 school year will result in the revocation of his tenure, but also that he is expected to participate fully in formulating a valid Corrective Action Plan for the 2020-2021 school year; to ask for and accept help from his colleagues, including master teachers and supervisors; to provide feedback by advising building or District supervisors if he feels the resources committed to him pursuant to the new CAP are not consistently being provided in a timely manner. Moreover, Respondent is hereby placed on notice that his attitude should be manifestly and consistently professional as he interacts with colleagues and students, complies with applicable deadlines, and seeks to improve his job performance to an acceptable level.

The District must unequivocally meet its obligation to provide continuing meaningful coaching, supervision, and guidance under a Corrective Action Plan for 2020-2021 so that the Respondent can ascertain and satisfy applicable standards of effective teaching and assure the thorough and efficient educational experiences that all the children of Orange School District so richly deserve. To achieve this goal, both parties will need to adjust their conduct.

Based on the evidence submitted, the tenure charges against the Respondent Kevin Cushing cannot be sustained. The evidentiary record mandates that the summative annual rating of Respondent's teaching

and job performance in the 2017-2018 School Year as Partially Efficient be discounted because of substantial procedural flaws that render the annual rating arbitrary and that materially affected the rating.

Respondent Cushing's rating of Partially Efficient for the 2018-2019 school year shall remain valid.

Respondent Cushing shall be entitled to another year of employment as a teacher, subject to a new Corrective Action Plan to be developed collaboratively with Respondent before the commencement of the 2020-2021 school year. This CAP shall be tailored to Respondent's teaching assignment for the 2020-2021 school year. Such specific grade level and school assignment shall be conveyed to Respondent not less than thirty calendar days before the first day that Respondent is scheduled to report back to work at the beginning of the school year. Respondent Cushing shall be afforded ample support as contemplated by the TEACHNJ statute, including coaching by supervisors and master teachers specific to his assignment on an ongoing basis.

The Arbitrator hereby retains jurisdiction to resolve any dispute that may arise regarding the implementation of this Award or the remedy ordered pursuant to this Award.

May 26, 2020

Daniel F. Brent, Arbitrator