DOCKET # 361-12/14
X----------X
In the Matter of the Tenure Charges Preferred by

EDISON TOWNSHIP BOARD OF EDUCATION
"District"

-against-

MARIA WEBER
"Respondent"

ARBITRATOR'S OPINION and AWARD

X----------X
BEFORE:
ARTHUR A. RIEGEL, ESQ., ARBITRATOR

APPEARANCES:
FOR THE DISTRICT:
BUSCH LAW GROUP, LLC by ARI D. SCHNEIDER, ESQ.
MARGARET DELUCA, DISTRICT AFFIRMATIVE ACTION OFFICER

FOR THE RESPONDENT:
DERETSKY HUNTER & DeFILLIPO, LLC by STEPHEN B. HUNTER, ESQ
JEFFREY BOWDEN, PRESIDENT, EDISON TOWNSHIP EDUCATION ASSOCIATION
MARIA WEBER, RESPONDENT

BACKGROUND

On November 24, 2014, Dr. Richard O'Malley (hereinafter "Dr. O'Malley") filed tenure charges with the Board of Education. On December 12, 2014, Ms. Weber filed a Statement of Position with the Board of Education, which is optional pursuant to **N.J.S.A.** 18A:6-11. Ms. Weber's Statement of Position was incorporated as part of the Answer filed in this proceeding. (Board Exhibit 6, as revised).

On December 16, 2014, the Board certified the tenure charges and forwarded the charges to

the Commissioner of Education. On January 7, 2015, Ms .Weber filed her Answer, consistent with an agreed upon extension of time approved by the Commissioner of Education's designee.

On February 6, 2015, a pre-hearing conference was conduced at which time a discovery schedule was established, as were tentative hearing dates.

The parties thereafter exchanged initial disclosures and discovery materials. This matter was consolidated for a hearing with **In the Matter of Tenure Charges Against Maryellen Lechelt**, Docket No. 365-12/14 and **In the Matter of Tenure Charges Against Tyler Van Pelt**, Docket No. 362-12/14. Hearings were conducted on March 10, 2015, March 19, 2015, March 25, 2015, April 2, 2015, April 12, 2015 and telephonically on April 21,2015. Subsequently, May 8, 2015 was established as the due date for the submission of the Post Arbitration Hearing Brief on behalf of Ms. Weber.

The parties were represented by counsel and were afforded a full and fair opportunity to conduct direct and cross examination of witnesses and to present relevant documentary evidence. The record was closed upon the Arbitrator's timely receipt of the parties' post-hearing briefs.

THE CHARGES

BACKGROUND COMMON TO ALL CHARGES

Ms. Weber has been employed by the Board as a Special Education teacher since the 2000-2001school year. Ms. Weber was obliged, among other things, to ensure the implementation and enforcement of all Board policies, follow administrative directives and procedures, as well as New Jersey law, and accord herself appropriately towards and amongst the other Board employees she works with on a day to day basis – *i.e.*, not to conduct herself inappropriately in their presence and cause them embarrassment, discomfort, offense and concern. Ms. Weber, however, has ignored the

foregoing duties and responsibilities, and knowingly accorded herself in both a highly inappropriate and highly offensive manner – exposing others to a hostile and uncomfortable working environment.

Board Policy 3362, *Sexual Harassment*, states that "[s]exual harassment includes all unwelcome . . . verbal contacts of a sexual nature that would not have happened but for the employees gender." Policy 3362 further states that "when such conduct is severe and pervasive and has the purpose or effect of unreasonably altering or interfering with work performance or creating an intimidating, hostile, or offensive working environment, the employee shall have cause for complaint."

Board Policy 3281, *Inappropriate Staff Conduct*, states in relevant part that "[I]nappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Therefore, school staff members are advised to be concerned with such conduct which may include, but is not limited to, communications and/or publications using emails, text-messaging, social networking sites, or any other medium that is directed and/or available to pupils or for public display."

Board Policy 3211, *Code of Ethics*, indicates that "the educator shall exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education."

Board Policy 1140, *Affirmative Action Program*, establishes that the program shall "promote the acceptance of persons of diverse backgrounds regardless of race, creed, color, national origin, ancestry, age, martial status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status." Further, this Policy provides that the Board's affirmative action program will "foster a learning environment that is free from all forms of prejudice, discrimination, and

harassment based upon race, creed, color, national origin, ancestry, age, martial status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status in policies, programs, and practices of the Board of Education."

Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members*, advises employees that the Board retains the right to have the Superintendent or designee monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use." Policy 3321 further states that "the Board provides access to computer network(s)/computers for administrative and educational purposes only." Moreover, the foregoing policy, in relevant part, states that "any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computers shall be subject to discipline or legal action: (1) using the computer network(s)computers for . . . inappropriate or obscene purposes."

Finally, Board Policy 3351, *Healthy Workplace Environment*, requires that "employees interact with each other with dignity and respect" and further states that "repeated malicious conduct of an employee or group of employees directed toward another employee or group of employees in the workplace that a reasonable person would find hostile and offensive is unacceptable and is not conducive to establishing or maintaining a healthy workplace environment."

On October 23, 2014, during a voluntary Engrade Chromebook Training, Ms. Weber actively participated in a group chat on the Today's Meet website (https://todaysmeet.com/engraderocks) through the District's computer network. Today's Meet is a public web forum, accessible by all Board employees and students. The group chat spanned for a period of roughly two and a half hours and served no instructional purpose. Rather, the chat was graphically sexual in nature;

discriminatory to women, homosexuals, elderly persons and special education/handicap students; highly offensive to anyone not involved with same; and created a hostile work environment to other Board employees who were able to view, at any point in time, the content of the discussion.

The nature of the foregoing conversation is egregious beyond the bounds of decency. No persons and/or classifications of persons were spared. Ms. Weber's behavior, as set forth more specifically below, illustrates a complete and shameful disregard of her responsibilities as an employee of the Edison Township Board of Education and a member of the teaching profession, including, but not necessarily limited to, violations of the above mentioned policies. Ms. Weber's conduct has caused both members of the Board's Administration and members of the staff grave concerns over her intentions and capabilities, to the point of no longer feeling comfortable to be in her presence and/or permitting her to interact with other Board employees or students.

I hereby charge Maria Weber with *conduct unbecoming a teaching staff member, misbehavior and/or other just cause, including but not necessarily limited to* insubordination; all of which warrant her dismissal, pursuant to N.J.S.A.18A:28-5, and 18A:6-10.1, et seq. As more specifically set forth below, it is clear that she has exhibited a callous disregard for the expectations of her employer, as well as the rights of other employees of the Board, to conduct their daily activities in an environment that is free from harassment, discrimination, bullying and inappropriate conduct and communications, as well as an egregious breach of the professional standards imposed upon her as a member of the teaching profession.

SPECIFICATION OF CHARGES

CHARGE I

Unbecoming Conduct and/or Other Just Cause
Inappropriate Staff Conduct With Other Staff Members

On October 23, 2014, while attending a voluntary Engrade Chromebook Training at the Board's Offices, Maria Weber engaged in a course of misconduct that violated New Jersey Law, as well as Board policies, regulations and procedures regarding staff interaction with and/or concerning other staff members. More specifically, Ms. Weber actively participated in a conversation through the District's network, in a public chat room ("Today's Meet"), that was visible to those present in the room and obtainable by any District employee and student through the Today's Meet website, which was discriminatory, offensive, rife with sexual innuendo and ultimately created a hostile work environment (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence). This misconduct by Ms. Weber is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

Count 1 - Inappropriate comments about Sara Bleekinger – Engrade Trainer

On October 23, 2014, Ms. Weber engaged in a course of misconduct directed towards Ms. Bleekinger, which was inappropriate, foul, discriminatory, offensive, harassing and sexual in nature (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence). Such conduct resulted from a group chat through "Today's Meet" that was visible to Alysia Battista and others who were present in the Training, as well as to the entire Edison Township School District community, as "Today's Meet" is a public chat room which maintains a transcript of each conversation and is accessible to all Board employees and students.

More specifically, Ms. Weber made the following comments about Ms. Bleekinger:

(1) "maybe she was caught in the rain";

(2) "I think you make her nervous";

(3) "your (sic) cuter... your mamalechelt"

(4) "was that your alarm or did I hear church bells";

(5) "are you winking at her';

(6) "maybe we would have learned something if stevie was giving the workshop";

(7) "does anyone have tips for her? Is that her way of saying I don't know what the hell im (sic) talking about";

(8) "I would hate to be her";

(9) "she keeps looking at you ...especially when she says repository";

(10) "teach like a robot ty";

(11) "dare you to ask her if she would go out with our friend ty";

(12) Adding her insight into potential pick-up lines for Mr. Van Pelt to use on Ms. Bleekinger, Ms. Weber stated, " how bout (sic) my eyes are the only thing I don't wanna (sic) take off of your (sic)" ;

(13) "she keeps staring at ty";

(14) "she keeps looking for your approval...can you give her a little something";

(15) "don't say good bye...just say see ya (sic) later babe";

(16) tell her to meet u (sic) in Dartmouth at 4(sic)";

(17) "im sure his roomie would love to join too",

(18) "do you want the pad ty? You can give her your number".

Ms. Weber's conduct resulted in a disruption of the October 23, 2014 Engrade Training, created a hostile school environment for anyone who has had occasion to review her comments and made it unpleasant for Ms. Battista and other staff members to be in her presence for fear that they will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and or view Ms. Lechelt make further inappropriate and offensive comments to them, about them and/or about others.

Count 2 - Inappropriate and offensive comments between each other

On October 23, 2014, Ms. Weber engaged in a course of misconduct which was inappropriate, foul, discriminatory, offensive and harassing and sexual in nature (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence). Such conduct resulted from a group chat through "Today's Meet" that was visible to Alysia Battista and others who were present in the Training, as well as to the entire Edison Township School District community, as "Today's Meet" is a public chat room which maintains a transcript of each conversation and is accessible to all Board employees and students.

More specifically, Ms. weber made the following comments:

(1) "hes a virgin still...leave him pure";

(2) " I like control fu (sic).

(3) In response to Mr. Van Pelt stating that he is a "backchannel guy", Ms. Weber stated. "cant you tell b the way she walks";

(4) In response to Ms. Lechelt stating that the conversation is "so beautifully filthy, Ms. Weber stated, "always is when tvp is chatting".

(5) "whats a repository? Is it something u (sic) stick up your ass";

(6) In response to Ms. Lechelt's comment regarding "the 01 (sic) powder your balls shower, " Ms. Weber stated "or soap in the wash cloth".

Ms. Weber's conduct resulted in a disruption of the October 23, 2014 Engrade Training, created a hostile school environment for anyone who has had occasion to review her comments and made it unpleasant for Ms. Battista and other staff members to be in her presence for fear that they will either be harassed, discriminated against and embarrassed; made to feel uncomfortable; and/or forced to hear and or view Ms. Weber make further inappropriate and offensive comments to them, about them and/or about others.

CHARGE II

Insubordination and Unbecoming Conduct and/or Other Just Cause Disruption of Professional Development Training

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, during an Engrade Training, Maria Weber engaged in a course of misconduct that was inappropriate, foul, discriminatory, harassing, offensive and sexual in nature. More specifically, by actively participating in a group chat through "Today's Meet", which was – in part – about Alysia Battista, visible to Ms. Battista and highly offensive to her, Ms. Battista was unable to focus and effectively forced to leave the training to forego further angst, ultimately preventing her from reaping any instructional benefits. This misconduct by Ms. Weber is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

CHARGE III

Insubordination and Unbecoming Conduct and/or Other Just Cause Misuse of the District's Computer Network

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, Maria Weber actively participated in a group chat through the District's computer network that was inappropriate, foul, discriminatory, harassing, offensive and sexual in nature (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence), by way of the "Today's Meet" website, which

constituted a flagrant misuse of Board resources and showed a concerning lack of judgment and failure to comply with the heavy duty of self-restraint and controlled behavior expected from any member of the teaching profession. This misconduct by Ms. Weber is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

CHARGE IV

Insubordination and Unbecoming Conduct and/or Other Just Cause Violations of District Policies

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, Maria Weber actively participated in a group chat through the District's computer network that was inappropriate, foul, discriminatory, harassing, offensive and sexual in nature (the content of which is set forth more fully in Exhibit B of the Sworn Statement of Evidence), by way of the "Today's Meet" website, which was both viewable to other attendees of the Engrade Training and obtainable by any District employee and student through the "Today's Meet" website, in violation of numerous Board Policies, as more specifically set forth immediately below within this Charge. This misconduct by Ms. Weber is unconscionable and constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

Count 1 – Violation of Sexual Harassment Policies/Regulations

Ms. Weber's conduct violated Board Policy 3362, *Sexual Harassment*, in that it subjected Alysia Batista, as well as other Board employees, "to sexually offensive speech and conduct . . . wholly inappropriate to the harmonious employment relationships necessary to the operation of the school district." Further, Ms. Weber's conduct was severe and pervasive and had the purpose or effect of unreasonably altering or interfering with work performance or creating an intimidating, hostile or offensive working environment for others. More specifically, Ms. Weber made statements, including but not limited to, her sexual abilities and those of co-workers; obscene teasing, jokes and remarks of a sexual nature; comments of a sexual nature on, or staring at, an individual's physical attributes; and questions about sexual conduct. Regardless of whether such comments were directed at a particular individual, or even if such targets were aware that comments were made about them, Ms. Weber's graphic declarations constitute sexual harassment.

Count 2 – Violation of Affirmative Action Policy

Ms. Weber's conduct violated Board Policy 1140, *Affirmative Action Program*, in that it subjected Alysia Battista, as well as other Board employees, to a "learning environment [rife] with all forms of prejudice, discrimination and harassment . . ."

Count 3 – Violation of Sexual Harassment and Affirmative Action Policies pertaining to Affirmative Action Investigation

Following an Affirmative Action/Sexual Harassment Investigation conducted by the District's Affirmative Action Office, Margaret Deluca, Ms. Weber's conduct during the October 23, 2104 Today's Meet group chat was determined to be in violation of the District's Sexual Harassment and Affirmative Action Policies, as well as various other Board Policies. In relevant part, Ms. Deluca found that the "comments in the chat were directed against females and were so outrageous that the teacher filing the complaint was unable to concentrate on the needed instruction, thus interfering with her work performance." Further, Ms. Deluca expressed her concern that Ms. Weber did not understand the gravity of her conduct. As a result of same, Ms. Deluca recommended that Dr. O'Malley "consider the most severe [disciplinary] consequences for Ms. Weber." Ultimately, Ms. Weber's behavior triggered an Affirmative Action/Sexual Harassment investigation that resulted in a determination of misconduct by her.

Count 4 – Violation of Code of Ethics Policy

Ms. Weber violated Board Policy 3211, *Code of Ethics*, in that she failed to "exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education, and to assist in preventing the practice of the profession by unqualified persons."

Count 5 – Violation of Inappropriate Staff Conduct Policy

Ms. Weber violated Board Policy 3281, *Inappropriate Staff Conduct*, by engaging in inappropriate conduct, outside of her professional responsibilities, including communications through the internet, which were available to pupils and for public display.

Count 6 – Violation of Healthy Workplace Environment Policy

Ms. Weber violated Board Policy 3351, *Healthy Workplace Environment*, by engaging in "repeated malicious conduct . . . directed toward another employee or group of employees in the workplace that [Ms. Battista, and others, found] hostile [and] offensive."

Count 7 – Violation of Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members

Ms. Weber violated Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members*, by engaging in a group chat on the District's computer network that had no administrative and/or educational purposes. More specifically, Ms. Weber violated this Policy by actively participating in a conversation through the District's computer network that was highly inappropriate (contrary to the intended use of the network) and outright obscene (contrary to the generally accepted social standards for use of publicly owned and operated communication vehicles).

CHARGE V

Insubordination and Unbecoming Conduct and/or Other Just Cause
Failure to Pay Attention During Professional Development Training

All of the allegations contained in the Background Information and preceding Charges are incorporated by reference as if fully set forth herein. On October 23, 2014, during an Engrade Training, as a result of a roughly two and a half hour inappropriate and extraneous conversation, unrelated to the Training in any way, Maria Weber failed to pay attention and/or make any effort to benefit from the instruction provided. This misconduct by Ms. Weber constitutes unbecoming conduct, misbehavior, neglect, insubordination, and/or other just cause for dismissal.

POSITIONS OF THE PARTIES

CONTENTIONS OF THE BOARD

The Board argued as follows:

These facts pertain to Maria Weber.

- Ms. Weber has been employed by the Board since the 2000-2001 school year. She is currently a tenured employee.
- Ms. Weber was a special education teacher, assigned to James Monroe School for the 2014-2015 school year.

On September 4, 2014, Ms. Weber executed the *Important Board Policies, Regulations, and Mandated Communications* Form, acknowledging that all Board policies and regulations can be found on the Board's website at http://www.edison.k12.nj.us/Page/514 and agreeing to review and conform to the requirements of same. B-19.

The following facts apply to all of the Respondents

- Article III(B)(1 and 2) of the Agreement for Professional Employees between Board of Education Edison Township New Jersey and Edison Township Education Association, July 1, 2011 through June 30, 2014 ("CBA") state, in relevant part, that "all Board of Education policies will be upheld and enforced by all Board employees who are party to this

Agreement, as well as by all Administrators, Principals, and Supervisors" and "all Board of Education policies will be available for review in the office of the principal, school library, and the Association office." B-27.

- Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members*, advises employees that the Board retains the right to have the Superintendent or designee monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use." Policy 3321 further states that "the Board provides access to computer network(s)/computers for administrative and educational purposes only." Moreover, the foregoing policy, in relevant part, states that "any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computers shall be subject to discipline or legal action: (1) using the computer network(s)computers for . . . inappropriate or obscene purposes." B-24.
- Moreover, Policy 3321 subject employees who violate same to discipline, which includes but is not limited to, suspension, revocation of computer privileges and/or dismissal. B-24.
- Unequivocally, there is no expectation of privacy for any Board employee when using the district's computer network. In fact, there is no program and/or policy that would trump the foregoing fact. 3T-14:16-15:12; 2T 26:13-19.
- Board Policy 3362, *Sexual Harassment*, states that "[s]exual harassment includes all unwelcome . . . verbal contacts of a sexual nature that would not have happened but for the employee's gender." Policy 3362 further states that "when such conduct is severe and pervasive and has the purpose or effect of unreasonably altering or interfering with work

performance or creating an intimidating, hostile, or offensive working environment, the employee shall have cause for complaint." B-21.

- Board Policy 3362 also states that "any employee . . . who is found to have sexually harassed an employee of this district will be subject to discipline which may include termination of employment." B-21.
- Board Policy 1140, *Affirmative Action Program*, establishes that the Board's affirmative action program will "foster a learning environment that is free from all forms of prejudice, discrimination, and harassment based upon race, creed, color, national origin, ancestry, age, martial status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status in policies, programs, and practices of the Board of Education." B-20.
- Board Policy 3281, *Inappropriate Staff Conduct*, states in relevant part that "[I]nappropriate conduct by a school staff member outside their professional responsibilities may be considered conduct unbecoming a staff member. Policy 3281 further states that "School staff's conduct in completing their professional responsibilities shall be appropriate at all time . . . [and] school staff shall not make inappropriate comments about pupils." B-23.
- Board Policy 3211, *Code of Ethics*, indicates that "the educator shall exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education." B-22.
- Board Policy 3351, *Healthy Workplace Environment*, requires that "employees interact with each other with dignity and respect" and further states that "repeated malicious conduct of an employee or group of employees directed toward another employee or group of

employees in the workplace that a reasonable person would find hostile and offensive is unacceptable and is not conducive to establishing or maintaining a healthy workplace environment." Policy 3351 further defines the foregoing unacceptable conduct to include the use of derogatory remarks; insults; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating. Finally, a single act of such conduct can constitute the unacceptable conduct prohibited by this policy if it is especially severe and egregious. B-25.

- Board Policy 3351 states that "appropriate disciplinary action may be taken depending on the severity of conduct." B-25
- On October 23, 2014, Respondents attended a mandatory Engrade Training (the "Training") at the Board's offices. Engrade was a new initiative (learning management system) for the District's elementary school teachers. 2T 24:3-23.
- The Training lasted for two-and-one-half hours (roughly 9:00-11:30AM) and was conducted by Sara Bleekinger, who is not a Board employee. 2T 28:24-29:2.
- Respondents were required to use their District issued Chromebooks to participate in the Training. All Respondents admit to using same during the Training and connecting to the Internet through the District's network. Further, Respondent's computers were open, with their screens exposed, throughout the duration of the Training. 1T 74:12-18; 2T 25:6-20. At 8:53AM, Mr. Van Pelt forwarded an email to Ms. Lechelt, Ms. Weber and Jonathan

Bauza, requesting that they "join [him] on [his] personal wiseass backchannel discussion."[1] B-12.

- Mr. Van Pelt attached a link to bring the invitees to a web site called "Today's Meet." B-12. Today's Meet is an interactive program that hosts various educationally based conversations (i.e., teacher to teacher / teacher to student). However, Today's Meet is not a program that the District requires it teachers to use and/or be familiar with. In fact, it has no affiliation to this District. Importantly, the District does not maintain Today's Meet chat and/or content, nor does it request and/or require Today's Meet to do so. 3T 20:5-11; 5T 236:24-237:15.
- Respondents were not required to use Today's Meet as part of the Engrade Training. In fact, there was absolutely no compatibility and/or correlation between the Engrade Training and the Today's Meet website. B-41.
- Respondents denied reading Lechelt-3 in its entirety prior to using the Today's Meet Program on October 23, 2014. More specifically, Respondent's did not review Today's Meet's Privacy Policy and Terms of Service. In fact, said portions of Lechelt-3 became effective December 13, 2014 – after the chat at issue occurred! See, Lechelt-3.
- Moreover, the document date stamped Lechelt-032 within Lechelt-3 illustrates that Today's Meet chat rooms can be public and/or have limited access. Without question, the chat at issue here was not totally private as Ms. DeLuca – who was not invited to take part in same – was able to access the chat room. See, Lechelt-3.

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[1] Note that while the invitation was actually sent at 8:53AM, the email illustrates that it was sent at 5:53AM. The district's network is set not set to Pacific Standard time and is therefore displayed at a time three hours earlier than it actually is. 2T 45:13-46:3.

- The Respondents, along with Jonathan Bauza, proceeded to engage in a 2.5 hour chat (beginning at 8:54AM and ending at 11:24AM) (hereinafter referred to as the "Group Chat"). B-13.
- James Madison Intermediate School Teacher, Alysia Battista, also attended the October 23, 2014 Engrade Training. 1T 60:10-16.
- Throughout the Training, Alysia Battista was seated in the last row, roughly 3 feet directly behind Ms. Lechelt. To the left of Ms. Lechelt were Jonathan Bauza and then Mr. Van Pelt. Ms. Weber was seated directly in front of Mr. Van Pelt. See, Lechelt-1; 1T 181:13; B-44 and Lechelt-1.
- Ms. Battista did not have any personal animosity towards Respondents prior to the Training. In fact she had no relationship (personal/professional) with any of them prior to same. 1T 83:4-9.
- A few moments after the Training began, Ms. Battista was distracted by noise emanating from Mr. Van Pelt, Ms. Lechelt and Mr. Bauza. Mr. Battista proceeded to "shush" Ms. Lechelt. 1T 67:5-22.
- Ms. Lechelt turned around and gave Ms. Battista a look that Ms. Battista interpreted as "really did you just shush me?" Ms. Lechelt and Messrs. Van Pelt and Bauza continued to converse loudly and lean in towards each other's computer screens. 1T 68:14-20.
- Ms. Battista was able to clearly see Ms. Lechelt's computer screen and, therefore, observe the content of the conversation between Ms. Lechelt, Mr. Van Pelt, Mr. Bauza and Ms. Weber. In fact, Ms. Battista indicated that Respondents made no effort to hide what was going on and, in fact, at one point during the training, Ms. Lechelt actually got up from her

seat, leaving the computer screen open and the chat on the screen – exposed to the general public and visible to anyone looking. More specifically, Ms. Battista observed the following comments: "short bus" and sexual innuendos – i.e., references to male genitalia, "blow me" and "how do you think I got my job"; comments about lesbians. Ms. Battista also observed comments about someone wearing red. Ms. Battista was wearing red and believed some of the commentary was directed towards her. 1T 69:18-71:22; 74:12-18; 1T 70:5-9, 74:12-19; B-8, B-10.

- Ms. Battista was heavily distracted and highly uncomfortable with the nature of the chat. She described same as "unbelievable". The content of the conversation was upsetting to Ms. Battista because: (1) she has a niece who is classified as special education; (2) she has an "uncle who's epileptic and his whole life he was called retarded and that affected him, so to see that from people who work with children"; and (3) she has a cousin who is discriminated against for being a lesbian. Ms. Battista indicated that "seeing those things especially with people who work with kids, whether it's a joke or not, that's not crossing the line, that's jumping over the line and turning around and spitting on it." 1T 73:5-24.
- Ms. Battista found the Group Chat to be "sexually offensive." 1T 151:16-20.
- Similarly, Ms. Battista clearly observed the web address that hosted the Group Chat. She documented same in both her note to Mr. Figurelli and her written statement. 1T 84:4-16; B-8 and B-10.
- Ms. Battista, based on the portions of the transcript she saw, believed that the Respondents were talking about her – *i.e.*, she observed a comment about something red somebody was wearing, and assumed it was a reference to her because she was wearing a red sweater; and

she saw a reference about someone "scratching their lips", which Ms. Battista tends to do when she gets upset, as was the case during the Group Chat. 1T 71:8-22; 176:11-21.

- Ms. Battista made a determination to inform central administration about this chat. She believed that since she preaches to her students to "say something if they see something", she would be disingenuous if she did not do same. Moreover, she expressed concern – *i.e.*, "if that's what's going on in public when other people can see it and I don't think they made any effort to hide what was going on, what could possibly be going on when the kids were not being supervised by other adults." 1T 74:7-11.
- Ms. Battista proceeded to take photographs of Ms. Lechelt's computer screen so she would be able to prove the egregiousness of Respondent's chat. Ms. Battista did not take the time to focus her phone when she snapped the pictures and that is why same came out blurry. 1T 75:21-25; B-7.
- Ms. Weber made all of the comments in the chat attributed to "trish." B-6. Specifically, Ms. Weber made the following comments about the Engrade Trainer – Sarah Bleekinger:
    - "maybe she was caught in the rain";
    - "I think you make her nervous";
    - "your cuter . . . your mamalechelt"
    - "was that your alarm tvp or did I hear church bells";
    - "are you winking at her";
    - "maybe we should have learned something if stevie was giving the workshop";
    - "does anyone have tips for her? is that her way of saying I don't know what the hell im talking about [sic]";

- "I would hate to be her";
- "she keeps looking at you . . . especially when she says repository";
- "teach like a robot ty";
- "dare you to ask her if she would go out with our friend ty";
- Adding her insight into potential pick-up lines for Mr. Van Pelt to use on [the trainer], Ms. Weber stated, "how bout my eyes are the only thing I don't wanna take off of your [sic]";
- "she keeps staring at tvp";
- "shes looking for your approval . . . can you give her a little something";
- "don't say good bye . . . just say see ya later babe [sic]";
- "tell her to meet u on Dartmouth at 4 [sic]";
- "im sure his roomie would love to join too [sic]";
- "do you want the pad ty? you can give her your number." B-13.

- Ms. Weber made the following comments to Mr. Van Pelt, Ms. Lechelt and Mr. Bauza:
  - "hes a virgin still . . . leave him pure [sic]";
  - "I like control fu";
  - In response to Mr. Van Pelt stating that he is a "backchannel guy", Ms. Weber stated, "cant you tell by the way he walks";
  - In response to Ms. Lechelt stating the conversation is "so beautifully filthy", Ms. Weber responded "always is when tvp is chatting";
  - "whats a repository? is it something u stick up your ass [sic]";

- In response to Ms. Lechelt's comment regarding "the ol powder your balls shower," Ms. Weber stated "or soap on the wash cloth." B-13.

- The foregoing chat had no educational purpose, nor did it enhance the instruction of the Training in any manner. 3T 250:24-251:6; B-42.
- Ms. Battista left the Training to speak with Steve Figurelli about her observations. Mr. Figurelli was unavailable so Ms. Battista wrote him a quick note and placed same in a sealed envelope for his attention. B-8.
- Ms. Battista returned to the Training because she knew the Training was important and because she felt she had a professional obligation to sit through same. She did not believe she could simply leave for the day. 1T 79:19-80:1; 149:19-21.
- As a result of Respondents' conduct, Ms. Battista was unable to concentrate and was prevented from learning the content of the Training. Thus, Ms. Battista was unprepared to use Engrade with her students and/or to teach Engrade to her less computer savvy team members and/or student teachers. 1T 71:23-25; 81:8-11; 1T 60:17-61:5.
- Within an hour after the Training, Ms. Battista met with her building Principal, Mr. Duggan, to inform him of Respondents' conduct. 1T 82:2-8.
- Pursuant to the request of Mr. Duggan, Ms. Battista prepared a handwritten statement, documenting her observations during the Training. 1T 83:15-19; B-10.
- Thereafter, later in the day on October 23, 2014, Ms. DeLuca interviewed Ms. Battista as part of an affirmative action investigation concerning Respondents' conduct. Ms. Battista provided Ms. DeLuca with a handwritten statement. Ms. Battista was very upset and visibly shaken during this meeting. See, B-11, B-10 and 2T 31:2-33:18; 1T 88:3-18; B-10.

- Ms. DeLuca accessed and reviewed a written copy of the Today's Meet Group Chat ("Transcript"). More specifically, Ms. DeLuca was initially provided with a copy of same by Tara Beams, but also was able to access a copy of the Transcript by simply opening Today's Meet.com and entering the Chat Room created by Mr. Van Pelt. 2T 41:4-20; B-13.
- Ms. DeLuca found the Transcript to be disgusting and offensive. 2T 48:20-23.
- The chat between Mr. Van Pelt, Ms. Lechelt and Ms. Weber was open to the public and anyone with the chat name was able to access same. 2T 44:6-10; 6T 8:19-22.
- In fact, Don Platvoet, during his brief training of Respondent's on the potential uses of Today's Meet, did not inform Respondent's that it was a private program. 6T 8:8-15.
- Next, Ms. DeLuca met with and interviewed the other teachers in attendance during the October 23, 2014 Engrade Training. 2T 50:12-25; See, teacher interview notes.
- Only one other teacher present during the Training (Angie McKenna) observed the content of the chat between Respondents. 2T 52:22-53:16.
- Ms. DeLuca then proceeded to separately interview each of the Respondents. B-14 through B-16; 2T 56:10-12.
- Mr. Van Pelt and Ms. Lechelt indicated that they made derogatory references to special education and/or handicap students as a result of the Instructor's "offensive" use of the designation "low" for students. 2T 63:15-64:8.
- Per the District's Assistant Superintendent for Special Services, the Instructors use of the designation "low" should not have been offensive. In fact, all of the tests used by the District to classify special education students use the term "low" when classifying students. 2T 65:13-66:5; 3T 237:12-239:16.

- Respondents all appeared to be sorry they were caught, not sorry they had engaged in the conduct at issue. 2T 93:19-24; 104:14-105:4; 114:18-21.
- Specifically, Mr. Van Pelt did not take Ms. DeLuca's interview seriously. On two separate occasions during the interview, Mr. Van Pelt blurted out offensive, disgusting and unacceptable comments – *i.e.*, (1) when explaining that the phrase "eating chicken" means oral sex, Mr. Van Pelt stated under his breath, audible to Ms. DeLuca, that he likes oral sex; and (2) after explaining that the phrase "get the baby batter off the brain" was a reference to masturbation, Mr. Van Pelt stated, that he did not masturbate, "at least not that time." 2T 75:2-8; 76:6-20; 88:6-89:6.
- Throughout the course of her investigation, Ms. DeLuca determined the following meanings for the following phrases used by Respondents:
    - That many, if not all, references to "backchannel" were references to anal sex. B-15; 2T 68:7-16; 3T 266:4-7.
    - Mr. Van Pelt consistently used the phrase "eating chicken", which means both smoking marijuana and oral sex. 2T 71:1-2, 73:22-23.
    - After Ms. DeLuca stated that Ms. Battista "keeps scratching her lips and they are getting bigger." Mr. Van Pelt stated, "DSL." "DSL" is an acronym for the phrase *Dick Sucking Lips*. B-13; 2T 77:5-24.
    - "Tricky d" and "Little Richard" were derogatory references to Dr. O'Malley, made by Ms. Lechelt and Mr. Van Pelt, respectively. B-13; 3T 227 20-24; 5T 244:12-20.
    - Mr. Van Pelt's use of the phrase "get[ting] the baby batter off the brain" was a reference to male ejaculation/masturbation. 2T 87:10-88:5; B-14.

- Following her interviews of Respondents, Ms. DeLuca reviewed and analyzed all relevant Board Policies to determine whether violations had occurred. 2T 114:22-115:1; 2T 55:3-20.
- Finally, Ms. DeLuca analyzed and evaluated all of the information/evidence gathered throughout her investigation and prepared a memorandum summarizing her findings and providing recommendations for Dr. O'Malley's review. B-26; 2T 126:10-22.
- Ms. DeLuca recommended that Dr. O'Malley consider the most severe consequences possible for all three Respondents because "they didn't seem, for lack of a better term, to get it. They didn't seem to realize the seriousness of the situation." 2T 127:25-128:13.
- Dr. O'Malley recommended that Tenure Charges be filed against Respondents because he "felt their comments and their actions were so egregious, that it would not make them suit [sic] to fit in a position of entrusting them with children . . . I just felt that in the context of their – what they wrote and what they were talking about was just – just disgusting and unbearable . . . And how could I ever look a parent in the eye and say that their children are safe knowing that they are in front of their classroom." 3T 57:17-58:3.
- The Tenure Charges were posted to the public through the news media. Parents and teachers alike have approached Dr. O'Malley on a daily basis to express their trepidations to the possible return of Respondents to the classroom. 3T 62:22-63:19.
- Dr. O'Malley indicated that "every parent and Edison resident and teacher feel that this was absolutely disgusting, and how can anyone not only talk about this, but talk about someone's child like this." 3T 63:4-8.

The record is closed and the evidence speaks for itself – the Board has proven by a preponderance of the credible evidence that Respondents have engaged in unbecoming conduct,

misbehavior and/or other just cause warranting their dismissal from their tenured positions with the Board.

Respondents conduct in engaging in a discriminatory, offensive and highly inappropriate group chat constitutes unbecoming conduct and/or just cause warranting their dismissal. On October 23, 2014, during a mandatory Engrade Training, Respondents engaged in a two and one-half hour "Group Chat" through the "Today's Meet Website, visible to those present in the room, observed in detail by Alysia Battista and ultimately printed through the news media and therefore, viewable by the general public. Respondents conceded that they were responsible for posting the various comments attributed to them (*i.e.*, "tvp" = Mr. Van Pelt; "trish" – Ms. Weber; and "mamalechelt" = Ms. Lechelt).. The chat was full of sexual innuendo, discriminatory, offensive content and ultimately created a hostile and uncomfortable work environment for Ms. Battista. In fact, Ms. Battista believed portions of the chat were directed at her and was made to feel so uncomfortable by the general content of same that she was unable to remain focused during the Training and was ultimately brought to tears after having been exposed to same.

The inappropriateness of Respondents' chat is born from an objective review of the Today's Meet Transcript (B-13). Respondents' subjective descriptions and/or interpretations of the chat as a *joke* or a *misunderstanding* are entirely irrelevant to this Tribunal's consideration. Conversely, the Board's conclusion that the Respondents displayed such poor judgment through their participation in the Group Chat that they are not fit to be entrusted with the care of this District's students, coupled with the common sense determination that their conduct crossed all behavioral boundaries for public school teachers, should not be disturbed.

As to Charge I Count 1, Respondents, as a group, consistently directed commentary towards and/or about Ms. Bleekinger that was sexually explicit and offense, demeaning, derogatory and wholly inappropriate. More specifically, Respondents consciously decided to turn a serious and important instructional course into a fantasy game of sorts, within which they vividly described and/or actively suggested ways for Mr. Van Pelt to initiate and achieve sexual interactions with Ms. Bleekinger, along with the sexual fantasies Mr. Van Pelt had towards Ms. Bleekinger. Mr. Van Pelt admitted to making the following comments: "I'd like to tag her"; "you know what would look good on you? ME"; "do you like to have your hair pulled"; "I'd like to invite her to a private backchannel discussion . . . all night long".

Ms. Lechelt admitted to making the following comments: "I have a feeling she would rather go out with me";[2] "im [sic] worried you'll catch something from her backchannel"; "theres [sic] not enough room in her repository for two"; "do you want to blow me". Ms. Weber admitted to making the following comments: "dare you to ask if she would go out with our friend ty"; "tell her to meet u [sic] at Dartmouth at 4"; "im [sic] sure his roomie would love to join too") our friend ty"; "tell her to meet u [sic] at Dartmouth at 4"; "im [sic] sure his roomie would love to join too").

Despite denying engaging in such behavior within their Answers to the Sworn Tenure Charges and Answers to Interrogatories, Mr. Van Pelt and Ms. Weber conceded, through their testimony, that their comments towards Ms. Bleekinger were inappropriate. Specifically, Mr. Van Pelt stated, "[d]id I make inappropriate comments about [Ms. Bleekinger]? Yes, I would agree they were inappropriate, yes."

With regard to the comments made by Ms. Weber, Ms. Weber conceded, "it wasn't right and

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[2] An implication that Ms. Bleekinger is a lesbian.

I've apologized a million times." Conversely, the record is devoid of any concession of remorse by Ms. Lechelt with regard to the specific comments she directed towards Ms. Bleekinger during the Group Chat.

Regardless of Respondent's testimony, even a cursory review of the portions of the Transcript directed towards Ms. Bleekinger illustrate that same is inappropriate for teachers to partake in during school hours and through the District's computer network. Further, whether or not Ms. Bleekinger observed the comments directed towards her is immaterial. The record is clear – the Board's administration, Ms. Battista (the only Board employee to view the chat) and the general public found the comments directed towards Ms. Bleekinger to be inappropriate, foul, discriminatory, offensive, harassing and sexual in nature. Thus, the Board has provided sufficient evidence to sustain this Charge.

Count 6 of Charge I alleges that the Respondents made disgusting, offensive and inappropriate sexual comments among themselves and about each other. Respondents, throughout the Group Chat, made consistent comments between each other about Mr. Van Pelt enjoying, preferring and/or engaging in anal sex – *i.e.*, use of word "backchannel." Mr. Van Pelt and Ms. Lechelt discussed masturbating, particularly in school and during the training session. In fact, the clear implication from their conversation was that Mr. Van Pelt had excused himself from the Training to masturbate in the restroom. Mr. Van Pelt made multiple references to the act of oral sex – *i.e.*, eating chicken, as well as a flippant comment about him being a "lesbian". Ms. Lechelt stated emphatically that she "loves" when Respondents ask her to "blow" them. Finally, the inappropriateness of Respondents' exchange is encapsulated by Ms. Weber's admission that the conversation is "so beautifully filthy" and "it always is when tvp is chatting."

Without question, such comments were graphically sexual, offensive, discriminatory, harassing and inappropriate to Ms. Battisa, Ms. DeLuca, Dr. O'Malley and the general public. Such commentary simply has no place inside of a school building. Thus, the Board has established that Respondents, with respect to this Charge, have engaged in unbecoming conduct.

Charge II alleges that Respondents engaged in unbecoming conduct during the training session when they caused a disruption by preventing Ms. Batista from participating in the training.

The record evidence demonstrates that Ms. Battista, upon viewing portions of the Group Chat, became offended, was unable to focus and was effectively forced to leave the training to report the misconduct she observed Respondents partake in. In fact, Respondents' conduct prevented Ms. Battista from learning the content of the training. Thus, Ms. Battista was unprepared to use Engrade with her students and/or to teach the Engrade program to her team members and/or student teachers.

Respondents' defense to this Charge is entirely misplaced.[3] More specifically, Respondents, through their testimony, failed to address the actual disruption to Ms. Battista (which was alleged in Charge II of the each of the Sworn Tenure Charges), while attempting to divert this Tribunal's attention to the lack of general disruption. Importantly, however, the Board did <u>not</u> charge Respondents with causing a general disruption to the Training as the Group Chat was only observed by one person and thus, logically, only could have disrupted one person – Alysia Battista.

Merrian's Webster Dictionary defines disruption as follows: to cause (something) to be unable to continue in the normal way; to interrupt the normal progress or activity of (something).

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[3]Mr. Waldman asserts that "the charges themselves . . . point to a much more general disruption and, in fact, they say that the harassment was public." 3T 131:20-24. However, such a statement is not accurate, as this Charge states, in relevant part, that "by taking part in a group chat through Today's Meet, which was –in part – about Alysia Battista, visible to Alysia Battista and highly offensive to her, Ms. Battista was unable to focus and was effectively forced to leave the training . . ." B-3. The Board did <u>not</u> charge "general disruption."

Here, without question, Respondents' Group Chat resulted in a situation where Ms. Battista was unable to continue with the Training in the normal way. Thus, the Board has sustained its burden in establishing that Respondents disrupted the Engrade Training.

As a consequence of Respondents' partaking in a 2 ½ hour group chat, they failed to pay attention to the training . The Board has established by a preponderance of the credible evidence that Respondents, as a result of their participation in a 2.5-hour conversation during the Training, failed to sufficiently pay attention to the content and/or presentation of the Engrade materials.

The Board had an expectation that all teachers present at the Training, or any professional development training for that matter, would pay attention to the entirety of the instructional presentation and refrain from engaging in ancillary and unrelated conduct. Respondents' conduct fell far short of the foregoing expectation.

The transcript of the Chat proves that it lasted for 2.5 hours. Mr. Van Pelt made his first comment at 8:54AM and his last comment at 11:23AM. Similarly, Ms. Lechelt made her first comment at 8:54AM and her last at 11:24AM. B-13. Finally, Ms. Weber made her first comment at 8:58AM and her last comment at 11:24AM. B-13. Between 8:54AM and 10:49AM, the longest period of time in between comments was only 4 minutes, on two separate occasions. Both Mr. Van Pelt and Ms. Weber testified that they spent as much as 15-20 minutes participating in the chat. Ms. Lechelt did not attempt to quantify her participation in the chat.

Regardless of the self-serving estimates set forth by Mr. Van Pelt and Ms. Weber, even if each Respondent only spent 15-20 minutes participating in the chat (or the length of time it took them to type the comments they admitted to making into the chat), they failed to pay attention, or at the least, refrain from engaging in unrelated activity – by their own admission – throughout the

entirety of the Training. Thus, the Board has sustained this Charge against all Respondents.

As to Charge III, on October 23, 2014, during the Training, Respondents participated in an inappropriate, foul, discriminatory, harassing and offensive chat through the District's computer Network and District's computers. The chat was not the result of any educational and/or instructional requirements or necessities. Thus, it constituted a misuse of the District's computer network.

Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers and Resources by Teaching Staff Members*, states – in relevant part – that "any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computers shall be subject to discipline or legal action: (1) using the computer network(s)/computers for illegal, inappropriate or obscene purposes, or in support of such activities . . . Inappropriate activities are defined as those that violate the intended use of the network(s) . . . ; and (3) using the computer network(s) in a manner that: engages in other activities that do not advance the education purposes for which computer network(s)/computers are provided."

Here Ms. Weber agreed that her conduct constituted a misuse of the District's network. Similarly, Ms. Lechelt grudgingly conceded that her participation in the Group Chat did not enhance any educational purposes. Only Mr. Van Pelt refused to acknowledge same by steadfastly arguing that the Group Chat, which provided an infusion of humor to the Training, enhanced the Respondents' learning capacity.

While Mr. Van Pelt's lack of credibility will be addressed in greater detail below, suffice it to say that Mr. Van Pelt's claim surely does not overcome the Board's proofs coupled with the other Respondents' concessions. Initially, Mr. Van Pelt set up the Group Chat and invited the other Respondents and Mr. Bauza to his "personal wiseass backchannel discussion." Clearly, the name

he chose for the Group Chat depicts his true intentions for the chats direction and content – *i.e.*, inappropriate.

Next, an objective review of the content of the chat illustrates that same was wholly inappropriate in relation to Board Policy 3321 and entirely unrelated to the educational purposes of the Training. Finally, and perhaps most importantly, the admissions of Ms. Lechelt and Ms. Weber that they misused the district network must be similarly attributed to Mr. Van Pelt, as his conduct during same was at least as egregious as the other two Respondents.

Thus, the Board has sustained its burden in proving that Respondents misused the District's computer network, constituting unbecoming conduct.

Charge IV indicates that Respondents' conduct during the training session violated several district policies. In September 2014, Respondents executed "Important Board Policies, Regulations, and Mandated Communications Forms." B-17, 18 and 19. These forms indicate, "employees are expected to review and become familiar with all Board policies and regulations" and further, directs employees to the web address where same can be found. In fact, Respondents all acknowledged that the policies and regulations are on the Board's website and agreed to "conform to the requirements of the policies and regulations of the Edison Township Board of Education."

Additionally, Article III(B), *Board Policies*, of the controlling CBA states, in relevant part, that: (1) all Board of Education policies will be upheld and enforced by all Board employees who are party to this Agreement, as well as by all Administrators, Principals, and Supervisors; and (2) all Board of Education policies will be available for review in the office of the principal, school library, and the Association office.

Thus, regardless of whether or not Respondent's actually adhered to their obligations to

familiarize themselves with and abide by all Board policies and regulations, their affirmative obligation to do same undercuts any efforts by Respondents to argue that they were unaware of certain policy requirements that they disregarded. More simply put, in considering whether or not Respondents violated Board Policies as alleged in the Sworn Tenure Charges against them, this Tribunal must find that they were familiar with all Board Policies and aware of their obligations pursuant to same.

Pursuant to Counts 1, 2 and 3 of Charge IV, Respondents are charged with violating the Board's Affirmative Action and Sexual Harassment Policies. More specifically, Board Policy 1140, *Affirmative Action Program*, requires the Board to implement and "foster a learning environment that is free from all forms of prejudice, discrimination, and harassment based upon race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status in the policies, programs, and practices of the Board of Education."

Board Policy 3362, *Sexual Harassment*, states that "[t]he Board of Education recognizes that an employee's right to freedom from employment discrimination includes the opportunity to work in an environment untainted by sexual harassment." Said Policy further provides that "[s]exually offensive speech and conduct are wholly inappropriate to the harmonious employment relationships necessary to the operation of the school district and intolerable in a workplace which the children of this district are exposed." Sexual harassment includes all "verbal or physical contacts of a sexual nature that would not have happened but for the employee's gender. When such inappropriate conduct is "severe and pervasive" and has the effect of unreasonably altering or interfering with work performance or creating an intimidating, hostile, or offensive working environment, the

employee shall have cause for complaint. Finally, employees are put on notice through Policy 3362 that should they be found guilty of sexual harassment, they will be subject to discipline which may include termination.

Though Respondents were not charged with violating New Jersey's sexual harassment laws, Respondents sought to interject the more stringent standards of same into this matter in an effort to defend the Board's allegations. Respectfully, any comparison of the Respondents' conduct to New Jersey Law is not relevant and/or appropriate, as Respondents were not charged with violating state law.

However, to the extent this Tribunal disagrees with the Board's interpretation of the Sworn Charges, the Board contends Respondents have, in fact, violated New Jersey Law, as established by the New Jersey Supreme Court. Lehman v. Toys R Us, Inc., 132 N.J. 587, 603-604 (1993)(a four part test must be considered in determining whether or not sexual harassment has occurred: (1) the complained of conduct would not have occurred but for the employee's gender; and (2) was severe or pervasive enough; (3) to make a reasonable woman believe that (4) the conditions of employment are altered and the working environment is hostile or abusive).

Here, the credible record evidence is clear and convincing – Respondents violated the Board's Affirmative Action and Sexual Harassment Policies. Ms. Battista, based on the portions of the transcript she saw, believed that Respondents – at least in part - were talking about her (*i.e.*, she observed a comment about somebody in red, and assumed it was a reference to her because she was wearing a red sweater; and she saw a reference about someone "scratching their lips", which Ms. Battista tends to do when she gets upset and was doing during the Group Chat). More specifically, but without limitation, Ms. Battista observed and recalled the following commentary between

Respondents: reference to a "short bus" - a demeaning reference to the mode of transportation for special education students; the size of male genitalia; use of the word "dick"; comments about being a "virgin"; describing the trainer as a lesbian, with a reference to a rainbow; "blow me" – "how do you think I got my job"; "men who are like 'turtles'". As a result of Respondents' conduct, Ms. Battista was unable to concentrate and was prevented from learning the content of the training – *i.e.*, Respondents altered and interfered with Ms. Battista's work performance and created an intimidating, hostile, and offensive working environment.

Further, the severity and pervasiveness of Respondent's 2.5 hour chat is borne from Ms. Battista's reaction at the time she observed same, Ms. Battista's demeanor during her testimony when she broke down in tears because she remains upset with the content of Respondent's chat and the testimony and conclusions of Ms. DeLuca and Dr. O'Malley.

Ms. DeLuca, an experienced affirmative action coordinator/investigator, determined that Respondents' comments during the Today's Meet Group Chat included: (1) explicit and graphic references to sexual acts and sexual sayings; (2) references and imaginations regarding a sexual relationship between Mr. Van Pelt and Ms. Bleekinger; (3) comments concerning Ms. Bleekinger's sexual preferences – *i.e.*, the suggestion that she is a lesbian; (4) inexcusable and insulting comments about special education/handicap students; (5) demeaning comments about other persons present in the training, including their sexual orientation and/or age; and (6) inappropriate, insulting and unfounded comments concerning Dr. O'Malley's physical appearance and hiring/promotion practices.

Ultimately, Ms. DeLuca concluded that the related Board Policies were violated because Respondents' verbal attack on females, elderly persons, lesbians and students with disabilities

created a hostile and offensive working environment for Alysia Battista.[1] Respectfully, the record would not support any alternative finding by this Tribunal.

Importantly, Respondents' efforts to attack the credibility of Ms. Battista by categorizing her as both unreasonable and atypical are unavailing. Initially, common sense must prevail.

Regardless of Respondents' self-serving and rehearsed definitions/meanings for the various phrases used throughout the transcript, this Tribunal must evaluate same based on the meaning the general public would have, and since has, attributed to such relevant statements – that they are disgusting, sexually offensive, insulting, demeaning, and discriminating on their face. Further, to the extent this Tribunal is convinced that Respondents' efforts to apply the "reasonable person standard" to Ms. Battista are appropriate, which the Board remains steadfastly opposed to, the Board argues that said standard has been satisfied – both Ms. DeLuca and Dr. O'Malley corroborated the reasonableness of her reaction to Respondents' Group Chat.

Thus, to categorize Ms. Battista's reaction to Respondents' commentary as "unreasonable" would be to implicitly identify such comments as acceptable. Moreover, the Board would be remiss to fail to point out the hypocrisy of Respondents' argument – *i.e.*, Respondents, in one breath, ask this tribunal to find that Ms. Battista's reaction to Respondents' comments was atypical or unreasonable, while in the other breath, argue that their "reaction" to Ms. Bleekinger's well accepted categorizations/classifications of special education students (*i.e.*, "low") was normal and a legitimate excuse to their behavior. Respondents' attempt to deflect this Tribunal's attention from their conduct, by yet again attacking Ms. Battista's person, should not be overlooked. The overwhelming

[1] Respondents' argument that the chat was not severe and pervasive because it only affected Ms. Battista is unavailing and disingenuous. Ms. Battista was the only employee to have viewed the chat during the chat. Thus, same should <u>not</u> serve as a mitigating factor in support of Respondents' case.

record evidence illustrates that Respondents' conduct violated the Board's Affirmative Action and Sexual Harassment Policies.

Count 4 and 5 of Charge IV asserts that Respondents violated Board Policy 3211 and Board Policy 3281. The *Code of Ethics* policy states in relevant part that the educator "shall not intentionally expose the pupil to embarrassment or disparagement." Further, Policy 3211 requires that the "educator shall exert every effort to raise professional standards to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education, and to assist in preventing the practice of the profession by unqualified persons."

Board Policy 3281, *Inappropriate Staff Conduct*, indicates, in relevant part, "staff members have the public's trust and confidence to protect the well-being of all pupils attending the school district." Policy 3281 further requires that "school staff's conduct in completing their professional responsibilities shall be appropriate at all times. School staff shall not make inappropriate comments . . . about pupils." B-23.

The foregoing policies hold Board employees to the highest degree of morality and professional standards. Similarly, they confer expectations on Board employees to safeguard the trust and confidence conferred upon them by the public. However, Respondent's voluntary and willful conduct during the October 23, 2014 Group Chat, along with the content of said chat, constituted a grave lack of professional judgment and a breach in the trust attributed to these teachers by both the Board and the general public. More specifically, the 2.5-hour conversation between the Respondents, with no instructional/educational purpose, during an important Professional Development Training (a professional responsibility) was highly inappropriate and a drastic

deviation from the administration's expectations for its employees to embrace the Engrade program and/or act with a certain level of respect and commitment during any professional development training.

Further, the content of same, specifically the derogatory references by Mr. Van Pelt and Ms. Lechelt about their special education / handicap students leapt across all bounds of decency. Perhaps most importantly, as a result of the words documented by Respondents, the young impressionable students (and their parents) previously assigned to Mr. Van Pelt and or Ms. Lechelt, at any time during the employment of Mr. Van Pelt and Ms. Lechelt, are forced to wonder which hurtful and derogatory grouping they were assigned to by their respective teacher. Thus, the Board has sustained its burden in establishing that Respondents' conduct violated Board Policies 3211 and 3281.

Count 6 refers to Board Policy 3351, *Healthy Workplace Environment*, which states, in relevant part, "employees [must] interact with each other with dignity and respect . . . Repeated malicious conduct of any employee or group of employees directed toward another employee or group of employees in the workplace that a reasonable person would find hostile or offensive is unacceptable and is not conducive to establishing or maintaining a healthy workplace environment." Policy 3351 defines unacceptable conduct as conduct that constitutes the "use of derogatory remarks; insults; verbal . . . conduct that a reasonable person would find threatening, intimidating or humiliating. A single act of such conduct shall not constitute the unacceptable conduct prohibited by this policy unless it is especially severe and egregious."

Here, once again, the Board has sustained its burden in proving that Respondents have violated this Policy. By their own admission, the overall content of the Group Chat contained interactions devoid of both dignity and respect – *e.g.*, graphic and vulgar sexual comments

concerning Mr. Van Pelt's desires with respect to Ms. Bleekinger; derogatory and insulting comments about Mr. Van Pelt and Ms. Lechelt's student groupings and special education students in general; baseless insulting and defamatory remarks about Dr. O'Malley's appearance and hiring/firing/promotional practices; derogatory and insulting remarks about woman, lesbians, elderly persons. B-13. Further, the Group Chat by Respondent's lasted 2.5 hours, encompassed 16 pages of a transcript and contained 318 separate comments, making the foregoing malicious conduct repeated conduct. B-13.

Finally, notwithstanding Respondents' unjustified and desperate claims that Ms. Battista is not a reasonable person and/or did not have a reasonable reaction to the content of the Group Chat, Ms. DeLuca and Dr. O'Malley certainly found Respondents' conduct hostile, offensive and humiliating as well. In reality, even a cursory review of the public comments associated with any of the printed news articles related to Respondents' conduct illustrates that the general public also finds the content of Respondents' Group Chat hostile, offensive and humiliating. Thus, without question, the Board has also satisfied the *reasonable person* element of this Policy.

Credibility is the value that the fact finder gives to the testimony of a witness. It contemplates an overall assessment of the witness's story in light of its rationality, internal consistency, and the manner in which it "hangs together" with the other evidence. Credible testimony must proceed from the mouth of the credible witness and must be such as common experience, knowledge and common observation can accept as probable under the circumstances. The Board cites judicial case law in this regard.

In deciding the facts of a case, the fact finder must decide which witnesses to believe and which witnesses not to believe based on the following factors: (1) interest in the outcome of this

case; (2) witness' recollection; (3) ability to know what he/she was talking about; (4) contradictions or changes in testimony; (5) demeanor; (6) whether or not testimony makes sense; (7) reasonableness of testimony when considered in the light of other evidence. See, NJ Model Civil Jury Charge. Additionally, New Jersey law permits a fact finder to reject the entirety of a witness's testimony if a determination is made that the witness deliberately lied on any fact significant to the decision in the case.

Initially, all Respondents' display of remorse during the Hearing was incredible as the Board exposed the same glaring contradictions made by each Respondent. Respondents attempted to illustrate, through their testimony, remorse for their behavior during the Training. However, the authenticity of such remorse, only displayed to the person responsible for deciding their fate, after undergoing hours of preparation with their counsels, must certainly be undermined by the Respondents conduct (*i.e.*, lack of remorse) during their suspension meetings with Dr. O'Malley, November 11, 2014 interviews with Ms. DeLuca, Sworn Answers to the Tenure Charges and Answers to Interrogatories.

Notwithstanding the lone admissions of making the comments in the Transcript, as well as other various innocuous admissions, Respondents uniformly and consistently denied the remaining substantive allegations made by the Board in the Sworn Tenure Charges. Id. Therefore, the weight given to Respondents' staged showing of remorse during the Hearing, must certainly be weighed in light of their failure to exhibit the same remorse when meeting with Dr. O'Malley and Ms. DeLuca, filing their Answers to the Charges and serving their Answers to the Board's Interrogatories. Such behavior by the Respondents bolsters the Board's assertion that Respondent's were only sorry they got caught, but not sorry for what they had done.

Next, Respondents' efforts to assert an expectation of privacy in defense of their actions during the Group Chat is unreasonable based on the record and the law – *i.e.*, Board Policy 3321 expressly denies Board employees of any expectation of privacy when using the district's network; pursuant to state and federal law, when something is exposed to the public view, such as this Group Chat, same is not protected by an reasonable expectation of privacy. Thus, Respondents' efforts to push such an illogical argument/defense on this Tribunal illustrate Respondents' lack of credibility.

Mr. Van Pelt and Ms. Lechelt's lack of credibility is further borne from the unreasonableness of their defense to the Charge alleging that they made inappropriate comments directed towards special education / handicap students – *i.e.*, that their perceived anger towards Ms. Bleekinger's direction to label a group of students "low" triggered their barrage of insulting and demeaning commentary.[2] This argument is irrational because: (1) the district's Assistant Superintendent / Director of Special Services informed Ms. DeLuca that the use of the designation "low" is an acceptable norm; (2) all Respondent's acknowledged and accepted the District's practice, as well as the nationwide practice, of using various tests that ultimately label the students as "low", "very low" and "average"; and (3) not one of the Respondents confronted Ms. Bleekinger during the Training about her student *designations* or raised a concern with the administration with regard to their accepted use of such *offensive* tests/terms.

When engaging in credibility determinations related to each Respondent, it should not be lost on this Tribunal that all of the Respondents, rather than simply take ownership for their conduct, blamed and attacked others (*i.e.*, Ms. Bleekinger and Ms. Battista), for causing these grown teachers to act in the manner they chose to act. More specifically, the notions that Ms. Bleekinger's use of

[2]Notably, this ludicrous defense also illustrates their lack of remorse – *i.e.*, their willingness to blame their voluntary actions on someone else, as opposed to simply stating they were wrong without qualification and excuse.

a uniformly accepted student classification; or that Ms. Bleekinger was inadequately prepared for the presentation; or that Ms. Battista was a "peeping tom" with the intention of bringing trouble upon the Respondents are so ostensibly absurd that the credibility of the persons making such statements must be gauged against the lunacy of same. In other words, a credible witness/person would not make such arguments.

Thus, the Board submits that this record is replete with reasons that should cause this Tribunal pause when considering whether Respondents provided credible testimony.

As a point of legal argument, the Board asserts that Respondents had no right to privacy when engaging in the Group Chat during the October 23, 2014 training session. Throughout this process, have asserted that they had a good faith belief that the Group Chat was private. More specifically, in concert, Respondents argued that if the chat rooms were open to the public, student privacy concerns under FERPA and state law would be triggered. However, Respondents' efforts to assert an expectation of privacy in defense of their actions during the Training are unavailing, as both the record and the law are fatal to such a defense. In fact, said argument is so suspect that it does nothing more than bolster the Board's assertion that Respondents are not remorseful for their conduct – *i.e.*, despite the baselessness of the claim, Respondents have conspired to stick with the defense through the resolution of this matter.

Board Policy 3321, *Acceptable Use of Computer Network(s)/Computers And Resources by Teaching Staff Members*, states – in relevant part – that "[t]he Board retains the right to have the Superintendent or designee monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use." Further, every District employee is aware that there is no expectation of privacy when using the District's computer network, and there is no program

and/or policy that trumps same. More specifically, Respondents were actually informed during Today's Meet training that the program was not private.

Here, Respondents all executed "Important Board Policies, Regulations, and Mandated Communications" Form, within which Respondents agreed to review and conform to all Board Policies. More importantly, Mr. Van Pelt and Ms. Weber acknowledged reviewing and being familiar with the Board's *Acceptable Use* Policy, along with the Board's right to monitor their network activity. Simply put, there is no way the Board could have been more explicit with the reality that employees do not enjoy any expectation of privacy when using the District's network.

FERPA is a Federal Law that controls the disclosure of personally identifiable information from an eligible student's *education records* to a third party unless the eligible student has provided written consent. The applicable statute defines education records as those records, files, documents and other materials which: (1) contain information directly related to a student; and (2) are maintained by an educational agency or institution or by a person acting for such agency or institution. Importantly, without dispute, the Group Chat did not contain and/or reference specific students or information directly related to specific students. Further, the Board does not maintain the Group Chats and/or transcripts of the Chats, and there is simply no reason for Respondents to have thought otherwise. Thus, Respondents' efforts to grasp on to the protections of FERPA, despite the record evidencing that FERPA's application is unjustified, is merely an act of desperation.

A person cannot assert an expectation of privacy with regard to something exposed to the public view. There is no liability under the tort of invasion of privacy for observing a plaintiff or even taking his photograph while he or she is walking on a public highway, since he or she is not

then in seclusion, and his or her appearance is public and open to the public eye. These premises are supported by judicial case law.

Here the record evidence is clear. Ms. Battista observed the conversation and identified the web address by viewing Ms. Lechelt's computer screen during a Training session. In fact, all Respondents engaged in the Group Chat on their computers in a room filled with thirty to forty other persons, with the screens open and on their desks for a two and a half hour period, during which they all, at one point or another, stood up and walked around, while not closing their computer screens. Had Respondents desired to avail themselves to an expectation of privacy, they surely would have found a way to be more discreet during the Group Chat. Thus, Respondent's expectation of privacy defense is contrary to well-established law. In fact, in the event this Tribunal feels compelled to give any deference to Respondents' FERPA based privacy argument – to which the Board contends none is warranted – Respondents' cavalier participation in the Group Chat during a training, visible to other members of the public, must trump any FERPA privacy considerations.

As to the charges serves on Respondents, the record confirms that the Board has proven by a preponderance of the credible evidence that Respondents are guilty of conduct unbecoming, insubordination and/or other just cause warranting dismissal. The infractions established in the record evidence cut to the core of Respondents' fitness to continue to teach. Unlike labor arbitration, this Tribunal's decision regarding any potential penalty must be first and foremost concerned with the welfare of students, not the employment rights of Respondent. There is ample, longstanding precedent for this proposition in the body of School Law in New Jersey that has developed over the last several decades, as well in the growing number of Tenure Hearing arbitral decisions under the

recently revised Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TeachNJ Act").

With respect to just cause, in evaluating whether an employer has just cause to discipline an employee, Arbitrators follow guidelines similar to those utilized in Enterprise Wire Co., 46 LA 359, 363-64 (1966); Grief Brothers Cooperage Corp., 42 LA 555, 558 (1964). Consequently, it has been held that the employer should satisfy the conditions set forth in the above cases in order to prove "just cause" for the disciplining the employee.

The "inherent duties of a public employee include compliance with all reasonable rules and regulations, and duties arising from a fiduciary relationship to the public and from such duties as arise by the nature of the office held." Unless the penalty is unreasonable, arbitrary or offensively excessive under all of the circumstances, it should be permitted to stand. These statements have been well established by New Jersey courts.

Moreover, recent case law suggests that progressive discipline is ***not*** a fixed and immutable rule to be followed without question because some disciplinary infractions are so serious that removal is appropriate notwithstanding a largely unblemished prior record. For example, in American Arbitration Association Decision, 2010 AAA LEXIS 439, Arbitrator Renovitch acknowledged that extremely serious offenses usually justify the enforcement of a discharge.

The holding that dismissal was warranted in the cited case resulted from a Grievant failing to perform an end-of-run check, which resulted in a sleeping student being left on her school bus. In that case, the arbitrator enforced a summary dismissal. Arbitrators Tener, Dichter and Simon enforced summary dismissals in other cases that reflected other fact patterns.

Moreover, since the implementation of the TeachNJ Act, Arbitrators have dismissed teachers for engaging in inappropriate conduct that has reflected poorly on both the teacher and the school district. The cited decisions were all issued since 2012.

In anticipation of the cases Respondents will likely seek to rely upon to argue that their dismissal is not warranted in this matter, the Board asserts same are readily and easily distinguishable from the matter at bar based on discrepancies in fact and proofs.

Here, the just cause conditions have been satisfied: namely, Respondents were forewarned prior to the Group Chat that dismissal could result from misusing the District's computer network and violating various Board Polices and standards of expected behavior. Respondents conduct on October 23, 2014 violated established Board Policy and any reasonable expectations of employee conduct; Respondents' conduct was investigated fully; substantial evidence, including Respondents' acknowledgments of wrongdoing, admissions and a copy of the actual transcript, were obtained; and termination was reasonably related to the seriousness of Respondents' offenses (*i.e.*, the duration and wholly inappropriate nature of the conversation, coupled with the grave lack of judgment displayed by Respondents) and the Respondents' past record. Specifically, Respondents' conduct with respect to the group chat, without the consideration of progressive discipline, rose above and beyond the level of egregiousness necessary for dismissal.

Accordingly, satisfaction of the just cause standard, along with the arbitral precedents, must result in the termination of Respondents. Their acts are egregious on their face. In fact, the totality of their conduct, and each specific charge considered alone, are more egregious than that deemed sufficient for dismissal in the above-cited precedents. Respondents violated board policies and the common decency expected of public school teachers, as illustrated in the record evidence, by

misusing the District's network to mock, insult, harass and offend others (including special education students, the superintendent of schools, the Engrade Training presenter, females, older persons and each other), while creating a hostile and unhealthy work environment for the one person who openly observed same; continuing such conduct for a period of 2.5 hours during scheduled instructional time; failing to comprehend the seriousness of their conduct by constantly making excuses, placing the blame elsewhere and disingenuously declaring remorse only when face-to-face with the assigned arbitrator after being prepped by their counsel as to what this tribunal wants to hear; and, in the case of Mr. Van pelt, admitting to masturbating on school property.

Respondents showed a complete lack of concern for the parents and students of the Edison Township School District, and a callous sense of desperation by attempting to attack and demonize the VICTIM – Ms. Battista (*e.g.*, referring to her as a "*peeping Tom*", claiming that she went out of her way to discover their chat and ultimately blaming her for the trouble and embarrassment now endured).

The record, as discussed and documented above, clearly illustrates that Respondents recognize a large portion of their conduct was inappropriate.[1] Specifically, Respondents concede, for the most part, that they misused the District's network and made regrettable comments about other persons and classifications of persons

It is well established in case law that the term "unbecoming conduct" is a broadly defined, elastic term, encompassing any conduct that has a tendency to destroy public respect for government employees and competence in the operation of public services. In hearings similar to this one,

[1]Importantly, it should not be lost on this tribunal that Respondents testified to same, despite their prior submissions denying any misconduct.

arbitrators have determined that conduct unbecoming a teacher has been found to include a broad range of behavior that impacts a teacher's ability to perform his duties or otherwise renders him unfit to have the responsibility to care for children. In this matter, Respondents have unmistakably breached the public trust placed in their position as teachers.

Based on the foregoing, Maria Weber has failed to satisfy the standards of a profession predicated on public trust and respect. Her misconduct goes to the heart of her character and fitness.

CONTENTIONS OF RESPONDENT

Respondent argued as follows;

Maria Weber (hereinafter "Ms. Weber" or "Respondent") has been recognized as an outstanding Special Education Teacher within the Edison Township School District receiving consistent "accomplished" and "distinguished" evaluative ratings. Ms. Weber's Principal Lynda Zapoticzny (hereinafter "Zapoticzny") in writing a letter on behalf of Ms. Weber, that was part of Respondent's Answer in this proceeding referred, in part, to Ms. Weber being "...the kind of professional who constantly seeks out best practices and new interventions that may lead to success for her students, even if it is just one who will benefit. Maria is willing to take on whatever comes her way for the greater good of the children of the school community".

It is uncontroverted that Ms. Weber was involved in the chat activity that took place on October 23, 2014 at which time Ms. Weber attended a voluntary Engrade training session at the Board's administrative offices. Ms. Weber, who was a novice regarding the use of social media sites, agreed to be a participant in a chat within the Today's Meet website that she viewed, based on information that had been previously provided to her, to be a private chat that was not accessible to anyone who was not specifically invited to be a participant and who did not know the applicable

"room number" to be a participant in the chat room activity.

The Today's Meet website emphasized the privacy rights of the participants. Moreover, the recommendation of Edison Township School District personnel that the Today's Meet website be used in a supplemental curriculum capacity indicated, in part, that the Board recognized that there were FERPA implications involving student notes and comments that could be a part of any Today's Meet chat activity, substantiating the chat participants' understanding that they were involved in a private chat room.

It is undisputed that Ms. Weber did not make any negative comments about classified students or any students in general. Moreover, it was stipulated that Ms. Weber did not make any critical comments about any supervisors or administrators employed within the Edison Township School District. There were no inappropriate comments addressed to any School District teachers by the Respondent aside from jocular jibes directed primarily at one of the other participants in the chat.

It was equally uncontroverted that, despite the Board of Education's tenure charge allegations to the contrary, there was absolutely no disruption of the training session. Out of the approximately 25 teachers who were interviewed as part of the Board of Education's investigation prior to the proffering of the tenure charges at issue only one teacher, Alysia Battista (hereinafter "Ms. Battista"), alleged that there was any disruption regarding the training session.

Ms. Weber testified concerning her full participation in numerous interactive activities as part of the Engrade training program, both independently and collaboratively with her fellow 4th grade teachers. The Respondent, in part, asked "Presenter" Sara Bleekinger, during the course of the training program, specific questions that were responded to.

Throughout the entire investigatory process and throughout the arbitration hearing itself, Ms. Weber was consistently apologetic and remorseful.

One of the foundational principles in evaluating what punishment should be assessed, assuming that it is determined that Ms. Weber engaged in conduct unbecoming a teacher, is to consider the applicable administrative and judicial decisions in this State applying the principle of progressive discipline.

Applying that progressive disciplinary policy mandates the conclusion that Ms. Weber should be the beneficiary of the application of progressive discipline principles. For over fifteen years in the Edison Township School District, Ms. Weber's record was unblemished, wherein she consistently received excellent evaluations.

Ms. Weber's participation in the chat does require a penalty, however, it is averred that the penalty should be a minimal one for a teacher who has provided consistently exemplary service for such a lengthy period of time and who was apologetic since "day one" concerning her involvement in a chat that she viewed related exclusively to private activity wherein her remarks, that Ms. Weber acknowledged were inappropriate, were almost exclusively limited to mocking remarks addressed to a former co-teacher, Tyler Van Pelt.

The **Fulcomer** and just cause standards are the relevant standards to be applied in teacher tenure cases. The lead case in New Jersey regarding tenure charges that have been initiated by local Boards of Education concerning allegations of unbecoming conduct is **In re Fulcomer**, 93 **N.J. Super**. 404 (App. Div. 1967)

Under **Fulcomer,** the Arbitrator is asked to consider the following factors:

1. The potential impact of your decision on Respondent Maria Weber's teaching career;

2. The longevity of Ms. Weber's career;

3. Ms. Weber's overall teaching record;

4. Ms. Weber's teaching ability;

5. Whether there was an absence of prior discipline;

6. Whether there was an absence of past increment discipline affecting Ms. Weber during her employment;

7. The nature and gravity of the offenses under all of the circumstances involved;

8. Evidence as to provocation, extenuation or aggravation; and

9. Any harm or injurious effect which Ms. Weber's conduct may have had on the maintenance of discipline and the proper administration of the school system.

The **Fulcomer** standards have been periodically "tweaked" in other Commissioner of Education decisions and by the courts. Factors which have previously been taken into account in making penalty determinations include (1) the nature and gravity of the offenses under all of 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; (4) any harm or injurious effect which the teacher's conduct may have had on the maintenance of discipline and the proper administration of the school system; and (5) the likelihood of such behavior recurring. Under the TEACHNJ Act, arbitrators have consistently applied the **Fulcomer** tests and several arbitrators have also considered the often cited seven tests of "just cause" that have historically been applied

Encompassed within the **Fulcomer** standards, and as part of the just cause tests summarized above, is the need to consider principles of progressive discipline in fashioning remedies in cases

in which an arbitrator has determined that at least one act of "conduct unbecoming" has been proven by the Board of Education. The New Jersey courts have observed that progressive discipline is to be used to justify severe penalties or to mitigate penalties based on the absence of prior disciplines.

The **Fulcomer** tests, as well as the application of progressive discipline standards, as referenced above, will be applied in the following legal points in evaluating Respondent Maria Weber's conduct in this case.

When applying the **Fulcomer** principles it becomes clear that Ms. Weber's employment should not be terminated but that she receive a fair and proportionate punishment reflective of how similar offenses of other public employees have been treated in tenure charge proceedings. The Board of Education has argued that Ms. Weber and the other two Respondents in this consolidated proceeding, violated District affirmative action policies and that her conduct somehow amounted to sexual harassment.

Under New Jersey case law for "hostile environment" sexual harassment, and in consideration of the Board's own policies, the Board cannot successfully argue that, under all of the circumstances, Ms. Weber's conduct amounted to any form of sexual harassment. It is significant that the Board of Education did not even accuse Ms. Weber of directing any of her limited chat remarks towards Ms. Battista and failed to present a scintilla of evidence that there was any disruption in the Engrade training program and that there were any teachers, aside from Ms. Battista, who were fearful "of being harassed".

It is submitted that the only "offense" committed by Maria Weber related to her violation of the District's computer use policy when she logged onto a chat when, after the initial chat remarks, Ms. Weber agreed that this "backroom chat" did not address any educational related issues. For this

violation Ms. Weber apologized profusely to District administrators and exhibited substantial remorse for her actions.

Assuming **arguendo** that the Board of Education's tenure charges could be construed as even alleging that Maria Weber engaged in a violation of the Board's Sexual Harassment, and/or Healthy Workplace Environment policies, when the Board of Education did not even include any allegations that any of Ms. Weber's limited comments were directed at Ms. Battista or, in fact, at any one other than the participants in the chat, the facts in this matter establish that the conduct at issue was "neither severe nor pervasive".

Regarding the issue of "pervasiveness" the record established that only Alysia Battista and one other teaching staff member Angie McKenna were even aware of the existence of the chat. Regarding the issue of "unreasonable interference" with work, the record clearly established how atypical Ms. Battista's reaction was.

The record established, consistent with the statements of Ms. McKenna, that Ms. Battista appeared to be "consumed" by the chat and took out her I-Phone, moved to her left, leaned forward towards Ms. Lechelt and Ms. Lechelt's computer, aimed her I-Phone at Ms. Lechelt's computer screen, zoomed in on the screen and took a series of pictures because of Ms. Battista's unsubstantiated belief that the chat participants were talking about her. No other teaching staff member advised Margaret DeLuca, the District's Affirmative Action Officer, that there was any disruption in the training program.

In consideration of the above, it is clear, as determined by the Board itself in the drafting the tenure charges that Maria Weber did not sexually harass Ms. Battista or anyone else.

There was no evidence presented by the Board of Education to indicate that Ms. Weber's

continued employment within the Edison School District had or will have any negative effect on the maintenance of discipline and the proper administration of the school system.

While Board witnesses Margaret DeLuca and Dr. O'Malley testified that they did not feel comfortable returning Ms. Weber to her position because the Board had supposedly received certain complaints about the participants in the chat room, the Board did not present any written evidence that could establish that there would be any problem raised by parents, or members of the Edison Township community, if Ms. Weber continued to be employed, in consideration of her outstanding reputation within the District.

A review of several recent TEACHNJ arbitration awards that related to the use of Board computers and social media sites, wherein teachers were charged with "conduct unbecoming" that was substantially more egregious and serious than the conduct attributed to Maria Weber, **that did not result in the termination of the teachers at issue**, substantially supports Ms. Weber's argument that her limited involvement in the chat room activity, with none of her remarks addressed to any District students, administrators or supervisors or teaching staff members, aside from those participants in what she viewed to be a private chat room, does not justify termination or a long term suspension.

A review of many tenure charge cases **decided by the Commissioner of Education** prior to the TEACHNJ Legislation involving the criminal acts of teaching staff members, as well as numerous acts of unbecoming conduct, in many instances as part of a pattern of disciplinary actions taken against the affected teachers, further supports the Respondent's contentions regarding the extent of any penalty that is imposed on her.

A review of all of the cases reviewed mandates the conclusion that not only is termination

not warranted in this matter, no long term suspension is required as well.

Ms. Weber's decision not to exit the chat room when she realized that the backchannel discussion only briefly referred to the Engrade instruction should not warrant the 120 day suspensions assessed against teachers Ciripompa, Buglovsky, Boyle and Dzownar imposed by other arbitrators!

If there had not been inappropriate remarks made by the other chat participants about special education students (taken out of context but still made) and the Superintendent of Schools would tenure charges have been filed against the Respondents at all? **Very unlikely!!** The Board of Education would probably have only withheld the increments of the "chat participants" for one year, **with no suspension sought**, if the chat only referred to jocular comments addressed at a colleague's imaginary flirtation with the training presenter.

Since Maria Weber did not make any negative remarks at all about District students, administrators or teachers not involved in the chat one can argue that, in consideration of the **Fulcomer** standards and the seven tests of "just cause", the imposition of a sixty day suspension without pay; i.e. a **$20,000** loss in salary, although excessive, still represents a measured, reasonable penalty.

Relevant case law as well as a review of the **Fulcomer** standards, establish that a teacher's expressions of remorse are often positively referred to whether the "trier of fact" was an Administrative Law Judge or an Arbitrator. A teacher's arrogant dismissal of the tenure charges, along with a refusal to acknowledge culpability would tend to support a local board of education's assertion that the behavior at issue was not aberrant and that the conduct that was the subject of the tenure charges could be repeated in the future. However, not every arbitrator has considered the

"lack of remorse" to be a dispositive consideration in the assessment of a penalty.

Maria Weber consistently expressed remorse for her actions in being a participant in the October 23, 2014 chat activity. She apologized from the time that she first met with her building Principal, prior to her meeting with the Superintendent of Schools on October 27, 2014.

As the Arbitrator you were able to observe Ms. Weber's demeanor during the course of her testimony and saw how passionate she has always been about teaching. Her remorse was genuine -- she had let her students, co-workers and supervisors down and had compromised her own values, by participating at all in the chat room.

There is no dispute that Maria Weber engaged in a single act of unbecoming conduct when she participated in the chat on October 23, 2014, regardless of her limited involvement in that chat and the absence of any negative remarks addressed to special education students within the District or to any students at all, or to any District supervisor or administrator, or to any teacher in attendance during the training session aside from the teachers who were also active participants in the chat. Her conduct did violate the District's Acceptable Use of Computer Network Policy.

However, the focus of the Board of Education's investigation was on the Battista sexual harassment claims. For the reasons set forth earlier in this Brief, it is averred that there was not a scintilla of evidence presented to establish that Ms. Weber engaged in any conduct that was prohibited by the District's Sexual Harassment or Affirmative Action policies.

The cited portion of Board Policy 3281, Inappropriate Staff Conduct, that was cited in the tenure charges filed against Ms. Weber refers to conduct, including the use of e-mails or social networking sites "...that is directed and/or available to pupils or for public display". Ms. Weber's participation in what she viewed to be a private chat room did not result in any communications that

were readily available to pupils or for members of the public. The chat was not accessible to anyone who was not specifically invited to be a participant and who did not know the applicable "room number" to be a participant in the chat room activity. Had it not been for Alysia Battista's all consuming decision, during the course of the 2-1/2 hour training program, to limit herself to what became a surveillance operation designed to produce evidence of improper computer use, because of her incorrect perception that she was being singled out for criticism, no one who was not an active chat participant would have known anything about the statements that were made during the course of that chat!

The Board of Education even referred to a violation of Board Policy 3351, Healthy Workplace Environment, that requires that "employees interact with each other with dignity and respect" and further states that "repeated malicious conduct of an employee or group of employees directed toward another employee or group of employees in the workplace that a reasonable person would find hostile and offensive is unacceptable and is not conducive to establishing or maintaining a health workplace environment". It is averred that there again was no evidence produced that any "reasonable person" would have found the actions of Respondent to be hostile and offensive and certainly there was no evidence of "repeated malicious conduct".

The only "conduct unbecoming" charge that was proven in this matter was Respondent's one time violation of the District's computer use policy. The penalty for this violation should be fair and reasonable and again reflective of the **Fulcomer** standards.

As summarized in the earlier Points of this Post Hearing Brief, New Jersey case law has provided many examples of teachers who were charged with "conduct unbecoming" for engaging in conduct that was substantially more egregious and serious than Maria Weber's conduct yet, not

only were they not terminated from their tenured positions but they generally received no more than 120 day suspensions without pay even in cases, such as the **Ciripompa** matter, wherein the arbitrator determined that there was no remorse shown by that respondent.

Maria Weber testified that for every 30 calendar days that she was suspended this would represent a **$10,000** penalty, adversely affecting not only her but her entire family. The relevant cases certainly establish that a 120 calendar day suspension is not a "default remedy" to be imposed in every instance when termination is not warranted, regardless of the application of the **Fulcomer** standards and the seven tests of just cause.

It is respectfully submitted that the application of the **Fulcomer** tests to Maria Weber's conduct provides substantial reasons why a 60 day suspension without pay would be a fair and measured penalty amounting to a **$20,000** loss in salary for gently chiding a former colleague of hers for his self deprecating remarks and his imaginary flirtation with the training Presenter that he knew he would never see again. Not only would a 60 day suspension without pay represent a very significant penalty for a teacher with a previous long term spotless record it should also be considered along with the significant devastating effect of Ms. Weber's removal from the classroom.

It is submitted that any greater penalty would be unnecessarily punitive and disproportionate to her conduct on the date in question.

OPINION

After considering the documentary and testimonial evidence, the undersigned concludes that Maria Weber is guilty of Charges I- Counts 1,2 IV- Counts 1,2, 4, 5, 6, 7 and V. Charges II, III, and IV-Count 3 and V are dismissed.

ANALYSIS OF THE CHARGES

The charges are arranged such that the numbered charges and specifications are preceded by a section entitled *Background Common to All Charges.* It would be appropriate to address that section before considering the numbered charges and specifications.

The bulk of this section deals with established Board policies. The cited policies concern sexual harassment (BX21), inappropriate staff conduct (BX23), the code of ethics (BX22), affirmative action (BX20), acceptable use of computer networks and computers (BX24) and a healthy workplace environment (BX25). The relevant Board Policy Numbers are 3362, 3281, 3211, 1140, 3321 and 3351 respectively.

On the theory that employees cannot be held accountable for the implementation of policies of which they were not put *on notice,* it is first essential to determine if and how the teachers employed by the Board knew of the existence of these policies and how they knew or should have known the substantive content of the policies.

The Board met its burden of demonstrating that the teachers acknowledged their knowledge of the existence of said policies, the manner in which they could secure copies of the policies and their agreement to review the policies and to abide by them. It did so by producing a document entitled *Important Board Policies, Regulations and Mandated Communications Form.* The record indicates that Respondent Weber executed this form on September 4, 2014 (BX19). Thus, she acknowledged that she was aware of the policies, that she would review them and conform to them.

In sum, Respondent Weber was *on notice* both procedurally and substantively of the Board's policies central to these charges. More important, she agreed to review the policies, to be conversant with the policies and to conduct herself in accordance with them.

It is well settled that employers are entitled to establish policies and work rules and to require employees to conform to them. This statement is true provided the employees are notified of the policies and rules. In this case, Respondent Weber acknowledged her responsibility to comply with them.

What is highly relevant here is that, under the circumstances, the failure to abide by the rules and policies is chargeable conduct. Since the failure to comply is chargeable, the Board is well within its rights to impose discipline on employees who are guilty of such breaches.

The second major component of *Background Common to All Charges* is a reference to a group chat on the *Today's Meet* website that was conducted through the District's computer network. The 2 ½ hour group chat was alleged to have taken place on October 23, 2014 during a professional development program that was called an *Engrade Chromebook Training.*

The District provides the teachers with laptop computers, Chromebooks. Thus, those participating in the group chat did so on District owned computers.

The record suggests that *Engrade* is a educational program employed by the District. The October 23, 2014 meeting was devoted to the program.

It is unchallenged that the *Engrade* meeting took place on October 23, 2014, that the group chat lasted (from beginning to end) 2 ½ hours and that Respondent Weber and approximately 25 other teachers were in attendance.

This section of *Background Common to All Charges* goes on to elaborate on the group chat and sets forth the allegedly unacceptable content of it. To the extent that these matters are included in the Charges and Specifications, they will be addressed below.

Charge I

This charge asserts that Respondent Weber's participation in the group chat rises to the level of unbecoming conduct and/or just cause. It alleges that Weber violated New Jersey law and Board policies, regulations and procedures concerning staff interactions. It charged that the chat room was public, was visible, accessible to other employees and students. It added that the chat room was offensive, discriminatory, rife with sexual innuendo and constituted a hostile work environment. This charge was the subject of two *counts* or specifications.

Count 1 concerned inappropriate comments about the Endgrade trainer, Sara Bleekinger. Weber was charged with a course of misconduct toward Ms. Bleekinger. It stated that the group chat was foul, discriminatory, offensive, harassing and sexual in nature. It cited the specific comments made by Weber during the group chat.

It should be stated that the group chat lasted for 2 ½ hours. It was downloaded from the computers and it was 16 pages in length (BX13). The text of Weber's comments were included in the charges served on her.

Eighteen of Weber's comments were listed in the charges. They were demeaning of Bleekinger and many had sexual overtones.

It must be noted that Weber's comments must be read in the context of comments made by other participants in the group chat. There were three main participants, Maria Weber, Maryellen Lechelt and Tyler Van Pelt. All of them were served with charges. While the matter was consolidated relative to the hearings, separate decisions are being written for each of the three named participants.

There was a small number of additional participants in the chat. They were either not

identified or no longer employed by the Board. In any event, their participation was limited and minor as compared to the three charged teachers.

As to Weber's culpability or lack thereof of Count 1, her comments about Sara Bleekinger were inappropriate. The comments related to Bleekinger's looks, her mannerisms and her ability. Many of her comments had sexual innuendos.

When these comments are put in the context of the entire chat, their inappropriateness is magnified. Thus, an objective review of the comments concerning Sara Bleekinger suggests that Weber's comments in and out of context with the total chat were inappropriate.

Despite the obvious, Weber argued that she is not guilty of this Count. She insisted that the she had an expectation of privacy relative to the chat. She posited that the chat would have gone unknown but for Alysia Batista, another attendee at the meeting, seeing it.

As will be discussed in greater depth below, Weber and her cohorts had no expectation of privacy. They were engaged in a chat in a public setting while using a District computer and a District network. Under the circumstances, there could be no expectation of privacy.

The fact that they thought that the chat was private is of no moment. Thinking something does not make it so.

The reasoning was that one needed an access code in order to see that chat's comments. That reasoning is fallacious. Anyone passing by could see what was on the screens of the computers. The fact that only one person complained about the chat is irrelevant. The chat was undertaken in a public setting and, irrespective of all of the issues concerning the ownership of the computer and the network, fell into the public realm. Once that is recognized, it is readily apparent that Weber had no expectation of privacy.

Much was said about Weber's remorse for her conduct. While she, in fact, made certain comments about her remorse for having participated, the defense suggests that she has not fully taken responsibility for her participation in the chat.

Weber always had the option of logging out of the chat. If she thought the comments being made were truly offensive, why would she continue to participate? She did not, suggesting that the comments were not, in her view, inappropriate until she was called to task for it.

Once the content of the chat became known, Weber became the subject of charges of unbecoming conduct for making inappropriate comments about Sara Bleekinger. The fact that the comments were not known to Bleekinger is irrelevant. The comments were public and were treated that way.

In short, the Board met its burden relative to Count 1.

Count 2 addresses comments made by Weber to individuals other than Sara Bleekinger. The comments were primarily made to Lechelt and Van Pelt.

As were the comments made about Ms. Bleekinger, the comments attributed to Weber that were made to Lechelt and Van Pelt were offensive, crude and sexual in nature. Weber again claimed that she was not guilty of this Count on the grounds that she legitimately had an expectation of privacy.

As noted above, she had no valid basis for believing that a chat conducted in a public setting on a computer and on a network that belonged to the District simply does not carry with it an expectation of privacy.

Thus, the comments must be judged on the own merits. These comments were made while Weber was engaged in a District training program in a District facility, using District equipment and

networks while being paid by the District. Under the conditions described immediately above, the comments were unacceptable.

The fact is that the comments were upsetting to one of the other attendees, Alysia Batista. Weber and her collaborators in the chat chose to *blame the victim.* The comments on their face were crude, discriminatory and upsetting and it is clearly understandable and reasonable that Ms. Batista would have reacted as she did, given the setting and the purpose for her being there.

The comments about Weber's remorse in Count 1 are applicable here. They need not be repeated.

Count 2 was proven. The Board met its burden of proof in this regard.

Charge II

This charge is limited to a single count. It alleges that Weber was insubordinate and guilty of unbecoming conduct in that she was involved in the disruption of Engrade training. An analysis of the allegation must be done before a determination is made about the charged misconduct.

The key word in this charge is *disruption.* An accepted definition of this word suggests that the action(s) of an individual or group interfered with the ability of others to continue an ongoing activity. Put another way, the actions of one or more people had to have prevented the organizers of a specific activity from continuing the activity to its planned conclusion.

With this definition in mind, one needs to examine the facts surrounding the instant matter. It is uncontested that the training started and ended on time. It is also clear that from the perspective the trainer, Sara Bleekinger, made her presentation in an uninterrupted manner. Thus, it is difficult to conclude that Weber and others disrupted the training.

That is not to suggest that Alysia Batista was not upset by the contents of the chat. It is

apparent that seeing the text of the chat interfered with her ability to benefit from the training.

It must be said that Batista was the subject of negative comments by the three main participants in the chat. There was a good deal of blaming the victim here. Such a response was inappropriate.

By any reasonable standard, there were many grossly offensive comments that were made during the chat. Any reasonable person would have found them offensive and large numbers of reasonable people would have been disturbed to read the comments, particularly in a professional setting.

The undersigned hastens to add that an absence of disruption of the training session does not obviate the contention that Weber was guilty of misconduct. As noted in the findings to Charge I, she was guilty of misconduct. Specifically in Charge I Count 2, Weber was found to be culpable of unbecoming conduct in connection with Alysia Batista and others. Furthermore, as will be seen in charges not yet addressed, she is guilty of additional misconduct.

However, it cannot be said that Weber disrupted the training session. If the actions of Weber and her two cohorts had not transpired, it is likely that the session would have been no different than it was in the presence of the group chat. Thus, Charge II is dismissed.

Charge III

This charge alleges the misuse of the District's computer network through a group chat that was *inappropriate, foul, discriminatory, harassing, offensive and sexual in nature.* The District alleged that the foregoing was a flagrant misuse of the Board's resources. The Board concluded that this conduct constitutes unbecoming conduct, insubordination and just cause for dismissal.

Without commenting on the merits of Charge III, the Arbitrator points out that Charge IV

Count 7 alleges, although worded in a slightly different way, the same misconduct in the context of Board Policy 3321.

Therefore, the issue of the alleged misuse of the District's computers and network will be addressed in the discussion of Charge IV Count 7. As such, Charge III is dismissed.

Charge IV

This charge asserts that Maria Weber violated various District policies. The District posited that such misconduct constituted unbecoming conduct and/or just cause for dismissal.

Charge IV is comprised of seven counts. Each of the counts will addressed individually. It should be noted that, of the seven counts, only Count 3 does not allege that Weber violated a specific District policy.

With that in mind, there are certain comments that apply to Counts 1, 2, 4, 5, 6, 7. Since it is more efficient to make certain observations about all six counts at the outset rather than repeat them in connection with each policy, the following observations apply to all of the cited Board policies.

As noted above, Weber was *on notice* about each policy (BX19). This document listed 34 policies and procedures in effect in the District. The policies cited in the six counts identified above are all listed on the document.

Weber signed this document to acknowledge receipt of it as well as an acknowledgment of her awareness that the policies can be found on the Board's website. Finally, Weber's signature reflects her agreement to conform to the listed policies and procedures.

What must be concluded is that Weber was bound to comply with the policies. If she failed to review the policies in order to be able to comply with them, she did so at her own risk. In short, she was required to comply with the policies.

A second observation to be made is that Weber and her two colleagues participated in the group chat. Their continued participation in the chat makes each of them responsible for its contents.

It is true that Weber made some, not most or all, of the inappropriate comments. However, had she been concerned about her commitment to honor District policies, she would have logged off of the chat and, in so doing, disassociated herself from it. She did not do so and must be held accountable for her actions.

What remains is an application of the facts of this case to the terms of the cited policies. Such an analysis will result in a determination of whether Weber is guilty of one or more of the counts.

Count 1 alleges a violation of the Board's sexual harassment policy (Policy number 3362) (BX21). In relevant part, the policy states:

> The Board of Education recognizes that an employee's right to freedom from employment discrimination include the opportunity to work in an environment untainted by sexual harassment. Sexually offensive speech and conduct are wholly inappropriate to the harmonious relationships necessary to the operation of the school district and intolerable in a workplace to which the children of this district are exposed.
> Sexual harassment includes all unwelcome sexual; advances, requests for sexual favors, and verbal or physical contacts of a sexual nature that would not have happened but for the employee's gender. Whenever submission to such conduct is made a condition of employment or the basis for an employment decision, or when such conduct is severe and pervasive and has the purpose or effect if unreasonably altering or interfering with work performance or creating an intimidating, hostile, or offensive working environment, the employee shall have cause for complaint.
> The sexual harassment of any employee of this district is strictly forbidden. Any employee or agent of the

> Board who is found to have sexually harassed an employee of this district will be subject to discipline which may include termination of employment.
> The Affirmative Action Officer shall instruct all employees and agents of the Board to recognize and correct speech and behavior patterns that may be sexually offensive with or without the intent to offend.

Before considering the facts, there needs to be analysis of the policy. The policy addresses two forms of sexual harassment, sexually offensive speech and sexually offensive advances, both physically and verbally. There is no evidence of sexual advances in any way, shape or form. Thus, the relevant language in this policy concerns the first paragraph above.

The sexual harassment in this case concerns sexually offensive speech. The purported sexually offensive speech was contained in the comments made during the group chat.

The facts suggest that Alysia Battista, a participant at the Engrade training was sitting behind and to the left of Maryellen Lechelt. She was able to see Lechelt's computer monitor and was able to read the ongoing comments of the group chat and became offended by the comments that were overtly sexual as well as those that had sexual innuendos

Battista became upset by what she saw and left the meeting room. She filed a complaint about the chat and the instant proceeding resulted.

To be clear, counsel for Weber, Lechelt and Van Pelt all cited *Lehman v. Toys 'R' Us,* 132 N.J. 587 (1993) as the seminal case in New Jersey for matters involving sexual harassment. The cited case is applicable to the portion of the instant policy that deals physical and verbal sexual advances. This aspect of the policy is found in its second paragraph, not the first one.

Moreover, the language in the second paragraph of the Board policy tracks *Toys 'R' Us.* The

same cannot be said for the first paragraph. It is evident that, if the Board intended for the *Toys 'R' Us* standards to apply to both paragraphs, it would have made such an indication in the policy. Thus, the plain language of the policy indicates that the Board intended to distinguish sexually offensive language from sexual advances of either a physical or a verbal nature.

Thus *Lehman v. Toys 'R' Us* is inapposite here. The judicial decision must read to indicate that the standards set forth in *Toys 'R' Us* do not apply in matters involving sexually offensive comments that are distinguishable from cases in which there was sexual advances of a physical or verbal nature.

This case deals with sexually offensive speech. The Board is well within its rights to issue policies that are relevant to the governance of the school district.

With the above analysis having been completed, the undersigned must now consider whether Weber was guilty of the violation of the Board's sexual harassment policy in terms of participating in sexually offensive speech.

The Arbitrator is persuaded that she did so through direct comments, by responses to the comments of others and by participating in the group chat from beginning to end. She directly commented on Van Pelt as being a *backchannel guy* by commenting about the way Van Pelt walks. The record suggests that *backchannel* refers to anal sex. Thus, Weber's comment was sexual in nature. Another bit of evidence of a sexual comment by Weber is found in her comment about *repositories* being *stuck up your ass*.

There are numerous examples of responses by Weber to comments made by Lechelt and Van Pelt. She added to a comment of Van Pelt about *pick-up lines* by saying *how about my eyes are the only thing I don't wanna take off of your* (sic). She also said to Van Pelt *don't say goodbye just say*

see you later babe and *tell her to meet u on Dartmouth at 4* (Van Pelt's address). These comments were made in the midst of a series of comments about Sara Bleekinger that were sexual in nature.

Finally, it is obvious that Weber stayed on the chat for its full length. She did not object to its content. She did not log off. It is disingenuous to argue that she did not violate the sexual harassment policy.

It may be true that Weber made fewer sexually offensive comments than did the other respondents in this case. That fact will be considered when a penalty determination is made.

In sum, Maria Weber is guilty of Charge IV Count 1.

Count 2 alleges a violation of the Board's affirmative action policy (Policy Number 1140) (BX20). This policy is designed to promote the acceptance of people of diverse backgrounds regardless of race, creed, color, national origin, ancestry, age, marital status, affectional or sexual orientation, gender, religion, disability, or socioeconomic status. The intent of the policy is spelled out in the first full paragraph of the policy statement.

While Weber made no comments that were directly violative of this policy, she participated in a chat that was disparaging of special needs students, lesbians and older people (BX13). She cannot credibly assert that she did not violate this policy while sitting through a chat that was replete with comments about people protected by the policy. She neither objected to the offensive statements nor withdrew from the chat entirely. Thus, she is guilty of Charge IV Count 2.

Count 3 concerns a purported violation of the policies alluded to in Counts 1 and 2 pertaining to the Affirmative Action Investigation. This count is dismissed.

Weber has already been found guilty of Counts 1 and 2. She is essentially being charged with the same misconduct a second time. In this regard, Count 3 is duplicative.

As to Weber's comments at the investigative interview, Weber is being charged with a lack of understanding of the seriousness of the matter. Even if true, that does not suggest misconduct. It introduces a factor to be considered when the penalty is determined.

With respect to the interview per se, there are circumstances under which a interviewee's conduct at an interview could rise to the level of misconduct. However, under the facts of this case, Weber was not guilty of misconduct when she was held to be lacking in her understanding of the seriousness of this matter. Thus, as indicated above, Charge IV Count 3 is dismissed.

Count 4 suggests a violation of the Code of Ethics policy (Policy Number 3211) (BX22). The key language in this policy is found in Principle II. It states as follows:

> The education profession is vested by the public with a trust and responsibility requiring the highest ideals of professional service.
> In the belief that the quality of the services of the education profession influences the nation and its citizens, the educator shall exert every effort to raise professional standards, to promote a climate that encourages the exercise of professional judgment, to achieve conditions which attract persons worthy of the trust to careers in education, and to assist in preventing the practice of the profession by unqualified persons.

Among other issues, this Code of Ethics requires teachers to endeavor to raise professional standards and to encourage the exercise of professional judgment. Weber's participation in the group chat was inconsistent with both of these principles.

Weber attended a professional development training session. It was offered in order to provide participants with the opportunity to improve their abilities with the Endgrade program. It is inconceivable that experienced educators would engage in group chat for 2 ½ hours while a trainer

was engaged in a professional presentation. What makes the misconduct especially egregious is the content of the chat. It was demeaning, denigrating, offensive and discriminatory. There was nothing about the chat that reflected *an endeavor to raise professional standards*. It was crude by any standard and was a clear violation of the District's Code of Ethics.

The Arbitrator is compelled to comment on the argument that the amount of time that the participants were involved the chat was limited to the time spent in inputting the comments. This argument is invalid and inappropriate. It suggests that they may have spent 15-20 minutes actually inputting their entries in the chat.

It is highly disingenuous to assert that the chat lasted 150 minutes but that the participants were involved in the chat for 15 or 20 minutes. That implies that they were focused on the training material for 130-135 of the 150 minutes. That suggests that the three respondents spent no time reading each other's *contributions* to the chat and that they spent no time watching their computer monitors while waiting for responses to previous inappropriate comments.

The chat lasted 2½ hours from beginning to end. There was a maximum of four minutes between chat comments. Weber's argument trivializes the misconduct and does nothing to reinforce the premise that she is sincerely remorseful for her actions.

The second aspect of the Code of Ethics that is pertinent here is the creation of a climate that encourages the exercise of professional judgment. The participation in the group chat is the antithesis of the exercise of professional judgment.

The Arbitrator is convinced that Weber violated this policy. Thus, Weber is guilty of Charge IV Count 4.

Count 5 addresses the Inappropriate Staff Conduct policy (Policy Number 3281) (BX 23).

The relevant provision in this policy is found in the fourth full paragraph. It states as follows:

> School staff 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 conduct towards the pupils.

There was an extensive string of comments concerning special needs students in the transcript of the chat. The comments were, to say the least, inappropriate and discriminatory.

It is true that Weber did not make any of the comments. However, she participated in the full chat and had to have known about the comments about these children. She did nothing to stop the comments or to register outrage to the manner in which these students were described.

What makes Weber even more culpable is the fact that she is a Special Education teacher. If such a teacher is not reactive to offensive comments about the students she teaches, who will be?

Suffice it to say that Maria Weber violated the Inappropriate Staff Conduct policy. She is culpable of Charge IV Count 5.

Count 6 concerns the Healthy Workplace Environment Policy (Policy Number 3351) (BX25). The relevant language in this policy is found in the second full paragraph of the text. It states as follows:

> A significant characteristic of a healthy workplace environment is that employees interact with each other with dignity and respect regardless of an employee's work assignment or position in the district. Repeated malicious conduct of an employee or group of employees toward another employee or group of employees in the workplace that a reasonable person would find hostile and offensive is unacceptable and not conducive to establishing or maintaining a healthy workplace environment.

The record indicates that Supt. O'Malley was the subject of numerous comments about his

appearance, hiring practices and his sexual practices. The comments were graphic and crude. The treatment that he received in the group chat was prototypical of what was proscribed in the policy.

The Arbitrator is compelled to note that the comments were made by Lechelt and Van Pelt. Weber made none of them. However, as noted above, there were three identified people in the chat and she was one of them. The fact that she remained part of the chat for its entire duration subjected her to at least part of the responsibility for it.

Therefore, she violated this policy. As such, Weber is culpable of Charge IV Count 6.

Count 7 addresses the final policy allegedly violated. It is the policy concerning the acceptable use of district computers and computer networks (Policy Number 3321)(BX24).

The key language in this policy is as follows:

> The Board recognizes that telecommunications will allow teaching staff members access to information sources that have not been pre-screened using Board approved standards. The Board therefore adopts the following standards of conduct for the use of computer network(s) and declares unethical, unacceptable, inappropriate or illegal behavior as just cause for taking disciplinary action limiting or revoking access privileges, instituting legal action or taking any other appropriate action as needed necessary.
>
> The Board provides access to computer network(s)/computers for administrative and educational purposes only. The Board retains the right to have the Superintendent or designee monitor network activity, in any form necessary, to maintain the integrity of the network(s) and ensure its proper use.
>
> Standards for Use of Computer Network(s)
>
> Any individual engaging in the following actions declared unethical, unacceptable or illegal when using computer network(s)/computer shall be subject to discipline or legal action:

> 3. Using the computer network(s) in a manner that:
> k. Engages in other activities that do not advance the educational purposes for which the computer network(s)/computers are provided.

Irrespective of the defenses offered by the three charged teachers, there can be no question that they used the District's computers in a manner that was violative of this policy. The defenses will be discussed below. However, the use of the computers for the group chat was clearly in violation of the Board's policy.

Weber, as one of participants in the chat, violated the policy concerning the use of District computers and computer networks. Thus, she is guilty of Charge IV Count 7.

Charge V:

This charge is one of a single count of misconduct. Weber is charged with a failure to pay attention during the Endgrade training and with making no effort to benefit from the instruction provided.

As has been previously documented, Maria Weber has been found guilty of various kinds of misconduct, ranging from inappropriate conduct with other staff members and with other participants in the group chat and individuals not in the employ of the District to significant violations of Board policy. In each of those charges and counts, the misconduct could be documented through a review of the transcript of the chat and through a review of the conduct of Weber in the context of the terms of several Board policies.

In this charge, Weber is said to have not paid attention to the training and having made no effort to benefit from the instruction. The transcript of the chat shows the timing of the comments.

At most, there was a time gap of four minutes between comments. It makes no sense to limit

the time spent on the chat to the amount of time writing comments. Weber was paying attention to the chat for virtually the full 2 ½ hour duration of the session. The total time she was involved in the chat precluded her paying attention to the content of the training.

Finally, Weber was on duty during the training. The session took place at a time when she would have been teaching. She had a professional obligation to make every effort to improve her teaching services by paying attention to the trainer. Instead, she opted to engage in an offensive, crude and grossly immature exercise of exchanging highly inappropriate comments on a chat.

Based on the record created, the Arbitrator concludes that, for practically the full length of the training session, Weber did not pay attention and did not make appropriate efforts to benefit from instruction that was designed to improve his teaching. She was expected to gain further expertise in a pedagogical program so that her students would benefit. She made little or no effort to actualize that goal. As such, Charge IV must be sustained.

ANALYSIS OF THE DEFENSES

Weber offered a number of defenses in an effort to mitigate the findings of misconduct. They are deserving of mention and discussion.

She observed that she made no vulgar comments during the chat. That statement is, for the most part, true. On the other hand, there were inappropriate innuendos in many of her comments.

That being said, comments can be inappropriate without being vulgar. Moreover, a portion of Weber's liability relates to her participation in a chat that was rife with inappropriate, both vulgar and not vulgar comments. She knew or should have known that some of her comments were inappropriate and that the group chat, in essentially its totality, was inappropriate. She also should have known that she should not have been part of an activity that was improper and potentially

hurtful and defamatory.

In short, despite the accuracy of her claim that many of her comments were not vulgar, this assertion does little to mitigate her wrongdoing.

Weber claims that she spent only 15 minutes in the chat. This defense was previously discussed and dismissed.

This claim trivializes the misconduct. One would have to accept the premise that the wrongdoing was limited to the time actually spent on inputting inappropriate comments. That proposition must be dismissed out of hand.

While it may be that Weber was not focused on the chat every second of its 2 ½ hour duration, her involvement had to have been very much longer than the time she actually spent writing her comments.

Weber asserted that her misconduct did not occur in the classroom and that such is a mitigating factor. The reality is that, had the misconduct been perpetrated in the classroom, the penalty in this case would certainly be dismissal.

This defense also presupposes that findings of misconduct can only be made when the events transpire in the classroom. Weber is a tenured employee every minute of her work day. Misconduct can take place in the presence or absence of children. Misconduct can also be found when the perpetrator is alone. The actions define the misconduct and not the people present when the actions are taken.

Weber argued that she had not violated the standards of sexual harassment, as set forth in *Toys 'R' Us.* This argument has been partially addressed above. However, it is sufficiently significant that it requires further discussion.

Weber's reliance on this argument is misplaced for several reasons. She is charged with violating a Board policy, not a New Jersey statute. School boards are expected to adopt policies that set forth guidelines to be followed by various members of the school community. Certainly, the professional staff is part of that community and teachers are required to abide by them.

If the Board adopts a policy that is inconsistent with the law, the remedy is found in a legal challenge. There is nothing in the record that indicates that any legal action has been taken to challenge the legality of the policy.

In addition, one must look at the consequences of violating a law as compared the breach of a policy. The violation of a law can result in either civil or criminal consequences imposed by the Court.

By contrast, the breach of a school board policy can result in the imposition of discipline in an administrative proceeding. While the imposition of discipline may be severe, it is not a civil or criminal penalty.

Weber's argument in this case suggests that the statutory standard for sexual harassment should be used in an administrative, non-judicial proceeding. As such, the argument must fail.

Finally, the Board's policy addresses two areas of possible misconduct. The first one involves the use of sexually offensive speech while the second one addresses unwelcome sexual advances that are either verbal or physical.

The section of the policy relating to unwelcome sexual advances appears to track the *Toy 'R' Us* language. It requires that the action be *severe and pervasive* as required by the Court's decision.

This case is not about unwelcome sexual advances. *Toys 'R' Us* specifically deals with verbal and physical sexual advances.

This is about sexually offensive speech. *Toys 'R" Us* is not. Thus, it is inapposite here. Weber is alleged to have engaged in sexually offensive speech. The undersigned has concluded that she did indeed engage in such speech. Weber was not charged with unwelcome sexual advances and the relevant defenses to such a charge are not applicable here.

Weber averred that none of her comments were addressed to District students or administrators. That may be true but she had an obligation, to say the least, to disassociate herself from the chat by either logging off or by expressing her condemnation over crude and discriminatory comments about students and Dr. O'Malley. She did neither. She *went along to get along* and now wants credit for not making the offensive comments while tolerating them.

Weber's culpability may not be as great as that of the makers of the wholly inappropriate comments about special needs children and Dr. O'Malley. However, she is not devoid of guilt on this regard. On the contrary, her culpability is significant.

Her final defense is that her actions did not have an injurious effect on the maintenance of discipline and the proper administration of the District. This matter will be addressed fully in an analysis of the *Fulcomer* standards.

THE *FULCOMER* STANDARDS

The Board is seeking the termination of Weber's services as a teacher. She argued that the leading New Jersey case concerning the termination of tenured teachers as a consequence of unbecoming conduct is *In re Fulcomer,* 93 N.J. Super. 403 (App. Div. 1967). This was a case in which the Commissioner of Education concluded that Fulcomer engaged in unbecoming conduct and that dismissal was required.. The Appellate Division disagreed and held that the trier of fact must first determine if the respondent teacher engaged in unbecoming conduct and, if so, whether the

misconduct warranted discharge or a lesser penalty.

In this regard, the Court determined that the following factors should be considered:

1. The potential impact on the charged teacher's career.

It is evident that, should Weber be terminated, the District would be required to report the dismissal to the State Board of Examiners for the possible revocation of her teaching certificates. It is reasonable to conclude that a termination in this case would dramatically increase the likelihood of Weber's teaching career in New Jersey being ended.

2. The longevity of Weber's career.

Maria Weber has been a teacher in New Jersey for 20 years, 15 of them in Edison Township. She is a senior teacher and should be given consideration for her years of service in the context of the other *Fulcomer* standards.

3. Weber's overall teaching record.

Weber's teaching record is devoid of negative comments. This comment will be expanded upon in Items 5 and 6 below.

4. Weber's teaching ability

A review of Weber's evaluations reveals that she has been consistently rated either *Accomplished or Distinguished* on the sub-parts to the evaluations, as well as on her overall ratings.

In addition, the record suggests her willingness to immerse herself in co-curricular and community activities. These activities reflect a desire to contribute to the school's standing through her contributions to out-of-classroom ventures.

Finally, her principal wrote a long and thoughtful letter about Weber's dedication and professionalism.

5. Whether there was an absence of prior discipline affecting Weber during her employment.

Weber has never been disciplined in any manner. Given the length of her service, a *clean* disciplinary record must be afforded serious attention.

6. Whether there was an absence of past increment withholdings.

There is no evidence of a salary increment being withheld.

7. The nature and the gravity of the offenses under all of the circumstances involved.

The misconduct described herein is very serious. She was part of a group of teachers who violated several important Board policies. She argued that her misconduct was mitigated by the fact that the majority of her comments were neither offensive nor discriminatory.

That is largely true. However, her continued involvement in the chat suggested that she saw nothing wrong with the comments of others and was devoid of condemnation of crude and unacceptable comments.

Her misconduct may have differed from that of the others but was only marginally less serious. Her lack of crudeness does not obviate her culpability.

8. Evidence as to provocation, extenuation or aggravation.

Weber was not provoked. There were no extenuating circumstances. There were no aggravating conditions.

9. Any harm or injurious effect which Weber's conduct had on the maintenance of discipline and the proper administration of the school system.

This matter ultimately became public. It had an impact on the manner in which the community views the school. Further, the comments made about Dr. O'Malley had to be personally embarrassing and offensive and could have had the effect of weakening his image as the

Superintendent of Schools.

JUST CAUSE

Just Cause standards emanate from *Enterprise Wire,* 46 LA 555 (1956). There are seven tests that need to be applied to a determination of the appropriateness of discipline.

In this case, there was Just Cause to discipline Weber. The Board policies forewarned her that she could be disciplined for violations of the policies. The cited policies were more than reasonably related to the *business efficiency of the District and the performance the employer might expect from an employee.* There was an investigation conducted to determine if Weber was culpable of misconduct. The investigation was fair and objective. It was related solely to the purported misconduct and there was an effort made to interview anyone who had knowledge of the underlying conduct Based upon the investigation and a review of the transcript, the District determined that there was substantial evidence of Weber's guilt. The rules/policies were applied fairly. Finally, the degree of discipline applied herein is related to Weber's misconduct and her past record.

CONCLUSIONS

A review of the *Fulcomer* and *Just Cause* standards persuades the Arbitrator that the Board had cause to serve disciplinary charges on Maria Weber. She is guilty of serious misconduct.

It may be that she is not guilty of making comments that are obscene and inappropriate. It is disappointing to note that she believes that her sole culpability concerns the misuse of District computers and its computer network. She does not recognize that her participation in the group chat, in and of itself, represents unbecoming conduct. Nor does she seem to understand that her involvement in the chat led directly to violations of several District policies.

Weber asserted that she was extremely remorseful for her involvement in the group chat. Her

expressions may have been sincere but, as noted relative to the Affirmative Action interview, she does not fully *get it.*

At the end of the case, she still believes that she only violated one Board policy and was properly remorseful. To paraphrase her remorse, she suggested that *I am sorry but.....* There should have been no *buts.*

However, when the record is viewed as a whole, Weber's misconduct does not rise to the level of justifying termination of services. When this finding is combined with the analysis of the *Fulcomer* and *Just Cause* standards , it becomes clear that dismissal is excessive.

Finally, counsel for the parties did an outstanding job of researching the relevant issues and presented numerous cases for the consideration of the Arbitrator. The cases were reviewed and considered. However, given the number of cases cited by both parties and their non-precedential nature, the cases are not cited in the Opinion. Furthermore, counsel for the parties are to be commended for their overall preparation, the quality of the examinations and cross-examinations and professionalism throughout a long and complicated case.

Thus, the Arbitrator finds that appropriate penalty to be imposed on Maria Weber is a 90 day suspension without pay. Therefore, based on the above, the undersigned makes the following

AWARD

1. Maria Weber is guilty of Charge I -Counts 1, 2, Charge IV- Counts 1, 2, 4, 5, 6, 7 and Charge V
2. The following charges are dismissed: Charge II, Charge III and Charge IV- Count 3.
3. The penalty imposed on Maria Weber is a 90 day suspension without pay.

Dated: June 30 2015
Hewlett Harbor, NY

ARTHUR A. RIEGEL, ESQ.
ARBITRATOR

AFFIRMATION

STATE OF NEW YORK)
COUNTY OF NASSAU)

I, Arthur A. Riegel, am the individual described in and who executed the foregoing instrument, which is my Opinion and Award.

ARTHUR A. RIEGEL