

STATE OF NEW JERSEY  
DEPARTMENT OF EDUCATION  
TRENTON, NEW JERSEY

-----  
IN THE MATTER OF ARBITRATION )

of )

JENNIFER FILO )  
MORRIS-UNION JOINTURE COMMISSION )  
NEW PROVIDENCE, NJ (UNION COUNTY) )

and )

AGENCY DOCKET NO. 334-11/14 )  
-----

OPINION  
AND  
AWARD

Before: Prof. Robert T. Simmelkjaer, Esq.  
Arbitrator

APPEARANCES

FOR THE COMMISSION

Robin T. McMahon, Esq., Cleary Giacobbe Alfieri Jacobs, LLC

FOR THE RESPONDENT

Timothy Smith, Esq., Caruso Smith Picini, P.C.  
Nicholas Poberezhsky, Caruso Smith Picini, P.C.

ALSO PRESENT

Andrea Marmolejos, Principal  
Roselouise Nappi Holz, UniServ Field Representative

## STATEMENT OF THE CASE

This case arises pursuant to the Teacher Effectiveness and Accountability for the Children of New Jersey Act ("TEACHNJ ACT" or the "Act"), N.J.S.A. 18A:6-16, effective August 6, 2012. The Tenure Employees Hearing Law N.J.S.A. 18A:6-10 et seq. was amended by P.L. 2012 C.26.

On November 14, 2014, the Morris-Union Jointure Commission (hereinafter the "Commission") submitted to David C. Hespe, Acting Commissioner, New Jersey Department of Education, the following: (1) Tenure Charges Against Jennifer Filo, (2) Certificate of Determination, and (3) Proof of Service. Two (2) charges were filed against the Respondent: (1) Unbecoming Conduct, and (2) Other Just Cause. The Commission requested that Commissioner Hespe "deem the charges sufficient to warrant dismissal or reduction in salary and refer the case to an arbitrator in accordance with the Tenure Employees Hearing Law."

On December 1, 2014, the Respondent, Ms. Jennifer Filo ("Filo") filed her Written Statement of Evidence, denying the charges and maintaining, inter alia, that "these charges should be dismissed so that an excellent teacher can continue her service to the students and the parents of this district."

By letter dated December 12, 2014, Ms. M. Kathleen Duncan, Director, Bureau of Controversies and Disputes, New Jersey Department of Education, advised the parties as follows:

Please be advised that, following receipt of respondent's answer on December 2, 2014, the above-captioned tenure charges have been reviewed and deemed sufficient, if true, to warrant dismissal or reduction in salary. Accordingly, on this date, they are being

referred to Arbitrator Robert T. Simmelkjaer pursuant to N.J.S.A. 18A:6-16 as amended by P.L. 2012. c. 26.

The Charges, dated October 28, 2014, are as follows:

**FIRST CHARGE**  
**(Unbecoming Conduct)**

1. The MUJC is a public educational agency that was established pursuant to N.J.S.A. 18A:46-25 (repealed, P.L. 2007, C. 63) for the primary purpose of providing services for students with disabilities. Currently, the MUJC consists of twenty-nine member school districts.
  2. The MUJC operates two Developmental Learning Centers that provide a public school program for students with autism or autistic like behaviors who have been referred to the MUJC by their district of residence. More than 250 children attend the Centers, which are located in New Providence and Warren, New Jersey.
  3. Ms. Jennifer Filo (hereinafter "Filo") is a tenured teacher employed by the MUJC. She received a standard certificate as a teacher of the handicapped in September 2006, whereupon, the MUJC hired her to serve in that capacity. Filo had previously worked for the MUJC, initially as a substitute teacher starting in November 2005 and, as of January 23, 2006, a teacher assistant.
  4. Though employed on a ten-month basis, Filo elected to work during the MUJC's extended school year ("ESY") program in 2014, which ran from June 24 through August 7, 2014. During that time, she engaged in a pattern of corporal punishment within the meaning of N.J.S.A. 18A:6-1, as follows:
    - a. On or about June 27, 2014, during integrated speech, she was extremely aggressive with student **HM**,\* pulling back the student's fingers and wrists, causing her to cry;
    - b. On multiple occasions, she twisted student **MC**'s wrist to one side, while simultaneously bending it severely back, in order to control his behavior;
    - c. On or about August 4, 2014, while student **MM** was in the cafeteria for breakfast, Filo stood over him, twisting and bending back his wrist, and on other occasions, she would twist and bend back his wrist in order to get him to move or sit down;
- \*\*\* Erroneously listed as "MH" in Specification 4(a).

- d. On more than one occasion, when restraining students CW or BK, she shoved a table against the student's stomach, longer and more forcibly than necessary;
  - e. When student MM would swing his arms, trying to hit others nearby, she would swat back at him with an appropriate hit;
  - f. During a vocational task, when MM swung at her, Filo used a wooden clipboard, not just to block his hit, but to repeatedly hit his knuckles and hands, which later became red and swollen;
  - g. On or about August 1, 2014, Filo withheld breakfast from students MC and MM because they had not finished their morning schedule;
  - h. Once, when student HM refused to get up off the floor, Filo bent HM's fingers back in order to make her comply;
  - i. On one occasion when student TH grabbed Filo's arm and dug his nails into it, Filo bent back TH's fingers with more force than necessary to get him to release her;
  - j. On or about June 27, 2014, when student CW was acting aggressively in a bathroom stall, Filo held CW's hands and unnecessarily bent her fingers backwards; and
  - k. When Filo and another staff member were holding student MC, each by one of his arms, because he had become agitated, Filo unnecessarily twisted MC's arm back, and on another occasion, when the student was walking in the hallway and threw his lunch, Filo bent his arm back to punish him.
5. During the ESY program, Filo engaged in other inappropriate behavior, as follows:
- a. Filo screamed at students on a daily basis; and
  - b. More than once when students were aggressing toward one another, she encouraged them to hit back.
6. During the 2013-2014 regular school year, Filo also engaged in inappropriate conduct, as follows:
- a. Filo yelled at students and mimicked their autistic-like behaviors, on one occasion, by cupping and screaming directly into the ear of a student BO, causing him to cry.

- b. She made derogatory comments to students RM and MH, asking them if they were stupid or an idiot;
  - c. With regard to student MH, who would play with vocational task items as though they were airplanes, Filo would frequently knock them off the table and onto the floor and make the student pick them up, sometimes forcibly prompting him to do so; and
  - d. On several occasions, she continued to feed RM, or allowed a teacher assistant to do so, to the point where he was in visible distress, crying or vomiting.
7. The duty of a teacher requires a degree of self-restraint and controlled behavior that oftentimes is not requisite to the other occupations and professions. As evidenced by the incidents described above, Filo has failed to exercise the degree of self-restraint commensurate to her position, has shown herself to be unfit to continue serving as a teacher, and has engaged in unbecoming conduct, warranting her immediate dismissal.
  8. Filo's continued presence in the classroom represents a danger to the safety and well-being of her students.
  9. Accordingly, and by letter dated August 26, 2014, the MUJC Superintendent notified Filo that with the concurrence of the Board President, the Superintendent was suspending Filo with pay, pending further notice.

WHEREFORE, the Morris-Union Jointure Commission demands the dismissal of Jennifer Filo based upon her unbecoming conduct in accordance with the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 *et seq.* as amended by P.L. 2012, C.26.

**SECOND CHARGE**  
(Other Just Cause)

10. The MUJC incorporates the foregoing allegations as though fully set forth at length herein.
11. Whether or not her behavior constitutes corporal punishment prohibited by N.J.S.A. 18:6-1, Filo's conduct, as hereinabove alleged, constitutes just cause for her immediate dismissal and relinquishment of her tenure status.

WHEREFORE, the Morris-Union Jointure Commission demands the dismissal of Jennifer Filo for other just cause in accordance with the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 *et seq.*, as amended by P.L. 2012, C.26.

### PROCEDURAL HISTORY

A hearing in the instant case was held on February 13, 2015, February 23, 2015, February 26, 2015, and February 27, 2015 at the Commission's offices in New Providence, New Jersey.

At the hearing, the parties were given ample opportunity to present their respective positions, including testimonial and documentary evidence, and the cross-examination of witnesses. The parties were represented by counsel and the hearing was transcribed. The record consists of two (2) Joint Exhibits, forty-one (41) Commission Exhibits and twenty-one (21) Union Exhibits. The Respondent submitted a post-hearing audio transcription. In addition, the parties submitted post-hearing briefs dated March 11, 2015. The evidence so submitted as well as the arguments of the parties has been considered by the Arbitrator in his award and accompanying opinion.

### STATEMENT OF FACTS

The Charges pertain to the 2013-2014 school year and the extended school year ("ESY") program, which ran from June 24<sup>th</sup> to August 7, 2014. At all times relevant, Ms. Filo was employed as a teacher of the handicapped. During the 2014 ESY, Filo taught at the Commission School known as the Developmental Learning Center ("DLC") in Warren, NJ. During the 2013-14 school year, she was assigned to the DLC in New Providence.

The Commission's students tend to be more on the severe end of the autism spectrum, including a large group of non-verbal students who were not able to focus and needed lots of physical prompting to do their work. The class was also comprised of aggressive students and students who could become violent. There were eight (8) students in the Respondent's ESY class – all but two of whom were non-verbal. "Of the same eight students, all had some aggressive behavior, but only CW posed a physical threat," according to Ms. Anclien. (Tr. @ 21).

The Commission called as witnesses three of the four teacher assistants, who were assigned to Ms. Filo's ESY class, and a speech teacher for some of the children in the class, namely: Kelly Anclien, Danny LoBello, Karen Romero and Speech Therapist Sandra Furia. With respect to the 2013-14 school year, the Commission called Melissa Olesky, Audrey Weiss, and Jennifer Ferraioli.

The Respondent testified on her own behalf. She also called as witnesses Tom McNamara, Blanca Sadik, Julie Gardner, Damon Murtha, Latonia Hall, Cynthia Vaillant, and Andrea Marmolejos. Ms. Sadik, a teacher assistant in the Respondent's class during the 2013-14 school year, was terminated by the Commission in October 2014 based on conduct similar to that alleged against Ms. Filo.

## THE CHARGES

### I. Extended School Year (June – August 2014)

Specification 4 (a): On or about June 27, 2014, during integrated speech, she was aggressive with student HM, pulling back the student's fingers and wrists, causing her to cry.

#### Commission Position

Ms. Kelly Anclien ("Anclien") testified that on or about June 27, 2014, during integrated speech, Filo was extremely aggressive with HM, a female student, for approximately twenty to thirty minutes, pulling back the student's fingers and twisting her wrists extremely hard, causing the student to cry. "So Danny LoBello and Jen physically tried to escort her to the table and she was, you know, being refusing and trying to get away and she even pushed back from the table several times and then she flopped to the floor at this point...but HM was on the ground and Jen went right over to her and took – intertwined her fingers, bent back her wrist and like twisted her and just keep going on with this. I mean speech lasts 30 minutes, it was throughout the entire speech session, and over this hurtful aggression continued." (Tr. @ 26). Anclien observed Filo kneeling, holding back HM's arms and toward the end of the episode, Filo was mimicking the "raspberry noise" made by HM. (Tr.@ 105-106).

According to Anclien, HM had not acted aggressively toward Filo prior to the Respondent's physical response. Anclien believed that HM was being hurt because "immediately upon this behavior HM is crying and at that point when Jennifer had let go of HM's hand." (Tr. @ 28). Neither Anclien nor Filo took HM to the nurse.



Danny LoBello ("LoBello") testified that he observed this incident while serving as a Teacher Assistant. He testified that at one point on June 27, 2014 he observed HM on the ground and Filo attempting to stop HM from picking up hair off the ground and placing it onto her, HM's head. In LoBello's recollection, the incident occurred on August 1<sup>st</sup>, while he was working with MC (male). "And Jen was attempting to stop that but when she was doing that she got down on her knees and that's when she grabbed her hands to get her to stop and she did again the same twisting motion. And then HM made out a little squeal, she was upset and that is exactly what happened." As he recalled, "...she has made that sound prior but you can see in her face it was definitely like pain."(Tr. @ 126-27).

Teacher Assistant Karen Romero testified that she was not in the classroom when the incident began, but when she returned from lunch between 1:30 and 2:00 p.m. she saw Filo and HM sitting on the floor, Indian-style, with HM crying. HM was slapping at Filo, windmill-style, while Filo mimicked her behavior ("just raspberried her back when HM raspberried her"). (Tr. @ 194).

Speech Therapist, Sandra Furia, saw HM flop on the floor, and Filo try to get her up, as HM was crawling away and crying. Furia did not observe the entire incident. "The only thing I could see was HM trying to get away from her, Jen following her and she did stop her a few times." (Tr.@ 339). The teacher assistants had attempted to get HM to join the group at the table for integrated speech.

Whereas Anclien testified that "everything had to be painful from the fingers all the way through" and that HM was "crying" and "wailing out," neither

she nor LoBello took HM to the nurse. (Tr. @ 29). As she put it, "I think I was just in such distress over what occurred, I totally forgot about the nurse."

#### Respondent Position

For her part, the Respondent focused on the length of time Ancien described the incident entailed, to wit, the "[e]ntire episode of bending back these wrists had to be a minimum of 20 minutes." Filo denied following HM around the classroom and denied bending back her wrists. She recalled the incident as one where she blocked the forehead of HM as HM attempted to bite her. (Tr.@ 892).

#### Opinion

In the Arbitrator's opinion, notwithstanding the failure of Ancien or LoBello to take HM to the nurse, or report the incident to the authorities, Specification 4(a) has been proven by a preponderance of the credible evidence. The Respondent's description of her effort to block HM and her general denial of the allegation is insufficient to overcome the testimony of two (2) credible eyewitnesses.

#### Specifications 4b-4k, 5a

(4b) On multiple occasions, Ms. Filo twisted student MC's wrist to one side, while simultaneously bending it severely back, in order to control his behavior.

(4k) When Filo and another staff member were holding student MC, each by one of his arms, because he had become agitated, Filo unnecessarily twisted MC's arm back, and on another occasion, when the student was walking in the hallway and threw his lunch, Filo bent his arm back to punish him.

### Commission Position

Anclien testified that during the ESY, Filo, intermittently, but on multiple occasions would bend and twist the hands of MC, a male student. In order to prevent MC, who had a tendency to bite his hands, from injuring himself Filo "would stand next to him and she would bend and twist his hands. It was I think her way or means of trying to gain control and make him stop." (Tr. @ 30).

Anclien testified that she observed this conduct "at least five or six times throughout the summer." (Tr. @ 107). On one such occasion, McNamara was present, standing on one side of MC while Filo stood on the outside. Anclien was uncertain if McNamara could observe what Filo was doing to MC's wrist. (Tr. @ 107, 109, 113).

Romero was present on one occasion when McNamara and Filo were restraining MC. To prevent MC from biting himself, McNamara held one of his arms down while Filo twisted MC's other arm and bent his arms. (Tr. @ 183-84).

### Respondent Position

Respondent called McNamara as a witness. He testified that he did not observe Filo do anything improper. He acknowledged that he was concentrating on what he was doing and not on what Filo was doing or where her hands were in relation to MC. (Tr. @ 645-646). Filo denied the allegation. (Tr. @ 886). She described MC as a "hand biter" who would "attempt to bite you or grab at you or push the table or throw a task." To control him "myself and somebody else would hold his arms down until he was calm." (Tr. @ 861).

(4c) On or about August 4, 2014, while student MM was in the cafeteria for breakfast, Filo stood over him, twisting and bending

back his wrist, and on other occasions, she would twist and bend back his wrist in order to get him to move or sit down.

### Commission Position

Anclien testified that during the morning of August 4, 2014 she was seated at a table in the school cafeteria feeding a student. At one point, she turned and saw Filo standing over student MM at the next table bending his wrist and twisting it. (Tr. @ 38-39). Anclien also observed Filo use the tactic to get MM to stand up off the track to leave. Filo threw a sweatshirt over MM's wrist, which Anclien interpreted as an attempt to hide what she was doing to MM's wrists. (Tr. @ 40).

. Furia testified regarding this incident of August 4, 2014. She saw Filo standing behind MM, holding his arm and pulling it back. She did not observe MM striking out at Filo, and no children were seated near him. (Tr. @ 326-327).

(4d) On more than one occasion, while restraining students CW or BK, she shoved a table against the student's stomach longer and more forcibly than necessary.

Anclien testified that on two separate occasions, that when Filo used a table to restrain student CW, a girl, and one occasion, student BK, a boy, she "forcefully shoved the table into them really hard." (Tr. @ 32-33). Anclien did not observe any physical injury to the students although they appeared hurt. Neither student was taken to the nurse. In Anclien's view, the teacher who engaged in the restraint was responsible for taking the student(s) to the nurse.

LoBello assisted Filo in holding the table against CW during one of the two restraints. It was Filo rather than LoBello who pushed the table against CW. CW had been restrained because she tried to hit someone in the room. Anclien

offered to help, but Filo and LoBello said that they were fine. LoBello testified that he was unable to see what Filo was doing. (Tr. @ 128).

(4e) When student MM would swing his arms, trying to hit others nearby, she would swat back at him with an inappropriate hit.

(4f) During a vocational task, when MM swung at her, Filo used a wooden clipboard, not just to block his hit, but to repeatedly hit his knuckles and hands, which later became red and swollen.

When MM was not seated, he had a tendency to swat his arms at anybody passing him. Anclien testified that Filo would swat back in retaliation at MM when he displayed this behavior. (Tr. @ 35-36). On one of these instances, MM was doing a vocational task, and whenever Filo would hand him a block or figurine, MM would swat at her. Every time he'd swat Filo, she smacked his knuckles really hard with a clipboard – ten possibly fifteen times. Later that day, Anclien noticed that MM's knuckles were swollen and red. (Tr. @ 35-36) (C. Ex. #4). Filo denied repeatedly hitting MM's knuckles with a clipboard. (Tr. @873).

(4g) On or about August 1, 2014, Filo withheld breakfast from students MC and MM because they had not finished their morning schedule.

Anclien testified that on the morning of August 1, 2014, Filo did not have MM and MC, a female student, join their classmates for breakfast in the cafeteria. Breakfast is from 9:00 to 9:30 a.m. Sometime after 10:00 p.m., Anclien noticed that MM's breakfast bag was full. When she asked Filo if she should give MM the bag, Filo allegedly responded that "MM and MC were not going to get their breakfast until they finished their tasks on their own." (Tr. @ 43).

When Romero returned to the classroom shortly thereafter, Anclien related the situation to her. At this point, Romero gave MC her breakfast. (Tr. @ 117).

Romero recalled the incident. After the fire drill, she returned to the classroom and saw MC holding her breakfast bag. When she noticed that MC had not eaten, she mentioned this aloud, with Anclien providing Filo's reason. Romero testified that she said she did not care whether Ms. Filo had a problem with it, but she was giving the student her breakfast and that food may not be withheld here. "I was like well, no, so I gave MC (female) her breakfast. It was like if Jen has a problem with it she can tell me something. I'm taking responsibility for it." (Tr. @ 191).

Ms. Furia corroborated this incident in part when she testified that on August 1, 2014, she was providing speech services to MM. She entered the class and asked Filo for a reinforcer to which Filo responded that MM had not eaten his breakfast. At this point, Furia took the breakfast from Filo and gave it to MM. (Tr. @ 324, 326).

#### Respondent Position

Filo recalled the incident as one where MC (female) "brings her breakfast in, she takes it out, she sits at her desk, she does her morning work, then she eats breakfast. That morning she was highly agitated, she came in very, very upset and I told her to finish the small task that she had in front of her and then she could put it aside instead of finishing her morning work like she usually does

and she could have her breakfast. It was literally sitting right in front of her..."

(Tr. @ 875-876).

(4i) On one occasion when Student TH grabbed Filo's arm and dug her nails into it, Filo bent back TH's fingers with more force than necessary to get him to release her.

### Commission Position

In July 2014, LoBello observed Filo bend and twist TH's fingers back with more force than necessary. (Tr. @ 122, 161). He recalled that TH was engaging in behavior, stood up and started to go after Filo. TH dug his nails into her.

LoBello demonstrated at the hearing that Filo was "able to twist, just hold his wrist behind him. TH's reaction was "he looked like he was in pain, his facial, he didn't make a sound or anything but his facial expression." (Tr. @ 123).

Also in July 2014, LoBello testified that he saw Filo engage in similar conduct with CW. CW had become aggressive and was starting to go behind her desk. He testified:

Q. And can you demonstrate again with Ms. Marmolejos what you observed for the record?

A. It was pretty much the same thing, like CW grabbed her pretty hard. She was able to kind of get her hand. I can't exactly – she was able to get her fingers more and she was squeezing her fingers a little bit upturn, I guess.

THE ARBITRATOR: Twisting them to the outside?

THE WITNESS: Yes, yeah. (Tr. @ 125).

LoBello testified that this method of restraining students was inconsistent with their training. "Staff are trained to break a student's hold without hurting oneself or the child and the technique does not involve bending or even holding a student's fingers." (Tr. @ 125).

(4j) On or about June 27, 2014, when student CW was acting aggressively in a bathroom stall, Filo held CW's hands and unnecessarily bent her fingers backwards.

Ms. Romero recalled that as CW began acting out, screaming and kicking, she and Filo pushed CW into a bathroom stall and closed the door. CW shook and kicked the door. Ms. Romero told Filo to push the button in the bathroom for help. Filo instead "put her hands over the door and grabbed the student's hands and twisted her hands back...she grabbed her hands and bent them backwards to try to get her hands off the door." (Tr. @ 178-179).

(4k) When Filo and another staff member were holding student MC, each by one of his arms, because he had become agitated, Filo unnecessarily twisted MC's arm back, and on another occasion, when the student was walking in the hallway and threw his lunch, Filo bent his arm back to punish him.

In continuing her testimony on this incident, Romero testified that students were going to lunch on this day when TH threw his lunch box – a soft container – into the air. She recalled that Filo grabbed his hands and bent them backwards in punishment. TH was not engaging in aggressive behavior at the time other than throwing his lunch box. (Tr. @ 186-188).

5(a) Filo screamed at the students on a daily basis.

5(b) More than once when the students were aggressive toward one another, she encouraged them to hit back.

Ms. Anclien recalled two occasions in July 2014 when Filo encouraged students to be aggressive toward one another. One occasion involved MM and TH. On the day in question, TH had become agitated during a speech session. He threw his water bottle at the ceiling and approached MM. As TH did this, Filo,



according to Anclien, encouraged MM to hit TH. "TH grabbed MM and the aides had to intervene to remove TH." (Tr. @ 40-42).

On the other occasion in July, MM had gotten up from his table and walked over to where CW was sitting. Filo encouraged MM to hit CW even though CW was known to be physically capable of hurting someone. (Tr. @ 41-42).

Ms. Romero testified that Filo encouraged MM to "hit" or "get back" at another student, TH. (Tr. @ 188-189).

Ms. Furia also observed Filo encourage TH and MC to fight. (Tr. @ 322-323). She reported her observations to the principal in a report dated September 5, 2014. (R. Ex. #J).

Romero recalled that Filo was loud in the classroom and would yell at the students. (Tr. @ 192). Ms. Audrey Weiss and Ms. Melissa Olesky also testified about Filo's yelling during the 2013-14 school year.

#### Respondent's Position

In her defense to the specifications, the Respondent has focused on the failure of Anclien, LoBello and Romero to report instances of what they considered to be improper conduct on Filo's part to the principal, DYFUS, or other authorities. Although on cross-examination, Anclien acknowledged that the abuse she observed had made her "wrestle with her moral conscious," she did not come forward until August 4, 2014. The Respondent argues that Anclien's reason for not reporting Filo for her alleged deviation from school restraint

policies, based on her concern that she might lose her job, constituted a "weak excuse" given whistle-blower protections.

Similarly, LoBello is criticized for "not reporting the alleged incidents to anyone and providing information to the administration when he was called into the office." Reviewing the Commission policy on "Reporting Potentially Missing or Abused Children," LoBello acknowledged that if he "witnessed something inappropriate" he was supposed to call DYFS. (Tr. @ 131) (C. Ex. #26). LoBello had also attended Harassment, Intimidation and Bullying ("HIB") training every year. LoBello's testimony that "he didn't know if necessarily (his) job would be safe" if he reported "seeing a tenured teacher physically abuse students."

Romero also admitted that she failed to report the incidents, "hoping" that HM would report the incident to her parents. Furia testified on cross that she neither reported Filo until August 5, 2014 nor Ms. Sadik despite her awareness of the district's policies regarding abuse of children, corporal punishment and physical restraint. (Tr. @ 354).

None of the District's witnesses (LoBello, Anclien, Romero) took any of the students who they believed were being abused by Filo to the nurse.

With respect to the specific charges for forcibly pushing a table against the students CW or BK to provide a restraint (4d), the Respondent relies on the testimony of LoBello that "the desk is always pressed up against the cabinet because it was like a natural barrier, L shape." (Tr. @ 145). LoBello further testified that he and Filo had used this restraint each time using their feet to anchor the desk; "[l]asting [no] more than a minute or two before she stood up.

(Tr. @ 146). McNamara's testimony is relied upon that Filo held the table in a manner that was not pressing against CW or was harmful.

The Respondent deems significant LoBello's testimony on cross that while he was aware of his reporting responsibilities, he was "unsure of whether I should report it" (i.e., the excessive force Filo had used to get TH to release her) because "she is a tenured teacher. I am just a TA, job security. He continued:

Q. And you don't think that if you observed more force than necessary being utilized that you were required to ensure that there was a reporting?

A. Can you repeat that?

Q. You don't think you had an obligation to report that activity, so you were unsure whether or not excessive force was used?

A. No, I was unsure of whether I should report it.

Q. Why is that?

A. Like I said before she is a tenured teacher, I am just a TA, job security. I didn't know what the repercussions were if I was wrong in that sense. I know what I saw but I didn't – I don't think I felt that my word wasn't as strong as a tenured teacher. I don't think they would believe me over a tenured teacher, that was my thought, that was the thinking behind not reporting it, so that's why I am unsure.

(Tr. @ 163).

Filo deems supportive of her position McNamara's testimony that during the 2014 ESY when he visited Filo's class two-three times a week for 45 minutes to an hour and he observed no incidents of corporal punishment. He observed her interact with students on approximately three to five occasions without seeing her pull back the wrists or fingers of CW, HM or any other student. He didn't see her swat back at MM or attempt to hit him with a clipboard, withhold food from MM or encourage other students to hit each other. (Tr. @ 610, 620-621, 625).

Similarly, Damon Murtha, a speech language specialist, who visited Filo's class 3-4 hours per week during the 2014 ESY did not observe her abuse any students. (Tr. @ 786-88).

The Respondent denied all of the allegations. Filo denied twisting or bending the fingers or wrists of any students (4a, 4b, 4c). She admitted blocking HM with her body when he fell to the floor to prevent her from engaging in further misbehavior but denied pulling her fingers and wrists back (4h). Filo testified that she removed CW's fingers from the bathroom door in order to dislodge her from the stall door, but denied bending them backwards or using excessive force (4j).

Filo corroborated the testimony of McNamara that she moved a table to prevent CW from hitting another student and when she observed the table was touching CW, she moved the table back (4d). (Tr. @ 866-867).

### Opinion

#### A. Specifications 4(d) and 5(a)

The Arbitrator dismisses Specification 4(d). The testimony of LoBello and McNamara corroborates the Respondent's testimony that the table was pushed against or toward CW in a manner to provide a restraint. The table acted as a "natural barrier" preventing CW from leaving the corner to act aggressively toward other students. The credible testimony of LoBello that he and Filo had performed this maneuver several times without harming CW is sufficient to dismiss this (4d) specification. The Arbitrator is persuaded that any physical contact made with CW using the table was inadvertent.

The Arbitrator also dismisses Specification 5(a). Although there is evidence that Filo occasionally spoke to the students in a loud voice, there is no evidence that she did this on a daily basis during the ESY.

B. Specifications a-c, e-k, 5(b)

With respect to the several other specifications, the Arbitrator is persuaded that they have been proven by a preponderance of the credible evidence. The testimony of Anclien, LoBello, Romero, and Furia collectively established that on more than one occasion, Filo twisted the students' wrists, bent their fingers back and inflicted pain as punishment. A preponderance of evidence established that Filo on June 27, 2014 during the ESY pulled back HM's fingers and wrists, on multiple occasions during the ESY bent MC's arm, and used excessive force to dislodge CW's fingers from the door of a bathroom stall. On or about August 4, 2014, she twisted and bent back the wrists of MM, during a vocational task swatted back at MM when he swung at her, used a clipboard on one occasion to hit his knuckles and hands, and bent back TH's fingers to get him to release her after he dug his nails into her arm

In addition, the evidence established that Filo withheld the breakfast of MC and MM on August 1, 2014. Anclien, Romero, and Furia testified credibly that Filo withheld their breakfast to force them to complete their tasks. Anclien and Furia testified credibly that Furia encouraged students to fight back and hit each other.

Given the weight of the testimonial evidence supporting the foregoing specifications, Filo's general denials constitute an insufficient defense.

The Commission has met its burden of proving that the conduct of the Respondent during the 2014 ESY was unbecoming that of a teacher in that the evidence established a pattern of corporal punishment of students that was excessive and unnecessary either for the purpose of self-defense or for the protection of persons or property. (See, N.J.S.A. 18:6-1). The fact that none of the witnesses to Filo's abusive conduct took the students to the nurse for treatment, notified the principal regarding their observations, or called in abuse allegations to DYFS does not, in the Arbitrator's judgment, detract from their credible testimony at the hearing regarding the specifications.

The Respondent's defense to the specifications, other than her general denial, relies upon the testimony of witnesses who were either not in the classroom or who intermittently taught in the classroom as therapists. Although the Arbitrator has credited the testimony of McNamara regarding specification (4d), which was corroborated by the testimony of LoBello, the fact that he was occasionally in Filo's classroom, approximately 3-5 times per week for a maximum time period of three hours, diminishes the probative value of his testimony regarding the remaining specifications. The testimony of McNamara that he never saw Filo pull back the wrists or fingers of CW, HM or any other student leaves open the probability that this misconduct occurred when he was not present. Therefore, the Arbitrator finds the testimony of the teacher assistants, who were in the Respondent's classroom on a daily and hourly basis, more probative on these specifications.

Similarly not probative of the proven specifications (4a- c, e - k and 5b) is the testimony of Mr. Murtha, a speech therapist, who visited Filo's class 3-4 hours a week during the 2014 ESY. Here again, Murtha's testimony that he did not observe Filo mistreat any of her students constitutes a limited sample of the Respondent's total classroom performance and as a result entitled to less evidentiary weight than the collective and credible testimony of Anclien, LoBello and Romero regarding the specifications.

In contrast to the Respondent's witnesses, other than McNamara, the Arbitrator has accorded more evidentiary weight to the testimony of Furia, a speech therapist, who also visited Filo's classroom sporadically, but gave specific testimony regarding the incidents she observed. She credibly corroborated the testimony of Romero regarding Filo's withholding of MM's breakfast on August 1, 2014 and observed Filo encourage two students, MM and TH, to physically attack each other. On August 4, 2014, she testified that Filo twisted MM's hands backwards while he was seated at a table during breakfast.

#### C. Fear of Retaliation/Failure to Report Abuse

The Arbitrator credits the testimony of the Commission witnesses who gave fear of retaliation or losing their jobs as their reason for not reporting their observations of student abuse before being called in by the principal. Although Anclien, LoBello, Romero and Furia all acknowledged that they were aware of the District's abuse policies, the Anti-Bullying Act, and that pursuant to state law they were required to report such abuse to DYFS, their principal or immediate supervisor, the Arbitrator is persuaded that they had a genuine, albeit unfounded

belief, that the reporting of any abuse incidents could redound to their detriment. As Anclien put it, "there's a lot of things that just don't go right in the world." (Tr. @ 65). At one point, Anclien testified that she approached Filo and said to her that her conduct appeared to be against school policy and encouraged her to be mindful of her actions with the students. Anclien's warning to Filo did not result in a report to the administration and her expectations that Filo would change did not materialize.

Similarly, LoBello testified that he "didn't know if necessarily [his] job would be safe" if he reported seeing a tenured teacher physically abuse students. (Tr. @ 128). Also, Romero testified that she didn't report the incidents out of a fear of getting fired because "I don't know, I just didn't." (Tr. @ 219).

Notwithstanding the whistleblower-type protections afforded those who report abuse under the law, and their protection against retaliatory termination under state laws and district policies, which the witnesses acknowledged, the evidence supports a finding that the untenured teacher assistants had a legitimate fear that reporting Filo would put their jobs at risk. Irrespective of whether the witnesses harbored an unreasonable fear of retaliation and by failing to report violated the Commission policies themselves as well as their legal duty to report, the Arbitrator is persuaded that this aspect of their conduct is properly separated from their credible testimony regarding the specifications. The Arbitrator discerns no nexus between their fear of retaliation when observing the Respondent's misconduct and their willingness to testify when confronted by their principal and the Commission officials.



#### D. Personality Conflicts

The Arbitrator found no evidence to support the Respondent's assertion that any of the witnesses who testified against her regarding the August 2014 ESY charges were biased due to a personality conflict, adverse supervisor-subordinate relations, or other performance issues. Anclien denied ever being reprimanded by Filo, having a personality conflict with her, or receiving any negative feedback about her performance. (Tr. @ 48, 86). LoBello denied having a personality conflict with Filo or receiving a reprimand regarding his performance. He did not resent her authority as the teacher and followed her orders. (Tr. @ 128, 164).

The Respondent, in her testimony, provided no evidence to support her claim that a personality conflict or her role as supervisor motivated the three teacher assistants to falsely testify against her.

#### E. Credibility

The Arbitrator is disinclined to apply the "false in one false in all" principle to the testimony of Ms. Anclien. While she may have misconstrued the time frame during which the table appeared to come in contact with CW, the incident undoubtedly occurred. McNamara's testimony that a cabinet blocked the physical contact with CW and lasted only a minute or two as opposed to Anclien's recollection of 20-30 minutes persuades the Arbitrator that she embellished or misremembered this incident; however, for the remainder of her testimony, there is corroboration by LoBello, Romero, Furia and others that Filo

twisted the wrists and bent back the fingers of students on multiple occasions as a form of corporal punishment.

With respect to the alleged discrepancy in Romero's testimony regarding the restraint of MC (5b), McNamara testified that he couldn't see what Filo was doing with her hands on the other side of MC. (Tr. @ 645-646).

#### F. Joint Compression Defense

In her Statement of Evidence and during her testimony, Filo has defended the specifications that she bent the fingers and twisted the wrists of several students by claiming that she was using a technique she referred to as "deep joint compression." She testified that she was taught the technique by an occupational therapist, employed by the Commission. She described it as follows:

Q. Now once again I just want to make sure we have it for the record, you talk about the fingers, what did you mean by compression because I felt, I don't think you articulated it.

A. Compression is when you're pushing against either side of the joints to make the joints compress and then instead of pulling back you would release so it was a natural release. (Tr. @ 881).

Q. The Arbitrator asked you what you referred to the pressure technique and you said deep pressure. But in your statement you refer to it as quote and you have quotes around it deep joint compression, right?

A I performed both deep pressure and deep joint compression.

Q. And the one you were taught by or trained by one of the occupational therapist, which one was that?

A. Both.

Q. So it was both deep joint compression. How is deep joint compression different from the other technique?

A. Deep joint compression you're creating impact to the joint whereas

pressure you're impacting the muscles. (Tr. @899)

In the Arbitrator's opinion, the Respondent's claim that the witnesses misinterpreted what they observed as bending back fingers and twisting wrists because she was engaged in deep joint compression or deep pressure was discredited by the testimony of Ms. Audrey Weiss, an occupational therapist.

Ms. Weiss disputed the Respondent's claim in her answer that she had engaged in "deep joint compressions" involving MC and TH. In demonstrating the joint compressions used by occupational therapist, Weiss displayed a gentle squeezing and tugging, distinguishable from the twisting of the wrist and bending back of the fingers described by the witnesses to Filo's conduct. Filo could not recall the name of the occupational therapist who had taught her the joint compression technique and no expert witness testified on her behalf.. (Tr. @ 863-864, 900-901) Weiss further testified that unless the student's IEP authorizes a teacher to use compressions or brushing techniques, it is not appropriate for a teacher to use them.

There is also no evidence that the restraint techniques used by Filo on the students were part of the Crisis Prevention Intervention ("CPI") or SCIP training she received under the auspices of the Commission. Clearly, the teacher assistants received such training and would have recognized approved restraints, holds and control positions to manage aggressive behavior had Filo used them. (C. Exs. #17, 18).

## II. The 2013-2014 School Year

### Specifications (6a,b, c & d)

#### Commission Position

Ms. Melissa Olesky ("Olesky"), teacher assistant in the Respondent's class from October 25, 2013 until June 19, 2014, testified that she went to New Providence – DLC Principal Julie Gardner just four days after being assigned to Filo's class to report name calling. (Tr. @ 234-235, 293). She subsequently met with the superintendent on September 17, 2014 and offered to write up what she had observed during the 2013-2014 school year. She omitted from her report to the superintendent that Filo had referred to two students as an "idiot" and "retarded." (R. Ex. #H). On the second day of her cross-examination, Olesky recalled that the incident where Filo had allegedly referred to Student RM as an "idiot" did not occur until January 2014, between 9:00 and 9:15 a.m. and therefore beyond the scope of the instant charges. While Olesky admitted that she may have mixed up the incidents when reporting to Gardner, she reiterated that the incidents had occurred. (Tr. @ 229, 302).

Ms. Olesky testified that she did report an incident to Gardner where Filo mimicked a student's autistic behavior and yelled into his ear. She also complained about Filo's and Sadik's belittling treatment of her as well as their inappropriate conduct toward the students. (Tr. @ 285, 234-235; R. Ex. #4). In her statement to Dr. Janet Parmalee, dated September 19, 2014, Olesky wrote, inter alia, the following:

For example, on one occasion, within those four days of me being placed into the room, at the back kidney table where vocational

schedules are being done by all four students, Jennifer Filo, was involved with a student (B.O.); she inappropriately mimicked the noise and hand gesture the student was making at the time, proceeding to take it to the next level and imitate him while screaming it into his ear. (At times, this particular student engages in inappropriate noise as a stim). Within those four days, on a separate school day, during academics in the morning, staff member (Blanca Sadik), was working with student (M.H.), staff member abruptly and inexcusably screamed within close proximity of students ear to, in my opinion, force him to listen more effectively. Which in my opinion, is completely unprofessional and unacceptable. In addition, there were several times in which both staff members (Jennifer Filo and Blanca Sadik), would intentionally throw students vocational tasks, during afternoon schedules, off of the kidney shaped table and onto the floor to make student pick each piece up, simply because student was playing with the pieces inappropriately.

For example, student (M.H.) would occasionally fly his voc task pieces, mostly the plastic large sized nuts and bolts, as if they were airplanes. Instead of intervening professionally, both at different times would intentionally take their one hand and slide it across the table abruptly to knock over all the pieces of the task, and say to the student "You want to fly your task, then fly them all the way over there". Of course, I immediately intervened and picked up the pieces of the task as well as the voc bin myself. That was not well liked by the two of them (J.F. and B.S.), but I did not mind the disrespectful whispers they spoke of me while I was present, in the months following...

In addition to mimicking the hand flapping and vocalizations of BO, Olesky recalled a second incident where BO threw an empty plastic bin and hit Filo with it. In response, Filo, according to Olesky, took BO's fingers and attempted to bend them back as he did the same thing to her. (Tr. @ 232-233, 295-296). Olesky did not report this incident to Gardner.

Ms. Olesky testified that on occasion, Specification 6(d), she observed Filo continue to feed RM although he was visibly distressed. (Tr. @ 309).

Despite working as an aide in the District for nine months and familiarizing herself with the District's student abuse policies, including physical restraint and corporal punishment, Olesky did not report any of the alleged incidents. She also did not take BO to the nurse when Filo screamed into his ear so loud that his own ears hurt and BO began to cry.

Olesky testified that when she reported the BO and MH incidents to Gardner, she was "crying hysterically" while requesting a transfer from Filo's classroom. (Tr. @ 239). Gardner informed Olesky that there were no additional positions available at the time. Following her transfer request around Thanksgiving 2013, Olesky did not make any complaints about Filo to Gardner.

Ms. Audrey Weiss, Occupational Therapist, testified that during her sessions in Filo's class during 2013-2014, Filo would mimic the autistic behavior of students and sometimes yell at them. She observed Filo mimic BO's behavior, repeating his stimming noises loudly in his ear. Ms. Weiss saw Filo do this twice. (Tr. @ 413-414).

Finally, on cross, Weiss testified that Filo had been aggressive with the children, both verbally and physically. (Tr. @ 430).

#### Respondent Position

Respondent relies on the testimony of Gardner that when Olesky requested a transfer in October 2013, she did not report any instances of abuse, but rather her personal mistreatment by Filo and Sadik. (Tr. @ 663-665).

The Respondent further relies on the testimony of Sadik, who was present in the classroom, that neither Olesky nor anyone else ever complained to her.

The fact that Gardner, to whom the student abuse was allegedly reported, took no action persuades Respondent that Olesky's allegations are false.

Respondent argues that "[h]ad there been any truth to her account, one must surmise that the Commissioner would likely have disciplined Ms. Gardner for failing to follow-up on Ms. Olesky's allegations, but she testified that no such discipline was imposed."

### Opinion

With the exception of Specification 6(a), which was corroborated by Weiss, the Arbitrator dismisses the remaining specifications preferred against Filo under Charge I by the Commission for the 2013-2014 school year. In support of Specification 6(a), Weiss testified credibly that Filo mimicked the behavior of BO, by repeating his stinging noises loudly into his ear.

Specifications 6(b), (c) and (d), which rely exclusively on the testimony of Olesky, are dismissed. The testimony of Principal Gardner that Olesky did not report these allegations to her when requesting a transfer from Filo's classroom in October 2013 combined with evidence that Olesky's testimony is biased due to the resentment she harbored against Filo and Sadik for their treatment of her convinces the Arbitrator that the Commission has not met its burden of proof regarding these specifications. Although the Arbitrator discounts the testimony of Sadik, who was terminated by the Commission and accused of misconduct similar to that of Filo, Olesky's statement that she was "not well liked by the two of them (J.F. and B.S.), but I did not mind the disrespectful whispers they spoke to me while I was present in the months following" coupled with Gardner's

testimony that she had no recollection of Olesky's report of student abuse in October 2013 persuades the Arbitrator that the remaining Specifications, which lack corroboration, should be dismissed.

### III. Respondent's Additional Defenses

Having found a preponderance of evidence that the Commission has met its burden of proof with respect to Charge One, Specifications 4a-4k, 5(b) and 6(a), the Arbitrator considers the Respondent's defenses for the purpose of either dismissing any of these specifications on procedural grounds or mitigating the penalty sought by the Commission.

The Respondent has argued that "[d]eficiencies in the Commission's investigation compromises integrity of evidence" and apparently warrants the dismissal of the charges and specifications. The Respondent contends:

The number and sheer magnitude of these proven-false allegations raises serious concerns that the Commission's handling of its investigation was systematically flawed and corrupted the testimony of its witnesses. A number of the witnesses testified that they were present with other staff members when questioned as part of the Commission's investigation, openly discussing their accounts of what transpired together. They were also handed prepared certifications, drafted by Ms. McMahon, to sign, which often times contrasted markedly with the fact summaries they themselves typed. The certifications also tended to contain more allegations than what was reported in the witness's personally-typed statements, and the notes taken during their interviews.

As an example of the deficiencies permeating the Commission's investigation, the Respondent alludes to the testimony and statement of Ms. Furia. According to the Respondent, the statement Furia prepared on September 5, 2014, "memorializing the alleged inappropriate conduct she witnessed" omitted "the supposed incident in which she accused Ms. Filo of



mimicking HM's movements while she was on the floor crying, as well as the incident where Ms. Furia was scratched during her initial therapy session with MM... The same applies to Ms. Romero's certification, which contains rather serious allegations – specifically, that Ms. Filo bent TH's hand and encouraged TH and MH to aggress each other – that were suspiciously left out of her original personally-typed statement.”

The Respondent, through her cross-examination of several Commission witnesses, and in her opening statement, has argued that the Commission and its counsel engaged in improper conduct. Counsel for the Respondent in his opening statement stated: “It is rather unprecedented with respect to manipulation, influencing, and tampering of witnesses... I know it is not really right to bring it to you, but during the course of this proceeding... there's been testimony to the effect uniformly from almost every witness ... that counsel for the Commission has met with all of the fact witnesses together on at least two occasions and during those meetings everybody was asked to share their versions of the events, together, not in isolation.” (Tr. @ 276).

On the other hand, Commission counsel responds that “[d]espite engaging in repetitive and prolonged cross-examination, Respondent's counsel never established any manipulation, influencing or witness tampering, or anything close to it, at least not on the part of the commission or its counsel.”

During Ancien's cross-examination, she testified:

- Q. During any of these meetings, okay, particularly the one a month ago and then the one with Ms. McMahon, the superintendent, were you ever given any information other than your personal knowledge of what you observed particularly with regard to what any of the

other teachers assistants or teachers, may have had to say about my client, were you told what anybody else said?"

A. No. (Tr. @ 70).

Later, she responded to the question, "[A]t any point during your meetings, have you acquired any knowledge of what other witnesses to this matter may have told the superintendent or told the principal, are you aware of their testimony? Anclien acknowledged that "yes, at our last meeting I was given everyone's testimony, including Ms. Filo's, a copy of that." (Tr. @ 71). Anclien further testified that she was given a packet, including the statements of Romero, LoBello, Olesky and Furia. She testified that she was allowed to take the statements home and "I read them just last night before coming." (Tr. @ 82).

At the end of the meeting in September 2014, where all of the Commission's witnesses were present, Commission counsel told them "what the process would be like, we were being told because we all had questions of what to expect." (Tr. @ 73). With respect to her conversation with Romero, Anclien testified:

Q. When did you speak to Karen Romero?

A. I guess February 1<sup>st</sup>, I just texted her saying I wonder if we will have school tomorrow, do you think that the thing is still on, she said yes, it should still be on even if school is canceled.

Q. You didn't have any conversation with Karen whatsoever about her statement, her account of this incident or her presumed testimony at the time of the proceeding, nothing about the facts of this case?

A. No, I mean we are still in a classroom together, so we really don't talk about this but we may have asked each other a question here or there. Honestly I can't recall what they were, you know.

Q. Question about what may have happened, what her understanding was of what happened way back, things like that?

A. Like I might have said I remember this happening, were you there that day, you know, something like that.

Q. Did you have those types of discussions with any of the other witnesses other than Karen?

A. No. (Tr. @74).

Anclien testified that she prepared one statement in August 2014 at the behest of Principal Marmolejos. (R. Ex. #B). In September 2014, she typed up a more detailed statement based upon what she could recall. (R. Ex. #C). Approximately one month prior to her testimony on February 13, 2014, she met with Commission counsel and the superintendent.

LoBello presented his handwritten statement, dated 9/8/14. On December 7, 2014, LoBello prepared a certification with the assistance of Commission counsel. (C. Ex. #6). Between September and December 2014, he met with Commission counsel and Marmolejos along with the other witnesses. He then testified:

- Q. Where did that meeting take place?
- A. It was either in Andrea's office or in there was like a conference room.
- Q. Were there any other attendees to that meeting, sir?
- A. It was the other TAs that were in the classroom, so it would be Karen and Kelly, and I believe Sandy was there.
- Q. And you guys were all participating in the same meeting together?
- A. Yes.
- Q. And you folks were all providing your accounts in the presence of the others in terms of, you know, what your observations were of the incidents in question?
- A. Yes.
- Q. Who was overseeing or directing that meeting, sir?
- A. It was Robin and Andrea...
- Q. This meeting you just talked about with all witnesses there, did you have any after that but prior to today?
- A. I believe so, yes.
- Q. And when was that subsequent meeting, sir?
- A. I don't know, I don't have a date for you.
- Q. Who were the attendees at that meeting?
- A. I believe it was the same.
- Q. Where did that take place?
- A. Conference room.

- Q. And once again all the attendees including the fact witnesses provide their accounts in the presence of the other witnesses?
- A. Yes.
- Q. At any point in time were you given the statements of the other witnesses, the written statements that other witnesses had provided to the Commission?
- A. Yes.
- Q. When was that done, sir?
- A. I don't have a date for you.
- Q. Do you still have them as you sit here today?
- A. Those papers?
- Q. Yes.
- A. I am sure I do, I don't know where I placed them. I don't know exactly where they are.
- Q. At any point in time in preparation for today's proceeding did you have occasion to review the statements of the other witnesses?
- A. No, I did not.
- Q. After you were given them you never read them?
- A. No.
- Q. At any point in time during these meetings, did either counsel for the Commission or anybody within the administration address with you the issue of not reporting what you had observed?
- A. No, I don't believe so.
- Q. At any point in time other than during the course of the meetings that you just spoke of, did you have occasion to have conversations with any of the other aides or staff members who were present in the classroom during any of the incidents that are in question here?
- A. We worked together so of course we are going to have contact.
- Q. With respect to the fact –
- A. Did we meet outside and talk about it?
- Q. Not necessarily meet. Did you have any occasion to speak?
- A. No.
- Q. Either on the phone?
- A. No.
- Q. Not about the facts?
- A. No, no, we kept to ourselves in respect to that. (Tr. @ 155-159).

The Respondent has focused on the discrepancy between Romero's statement "I was not there for the incident with HM" and her certification that on June 27, 2014 "when I returned to the classroom after lunch, Ms. Filo was on the floor with HM. The student was crying hysterically. Ms. Filo copied HM's

behaviors, hitting her back and forth when an open hand slap like a two year old and making raspberries when HM made that sound." (R. Ex. #F; C. Ex. #8) ( Tr. @ 204-205). In the Arbitrator's opinion, Romero credibly clarified the discrepancy by testifying that she was present for part of the 6/27/14 incident with HM.

Romero recalled the meeting with McMahon, Marmolejos and Parmalee as "We had our statements and we were just told to review them and we just talked about what was going to happen with the trial and stuff like that." Later, she received a packet with a copy of Filo's statement/certification. At a prior meeting, "individual staff members spoke of what they recollected during the summer." (Tr. @ 217-218).

The crux of the Respondent's claim of "witness tampering" is that the Commission and/or its counsel improperly influenced the testimony of its witnesses so that they testified in a manner other than their best recollections of what they observed. Despite extensive cross-examination of Anclien, LoBello and Romero by Respondent's counsel regarding their initial statements to the principal in August and September 2014, subsequent certifications in December 2014, and attendance at a hearing preparation meeting in or about January 2015, the Arbitrator discerns no evidence that the Commission's witnesses altered their testimony to add allegations that they did not personally observe, received information from the Commission or its counsel to bolster their testimony, or as a result of meetings attended by the witnesses significantly deviated from their original accounts.

Although the witnesses received the certifications of the other Commission witnesses as well as the certification of Ms. Filo and provided their accounts of the alleged incidents to each other, they did not change their statements or amend their certification. For example, LoBello, who received the packet of witness certifications, testified that he did not read them or communicate with any of the other witnesses before testifying at the hearing. Ms. Anclien denied receiving any information about what the other witnesses may have said. Romero testified on cross-examination that neither Commission counsel nor anyone else suggested that she "put things in your statement that were untrue." (Tr. @ 221). To the extent that discrepancies can be discerned they were clarified as in Romero's case or corroborated by the testimony of other witnesses. With respect to Furia's omission from her statement that Filo mimicked HM's movements on the floor while he was crying, Anclien, LoBello and Romero, along with Furia, corroborated the particulars of the June 27, 2014 incident. There is no specification alleging that during ESY Filo mimicked HM's behavior while he was on the floor.

#### IV. Penalty

Having found no evidence of a procedural irregularity or an appearance of an impropriety that would warrant the dismissal of any charges or specifications on procedural grounds, the Arbitrator reiterates his finding that the Respondent, with the exception of the charges dismissed, committed the misconduct set forth in the Commission's tenure charges. Unlike a procedural irregularity that was

outcome determinative or harmful to the interest of the Respondent, the Commission's investigation and witness preparation were not problematic.

The Commission has met its burden of proof by a preponderance of the credible evidence that Ms. Filo engaged in conduct unbecoming or other just cause manifested in a pattern of corporal punishment and excessive force prohibited by Commission policy and state statute.

The Commission has cited the New Jersey Supreme Court's decision of the "unbecoming conduct" standard to tenure charges as follows:

Unbecoming conduct...has been defined as conduct "which has a tendency to destroy public respect for [government] employees and confidence in the operation of [public] services." Karins v. City of Atlantic City, 152 N.J. 532, 554 (1998) (citation omitted).

Unbecoming conduct may include "any conduct which adversely affects the morale or efficiency of the [department.]" *Ibid.* (citation omitted). The touchstone of the determination lies in the certificate holder's "fitness to discharge the duties and functions of one's office or position." In re Grossman, 127 N.J. Super. 13, 29 (App.Div. 1974). In re Young, 202 N.J. 50, 66 (2010).

Whereas the Respondent has argued that "a number of the accusations made against Ms. Filo would not constitute 'unbecoming conduct' as contemplated by the TEACHNJ ACT even if found to be true," the Arbitrator notes that the charges sustained, as opposed to those alluded to by the Respondent of raising her voice to students, mimicking their behavior, or throwing task pieces on the floor, encompass a pattern of inflicting corporal punishment, including the twisting of students' wrists and bending back their fingers. Moreover, in the Arbitrator's opinion, Filo's unbecoming conduct also entails the withholding the breakfast of MC and MM as punishment (Specification #4g), mimicking the autistic-behavior of student BO while repeating his stimming

noises loudly in his ear (Specification #6a), using a wooden clipboard to hit the knuckles and hands of MM (Specification #4f) and encouraging students to fight with each other (Specification #5b).

The Arbitrator has dismissed Specification #4d. The Arbitrator has not sustained the specification (5a) that charged Filo with raising her voice, namely, "scream[ing] at students on a daily basis" or Specifications 6b, 6c and 6d.

As the Commission correctly asserts, the "use of physical force by a teacher to maintain discipline or to punish infractions constitutes conduct unbecoming a public employee." See, In re Fulcomer, 93 N.J. Super. 401, 421 (App. Div. 1967). "Such conduct can adversely affect the morale or efficiency" of the public entity, the Jointure Commission in the instant case, and has "a tendency to destroy public respect for... [public] employees and confidence in the operation of [public] services." See, In re Emmons, 63 N.J. Super. 136, 140 (App. Div. 1960).

Both parties agree that "the touchstone is fitness to discharge the functions of one's office or position." In re Grossman, 27 N.J. Super. 13, 29 (App. Div.). Clearly, a teacher who engages in the corporal punishment of her students has forfeited the right to continue in position requiring public trust.

Although there is case law which recognizes the difficult task a teacher must perform in managing students with disabilities, particularly students with autistic behaviors prone to physical aggressive and verbal outburst, the Respondent's training and certification ostensibly prepared her to management student acting out behaviors without resort to physical force.



Whereas Respondent argues that "it is quite possible that the other staff members, who were not teachers, either exaggerated or misinterpreted her actions," the Respondent produced a paucity of evidence to support this contention. With the exception of Anclien's testimony regarding Specification 5(a), where she exaggerated or misperceived the time period Filo pulled back MM's fingers, the other teacher assistants credibly testified that they observed corporal punishment being inflicted on HM and other students. Their experience as teacher assistants averaged 7 years, they all received CPI and SCIP training in physical restraints and collectively considered Filo's conduct excessive despite their failure to report.

In her defense, Filo was unable to provide any plausible explanation as to how her massage-type pressure could have been misconstrued as excessive force. For example, in describing the technique she use in blocking HM's forehead as HM attempted to bite her – a technique that Anclien purportedly misconstrued – Filo admitted that this was not a technique she acquired from her CPI training. (Tr. @ 893). Filo recalled that she had learned the "tactile or vestibular sensory input" from an occupational therapist at the DLC, whose name she couldn't recall. At no point in applying her deep joint pressure on MC, which she described as akin to a massage, did Filo validate the technique with her supervisors. She never requested retraining, clarification in the use of physical restraint or additional guidance in controlling student behavior. Filo admitted that none of the training she received sanctioned bending back fingers or twisting wrists.

In the absence of any evidence that the teacher assistants collectively misconstrued what they observed Filo doing when she bent back fingers and twisted wrists to obtain student compliance, the Arbitrator is compelled to conclude that she engaged in a pattern of corporal punishment as distinguished from an isolated incident. This behavior constitutes conduct unbecoming or other just cause warranting the removal of the Respondent's tenure. With the exception of the CW and BK specifications, the Respondent's misconduct has been accurately summarized by the Commission as follows:

- 1) HM (pulling back fingers and wrists); 2) MC (twisting his wrists to one side, while simultaneously bending it severely back, and unnecessarily twisting and bending his arm back; 3) MM (twisting and bending back his wrists, using a wooden clipboard to repeatedly hit his knuckles and hands and swatting back at him when he swung his arms at others ...
- 6) HM (bending her fingers back; 7) TH (bending his fingers back).

In addition to the foregoing misconduct, the preponderant evidence also sustained specifications where Filo encouraged students to hit back at each other, where she mimicked their autistic behaviors, and an incident where she withheld breakfast as punishment.

In the aggregate, the Arbitrator concludes that the Respondent has displayed unbecoming conduct incompatible with the professional standards required of teachers who serve as role models and hold positions where "they teach, inform and mold attitudes and influence the opinions of pupils." See, In re Tenure Hearing of Cotto, EDU 7420-97 (May 10, 2000). Teachers have been dismissed for inflicting physical, mental and emotional punishment. Similar to Respondent here, the teacher in In re Tenure Hearing of Smith, EDU 2838-92

(May 12, 1993) "dug her nails into the student's arms, shoved her into a seat on two occasions and made her stand in the corner from 9:15 until lunch time."

The Arbitrator concurs with the Commission in finding that dismissal is the only appropriate penalty for the Respondent's unbecoming conduct. The gravity of her misconduct, her use of excessive force, and the absence of extenuating circumstances render her unfit to teach. The Respondent's lack of remorse for her use of excessive force and failure to acknowledge that any of her conduct was inappropriate militate against the imposition of a lesser penalty such as a suspension coupled with retraining.

Although the Arbitrator is cognizant of the stressful conditions under which the Respondent has worked as a teacher of autistic students, her experience and training necessitated that she maintain her composure at all times. As Superintendent Parmalee aptly put it, "We cannot guarantee what our students learn and how they progress academically with us ... I have to guarantee our staff does not purposely hurt our kids. I have to guarantee that."

In the final analysis, the Arbitrator concludes that dismissal is the only appropriate penalty that will safeguard the students, ensure accountability for proven misconduct, and serve to deter a similar deviation from the requisite standards.

NOW THEREFORE, as the duly selected Arbitrator, having heard the evidence presented, I hereby issue the following:

RECEIVED BY  
MORRIS UNION JOINTURE COMMISSION  
2015 MAR 23 A 9 37

AWARD

- (1) The Commission proved Charge 1 (Conduct Unbecoming), Specifications 4a-4c, 4e-4k, 5b and 6a and Charge 2 (Other Just Cause).
- (2) The Arbitrator dismisses Charge 1, Specifications 4d, 5a, 6b, 6c and 6d.
- (3) The Respondent, Jennifer Filo, shall be dismissed from her tenure position with the Morris-Union Jointure-Commission.

March 22, 2015

  
Robert T. Simmelkjaer

STATE OF NEW JERSEY  
COUNTY OF BERGEN) SS

I, Robert T. Simmelkjaer, affirm that I have executed this Instrument as my Award in Agency Docket Case No. 334-11/14 sustaining tenure charges as set forth above.

March 22, 2015

  
Robert T. Simmelkjaer