

STATE OF NEW JERSEY
DEPARTMENT OF EDUCATION

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In the Matter of the Tenure Hearing of

KELLY MASCIO

and

SCHOOL DISTRICT OF MULICA TOWNSHIP, ATLANTIC COUNTY

Agency Docket No. 51-2/14

AWARD OF ARBITRATOR

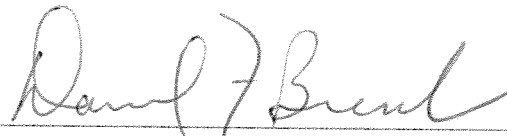
The undersigned Arbitrator, having been designated in accordance with the arbitration agreement entered into by the above-named parties, and having been duly sworn, and having duly heard the proofs and allegations of the parties, AWARDS as follows:

Based on the evidence submitted, the tenure charges brought by Mullica Township School District against the Respondent, Kelly Mascio, cannot be sustained, and are hereby denied. Respondent was, however, culpable for her failure properly to supervise two of her students on September 30, 2013. For this conduct, she shall be issued a ten school day suspension.

Respondent shall be reinstated forthwith to her former position, with uninterrupted seniority and service credit for all purposes and with full back pay, medical insurance, and other fringe benefits from the commencement of her unpaid suspension until her reinstatement, less ten days wages attributable to her suspension, computed as a fraction of entire school year.

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

June 20, 2014

A handwritten signature in cursive script, reading "Daniel F. Brent". The signature is written in black ink and is positioned above a horizontal line.

Daniel F. Brent, Arbitrator

State of New Jersey
County of Mercer

On this 20th day of June, 2014 before me personally came and appeared Daniel F. Brent, to me known and known to me to be the individual described in the foregoing instrument, and he acknowledged to me that he executed the same.

A handwritten signature in black ink, appearing to be 'D. Brent', written over a horizontal line.

An Attorney at Law of the
State of New Jersey

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DEPARTMENT OF EDUCATION

In the Matter of the Tenure Hearing of

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and

SCHOOL DISTRICT OF MULLICA TOWNSHIP, ATLANTIC COUNTY

Agency Docket No. 51-2/14

Hearings were held in the above-entitled matter on May 7, 15, and 16, 2014 at the offices of Cooper Levenson, Esqs. in Cherry Hill, New Jersey, before Daniel F. Brent, duly designated as Impartial Arbitrator by the New Jersey State Department of Education. Both parties attended these hearings, were represented by counsel, and were afforded full and equal opportunity to offer testimony under oath, to cross examine witnesses, and to present evidence and arguments. Both parties submitted post-hearing briefs, and the record was declared closed on May 24, 2014.

APPEARANCES

For the Petitioner:

William S. Donio, Esq., of Cooper Levenson, Esqs.

Brenda Harring-Marro, Superintendent of Schools

Michael Mazzone, Principal

For the Respondent:

Michael C. Damm, Esq., of Selikoff and Cohen, P.A.

Kelly Mascio, Respondent

Myron Plotkin, NJEA Representative

Vince Perna, NJEA Representative

Barbara Rheault, MTTA President

ISSUE SUBMITTED

Should the tenure charges brought by Mullica Township School District against the Respondent, Kelly Mascio, be sustained?

If not, is the Respondent culpable for any misconduct?

If so, what is the appropriate penalty?

NATURE OF THE CASE

The Respondent, Kelly Mascio, has been employed as a teacher by the Mullica Township School District for sixteen years. In the 2013-2014 school year, Respondent was assigned to teach a kindergarten class, a grade level she had not previously taught for the District. An incident occurred in the Respondent's classroom on September 30, 2013, three weeks into the new school year, involving two five-year-old kindergarten students, a male and a female, while Respondent was screening an educational video for twelve of her students, who had returned from standardized testing activities in another room. Her classroom lights were out, but ambient light came through the windows, and the students were seated on the carpet in the middle of the room watching the video projected from a computer drive onto a smart board on the classroom wall, waiting for the rest of the class to finish their testing.

While the students were watching the video, the five-year-old male student went into the single toilet bathroom located in Respondent's classroom and closed the door. Before he exited the bathroom, the female student entered the bathroom. When Respondent noticed light and shadows flickering under the door and asked who was in the bathroom, a student informed her that the male and female student were

in the bathroom together. Respondent immediately told them to come out. When they emerged, the boy's shirt was on backwards, which caused the Respondent to ask him what had happened. As reported by Respondent, the boy stated, "Hers wanted to have sex with me," whereupon the female student said, "He wanted to have some with me." (Employer Exhibit 23)

As soon as the Respondent heard these statements, she reported the incident to the School Psychologist, who immediately notified the school administration and commenced an investigation. The Elementary School Principal was not present that day. When interviewed by the psychologist, both children repeated their statements and acknowledged that they had removed at least some of their clothing in the bathroom and had touched each other's private parts. Nothing in the record clearly indicated that they had removed their underwear as well, but the children told the psychologist and the Middle School Principal who interviewed them that they had engaged in mutual tactile exploratory behavior involving their genital areas.

After the interviews conducted by the School Psychologist and then by the Middle School Principal were reported to the District Superintendent, she summoned Respondent to her office, accompanied by an Association representative, and asked for an explanation of what

had transpired in her classroom. In the interim, the Superintendent checked with her mentor, who confirmed her understanding that the incident had to be reported to the New Jersey Department of Youth and Family Services Institutional Abuse Investigation Unit (hereafter, DYFS or IAIU), that the incident had to be reported to the local police pursuant to a local assistance Memorandum of Agreement Section 4.19 as mandated by applicable statute and Department of Education regulations, that the children's parents had to be notified, and that the Respondent must be immediately suspended with pay. The Superintendent directed the Middle School Principal to reach out for the children's parents and to contact DYFS. The Superintendent then suspended the Respondent with pay.

On October 1, 2013, a representative from the DYFS Institutional Abuse Investigation Unit arrived at the school and interviewed the male student involved in the incident and the other children who had been in Respondent's classroom at the time of the incident. The female student was not interviewed because the girl's mother requested that she not be further "traumatized" by being interviewed by anyone else about the incident. The IAIU Investigator spoke with the School Psychologist and the Middle School Principal, and returned the next day to speak with the other kindergarten students who had been in Respondent's classroom when the incident occurred.

DYFS issued a findings report dated December 3, 2013. After receiving the DYFS findings report, the District initiated its own investigation, as according to the testimony, the District was precluded from conducting such an investigation during the pendency of the DYFS investigation. The District Superintendent, accompanied by the School Psychologist, interviewed the children in Respondent's class on December 18 and 19, 2013. At the conclusion of the Superintendent's investigation, the pending tenure charges were prepared and proffered against the Respondent, charging conduct unbecoming a teacher and unprofessional conduct because of her failure to properly supervise students in her care. The ongoing suspension of Respondent from her teaching duties continued, as the charges called for termination of her employment for conduct unbecoming a teacher and unprofessional conduct.

On March 24, 2014, the undersigned Impartial Arbitrator was appointed by the New Jersey Department of Education from its Special Panel of Impartial Arbitrators. A preliminary conference was held with the counsel for Respondent and the District during which conference evidentiary hearings were scheduled within the statutorily mandated time frame. After hearing the testimony offered by both parties and considering all the evidence introduced at the arbitration hearings, the Arbitrator carefully evaluated all the facts and circumstances presented.

BOARD CHARGES

STATEMENT OF CHARGES AND SPECIFICATIONS REGARDING THE
EMPLOYMENT OF KELLY MASCIO, A TENURED FACULTY MEMBER
WITHIN THE EMPLOY OF THE TOWNSHIP OF
MULLICA BOARD OF EDUCATION

Kelly Mascio, a tenured teaching staff member employed by the Township of Mullica Board of Education (the "Board") engaged in the following unbecoming conduct of a teaching staff member, all of which was pervasive, flagrant and unjustifiable, as follows:

CHARGE 1: Kelly Mascio ("Mascio"), a tenured teaching staff member, engaged in conduct unbecoming a teaching staff member by engaging in unprofessional conduct during the 2013-2014 school year by failing to properly supervise her kindergarten students.

SPECIFICATION: Mascio is a tenured teaching staff member employed by the Board, who for the 2013-2014 school year is assigned to teach a kindergarten class of twenty-one students.

SPECIFICATION: The kindergarten classroom to which contains a single user bathroom is located inside the classroom. Upon entering Mascio's classroom from the hallway door and looking straight ahead, the bathroom door is the second door on the right hand side, after a closet door which is near the classroom entrance. The classroom whiteboards are on the far left wall (directly opposite from the wall where

the bathroom door is located). Facing the bathroom, Mascio's desk is to the left of the whiteboard area. There is also a carpeted area between the whiteboard area and the student tables, providing a space for students to sit for educational activities.

SPECIFICATION: On September 30, 2013, the kindergarten students, including those in Mascio's class, had benchmark assessment testing in the library. At approximately 1:00 p.m., Mascio took a group of approximately eight (8) kindergarten students that finished the testing early back to her classroom to watch a movie, "Daniel Tiger's Neighborhood." The students watched the movie while sitting on the carpet area in Mascio's classroom directly in front of her desk.

SPECIFICATION: During the movie, Ms. L---, an aide, brought another six (6) students to Mascio's classroom, upon the completion of their benchmark assessment testing. There were fourteen students in Mascio's classroom at the time of the incident, significantly less than the total number of students in Mascio's regular class.

SPECIFICATION: While the movie was playing, Mascio failed to properly supervise the reduced number of kindergarten students.

SPECIFICATION: Although the kindergarten students were supposed to be supervised by Mascio, a boy (Student A) and girl (Student B) student, at two separate times, left the carpeted area and went to the back of the classroom where they entered the classroom's single bathroom and remained together. While in the bathroom, Student A and

Student B admit that they removed their clothes and touched each other “private parts.”

SPECIFICATION: Mascio did not realize two of her kindergarten students were missing for at least approximately five (5) minutes.

According to Mascio, upon seeing the light from underneath the bathroom door “flicker,” another kindergarten student reported to Mascio that Student A and Student B were in the classroom’s bathroom together.

SPECIFICATION: When Student A and Student B came out of the bathroom, Student A had his shirt on backwards, Mascio asked the students what they were doing and Student B stated, “well he wanted to have sex with me,” and Student A stated, “hers wanted to have sex with me.”

SPECIFICATION: Mascio’s failure to properly supervise her kindergarten students threatened the health, safety and welfare of her students and allowed two students to engage in improper behavior.

SPECIFICATION: Mascio, a tenured teaching staff member, engaged in unprofessional conduct and conduct unbecoming a teaching staff member, by failing to properly discharge her responsibility for the supervision of pupils with the highest level of care and prudent conduct in violation of Board Policies and Regulations, Staff Handbook, as well as the standards of professional conduct.

CHARGE 2: Kelly Mascio (“Mascio”), a tenured teaching staff member, engaged in conduct unbecoming a teaching staff member by engaging in unprofessional conduct during the 2013-2014 school year by failing to properly discharge her responsibility for the supervision of pupils with the highest level of care and prudent conduct in violation of Board Policy and Regulation Liability for Pupil Welfare Number 3280 and the Staff Handbook.

SPECIFICATION: Board Policy Number 3280 says in pertinent part, “Teaching staff members are responsible for the supervision of pupils and must discharge that responsibility with the highest level of care and prudent conduct.”

SPECIFICATION: Board Regulation Number 3280 says in pertinent part, “A teaching staff member must maintain a standard of care for supervision, control, and protection of pupils commensurate with the members assigned duties and responsibilities.”

SPECIFICATION: Staff Handbook, section “Classroom Responsibilities” states in pertinent part, “Staff members are responsible and accountable for areas and/or classes to which they are assigned. At no time may a student be left unsupervised by a certified staff member.”

SPECIFICATION: Mascio failed to discharge her duties and responsibilities as a professional teaching staff member by failing to supervise her students with the highest level of care and prudent conduct. Mascio’s disregard of her duty to supervise her students

allowed two of her classroom kindergarten students, Student A (boy) and Student B (girl), to enter the single bathroom in the class separately, but remain in the single bathroom together. While Student A and Student B remained in the bathroom, unsupervised, they removed their clothes and touched each other's private parts.

SPECIFICATION: Mascio, a tenured teaching staff member, engaged in unprofessional conduct and conduct unbecoming a teaching staff member, by failing to properly discharge her responsibility for the supervision of pupils with the highest level of care and prudent conduct in violation of Board Policies and Regulations, Staff Handbook, as well as the standards of professional conduct.

RELEVANT STATUTORY LANGUAGE

P.L. 2012, Ch. 26 (TEACHNJ) ACT

8. N.J.S.A. 18a:6-16:

* * *

If, following receipt of the written response to the charges, the commissioner is of the opinion that they are not sufficient to warrant dismissal or reduction in salary of the person charged, he shall dismiss the same and notify said person accordingly. If, however, he shall determine that such charge is sufficient to warrant dismissal or reduction in salary of the person charged, he shall refer the case to an arbitrator pursuant to section [23] 22 of P.L. 2012 Ch. 26 for further proceedings, except that when a motion for summary decision has been made prior to that time, the commissioner may retain the matter for purposes of deciding the motion.

* * *

[23] 22. (New Section)

* * *

b. The following provisions shall apply to a hearing conducted by an arbitrator pursuant to N.J.S. 18A:6-16, except as otherwise provided pursuant to P.L. , c. (C

(1) The hearing shall be held before the arbitrator within 45 days of the assignment of the arbitrator to the case;

* * *

(3) Upon referral of the case for arbitration, the employing board of education shall provide all evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employee or the employee's representative. The employing board of education shall be precluded from presenting any additional evidence at the hearing, except for purposes of impeachment of witnesses. At least 10 days prior to the hearing, the employee shall provide all evidence upon which he will rely, including, but not limited to, documents, electronic evidence, statements of witnesses, and a list of witnesses with a complete summary of their testimony, to the employing board of education or its representative. The employee shall be precluded from presenting any additional evidence at the hearing except for purposes of impeachment of witnesses.

Discovery shall not include depositions, and interrogatories shall be limited to 25 without subparts.

c. The arbitrator shall determine the case under the American Arbitration Association labor arbitration rules. In the event of a conflict between the American Arbitration Association labor arbitration rules and the procedures established pursuant to this section, the procedures established pursuant to this section shall govern.

d. Notwithstanding the provisions of N.J.S. 18A:6-25 or any other section of law to the contrary, the arbitrator shall render a written decision within 45 days of the start of the hearing.

e. The arbitrator's determination shall be final and binding and may not be appealable to the commissioner or the State Board of Education. The determination shall be subject to judicial review and enforcement as provided pursuant to N.J.S. 2A:24-7 through N.J.S. 2A:24-10.

f. Timelines set forth herein shall be strictly followed; the arbitrator or any involved party shall inform the commissioner of any timeline that is not adhered to.

g. An arbitrator may not extend the timeline of holding a hearing beyond 45 days of the assignment of the arbitrator to the case without approval from the commissioner. An arbitrator may not extend the timeline for rendering a written decision within 45 days of the start of the hearing without approval of the commissioner. Extension requests shall occur before the 41st day of the respective timelines set forth herein. The commissioner shall approve or disapprove extension requests within five days of receipt.

* * *

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

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

DISCUSSION AND ANALYSIS

The District charged the Respondent with conduct unbecoming a teacher and with unprofessional conduct arising from her failure to notice that a second kindergarten student had entered the classroom bathroom before another student using the bathroom emerged and that two kindergarteners in her charge stayed in the bathroom in her classroom together for an period of approximately five minutes. As soon as Respondent noticed the flickering shadows and light under the bathroom door, she asked who was in there and was told by a student that two other students were in the bathroom. Respondent immediately told the students to come out of the bathroom, and asked them what they were doing. According to Respondent, the male student said, "Her asked me to have sex with her," whereupon the female student said, "No, he asked me to have some with him." Respondent immediately advised the School Psychologist of the incident, as the Elementary School Principal was not in the building that day. The School Psychologist, who

interviewed the students shortly thereafter, substantially corroborated Respondent's version of the children's accounts.

The District Superintendent concluded on the basis of statements by the two children to the School Psychologist who interviewed them that they had likely engaged in some visual, and perhaps physical, examination of each other's private parts while they were alone in the bathroom. Consequently, after seeking advice from a trusted mentor, the Superintendent notified the Division of Youth and Family Services and the Mullica Township Police Department and directed the Middle School Principal to notify the children's parents. A police report (Employer Exhibit 9) was generated on which the students' full names and addresses were listed, along with an erroneous statement that they had been found naked in the classroom bathroom.

The Institutional Abuse Investigation Unit of DYFS sent an Investigator, who interviewed the male student at the school on October 1, 2013 and returned the next day to speak with the other students who had been in the room when the incident occurred. He also interviewed Respondent, the School Psychologist, and the Middle School Principal, who had interviewed the male and female student on September 30th. The parents of the female student declined to permit her to be interviewed by the IAIU Investigator. According to the

testimony, the District could not conduct its own investigation of this incident until after DYFS had completed its investigation and issued a report.

DYFS issued a findings report dated December 3, 2013, stating that:

Neglect/Inadequate Supervision is not established, in accordance with N.J.S.A. 9:6-8.21. No adjudicative findings have been made. IAIU's review herein is solely investigative.

The "Investigative Observations" section of the IAIU report stated that:

[Male student name], age 5 was not harmed. [Female student name], age 5, was not harmed. The results of the investigation indicate that [Male] and [Female] were found alone inside the classroom bathroom by school teacher, Ms. Mascio. There was no information to confirm that Ms. Mascio was aware that both children were together in the bathroom. The information received indicates [Male] went to the bathroom and then [Female] went into the bathroom without the teacher's consent. [Male] and [Female] confirmed that they engaged in peer to peer sexual contact. Witnesses interviewed confirmed that [Male] and [Female] were in the bathroom together. Based on the information gathered and physical observations of the children, [Male] and [Female] are not neglected children as defined by statute.

In the "Remedial Action" section of the DYFS report, the IAIU Investigator stated:

Corrective action is not required. Your organization has the responsibility to make an independent judgment as to whether to accept IAIU's findings and recommendations....
(Employer Exhibit 19).

Thus, the State of New Jersey determined that neither child had been harmed and that no further action against the Respondent or the District was warranted.

After receiving the DYFS report, the District undertook an independent investigation of the situation. However, by this time, the identity of the two students contained in the police report had been noted by the local press and thereafter picked up by regional broadcast media, which contacted the children's parents. The widespread publicity surrounding the instant case was exacerbated because of the unwise and irresponsible failure of the police to redact the children's identity and addresses from the police report before the report became available to the press or to the public, as well as by the inclusion of an inaccurate statement that the children had been naked in the bathroom. This statement further complicated the situation, perhaps forming a significant factor in the Board's decision to charge Respondent for conduct unbecoming a teacher and with unprofessional misconduct.

The ramifications for the District, for Respondent, and particularly for the children and their families because of this unfortunate lapse may explain the intensity of emotion surrounding the instant case. However, it is the Arbitrator's role and duty to determine whether Respondent's conduct, as established by competent proofs, was sufficient to justify

terminating her employment. After duly and thoroughly examining all of the documents submitted in evidence, evaluating the testimony offered at the arbitration hearings, and weighing the evidence, the only reasonable conclusion is that Respondent's conduct on September 30, 2013 did not justify her dismissal.

The statement by Respondent's counsel that Respondent should receive no punishment because she did nothing wrong cannot be sustained, as the facts clearly established that Respondent failed adequately to supervise all of the children in her care not just for a momentary interval, but for at least a few minutes. However, unlike the decisions submitted in evidence by both parties that sustained substantial discipline, including termination of employment, in cases involving charges of failure to supervise, Respondent did not leave her children unattended in the classroom; she did not abandon her professional responsibilities to pursue a personal errand; and she did focus her attention on any alternative activity in the classroom that was deleterious to the students in her care or inconsistent with her professional duties.

The positioning of Respondent's desk made it more difficult, but not impossible, to observe both the students on the rug as they watched the video and students moving toward the bathroom. Respondent

apparently lost track of time between head counts, failed to count heads as she scanned the room during the video, and did not discern that a second student had entered the bathroom before the first student emerged. Respondent thus failed to perceive that more than one of her students was not watching the video until she saw movement of light and shadow flickering under the bathroom door.

Respondent contended that no one could anticipate that two kindergartners would sneak into a classroom bathroom and engage in such sexual exploratory conduct. Regardless of whether or not her experience teaching older elementary school students should have alerted her to this particular consequence of losing track of two students within the boundaries of her classroom for a few minutes, Respondent was still obligated to know where all of her students were at all times. That she may have been lulled into a false sense of security while showing a video to twelve students does not insulate her entirely from culpability for her lapse in concentration.

The Respondent was unequivocally responsible to know where each and to know every one of her students was while they were in her classroom under her control. Respondent inaccurately expected, having only been a kindergarten teacher for approximately three weeks, that students of such a tender age understood and would obey her classroom

rule mandating that only one child at a time use the bathroom. Whether or not Respondent's assumption was realistic, her expectation did not exculpate the Respondent from her duty to supervise the children in her room. A momentary lapse in accounting for the twelve children in her care, resulting in her failure to notice that the bathroom door had opened to permit a female student to enter the bathroom while the male student was in the bathroom, does not rise to the level of misconduct necessary to justify a charge of conduct unbecoming a teacher or support a charge of professional misconduct. However, Respondent is culpable for her five- minute failure to provide adequate oversight.

The District initially articulated unsubstantiated speculation that Respondent was distracted because she may have been using her cell phone or using her computer other than to project the video. Respondent provided her cell phone and social media records for the relevant time interval for inspection by the Arbitrator. Nothing in these documents or elsewhere in the evidentiary record supports such a conclusion. Respondent had a lapse in attention while either performing legitimate work-related duties during the projection of the video or while watching the video. As a result, she failed to detect misconduct by two five-year-old children. Fortunately, neither child suffered any harm, as determined officially by the State of New Jersey and as evidenced by the DYFS Investigator's report.

The primary adverse consequence to the Mullica School District arising from this unfortunate incident was triggered by the public dissemination of the details of the incident. The exacerbating factor, apparently attributable to the failure of the police department to protect the names of the families before the police report was made available to the press, cannot be discounted in analyzing the appropriate penalty for Respondent's failure properly to supervise her class for these few minutes. As Respondent argued, if the two children had only been washing their hands in the bathroom at the same time, Respondent would have been counseled to strengthen or reiterate her existing bathroom rules in a manner appropriate for kindergarten students who cannot read or write. However, the two children were not simply washing their hands. They were engaged in behavior that was inappropriate for school premises and, as they told the School Psychologist, repeating conduct with which they had engaged during pre-kindergarten the prior year.

But for Respondent's mistake, the two children would not have engaged in the visual or tactile mutual exploration described to the School Psychologist and the Principal. However, Respondent did not abandon her students, place personal business above her teaching responsibilities, or exercise poor professional judgment by making a bad

decision. She failed to notice that more than one few student was not watching the video. Contrary to the District's assertion, there was no evidence that other children were milling about or otherwise apparently waiting to use the bathroom while these two students were in the bathroom together, and that these waiting students should have alerted Respondent that something was amiss. Moreover, Respondent reported the incident immediately to the School Psychologist in the absence of the Elementary School Principal that day, and cooperated fully in the subsequent DYFS and District investigations.

The District was entitled to conduct its own investigation after receiving the DYFS report, as the District is not bound by the DYFS investigator's conclusion as determinative of allegations of misconduct outside the scope of DYFS jurisdiction. That the District's investigation was deferred because of DYFS' delay in issuing its report does not diminish this right. However, nothing learned by the District during its subsequent investigation established more clearly that the children had been discovered naked or stated they were naked in the classroom bathroom, or had actual physical sexual contact. Nor was any additional factor established during the District's investigation that justified a finding by the District of conduct unbecoming a teacher or any professional misconduct more serious than what Respondent had

described in her reports to the District administration or other than what IAIU had discovered in its investigation.

Respondent is culpable for the lapse in concentration that caused her failure to discern for approximately five minutes that two children were in the bathroom, as that is the essence of her misconduct, although the ramifications were intensified because the two five-year-old students decided to act out their sexual curiosity at that moment. Although this lapse constituted a failure properly to supervise her students in the classroom, this error did not justify the continuation of her suspension after DYFS reported no harm to the students or found no culpability by Respondent or by the District, and particularly long after the District concluded its investigation.

These consequences could not have occurred if Respondent had noticed the girl's entering the bathroom before the boy emerged, but DYFS officially exonerated Respondent and the District from culpability under the law. The two students' parents were understandably dismayed at the lack of supervision provided by Respondent in her classroom on September 30, 2013. Nevertheless, only a penalty reasonably commensurate with Respondent's offense can be justified.

Moreover, the harm to the District's reputation and the distress caused to the students' families can also be attributed to the unfortunate release of the students' names and addresses and the unsubstantiated notation in the police report that the children were naked. Dissemination of this information, and the ensuing public controversy, did more harm to the District and its reputation than did the time spent in the bathroom by the two children.

Notwithstanding the District's repeated characterization, consistent with the DYFS report, of the activity in the bathroom between five-year-olds as "peer to peer sexual activity" that is indeed inappropriate in a school, the penalty of dismissal is clearly excessive under the circumstances adduced during the District's investigation, and at the arbitration hearings. Similarly, given Respondent's sixteen years of otherwise satisfactory service to the Mullica School District, her eventual declaration of remorse and her expressed willingness to address appropriate bathroom and child supervision procedures in the future, a lengthy suspension is unwarranted, especially considering Respondent's relatively brief lapse in concentration. No students left the classroom. Rather, two students congregated in the bathroom at the same time in violation of a stated classroom policy that required vigilant enforcement, especially, so soon after the beginning of the school year given the age of the students. Consequently, a proportionate penalty must be imposed.

Based on the evidence submitted, the tenure charges brought by Mullica Township School District against the Respondent, Kelly Mascio, cannot be sustained, and are hereby denied. Respondent was, however, culpable for her failure properly to supervise two of her students on September 30, 2013. The District demonstrated proper cause to discipline Respondent for this conduct. Consequently, she shall be issued a ten school-day suspension. Respondent shall be reinstated forthwith to her former position, with uninterrupted seniority and service credit for all purposes and with full back pay, medical insurance, and other fringe benefits from the commencement of her unpaid suspension until her reinstatement, less ten days wages attributable to her suspension, computed as a fraction of entire school year.

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

June 20, 2014

Daniel F. Brent, Arbitrator