17-015

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
COMMISSIONER OF EDUCATION

JAMES VINER,	:
Petitioner,	:
	:
vs.	:
	:
NORTH KINGSTOWN SCHOOL	:
COMMITTEE,	:
Respondent.	:

FINAL DECISION AND ORDER OF COMMISSIONER OF EDUCATION

Held: School Committee's decision to suspend and terminate the teacher's employment was supported by the "good and just cause" required under the state's Teachers' Tenure Act; thus, its decision to suspend and then terminate the teacher's employment is affirmed.

May 09, 2017

On December 18, 2015, Petitioner, James Viner ("Mr. Viner"), a tenured teacher at North Kingstown High School, filed an appeal with the Commissioner pursuant to the state Teachers' Tenure Act (the "Tenure Act"), RIGL § 16-13-4(a), with respect to the December 7, 2015 decision of Respondent, North Kingstown School Committee (the "School Committee"), to suspend him without pay for the remainder of the 2015-16 school year and then to terminate his employment.

Hearings were held before Hearing Officer Anthony Cottone, who was appointed by the Commissioner pursuant to the Tenure Act, RIGL § 16-13-4(a). Hearing Officer Cottone issued a Hearing Officer Decision recommending the reversal of the School Committee's decision, attached hereto as Exhibit A. The Commissioner of Education accepts the Hearing Officer's findings of fact. The Commissioner further accepts the Hearing Officer's conclusion of law relative to the School Committee's violation of Mr. Viner's constitutional and statutory right to due process. Those provisions of the Hearing Officer Decision are incorporated fully into this Final Decision. However, the Commissioner rejects the Hearing Officer's conclusion that the School Committee failed to meet its burden of proving that its suspension and dismissal of Mr. Viner had been for "good and just cause."

The Commissioner concludes that the Hearing Officer applied the incorrect legal standard in reviewing the School Committee's decision under the Tenure Act and finds, contrary to the Hearing Officer, that the School Committee met its burden of proving that its suspension and dismissal of Mr. Viner was for "good and just cause" for the reasons explained below.

I. The "Just Cause" Standard

The Tenure Act provides, in pertinent part: "No tenured teacher in continuous service shall be dismissed except for good and just cause." R.I. Gen. Laws § 16-13-3(a). Rhode Island

courts have had occasion to weigh in on what "good and just cause" means. "It has been said that the phrase includes any ground that is put forth by the school board in good faith and which is not arbitrary, irrational, unreasonable or irrelevant to the task of building and maintaining an efficient school system." *McCrink v. City of Providence*, No. PC 10-4304, 2012 R.I. Super. LEXIS 152, at *16-17 (R.I. Super. Ct. Sep. 28, 2012). "[T]he term good and just cause includes any cause which bears a reasonable relation to the teacher's fitness or capacity to discharge the duties of his position." *McKenney v. Barrington Sch. Comm.,* No. 2014-2223, 2016 R.I. Super. LEXIS 78, at *20 n.14 (R.I. Super. Ct. July 14, 2016) (internal quotations omitted).

It has been held by courts in Rhode Island and by other courts that termination of a teacher may be justifiable on the basis of a single incident. *See McCrink*, 2012 R.I. Super. LEXIS 152, at *19-20 (the single incident of a teacher's unreported absence was sufficient to support his termination). *See also Rogers v. Board of Educ. of City of New Haven*, 252 Conn. 753, 749 A.2d 1173, 1184 (Conn. 2000) (upholding the termination of a teacher based on a single incident of failing to act to protect the privacy of a student); *Pierre v. Smithfield Sch. Committee,* 2009 R.I. Super. LEXIS 121, 2009 WL 3328362 (R.I. Super. September 9, 2009) (affirming the principle that a single incident can suffice as good cause to justify termination).

In the context of what is "just cause" to terminate a teacher, the Supreme Judicial Court of Massachusetts held upon similar facts that "[a] teacher who models sexually harassing behavior in front of public school students as if it is all in good fun undercuts our constitutional value of freedom from gender discrimination. Indeed, students who witness a teacher engage in such conduct may come to believe that such conduct is acceptable in an academic or professional setting." *Sch. Comm. of Lexington v. Zagaeski*, 469 Mass. 104, 119 (Mass. 2014) (dismissing teacher for conduct unbecoming a teacher was within the superintendent's statutory authority and

was not unwarranted in light of the broader implications of the teacher's conduct) (internal citations omitted).

II. Mr. Viner's Conduct

Mr. Viner admitted to putting his hand next to student R.J.'s ear and making an "air kissing sound" in student R.J.'s ear. *See* Hearing Officer Decision findings of fact (hereinafter "Facts"), at ¶¶ 3, 18(a); 45(a); 51(a). R.J. alleges that Mr. Viner actually kissed her cheek, and she immediately texted her best friend to tell her that Mr. Viner kissed her on the cheek. *See* Facts, at ¶¶ 3, 27, 44. It is undisputed that R.J. did not welcome Mr. Viner's conduct. It is undisputed that when R.J. was informed by her mother that she may need to retake Mr. Viner's class, she became incredibly upset and "immediately freaked out and said 'Oh, Mom! Don't make me take Viner's class again I can't I just can't!!!'" *See* Facts, at ¶ 5. When R.J. texted her friend about the kissing incident, she also used the same terminology – texting "I FREAK ABOUT GOING TO HIS CLASS." *See* Facts, at ¶ 27.

Student R.J. testified that Mr. Viner treated female students differently than male students and commented on female students' appearance "a lot," but never or rarely made comments about male students' physical appearance. *See* Facts, at ¶ 44(c). It is undisputed that Mr. Viner referred to female students with nicknames based on the clothing they wore – by his own admission, in an attempt to shame them into complying with the school's dress code – such as "Crop Top Kelsey" and "Daisy Duket." *See* Facts, at ¶¶ 46(d), 49, 51(c), 51(f). Mr. Viner also regularly used nicknames such as "baby," "babala," "sweetheart," or "honey" for his female students. *See* Facts ¶ 18(e), 46(b), 51(e). Mr. Viner also referred to a female student as "ten out of ten" and a "total package." *See* Facts ¶¶ 18(b), 44(c), 47(c), 51(b).

Mr. Viner took it upon himself to peruse the social media postings of his students. *See* Facts ¶ 37, n 17. He also would edit the photos he found on students' social media sites by putting the students' faces on adult bodies, including those of body builders in a bikini or models, and hanging the edited pictures around his classroom. *See* Facts ¶ 37, n 17; 49.

III. Mr. Viner's Violation of the Staff Policy on Sexual Harassment.

The District's Staff Policy on Sexual Harassment establishes guidelines for teachers in their interactions with students. The Staff Policy on Sexual Harassment has the stated purpose of "establishing and maintaining a learning, activity and working environment which promotes respect for all persons regardless of gender." Respondent's Ex. 4 at 1. It forbids a broad range of sexually harassing conduct. The School Committee relied upon a portion of the District's Staff Policy on Sexual Harassment which forbids "unwelcome …verbal, written visual or physical conduct of a sexual nature" that has the "purpose or effect of unreasonably interfering with an individual's work or academic performance; creating an intimidating, hostile, or offensive working or educational environment; or of adversely affecting the employee's or student's performance, advancement, assigned duties or any other condition of employment, career development, or educational program," including "[u]nwelcome sexual slurs, epithets, threats, verbal abuse, derogatory comments or sexually degrading descriptions or sexually suggestive recordings," as well as "[u]nwelcome sexual jokes, stories, drawings, pictures or gestures." *See* Facts, at ¶ 29; Respondent's Ex. 4 at 1 (quoting §§ 2 and 4 of the Policy). The Superintendent and the Principal both concluded that Mr. Viner had violated that policy, which was confirmed by the School Committee.

For purposes of the "just cause" standard, Mr. Viner's admitted behavior of blowing a kiss in student R.J.'s ear, together with his failure to maintain a respectful atmosphere in his

classroom and failure to maintain appropriate professional boundaries with his students, is sufficient to satisfy termination for just cause. The record in this case is replete with testimony supporting the School Committee's ultimate conclusion that just and good cause existed and was sufficient to terminate Mr. Viner's employment.

Mr. Viner has asserted that he lacked intent to harass any of his students. However, for purposes of sexual harassment, the intent of the alleged harasser is irrelevant. Rather, the focus is on the effect of the alleged harasser's conduct on the student. This is stated clearly in the Staff Policy on Sexual Harassment, which forbids conduct that as the "purpose <u>or effect</u> of unreasonably interfering with an individual's work or academic performance; creating an intimidating, hostile, or offensive working or educational environment; or of adversely affecting the employee's or student's performance, advancement, assigned duties or any other condition of employment, career development, or educational program." (emphasis added). Thus, Mr. Viner's intent, or purpose, however innocent, is irrelevant to the question of whether his conduct was, in fact, harassing – or for that matter whether his conduct merited discharge. The testimony of R.J. and H.D. made clear that they did not welcome Mr. Viner's conduct and that it affected their education in a negative way.

The School Committee has discretion to determine what constitutes good cause to terminate a teacher, which includes any ground that is not irrational, unreasonable, or unrelated to maintaining an efficient school system. The School Committee's decision was rational and reasonable because it found, based on the evidence presented to it, Mr. Viner's conduct was unwelcome conduct of a sexually harassing nature, as defined in the District's Staff Policy on Sexual Harassment, and that Mr. Viner's conduct unreasonably interfered with the educational environment in his classroom.

IV. Title IX

Mr. Viner has argued that the School Committee failed to comply with procedures for investigating sexual harassment mandated under Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C.A. § 1681 (2015). The issue before RIDE, however, is whether the School Committee terminated Mr. Viner's employment for reasons constituting "just cause" under the Tenure Act, not whether the School Committee complied with Title IX procedures or whether Mr. Viner's conduct also violated Title IX. If the conduct at issue supports a finding of "just cause" under the Tenure Act, which it does, that is sufficient to affirm the decision of the School Committee. Whether Mr. Viner also violated Title IX, or whether the School Committee violated Title IX procedures, are not questions properly before RIDE.

Based on the evidence before RIDE, the North Kingstown School Committee's conclusion that Mr. Viner's conduct was inappropriate and a violation of the District's Staff Policy on Sexual Harassment was in good faith and was not arbitrary, irrational, unreasonable or irrelevant to the task of building and maintaining an efficient school system. In summary, the School Committee met its burden of proving that there had been "good and just cause" to justify its December 7, 2015 decision to suspend and then dismiss Mr. Viner.

V. ORDER

For all the above reasons, the School Committee's December 7, 2015 decision to suspend Mr. Viner without pay for the 2015-16 school year and then terminate his employment is hereby affirmed.

____

Ken Wagner, Ph.D.,
Commissioner

Dated: May 09 2017

016-____

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
COMMISSIONER OF EDUCATION

JAMES VINER,	:	
Petitioner,	:	
	:	Exhibit A
vs.	:	
	:	
NORTH KINGSTOWN SCHOOL	:	
COMMITTEE,	:	
Respondent.	:	

DECISION AND ORDER

Held: School Committee violated the constitutional right of a tenured teacher to due process and failed to prove either that the teacher had sexually harassed students or that its decision to suspend and terminate the teacher's employment was otherwise supported by the "good and just cause" required under the state's Teachers' Tenure Act; thus, its decision to suspend and then terminate the teacher's employment is reversed, and the teacher is reinstated with an appropriate award of back pay.

December __, 2016

I. INTRODUCTION

On December 18, 2015, Petitioner, James Viner ("Mr. Viner"), a tenured teacher at North Kingstown High School (the "High School"), filed an appeal with the Commissioner pursuant to the state Teachers' Tenure Act (the "Tenure Act"), RIGL § 16-13-4(a), with respect to the December 7, 2015 decision of Respondent, North Kingstown School Committee (the "School Committee"), to suspend him without pay for the remainder of the 2015-16 school year and then to terminate his employment.

The following facts were deduced from testimony during the hearings held before the undersigned hearing officer, who was appointed by the Commissioner pursuant to the Tenure Act, RIGL § 16-13-4(a), as well as from the exhibits that were entered into evidence in the course of the proceeding.[1]

II. FACTS

1. Mr. Viner has been employed as a teacher for some twenty-two years, eighteen of which have been spent in North Kingstown. *See* Aug. 11 Tr. at 116-117, 122. During the 2014-15 school year, he was a tenured teacher in the High School's Science Department, teaching "Honors Chemistry" and "College Prep. Chemistry." *See id.* at 122.

2. Prior to his recent suspension and termination, Mr. Viner had received satisfactory professional evaluations and had never been the subject of any complaint alleging

---

[1] Due to the fact-intensive nature of the relevant allegations, the introduction into the record of the transcripts of separate hearings before the School Committee (the "SC Tr."), the Department of Labor and Training ("DL&T Tr."), and the Superior Court, as well as pertinent statutory requirements pertaining to agency decisions, *see* RIGL §§ 42-35-9 and 42-35-12, the instant Decision and Order is longer than one might desire. For those interested, the discussion of the relevant issues begins at § III (C), *infra* at 30. Also, it should be noted that references to the transcripts of the hearings before the undersigned will be cited simply with reference to the date and page, and unless expressly noted to the contrary, all cited exhibits were entered into evidence during the hearings before the undersigned.

inappropriate sexual comments or conduct involving students. *See* June 10 Tr. at 86.[2]

A. The Initial Allegation

3. On July 6, 2015, "Mrs. J.", the mother of "R.J.", a student in one of Mr. Viner's Chemistry classes during 2014-15, sent an e-mail to the High School alleging that:

> [t]hroughout the school year Mr. Viner repeatedly made inappropriate comments about other female students in front of my daughter.
>
> On May 5th [R.J.] had a panic attack during the NECAP practice testing and asked to go to the nurse's office (she has social anxiety). As she was preparing to leave the class Mr. Viner leaned in to her and said, 'Hey, [R.J.], lean close, I want to whisper something in your ear.' She leaned in (because she tries hard to please her elders) and instead of saying anything to her, which would have been cause enough for concern, he kissed her on the cheek. This is, of course, completely inappropriate behavior for a teacher, even if he was just trying to comfort her. [R.J.] says that she found it extremely hard to concentrate in his class, that she felt 'creeped out' in his presence.

See Respondent's Ex. 3 at Exhibit A; *see also* May 25 Tr. at 119-120.[3]

4. Mrs. J. first learned of the alleged conduct by Mr. Viner in early July, 2015. R.J. had been in Germany since the end of the school year participating in a foreign exchange program. Upon her return, Mrs. J. informed her that she had failed Algebra and Chemistry, and that since Chemistry would not be offered during summer school, that she might have to "rearrange her electives so she could take the class again during the school year." *See* Respondent's Ex. 3 at Exhibit A.

5. According to Mrs. J., her daughter "immediately freaked out and said 'Oh, Mom! Don't make me take Viner's class again I can't I just can't!!!!!'" *Id.* R.J. then told her mother

---

[2] *See also* Petitioner's Ex. 21 (professional evaluations dated June 9, 2014, June 24, 2013, November 15, 2012, June 8, 2012, February 27, 2012, June 1, 2011, May 17, 2000, May 28, 1999 and May 4, 1998).

[3] R.J. and other student witnesses have been fully identified in several public proceedings related to this matter and counsel for the parties have advised that they do not believe there is any need to maintain their anonymity whether or not they are minors. Indeed, Mr. Viner's attorney has requested that all witnesses be identified fully. *See* May 10 Tr. at 14-15. Nonetheless, the undersigned will refer to student witnesses using initials rather than their full names, which is consistent with the practice of the Commissioner and his predecessors.

about the allegedly inappropriate conduct of Mr. Viner, prompting Mrs. J. to send the July 6, 2015 e-mail to the High School. *Id.; see also* May 11 Tr. at 33-34.

6. In fact, according to Mr. Viner, he had told R.J. that she had passed Chemistry before she left for Germany, and she had been reported as having failed due to the fact that he had neglected to "round-up" her final grade of "68.2" to a passing "70," which he had intended, but simply forgot, to do. *See* August 11 Tr. at 171-73; Petitioner's Ex. 2.[4]

7. Mrs. J.'s e-mail was forwarded to District Superintendent Philip G. Auger, Ph.D. (the "Superintendent"), and after discussing the allegations with the District's private attorney (Mary Ann Carroll), he authorized an attorney from her firm (Aubrey Lombardo) to investigate. *See* May 25 Tr. at 120-21; June 10 Tr. at 73.

8. Thus, from July 21 through August 6, 2015 Attorney Lombardo interviewed five female students who had attended one of Mr. Viner's Chemistry classes during 2014-15, and then summarized the interviews in a six-page report (with Exhibits A and B) which she entitled the *Viner Investigation Report* (hereinafter, the "Report," or the "Viner Report"). *See* Respondent's Ex. 3.

9. The Viner Report consisted solely of Attorney Lombardo's summaries of her interviews with students: (a) "R.J."; (b) "H.D."; (c) "M.R."; (d) "R.B."; and (e) "K.C." *See* Respondent's Ex. 3. The Report did not contain any evaluation or comment as to the credibility of the students interviewed, nor any recommendations with respect to the discipline of Mr. Viner. *See id.* Indeed, Attorney Lombardo did not interview Mr. Viner. Yet, as will be

[4] R.J. testified that although she did not have a clear memory of Mr. Viner informing her that she had passed Chemistry before she left for Germany, he "might have," and in any event, she had assumed that she had passed. *See* ¶ 44(e), *supra*. The grade change was in fact made by Mr. Viner after he was told by his attorney that it would be appropriate to do so, which was after the School Committee's initial approval of the Superintendent's recommendation that he be suspended and terminated. *See* Aug. 11 Tr. at 263-264; Petitioner's Ex. 20.

discussed, the student allegations summarized in the Report formed the basis of the statutorily-mandated statement of cause generated by the School Committee in support of Mr. Viner's suspension and eventual termination. *See* ¶¶ 14-18, *infra*.

B. The Response of the Superintendent and the School Committee

10. On or about July 22, 2015, the District's attorney advised Mr. Viner (through Mary Barten, his union representative from the National Education Association of Rhode Island (the "Union")) that it had been alleged that Mr. Viner "had kissed a student on her ear," and that an investigation was underway. *See* Aug. 11 Tr. at 14-16, 117-118. On August 7, 2015 Mr. Viner was then informed by his Union representative that a meeting with the Superintendent would be scheduled. *See id.* at 117-119.

11. On August 24, 2015, the Superintendent, who had not met with either Attorney Lombardo or any of the students she had interviewed, *see* May 25 Tr. at 156, 158, sent a letter to Mr. Viner and his Union representative summoning Mr. Viner to his office at 10 a.m. that day for what was described as a "pre-deprivation hearing." *See* Petitioner's Ex. 9. The Superintendent explained that "[t]he District had received a student [c]omplaint that you acted in an inappropriate manner in your dealings with her and other students in class" and that "legal counsel for the District has been conducting a thorough investigation into these and related matters." *Id*.[5]

12. Mr. Viner appeared at the Superintendent's office with his Union representative and was asked a series of prepared questions by Attorney Carroll. The High School's Principal, Denise Mancieri, Ph.D. (the "Principal"), also was present and as will be discussed, Mr. Viner allegedly made various admissions during the meeting, s*ee* ¶ 18, *infra*, which lasted between

[5] Mr. Viner testified that he only received the letter after the scheduled meeting had occurred, *see* Aug. 11 Tr. at 119-120, although it is apparent that his Union representative did receive a copy. *See id.*

thirty and forty minutes. *See* Aug. 11 Tr. at 21, 26.[6]

13. Later that same day (August 24, 2015), Mr. Viner was notified by letter that a complaint that he had "acted in an inappropriate manner" had "been filed against you by a student," *see* Petitioner's Ex. 10, and that at six p.m. the following day (August 25) the Superintendent would recommend to the School Committee that he be suspended without pay for the 2015-16 school year, and then terminated at the close of year. *See id.* Mr. Viner was not provided with a copy of the Viner Report, *see* May 25 Tr. at 153, and neither the identity of the student who made the complaint nor any description of the alleged "inappropriate manner" were provided in the letter. *See* Petitioner's Ex. 10.[7]

14. The Superintendent's written recommendation to the School Committee (the "Superintendent's Recommendation") – which was based entirely upon the Viner Report and the August 24 meeting with Mr. Viner, *see* May 25 Tr. at 156, 160; June 10 Tr. at 68 – was read to the Committee at its August 25, 2015 meeting and provided, in pertinent part, that:

> [d]ue to the corroborated and multiple allegations of inappropriate behavior on the part of Mr. Viner and contained in Attorney Lombardo's report, as well as the admissions of instances of such behavior made by [*sic*] Mr. Viner on August 24, it is the recommendation of the Superintendent that Mr. Viner be suspended without pay for the 2015-2016 school year and that his employment with the School District be terminated at the conclusion of the 2015-2016 school year for good and just cause.

See Respondent's Ex. 5 at 2.[8]

15. The School Committee voted in closed session to accept the Superintendent's

---

[6] Although there was no stenographer, it appears that both Attorney Carroll and Mr. Viner's Union representative took notes of some of Mr. Viner's answers. *See* Petitioner's Exhibit 5; Aug. 11 Tr. at 15.

[7] The Superintendent testified that he had never conducted an investigation involving an allegation of sexual harassment and had never received any training with regard to how such investigations should be conducted. *See id*. at 155.

[8] The Superintendent noted that the Recommendation was made to suspend without pay for the 2015-16 school year, rather than to terminate immediately, so as to avoid the Tenure Act requirement that notice of termination be provided on or before March 1 of the preceding school year. *See* May 25 Tr. at 147; *see also* RIGL § 16-13-2(a).

Recommendation at its August 25 meeting and generated the statement of cause (the "Statement of Cause") mandated under the Tenure Act, *see* RIGL § 16-13-4(a), which was, in substance, a restatement of the Superintendent's Recommendation. *Compare* Respondent's Exs. 1 and 5. Thus, the Statement of Cause, like the Superintendent's Recommendation, cited two factors in support of its decision: (a) the "corroborated and multiple allegations of inappropriate behavior on the part of Mr. Viner and contained in Attorney Lombardo's report." *See* Respondent's Ex. 1 at 5; and (b) the "admissions of instances of such behavior made by [sic] Mr. Viner at the August 24 meeting with the Superintendent." *Id*.

16. As to the "corroborated and multiple allegations of inappropriate behavior," which Mr. Viner denied, the Statement of Cause provided that "the general nature of the complaint" was that Mr. Viner had made "inappropriate comments about female students and their physical appearance in the presence of the entire class." *See* Petitioner's Ex. 1 at 2.

17. The Statement of Cause also referred to other specific allegations that were denied by Mr. Viner, including that he had:

(a) "repeatedly rubbed the shoulders and/or neck of at least one female student in class." *See id*. at 3;

(b) "made comments about female students' tight clothing in class." *See id*.; and

(c) "encourage[d] students to cheat on exams." *Id.*

18. As to the admissions allegedly made by Mr. Viner at the August 24 meeting with the Superintendent, the Statement of Cause claimed that Mr. Viner had admitted:

(a) the basic facts of the May 5, 2015 incident involving R.J., "differing only in stating that he merely 'blew a kiss by her ear' [and] denied actually kissing her." *See* Statement of Cause at 2;

(b) referring to one female student as being a 'ten out of ten' and as having a

‘complete body.’” *Id.*;[9]

(c) “commonly referring to another student as ‘Daisy’ in an intended reference to the television character ‘Daisy Dukes.’” *Id.*;

(d) “giving two male students bathroom class passes and implying to the class with a comment alluding to sexual behavior in the bathroom between the two students upon their return to the classroom.” *Id.*; and

(e) “frequently” referring to female students using a word “that had ‘baby’ as its root.” *Id.* at 2.

19. On September 1, 2015, Mr. Viner appealed to the School Committee and requested a full evidentiary hearing, *see* Petitioner’s Ex. 16, as was his right under the Tenure Act. *See* RIGL §16-13-4(a). In addition, Mr. Viner’s attorney requested copies of “all written and recorded statements and/or relevant documents resulting from the investigation of this matter.” *See id.* A second request for “documents relied upon by the Superintendent in making his recommendation to the School Committee” was made by a Union representative on September 23, 2015. *See* Petitioner’s Ex. 13.

20. On September 28, 2015, the School Committee denied Mr. Viner’s request for documents, alleging through its counsel that the request sought “to invade the attorney-client privilege, the attorney work product privilege” and sought “information and documentation that, if provided, would unlawfully violate the privacy rights of third parties,” and was “otherwise overbroad.” *See* Petitioner’s Ex. 14.

C. The Hearings before the State Department of Labor and Training and the School Committee

(i). The DL&T Board of Review Hearing

21. Following his termination, Mr. Viner applied to the state Department of Labor

[9] The subject of the alleged comments, Student “J.O.”, was not interviewed by Attorney Lombardo. *See* June 10 Tr. at 96.

and Training (the "DL&T") for unemployment benefits, which were challenged by the School Department on the ground that he had been "discharged for misconduct," and thus was not entitled to the benefits. A hearing was held before the DL&T Board of Review on November 5, 2015. *See* Respondent's Ex. 6.[10]

22. None of the students testified, but the Superintendent, Principal, and Mr. Viner did, and although certain details were forgotten or omitted and others added, the testimony of all three was in most respects, and in all material respects, consistent with their subsequent testimony before the School Committee on December 7, 2015 and then before the undersigned in May, June and August of 2016, as will be discussed.

23. However, when asked "would it be fair to say that it is possible that Mr. Viner was just innocently just joking around with his students?" *see* DL&T Tr. at 21, the Principal answered: "I have no idea." *Id.*

24. On July 11, 2016, the DL&T Board of Review rendered a decision finding that Mr. Viner had been discharged "for reasons which constitute 'misconduct'" within the meaning of RIGL § 28-44-18,[11] and disqualified him from receiving unemployment insurance benefits. The Decision, however, has no precedential value outside of the employment context.[12]

---

[10] Although the transcript of the DL&T hearing was admitted without objection, it should be noted that it is within the discretion of the undersigned to assign the appropriate weight to be given to the evidence. *See Foster-Glocester Regional School Committee v. Board of Review*, 854 A.2d 1008, 1018 (R.I. 2004) (former testimony in arbitration deciding wrongful termination of tenured teacher entitled to some weight and decision of arbitrator "entitled to probative force" in subsequent hearing before the DL&T).

[11] Under the statute, "misconduct" is defined as "deliberate conduct in willful disregard of the employer's interest, or a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee's incompetence." *Id.* at (a).

[12] *See* RIGL § 28-44-50.1, which provides in pertinent part that:

> the findings of fact, conclusions of law, and determinations of eligibility of the director or the board of review, including decisions reviewed by the district, superior, or supreme courts, shall not be binding upon, or determinative of any issue of fact or law, in any criminal prosecution or civil action or administrative proceeding, other than the proceeding under this chapter in which the said findings, conclusions, or determinations were made.

Id.

(ii) The School Committee Hearing

25. The School Committee conducted its evidentiary hearing on December 7, 2015. *See* Petitioner's Ex. 4.[13] Five (5) witnesses testified: Students (a) R.J.; (b) H.D.; and (c) E.B.; as well as (d) the Principal; and (e) the Superintendent. Mr. Viner did not testify and neither did Students M.R. or K.C., whose allegations were included in the Viner Report.[14]

26. Significantly, R.J. was not questioned about certain text messages between herself and H.D. which had been included in the Viner Report (and attached as Exhibit B to the Report), and although the School Committee received a copy of the text messages along with the Viner Report, they were not provided to Mr. Viner.

27. The relevant text messages between R.J. and H.D. provided in pertinent part, as follows:

> R: . . . I don't wanna know what my NECAP scores are going to look like.
> H: Dude I purposefully failed mine.
> R: To fuck the system?
> H: To fuck over Viner
> R: True man You know he's always complimenting all the girls The other day when I had a panic attack in his class I asked for a pass to the nurse . . .
>
> * * *
>
> HE KISSED ME ON THE CHEEK. THAT'S SEXUAL ASSAULT.
> H: AND THEN HE DID IT TO ME OH WAIT ARE [sic] YOU TALKING ABOUT THE KISSY THING
> R: I HAVENT TOLD ANYONE AND I DON'T KNOW WHAT TO DO

---

[13] The transcript of the December 7, 2015 hearing before the School Committee was marked for identification purposes as Petitioner's Ex. 4, *see* May 10 Tr. at 102 Tr. at 102-03, and although it evidently was the intention of Petitioner's attorney to redact the testimony of those who would not be testifying before the undersigned and then move to admit the redacted version in full, it does not appear that this was accomplished prior to the close of the evidence. However, the undersigned – while consonant of the applicable *de novo* standard of review, *see infra* at 23 –will nonetheless *sua sponte* consider the complete transcript as as a full exhibit and assign it the weight he deems appropriate. *See Foster-Glocester Regional School Committee,* note 10, *supra.*

[14] During the hearing, Mr. Viner's counsel made a third request for the production of documents relating to the identity of Mr. Viner's accusers and/or witnesses at the hearing, and the request was again denied. *See* SC Tr. at 86-88.

H: YEAH FUCKING CREEPY [sic] AGH REPORT HIM
R: I FREAK ABOUT GOING TO HIS CLASS
H: NO HE THOUGHT IT WAS JUST IN YOUR EAR THO HE THOUGHT HE WAS JUST MAKING THE NOISE BUT THAT'S STILL FUCKING WEIRD
R: NAH HE MADE CONTACT MAN
H: I TALKED TO HIM ABOUT IT AHHHHHHHH
R: LIKE CHEEK /EAR CONTACT
H: TELL HIM NAH
R: WEIRD MAN NOT OKAY
H: NAH ALL OVER THE PACW [sic]
R: Idk what to do about it man I mean I don't wanna report him but like
H: but like ew
R: Yeah man I know

Id.

28. In addition, although R.B. was quoted in the Viner Report as alleging that Mr. Viner "comes over to her every day and massages her shoulders and neck and makes crude comments and calls her baby," and "often comes up behind her and touches her - both while she is standing and sitting," *see* Viner Report at 4, her testimony before the School Committee told a very different story, as evidenced by the following colloquy:

Q: And while you were in class with him last year did he at any time physically touch your neck or your shoulders?
A: He rubbed my shoulders once, but I just kind of shrugged and that was the end of it.
Q: Did he ever touch you, physically contact you again?
A: No.

SC Tr. at 10.

29. The Principal identified the applicable school sexual harassment policy, *see* Respondent's Ex. 4, which she described as containing the "guidelines for our staff to make sure that we're all working in a very positive environment, without any disruption," and which provides that employees who engage in "sexual harassment" may be subject to discipline, "up to and including dismissal," *see id*. at 76 – and both the Principal and Superintendent opined that

Mr. Viner had violated examples Nos. 2 and 4 on page 2 of the Policy. *See* SC Tr. at 77-78, 103; ¶ 38, *infra*.

30. In addition, while admitting that she was not aware if any employee of the District had been specifically trained to handle complaints involving sexual harassment, *see* SC Tr. at 84, the Principal noted that:

> we had a relatively new administrative staff, I think with the nature of this particular serious allegation, you know, you know what's going on right now in the world of black lives matter and the police and all of the different things about when the police investigate their own that sometimes things can be misrepresented, and I think we erred on the side of caution and we asked the attorneys to come in and make sure we were doing something that was totally hands off so it could be a very fair investigation.

Id. at 83-84.

31. Following the hearing on December 7, 2015, the School Committee voted to affirm the Superintendent's Recommendation by a vote of four (4) to one (1) taken in executive session. *See* Petitioner's Ex. 4 at 119-120.

32. On December 18, 2015, the School Committee provided Mr. Viner with what it described as "formal notice" of the decision it had reached on December 7. *See* Respondent's Exhibit 2. However, this notice, rather than detailing the basis of the School Committee's decision, merely advised Mr. Viner as to his right of appeal and informed him that the Committee had "voted 4-1 in support of the motion to uphold your suspension without pay for the 2015-2016 school year and to terminate your employment with the North Kingstown School department thereafter." *Id.*

D. The RIDE Hearing

33. As noted, Mr. Viner appealed the School Committee's December 7, 2015 decision to the Commissioner on December 18, 2015, *see* Petitioner's Ex. 1. 21, and in March of 2016,

his counsel presented two witness subpoenas and a subpoena *duces tecum* to the undersigned for signature in an effort to compel the School Committee to produce Attorneys Carroll and Lombardo for questioning, as well as to produce a variety of documents relating to the identity of the accusers against Mr. Viner, to relevant witnesses, and to the precise nature of the allegations against him, which necessarily would have included the Viner Report.[15]

34. After the subpoenas were signed, the School Committee responded by filing a Miscellaneous Petition in Superior Court seeking to quash them on the ground that they sought information from witnesses and documents which were privileged under the attorney-client privilege and/or the work product doctrine. *See North Kingstown School Committee v. Ken Wagner, et al.*, C.A. No. 2016-0128 (Washington County Superior Court) (Matos, J.).

35. On April 22, 2016, the Superior Court, while quashing the witness subpoenas, ruled that the Viner Report should be produced, holding that:

> [i]n this case, although the Court does find that the attorney/client privilege would protect any communications between the attorneys and between members of the School Committee, advice, opinions, or anything of that nature, and the Court, after having reviewed the materials in-camera, the Court cannot find that the actual interviews themselves are protected by the work product privilege. And that is because ***the basis for the suspension of Mr. Viner was both in the letter that was outlined on August 27th I believe, as well as the hearing before the School Committee was based in part, and the justification was based in part on the interviews that were conducted of the students and the information that was obtained from students***, not all of which was provided during the testimony and some of which was directly and indirectly referred to by the Principal that made the determination, certainly Mr. Auger, the original determination to suspend Mr. Viner.
>
> Moreover, the Court doesn't find that the disclosure of the materials, that there is a significant ***-- there certainly isn't any disclosure from the materials that the Court reviewed of any opinion, thought process, communications, or anything that would disclose any kind of strategy or anything on behalf of the School***

[15] RIGL § 16-39-8 provides that "subpoenas shall [ ] be issued by the commissioner or hearing officer at the request of any party participating in any hearing," which are enforceable by the Superior Court. *Id.* Although the referenced Miscellaneous Petition was not entered into evidence, the undersigned will take judicial notice of the public documents filed in the Superior Court case.

> ***Committee.*** The interview reports are factual renditions, the majority of which in one way, shape or form have been made reference to either because Mr. Viner was asked to admit or deny certain allegations, the genesis of which were the interviews of the students, or because some of the students testified, or because the Superintendent and the Principal made reference obliquely to some of the information. So the Court finds that there has been a waiver, and that fairness does dictate that the interviews be turned over.

See April 22 Superior Court Tr. in *North Kingstown School Committee, supra* at 1-20 (emphasis added).[16]

36. The hearing before the undersigned, which involved sworn testimony from a total of twelve witnesses, began on May 10 and then continued on May 25, June 10 and August 11, 2016.

(i). The Superintendent and the Principal

37. In his testimony on May 25, the Superintendent essentially reiterated that Mr. Viner had made the admissions at the August 24, 2015 meeting in his office which were described in the Statement of Cause.[17] When asked what factors had gone into his decision to recommend Mr. Viner's suspension and termination to the School Committee, the Superintendent noted that:

> [g]oing into that decision was, you know, knowledge of this sexual harassment policy and what I felt his conduct had, could be, you know, considered to be sexual harassment according to [the Sexual Harassment Policy adopted by the District[18]].

---

[16] Mr. Viner's appeal of the Court's ruling quashing the witness subpoenas is pending. *See North Kingstown School Committee v. Ken Wagner, et al.*, Case No. SU 16-0241. The School Committee, however, did not appeal the decision to compel production of the Viner Report. *See generally* May 10 Tr. at 15-21 (counsel's discussion of Superior Court proceeding and implications of reversal on appeal).

[17] In addition to the admissions alleged in ¶18, *supra,* the Superintendent alleged that Mr. Viner had admitted:

(a) that the comments made with reference to Student J.O. were "not appropriate." *Id.*;
(b) referred to another student, K.C., as "Kelsey Crop Top" because "he felt she was inappropriately dressed." *Id.* at 135;
(c) admitted that "metaphors like a three-some of some kind came up" during his after-class explanation of Chemistry's double replacement theory. *See id.* at 136; and
(d) admitted that he photo-shopped photos of students, and that "he would go on to students' Facebook pages and find pictures; and then, as a joke, put pictures of students' heads on, you know, bodies of body builders, or you know, models or things like that." *Id.* at 137.

[18] The relevant policy was introduced as Respondent's Ex. 4.

* * *

> I look at Page 2 of the policy where it talks about some examples not intended to be inclusive, any conduct which would constitute sexual harassment whether committed by a supervisor, any employee or not an employee doing business for the School Department, including number two, which I read as unwelcomed sexual slurs, epitaphs, threats, verbal abuse, derogatory comments or sexually degrading descriptions or sexually suggested recordings. Number four, which is unwelcomed sexual jokes, stories, drawings, pictures or gestures.

Id. at 141-42.

38. The portion of the District's Sexual Harassment Policy cited by the Superintendent provided as follows:

> [s]ome examples, not intended to be inclusive, of conduct which may constitute sexual harassment, whether committed by a supervisor, any other employee, or non-employee doing business with the School Department, are:
>
> * * *
>
> 2. Unwelcome sexual slurs, epithets, threats, verbal abuse, derogatory comments or sexually degrading descriptions or sexually suggestive recordings.
>
> * * *
>
> 4. Unwelcome sexual jokes, stories, drawings, pictures or gestures.

See Respondent's Ex. 4 at 2.[19]

39. The Superintendent testified that in his opinion, even if a teacher's motive was solely to comfort a student, the act of blowing a student a kiss would constitute sexual harassment under the District's Policy. *See* June 10 Tr. at 15. In addition, although he had not interviewed J.O., *see id.* at 68, the Superintendent testified that he did not believe she "was telling the entire truth" when she testified that Mr. Viner's comments about her were in relation to her academic performance. *See id*. at 13.

40. The Principal, who had worked with Mr. Viner in the same building for "five or six years," *see id*. at 85-86, corroborated the gist of the Superintendent's testimony relating to the alleged admissions by Mr. Viner at the August 24 meeting. *See* June 10 Tr. at 77-80. She also

[19] The Policy was last amended on February 8, 2006. *Id*.

admitted that she had received no formal training in "sexual harassment investigation," *see id*. at 91-92, and that she did not know whether any employee of the District had received such training. *See id*. at 109. Moreover, the Principal did not recall whether she had seen the Viner Report prior to the August 24, 2015 meeting with the Superintendent, *id*. at 97, or whether she had expressed any opinion to the Superintendent prior to his decision to recommend suspension and termination to the School Committee. *Id*. at 113.

41. Indeed, at one point in her testimony the Principal – who, like the Superintendent, had not met with any of the students interviewed by Attorney Lombardo or with Attorney Lombardo herself, *see id.* at 93 – stated that she had not reached a conclusion as to whether Mr. Viner had actually kissed R.J. on May 5, 2015, *see id*. at 115 and 118-19, and then several questions later concluded that at the time he was charged she did believe that he had, but "didn't want to believe it because I really like [Mr. Viner]." *See id*. at 118. The Principal did, however, believe that Mr. Viner had "put his hands on [R.B.'s] shoulders," but did not explain how or why she had come to this conclusion. *Id*. at 119.

42. Like the Superintendent, the Principal opined that Mr. Viner had violated example numbers 2 and 4 on page 2 of the District's Sexual Harassment Policy (quoted at ¶ 38, *supra*). *See* June 10 Tr. at 84 and 104. She also testified that in her opinion, J.O. had "lied" when she claimed that Mr. Viner's comments to her were with respect to her academic performance, *id*. at 95, although, as noted, neither she nor the Superintendent had actually met with J.O.

(ii). The Students

43. R.J. made clear on May 10, 2016 that she did not believe that Mr. Viner's alleged "kiss" on May 5, 2015 was intended to be sexual, but rather was intended to comfort her," as she had conveyed to Attorney Lombardo. *See* May 10 Tr. at 41, 55-56. Yet, she considered the

conduct to be “basically” a “sexual assault” because “even if it wasn’t meant in a sexual way, it is still generally to be interpreted like a sexual action.” *Id*. at 69.

44. In addition, R.J.:

(a) corroborated in material respect the facts relative to the May 5, 2015 incident as provided in the Viner Report and her mother’s July 6 e-mail, *see* May 10 Tr. at 29-30, stating that:

> I did have a panic attack; and when I asked Mr. Viner’s permission to leave because I wanted to go to the nurse, he told me, of course, I could or something along those lines, and he asked if he could like tell me something. And when I leaned in, he, as far as I remember, he kissed me on the cheek and sent me to the nurse with my pass.

Id. at 29-30;

(b) confirmed that she had not mentioned the alleged kiss to the nurse, *see id.* at 30-31, but told her “best friend” [H.D.] that day or the next (*see id*. at 40) that Mr. Viner “had made contact with [her], like made physical contact with like the cheek are on my face,” *id*. at 32, but did not tell anyone else about the incident before she told her mother in July after being informed by her mother that she had failed Chemistry. *See id*. at 34;

(c) stated that Mr. Viner told her once that she “cleaned up well,” *id*. at 27; and would “compliment people on their appearance a lot,” *id*., adding that:

> [t]he most prominent in my mind is the time he paused a test, the quiz to talk about [J.O.]. She is a girl in my class. He went on about how she was basically a perfect person. She was a ten out of ten. She had the brains, the body and personality; and that, to me, was the most prominent comment.

Id. She also confirmed that J.O. told her she had been “upset and embarrassed” by the comments. *See id*. at 47;

(d) confirmed that she had sent and received the text messages attached to the Viner Report as Ex. B either on May 5 or 6, 2015. *See id*. at 60, 68-69; ¶ 27, *supra*;

(e) stated that when she left for Germany on June 8, 2015, she assumed she had passed Chemistry, although she did not have a “clear memory” of Mr. Viner telling her that before she left, while also admitting that he “might have.” *See id*. at 51-52, 55; and

(f) agreed that Mr. Viner "had a reputation as a very well-liked teacher," *see id*. at 49, that he was "a popular teacher" and that most students "enjoyed his class." *See id.* at 45.

45. H.D., who was in a different Chemistry class taught by Mr. Viner than R.J., also testified before the undersigned on May 10, 2016, stating that:

(a) R.J.:

> told me that she was in the midst of having an anxiety attack or panic attack and Mr. Viner came up behind her and kissed her ear. But I, I did confront him about it, and he told me that he just made the kiss noise, and so I, I still said that wasn't okay.

Id. at 77;

(b) Mr. Viner would:

> make comments about how little clothes the girls were wearing , and he would make jokes about that, or he would make jokes about the length of their clothing. In some instances he would make comments about what some of the girls were wearing in some of the pictures on like their Instagrams; or there was ice bucket challenge video or something and made a comment to my friend about what she was wearing for a bathing suit.

Id. at 79;

(c) Mr. Viner "tried to put the name Daisy Duke on me and I just said, no, I don't like that. No." *Id*. at 82;

(d) Mr. Viner would:

> try to use sexual innuendos to try to get kids to pay attention in class and like understand the material because that was the only time that rowdy classroom would really pay attention . . . He tried to rope me into like a sexual situation like trying to explain like, something about covalent bond and something about some joke about a three-way. I don't remember exactly what was said, but he had tried to make those kinds of connections a lot at the time whenever he was teaching.

Id. at 84; and

(e) she had told Attorney Lombardo that Mr. Viner "was the worst teacher

[she] had ever had" and "does zero teaching." *See id*. at 96.

46. M.R. testified on May 16, 2016 that:

(a) she considered Mr. Viner "a good teacher," *id*. at 273, who was "open and approachable" *id*. at 277, and that "everyone loved him" and "he was one of the nicest teachers in the school." *Id*. at 292;

(b) when asked if he ever made sexual comments about other people, she answered "somewhat," *see id*. ay 274-275, explaining that "like calling someone like sweetheart or honey or stuff like that," *id*. at 274, or calling the students "Baby." *See id*. at 284;

(c) Mr. Viner did not use "vulgar language," or make "inappropriate comments about clothing or appearance," *see id*. at 275, did not suggest that "two boys going to the bathroom were having sex in the bathroom," *see id*. at 277, did not refer to a student as a "ten out of ten," *see id*.,

(d) did call K.C. "Crop Top Kelsey" in front of the class, *see id*. at 289, while adding that "it was more like making jokes about her because we all made fun of [K.C.] because she wore them every day." *Id*. at 288-89; and

(e) did not recall Mr. Viner ever photo-shopping a student's face on the picture of a female body builder in a bikini. *See id*.

47. Neither R.B. nor K.C., whose interviews by Attorney Lombardo were included in the Viner Report, testified before the undersigned. However, other students who were not interviewed by Attorney Lombardo did testify, including J.O., who testified on May 25 that:

(a) Mr. Viner's class was "a fun class" and she never heard him "make sexual comments to students," make comments about students' "bodies or how they were dressed," use "vulgar" language, and he never made her feel "uncomfortable," *see id*. at 189-190, 205, and she never heard a student complain about his conduct in class. *See id*. at 192;

(b) never heard him use the nickname "Daisy Duke" or "Crop Top." *See id*. at 192;

(c) as to the comment alleged to have been made by Mr. Viner that she was a "ten out of ten," she "understood it "as the grades" or her "academic standing" because she "was doing well in the class at the time." *Id*. at 191, 206. She also did not recall that Mr. Viner ever stated that "she had the complete package of body, beauty and brains," *see id*. at 204, and denied ever having told R.J. that the comment had made her feel uncomfortable.

See id. at 198; and

(d) as to the alleged photo-shopping of student's faces, she testified that she remembered him doing so on a picture of a super hero and a character on the television show "Friends," but did not recall that he attached photos on pictures of "female body builder's photo in a bikini." *Id.* at 201-202.

48. In addition, several other students who were not interviewed by Attorney Lombardo or mentioned in the Viner Report testified on May 25, 2016 – including "J.L.",[20] "D.D.", "K.T.", "E.G." and "B.P." – and all attested to their belief that Mr. Viner was a popular and effective teacher,[21] and were nearly unanimous in affirming that:

(a) they never heard a student complain about the Mr. Viner's conduct in class. *See id.* at 184-85 (J.L.), 249-50 (D.D.); and 314 (E.G.);

(b) Mr. Viner never used "vulgar language," "sexual comments" or "sexual innuendo" in front of them (*see id.* at 174-175, 179 (J.L.); 295-96, 299-301 (K.T.); and 311-12 (E.G.); and

(c) Mr. Viner did not make a sexual innuendo or joke with respect to either two boys going to the bathroom or while explaining the double replacement theory. *See id.* at 178-179 (J.L.); 250 (D.D.); 277, 286 (M.R.); 299-300 (K.T.); 313 (E.G.).

49. As to the allegation that Mr. Viner photo-shopped faces of students onto superheroes, television show characters or prom pictures, most recalled that he did so, *see id.* at 217-18 (E.G.); 290 (M.R.); and 296, 306 (K.T.), but only J.L. recalled that he had used a picture of a "woman body builder in a bikini," *see id.* at 179-80 (while also not recalling that that he had used pictures of "girls or models." *See id.* at 180). And it also should be noted that K.T. recalled that Mr. Viner referred to K.C. as "Crop Top Kelsey," adding that he did so "because she wore

[20] He also submitted a letter giving his opinion that Mr. Viner was an excellent teacher. *See* Petitioner's Ex. 6.

[21] *See, e.g., id.* at 171 (J.L., "excellent teacher); 248 (D.D., "excellent teacher"); 277, 292 (M.R., "open and approachable," and "everyone loved him, he was one of the nicest teachers in the school"); 295 (K.T., "helpful, caring and understanding"); 314 (E.G., "best teacher, always caring, very friendly, and somebody kids can go to talk to and who's like always there for them").

crop tops a lot, and that was against the school [dress] code." *Id*. at 304.[22]

50. In testimony before the undersigned, no student corroborated the allegation by R.B. – reported in the Viner Report and described in the Statement of Cause – that Mr. Viner had "repeatedly rubbed her shoulders and neck," *see* ¶ 17(a), although, as noted, R.B. made a very different claim in her testimony before the School Committee. *See* ¶ 28, *supra*. In addition, E.G., who sat right behind R.B. in Mr. Viner's class, testified that she never observed any such conduct. *See* May 25 Tr. at 310-11, 318.[23]

(iii). Mr. Viner

51. As to the admissions allegedly made by Mr. Viner at the August 24, 2015 meeting with the Superintendent, *see* ¶ 18, *supra*, Mr. Viner testified on August 11:

(a) that he did not "recall a specific actual instance [involving R.J. on May 5, 2015]", however, he did recall that R.J. was upset once," adding that "it's possible that I made a noise of some kind, maybe like an air kissing sound. She might have thought was a kiss, but I never kissed her. I was very adamant about that" and "it was for comfort." *See* Aug. 11 Tr. at 125-27;

(b) he did not specifically recall, but indicated he could have referred to J.O. as a "ten out of ten," *see id.* at 123, and could have said J.O. had the "total package," *see id*., adding that it would not have been said with reference to her physical appearance and he believed neither comment would have been inappropriate. *See id*. at 124;

(c) that he referred to H.D. as "Daisy Duket," explaining that:

> [t]his was probably around the same time the weather had gotten nice. She came in. She had shorts on, and there was nothing remarkable about it. I just, it just struck me that I had never said Daisy Duket before. I had said to her, do you want to duke it out at the beginning of the year, and I don't think she thought I was asking her to box with me. And then that's what I said to her. I said, Daisy Duket.
>
> * * *

[22] The High School Dress Code was no entered into evidence, but it was not disputed that "crop tops," i.e., blouses which display the midriff, were not permitted.

[23] In addition, two of the students testified that R.B.'s "reputation for honesty" was "not the best." *See id*. at 261 (D.D.); and *id.* at 280 (M.R.), and M.R. added that "[R.J.]'s reputation for truthfulness" was "not the best either. *Id.*

Id. at 137;

(d) as to the alleged comments referring to male students returning from the bathroom, he stated that:

> [a]s they came through the door, I said to them, oh, come on, where have you been? You weren't in the bathroom. Come on, let's go. After they had been seated, I walked over to them. I said, you two aren't going anywhere together again. And that was the extent of the conversation.

Id. at 133;[24]

(e) as to the allegation that he referred to students "using a word that had 'baby' as its root," testified that:

> I use a word like babe, babala, and I went on to explain that I have, unfortunately have this particular that I do. It's a throw-away thing where sometimes I will call them dude, sister, brother. It's, it's just a throw-away thing. It's not meant to be anything really . . . I don't mean anything by it. It just comes out.

Id. at 139; and

(f) admitted that he did refer to K.C. as "Crop Top Kelsey," "[t]rying to basically push her to cover up, to put on a sweater," but denied having made it her nickname. *See id.* at 130.

52. Mr. Viner flatly denied that he had:

(a) "massaged" R.B.'s shoulders and neck. *See id*. at 189; and/or

(b) allowed students to cheat on exams, and specifically had allowed student R. B. to do so. Mr. Viner testified that he made an inadvertent clerical error and mistakenly included the answer sheet along with a make-up Chemistry exam that had been given to R.B. *See id*. at 168-169.

53. Finally, Mr. Viner submitted some fourteen (14) letters in support, urging that his employment not be terminated. *See* Petitioner's Exs. 22 and 23.[25]

---

[24] In an e-mail to Mr. Viner's attorney, one of the two male students, "D.S.", stated that he "never once felt distracted from my work or offended by anything that [Mr. Viner] said," *see* Petitioner's Ex. 17, adding that Mr. Viner's class was "by far [his] favorite class." *Id.*

[25] Letters were submitted in support of Mr. Viner by: (1) Woonsocket High School Assistant Principal Robert R. Vachon; (2) Woonsocket High School Science Department Chair Linda A. Jzyk; (3) Woonsocket High School

III. DISCUSSION

A. Jurisdiction, Burden of Proof and Standard of Review

The Commissioner's jurisdiction here is provided under the Tenure Act, which makes clear that "[a]ny teacher aggrieved by the decision of the school board [or committee] shall have the right of appeal to the department of elementary and secondary education . . ." RIGL § 16-13-4(a).

It also is clear that the burden of proof is upon the School Committee. *See Hobson v. Rhode Island Bd. of Regents for Elementary and Secondary Educ.*, 1998 WL 726655 (Superior Court, September 29, 1998) (Needham, J.) at 3 (burden of proof must be met by a school committee defending its termination of a tenured teacher); *Clifford v. Board of Regents,* 1987 WL 859783 (Superior Court, April 20, 1987) (Caldarone, J.) at 3 (burden of proof on school committee to provide that bona fide financial exigency justified teacher terminations); *Botelho v. Providence School Board*, RIDE (July 25, 2007) at 8 ("the burden is on the School Board to prove its allegations by a preponderance of the evidence and substantiate that 'good and just cause' supports the termination.").

Finally, as the Court held in *Jacob v. Board of Regents for Ed.*, 117 R.I. 164, 171, 365 A.2d 430, 434 (1976), "[t]he hearing before the commissioner is *de novo*." *Id.* And as the Court noted in *Greenhalgh v. McCanna,* 90 R.I. 417, 421, 158 A.2d 878, 880 (1960), hearing a case *de*

Mathematics Department Chair Paul R. Gagnon; (4) Coventry High School Science Department Chair Raymond Coppa; (5) Exeter-West Greenwich Junior High School Principal Lew Klaiman; (6) Chariho Regional High School Principal Edward P. Morgan; (7) North Kingstown High School Social Studies teacher Lawrence W. Verria; (8) North Kingstown High History & Social Studies teacher Serena Mason; (9) North Kingstown High School Mathematics teacher Lisa Garcia; (10) North Kingstown High School Science teacher Kathleen Crescenzo; (11) North Kingstown Reading Specialist Deborah L. Santagata; (12) North Kingstown High School Spanish teacher Marianna Korney; (13) Mitchell Cournoyer; and (14) Margaret Ryng.

novo means hearing it "as if no [proceeding] whatever had been had . . . below." *Id*.

B. The Positions of the Parties

On June 10, 2016, the undersigned asked the parties to address the following questions:

(a) whether Mr. Viner had a statutory, contractual and/or due process right to have been informed, some time prior to August 24, 2015, as to:

(i) the identity of the students whose statements formed the basis of the August 25, 2015 Superintendent's Recommendation (Respondent's Ex. 5) and the School Committee's [August 27, 2015] Statement of Cause (Respondent's Ex. 1); and/or

(ii) the specific facts underlying the Recommendation and Statement of Cause; and/or

(iii) the contents of the Viner Report (Respondent's Ex. 3); and

(b) whether the Commissioner had the authority to remand the matter to the School Committee for re-consideration, and if so, whether remand would be the appropriate remedy.

See June 10 Tr. at 38-41.

1. Mr. Viner

In addition to responding to the above legal questions, Mr. Viner moved for judgment as a matter of law, *see* Petitioner's July 25, 2016 *Interim Memorandum on Due Process and Motion for Judgment as a Matter of Law* ("Mr. Viner's Interim Mem.") at 7, arguing that:

(a) the August 24, 2015 letters from the Superintendent, *see* Petitioner's Exs. 3 and 10 . . . "fell far short of an adequate notice of the charges against [Mr. Viner], or an explanation of the evidence against him," and thus constituted "a violation of Mr. Viner's rights to pre-deprivation process under *[Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (19850]." *See* Mr. Viner's Interim Mem. at 9-10;[26]

(b) the Superintendent's Recommendation, *see* Respondents Ex. 5, "did not

[26] Citing *McDaniel v. Princeton City Sch. Dist. Bd. of Educ*., 72 F.Supp.2d 874, 880 (S.D. Ohio); *Gniatek v. City of Philadelphia*, 808 F.2d 241, 244 (3d Cir. 1986); *Cotnoir, supra; Stanton v. Mayes*, 552 F.2d 908, 912 (10th Cir. 1977); *County Bd. of Educ. of Clarke County v. Oliver*, 270 Ala. 107, 116 So.2d 566, 568 (1959); *Saxby v. Bibb*,173 Ga. App. 633 , 327 S.E.2d 494, 496 (1985); *Jefferson Consolidated Sch. Dist. v. Carden*, 772 S.W.2d 753, 758 (Mo.App. 1989); and *Benton v. Board of Education*, 219 Neb. 134, 361 N.W.2d 515 (1985).

adequately inform Mr. Viner of precisely what he was accused of, or explain the evidence against him," *see* Mr. Viner's Interim Mem. at 13, as "it [was] not entirely clear whether Mr. Viner was even being charged with having engaged in [the behavior described in the Recommendation], or whether the Superintendent was merely reporting that these allegations had been made." *Id.* In addition, Mr. Viner argued that in the Recommendation:

> [t]he explanation of the evidence against Mr. Viner is similarly vague. Mr. Viner is told that he purportedly 'admitted' to various conduct during the August 24, 2015 meeting. The letter states that the conduct admitted to 'include[s]' various comments. It could be that there are more than those expressly described, but we are not told what they are. Later in the letter, we are told that the allegations were 'corroborated' from sources other than Mr. Viner's purported admissions. However, we are never told who corroborated what allegation - if indeed there was any corroboration. The statement still does not tell us who the witnesses against Mr. Viner were, or even how many of them existed.

Id. at 13; *see also id*. at 13-14, citing *Otero v. Bridgeport Housing Authority*, 297 F.3d 142 (2nd Cir. 2002);

(c) Mr. Viner had a right to review the Viner Report prior to the August 24, 2015 meeting and prior to any appearance before the School Committee, arguing that "the Superintendent's use of the Report, while simultaneously denying Mr. Viner access to that Report, deprived Mr. Viner of a fair chance to convince the School Committee that it should not accept the recommendation to terminate him." *Id.* at 14. Mr. Viner added that:

> [t]he Superintendent's Recommendation specifically referenced and repeatedly referenced the Viner Investigative Report. The Superintendent was clearly using the mere existence of this Report to bolster the credibility of the charges that he was leveling against Mr. Viner. Worse, the Superintendent's summary of the report was not even fair. His summary gave the impression that there a number of female students who had been subjected to improper touching and crude remarks about their bodies, and a number of students who had borne witness to these events.

Id.; *see also id.* at 14-23;[27] and

[27] Citing *Wagner v. Little Rock Sch. Dist*., 373 F.Supp. 876, 882 (E.D. Ark. 1973); *Charland v. Pawtucket Sch. Comm.*, RIDE (November 26, 2001*); Parks v. Goff,* 483 F.Supp. 502, 505 (E.D. Ark. 1980); *McDaniel, supra*; *Newman v. Bd of Educ*., 594 F.2d 299, 305 (2d Cir. 1979);

(d) "[g]iven the severity and persistence of the due process violations wrought upon Mr. Viner," the Commissioner should either:

(i) "immediately rescind the suspension and termination." *Id*. at 23;[28] or

(ii) rule in Mr. Viner's favor as a matter of law. *See id*. at 23-33.[29]

After the undersigned reserved on both the due process issues that had been raised as well as Mr. Viner's Motion for Judgment as a Matter of Law, these arguments were reiterated in Mr. Viner's September 21, 2016 *Supplemental Memorandum on Due Process and Motion for Judgment as a Matter of Law* ("Mr. Viner's Supp. Mem."), where Mr. Viner concluded that:

> the overwhelming weight of the evidence demonstrates that there was no 'just cause' for Mr. Viner's termination. Instead, Mr. Viner's good nature, approachability, and rapport with his students has seized upon by malicious individuals with their own agenda, and distorted into a set of untruths calculated to destroy his career and reputation.

Id. at 21. In support of this conclusion, Mr. Viner claimed that:

(a) although "[t]here [was] some dispute between the parties as to whether or not Mr. Viner gave [R.J.] an 'air kiss,' or actually made physical contact, what both Mr. Viner and [R.J.] do agree upon was that there was no sexual connotation to this action," and thus "there [was] no evidence of any kind of inappropriate behavior." *Id*. at 13;

(b) as to the comments made with respect to student J.O., Mr. Viner argued that "the most telling evidence of misconstruction can be found in the testimony of [J.O.] herself." "Although "[f]or whatever reason, the investigator never interviewed [J.O.] about conduct that was allegedly directed at her," [J.O.] testified that "she did not place any type of sexual construction upon that remark. Instead, she concurred with Mr. Viner's testimony – that it was a remark about her excellent grades." *See id*. at 14-15;

(c) as to referring to H.D. as "Daisy Dukes," he argued that:

---

[28] Citing *Valerio v. William M Davies, Jr. Career and Technical High Sch.,* RIDE (April 29, 1998); and *Chadwick v. Pawtucket Sch. Comm.*, RIDE (1987).

[29] Citing *Cathay, Inc. v. Vindalu*, LLC, 962 A.2d 740 (R.I. 2009); *Charland v. Pawtucket Sch. Comm*., RIDE slip op. at 1 (August 11, 2000); *In re Enterprise Wire Company and Enterprise Independent Union*, 46 LA 359, (March 28, 1966); and Koven & Smith, *Just Cause: The Seven Tests* at 23 (2d ed., 1992).

it is difficult to fathom how the 'Daisy Duke' matter could have risen to the level of a disciplinary matter. Both Mr. Viner and [H.D.'s] testimony are in agreement as to what took place. They agree that Mr. Viner called her by that name twice. They agree that [H.D.] indicated that she did not like the name, and Mr. Viner stopped. [citation omitted]. More importantly, there is no evidence on the record that even remotely supports that there was any sexual connotation to the remark.

Id. at 15;

(d) as to the claim that he made a sexual innuendo when two boys returned together from the bathroom, he argued that "the overwhelming testimony supports Mr. Viner's account of the situation," *id.* at 16, i.e., that "he had 'called out' the boys because they had apparently abused their leave to go to the bathroom, and instead frolicked to the cafeteria." *Id*. at 15-16;

(e) with respect to the allegation that he had "repeatedly rubbed the shoulders and/or neck of . . . at least one female student," Mr. Viner claimed that there was "no support for the claim," and "the record as a whole speaks to only one individual who made a such a claim: R.B. Her testimony is hardly credible." *Id*. at 16;

(f) and Mr. Viner argued that:

[t]he allegation that Mr. Viner encouraged students to cheat is equally without support. The School Committee has presented no competent evidence that even remotely supports that charge. It appears that [R.B.] was accidentally given the answer key to her make-up chemistry midterm. According to the Viner Report, [R.B.] did not see fit to do the honest thing and turn in the answer sheet unused. Instead, she used the answers – and was careful to first clarify that her grade would nevertheless remain unchanged. [citation omitted]. However, a mere clerical error of this nature is not evidence of encouraging students to cheat.

Id. at 17.

In his October 12, 2016 *Reply Memorandum* ("Mr. Viner's Reply Mem."), Mr. Viner argued that:

(a) the fact: (i) that the School Committee had informed Mr. Viner's Union representative of the then-pending investigation as to one of the allegations made against him; (ii) that Mr. Viner did not

immediately ask for a copy of the Viner Report; and/or (iii) that some of his accusers were made known at the hearing before the DL&T, did not mean that the School Committee was not required to provide Mr. Viner with the Report. *See id*. at 1-4;

(b) the School Committee had mischaracterized the testimony of many of the students who testified before the undersigned. *See id.* at 5-8; and

(c) much of the behavior alleged by the School Committee did not constitute teacher misconduct or sexual harassment. *See id*. at 9-10.

And finally, in his October 18, 2016 *Supplemental Memorandum* ("Mr. Viner's Supp. Mem."), Mr. Viner argued that the School Committee's failure to comply with procedures for investigating sexual harassment mandated under Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C.A. § 1681 (2015), mandated that its December 7, 2015 decision be overturned, relying chiefly on a recent report of an investigation at Wesley College that had been conducted by the United States Department of Education's Office for Civil Rights (the "OCR"). *See* Mr. Viner's Supp. Mem. at 2-4, discussing *In Re Wesley College*, OCR No. 03-15-2329 (October 12, 2016 letter from OCR to Wesley College President).[30]

2. The School Committee

In its August 9, 2016 *Omnibus Memorandum of Law as Ordered by Hearing Officer and Memorandum in Support of Objection to James Viner's Motion for Judgment as a Matter of Law* (the "School Committee's Interim Mem."), the School Committee argued that:

(a) Mr. Viner had no constitutional or statutory right to have received the Viner Report prior to the August 24 meeting with the Superintendent. *See* Respondent's Interim Mem. at 9-10, citing *Loudermill, supra* ; *Alba v. Cranston School Committee*, 90 A.3d 174, 184 (R.I. 2012); and *Barber, supra*, and in any event, prior to August 24, the Viner Report was protected by the attorney-client privilege. *See id*. at 9-10, citing Judge Matos' decision in *North Kingstown School Committee v. Ken Wagner, et al.*, C.A. No. 2016-0128 (Washington County Superior Court) (quoted in pertinent part at ¶ 35, *supra*);

[30] Available at http://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf.

(b) even if the failure to produce the Viner Report constituted a due process violation, it was cured because:

(i) the relevant information was provided during the hearing before the DL&T on November 5, 2015, a month prior to the December 7, 2015 hearing before the School Committee. *See* Respondent's Interim Mem. at 12-13; and

(ii) the Report was produced in its entirety prior to the *de novo* hearing before the undersigned. *See id.* at 11, citing *St. Pierre v. Smithfield*, RIDE No. 0005-08, slip op. at 8, n. 11 (February 6, 2008); and

(c) at the time of Mr. Viner's Motion for Judgment, not all of the "facts necessary for the Hearing Officer to decide this case on the merits had been "presented and heard," *see* Respondent's Interim Mem. at 14, and thus the matter was not then "ripe for decision or judgment." *Id.*

The above arguments were reiterated in the School Committee's October 5, 2016 *Supplemental and Post-Hearing Memorandum of Law* (the "School Committee's Supp. Mem."), where the School Committee argued that:

(a) there had been no due process violation since:

(i) Mr. Viner had not requested the documentation supporting the charges against him prior to August 25, 2015. *See id*. at 12;

(ii) the School Committee's attorney had advised Mr. Viner's Union representative of the investigation in July of 2015. *See id.* at 2; and

(iii) the identity of the students making charges against him were made known to Mr. Viner at the hearing before the DL&T on November 5, 2015 – a month prior to the December 7, 2015 hearing before the School Committee. *See id.* at 3-4;

(b) Mr. Viner's alleged admissions during the August 24 meeting with the Superintendent were not repeated verbatim in subsequent testimony before the DL&T and the School Committee. *See id*. at 6-10; and

(c) the testimony of R.J. and H.D. was "consistent, honest and forthright." *Id*. at 14; and

(d) the testimony of M.R., K.T. and E.G. "contradicted Mr. Viner's claims."

See id. at 10-11.

Finally, in its November 11, 2016 *Supplemental/Reply Memorandum in Response to James Viner's Supplemental Memorandum on Title IX* ("School Committee's Supp./Reply Mem."), the School Committee argued that:

(a) RIDE has no jurisdiction to investigate or adjudicate a Title IX claim, and thus, Mr. Viner's reliance upon *In Re Wesley College*, *supra*, is misplaced. *See* School Committee's Supp./Reply Mem. at 3-4; and

(b) the very different facts of *In Re Wesley College, supra,* render it irrelevant here. *See* School Committee's Supp./Reply Mem. at 5.

C. Decision

1. Introduction

This case, like almost all teacher dismissal cases under the Tenure Act, poses two distinct questions. First, did the School Committee comply with the Tenure Act's procedural dictates and afford the teacher his or her constitutional right to procedural due process? And second, did the School Committee meet its burden of proving that its decision to terminate the teacher's employment was supported by the "good and just cause" required under the Act? If the answer to either question is in the negative, an appropriate remedy must be fashioned.

As to the first question, it is clear that the School Committee violated Mr. Viner's statutory and constitutional right to due process, as will be discussed. *See* § 2, *infra* at 32-36. Despite repeated requests, the Committee failed to disclose to Mr. Viner material factual evidence necessary to his defense – including such essential information as the identity of his accusers and the nature of the "corroboration" which the Statement of Cause alleged existed with respect to "multiple allegations" – until it was ordered to do so by the Superior Court months after the School Committee had conducted its evidentiary hearing. And no mention was made of the relevant portions of the District's Sexual Harassment Policy in the Statement of Cause,

despite the fact that the Superintendent and Principal later claimed that the Policy was the basis of their decision.

Despite the number of obvious due process violations, it generally is the case that a teacher's right to appeal a school committee decision to the Commissioner and obtain a *de novo* evidentiary hearing, which is provided under the Tenure Act, is a sufficient remedy. *See* notes 37 and 38, *infra*, and accompanying text. Here, however, the answer to the second question posed above effectively moots the issue.

As to the second question, the School Committee, after violating Mr. Viner's right to due process, failed to prove that its decision to suspend and then terminate his employment was supported on its merits by the "good and just cause" mandated under the Tenure Act. *See* § 3, *infra* at 36-44. In short, the School Committee failed to prove that the comments described in the Statement of Cause (most of which were admitted by Mr. Viner, *compare* §§ 18 and 51, *supra),* amounted to sexual harassment. Although such comments would have been entirely inappropriate in any classroom and should have resulted in some appropriate disciplinary action, the evidence did not establish they they amounted to sexual harassment, either as defined in the District's Sexual Harassment Policy or other applicable law.

With respect to the other offensive conduct alleged – i.e., the alleged "kiss" of one student and the alleged rubbing of the shoulders of another, *see* ¶¶ 44(a)-(b), *supra*, and the Statement of Cause, Petitioner's Ex. 1 at 2 – the Principal essentially admitted at the RIDE hearing that despite sitting through two hearings on the issue, she still didn't know whether Mr. Viner had actually "kissed" R.J. *See* June 10 Tr. at 118-119; and the only evidence that Mr. Viner ever laid a hand on a student was based upon completely inconsistent and irreconcilable hearsay and double hearsay. Discussed *infra* at 40-41.

In short, the evidence with respect to sexual harassment was either totally lacking, contradictory, or simply unpersuasive. Indeed, as will be discussed, the School Committee based its decision to suspend and dismiss a teacher who served without incident for twenty-two years without prior warning or gradual discipline based largely, if not entirely, upon the bare, contradictory allegations of five students, without interviewing other students who may have shed a different light on various issues and without the benefit of *any* meaningful evaluation as to the credibility of the students who were interviewed.

2. The School Committee's Violation of Mr. Viner's Constitutional and Statutory Right to Due Process

The state Supreme Court has made clear that "a tenured teacher has a legitimate claim of entitlement to his position and may not be deprived of it without due process of law under the Fourteenth Amendment." *Barber v. Exeter-West Greenwich School Committee*, 418 A.2d 13, 20 (R.I. 1980), citing *Loudermill*, *supra*.[31] Thus, the Tenure Act, which provides that "no tenured teacher in continuous service shall be dismissed except for good and just cause," RIGL § 16-13-3(a), also provides that a "statement of cause" must be provided prior to dismissal and that:

> ***[t]he statement of cause for dismissal shall be given to the teacher, in writing, by the governing body of the schools.*** The teacher may, within fifteen (15) days of the notification, request, in writing, a hearing before the school committee or school board. The hearing shall be public or private, in the discretion of the teacher. Both teacher and school board shall be entitled to be represented by counsel and to present witnesses. The board shall keep a complete record of the hearing and shall furnish the teacher with a copy.

RIGL § 16-13-4(a) (emphasis added). In addition, the Act provides that, although a teacher may be suspended for "good and just cause," RIGL § 16-13-5(a), prior to any such suspension:

[31] The Due Process Clauses of the Fourteenth Amendment to the United States Constitution, and Article I, Section 2 of the Rhode Island Constitution provide that: "[n]o person shall be deprived of life, liberty or property without due process of law." *Id.* In *Loudermill, supra*, the United States Supreme Court held that a security guard and bus mechanic employed by two boards of education had a property right in their continued state employment and thus could not be deprived of this right "except pursuant to constitutionally adequate procedures." 470 U.S. at 541.

> the school committee shall hold a pre-suspension hearing to determine if a suspension is warranted, and at the pre-suspension hearing, ***shall consider any available evidence and afford the teacher or his or her counsel an opportunity to respond to that evidence.*** In the event a teacher is suspended or otherwise not permitted to perform his or her duties prior to the pre-suspension hearing, then the teacher shall be paid his or her regular salary during that period.

Id. (emphasis added). And the Act provides that:

> [w]henever a teacher is suspended by a school committee, the school committee shall furnish the teacher with ***a complete*** *statement of the cause(s) of the suspension* and, upon request, shall afford the teacher a hearing and appeal pursuant to the procedure set forth in § 16-13-4.

Id. at (b) (emphasis added). Finally, the Act states that:

> [a]ny teacher aggrieved by the decision of the school board shall have the right of appeal to [RIDE] and shall have the right of further appeal to the superior court.

RIGL § 16-13-4(a).

In *Barber, supra*, the Court, while holding that the procedures mandated under the Tenure Act were consistent with constitutional due process requirements, *see* 418 A.2d at 20, also emphasized that "[d]ue process is a flexible concept and the degree of protection afforded to an individual may vary with the particular situation." *Id.*, citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972); *see also Gorman v. University of Rhode Island*, 837 F.2d 7, 12 (1988), quoting *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976) ("[d]ue process, which may be said to mean fair procedure, is not a fixed or rigid concept, but, rather, is a flexible standard which varies depending upon the nature of the interest affected, and the circumstances of the deprivation").

Thus, it is impossible to establish a bright line rule in every case that makes clear the precise detail as to pending charges that a school committee must provide to a teacher whose job is on the line. We are left to determine on a case-by-case basis what specific level of detail a teacher would need to defend himself, and which would thus be required to be included in a

legally effective statement of cause.[32] That being said, a teacher at risk of losing his constitutionally protected interest in his employment must, at a minimum, be provided with the identity of his accusers and an adequate description of the specific charges. Without this basic information, a teacher would be unable to prepare a defense.

Here, the Superintendent's Recommendation and the School Committee's Statement of Cause, which for all intents and purposes were identical, *compare* Respondent's Exs. 1 and 5, advised Mr. Viner that there were two reasons he was being suspended and terminated:

(a) the "corroborated and multiple allegations of inappropriate behavior on the part of Mr. Viner and contained in Attorney Lombardo's report." *See* Respondent's Ex. 1 at 3, Ex. 5 at 2; and

(b) the "admissions of instances of such behavior made by [sic] Mr. Viner at the August 24 meeting with the Superintendent. *See* Respondent's Ex. 1 at 3, Ex. 5 at 2; *see also* ¶ 18, *supra*.

As to the School Committee's first rationale, i.e., the allegedly "corroborated and multiple allegations" in the Viner Report, it is hard to see how Mr. Viner could have prepared a defense to allegations in a report he had not seen. Although it was expressly referenced in the Statement of Cause, Mr. Viner had no access to the Viner Report until the Superior Court ordered its production on April 22, 2016, *see* ¶ 35, *supra*, which was roughly eight (8) months after the Superintendent's Recommendation and the Statement of Cause had been issued (on August 25 and 27, 2015, respectively) and nearly five (5) months after the evidentiary hearing before the School Committee on December 7, 2015.

A school committee seeking to dismiss a teacher cannot fail to disclose material factual

[32] *See, e.g., Perez v. Providence School Board*, RIDE slip. op. at 15 (January 14, 2013) (confining admissible evidence "to those matters of which Appellant had been duly noticed"); *Richardson v. Providence School Board*, RIDE slip. op. at 10-11 (May 25, 2005) ("lack of clarity and comprehensiveness of the notice provided to Appellant" caused Commissioner "to focus only on matters which were specified sufficiently in the notices"). As the First Circuit noted in *Cotnoir v. University of Maine Systems*, 35 F.3d 6 (1st Cir. 1994), "[w]hen a public employee's tenured status is threatened, he is entitled to an explanation of the substance of the employer's evidence against him so that he can present his side of the story." *Id*. at 10-11.

evidence necessary to the teacher's defense, including the identity of his accusers, by simply ensuring that the evidence is created or transmitted by an attorney.[33] Indeed, the District's own Policy on Sexual Harassment provides that one investigating a charge of sexual harassment "will communicate findings to the complainant and the alleged harasser as expeditiously as possible." *See* Respondent's Ex. 4 at 4 (no. 10).[34]

Without access to the Viner Report, the Superintendent's and School Committee's description of the allegations as "multiple and corroborated" did nothing to inform Mr. Viner either as to the identity of those making the allegations, which specific allegations had been corroborated, or the nature of the alleged corroboration; and the Statement of Cause made no mention of the District's Sexual Harassment Policy, which the Superintendent and Principal would later claim was the basis of their decision. *See* ¶¶ 42 and 38, *supra*.[35]

---

[33] The School Committee claims that it refused to produce the Viner Report because it was protected as confidential under the attorney-client privilege. *See* School Committee's Interim Mem. at 5. According to the School Committee, the Superior Court's finding that any privilege had been waived when the Superintendent and the Principal referred to the Report in their December 7, 2015 testimony before the School Committee was an implicit recognition by the Court that prior to waiver, the Report had been privileged. *See id*. However, the fact that the Court found waiver does not necessarily mean that it had concluded that the Viner Report was in fact privileged. The School Committee simply failed to mention that the Court also found that "there certainly [wasn't] any disclosure from the materials that the Court reviewed of any opinion, thought process, communications, or anything that would disclose any kind of strategy or anything on behalf of the School Committee," *see* ¶ 35, *supra*, while concluding that "the interview reports [were] factual renditions." *Id*. Indeed, it is nearly self-evident that the Viner Report, which is devoid of any legal advice of any kind, does not come under the attorney-client privilege. *See State v. Von Bulow*, 475 A.2d 995 (R.I. 1984) (quoting 8 Wigmore, *Evidence*, § 2292 at 554 (McNaughton rev. 1961) (listing elements of privilege).

[34] In addition, Mr. Viner is correct that the fact that counsel may have kept Mr. Viner's Union representative informed as to the status of the investigation, or that Mr. Viner may have learned the identity of certain of the students making allegations against him at the hearing before the DL&T, does not somehow relieve the School Committee of its affirmative obligation to provide Mr. Viner with a "statement of cause" and "an explanation" of the evidence against him after it was available. *See* Mr. Viner's Reply Mem. at 1-4.

[35] Indeed, the School District's Sexual Harassment Policy expressly provides that: (a) "the School Department will designate responsible employees who are trained to investigate sexual harassment complaints," *see id*. at 3 (no. 5); and (b) the investigator "will communicate findings to the complainant and the alleged harasser as expeditiously as possible." *See id.* at 4 (no. 10). Yet here: (a) it does not appear that any employee in the District had received training in "sexual harassment investigation," *see* June 10 Tr. at 91-92 and 109, and there is no evidence whether or not the actual investigator (Attorney Lombardo) had received any such training; and (b) as noted, not only was the Viner Report not provided to Mr. Viner "expeditiously," it took an order from the Superior Court months after the evidentiary hearing before the School Committee before it was eventually produced, despite repeated requests. *See* ¶¶ 19-20, note 14 and ¶ 35, *supra*. Perhaps if a District employee had received the appropriate training, the Superintendent and/or Principal would have realized that relying almost entirely upon the Viner Report was a

Moreover, admissions by a teacher with no real understanding of the specific charges against him at an abruptly-called meeting in a superintendent's office could never serve as a substitute for a school committee's obligation to provide adequate notice to enable the teacher to understand the charges and be able to prepare a defense.[36] Moreover, as has been noted by the First Circuit:

> [w]here an employee is fired in violation of his due process rights, the availability of post-termination grievance procedures will not ordinarily cure the violation. *Kercadó–Meléndez v. Aponte–Roque*, 829 F.2d 255, 263 (1st Cir.1987) (citing *Schultz v. Baumgart*, 738 F.2d 231, 237 (7th Cir.1984)), *cert. denied*, 486 U.S. 1044, 108 S.Ct. 2037, 100 L.Ed.2d 621 (1988). Thus, even where a discharged employee receives a post-termination hearing to review adverse personnel action, the pre-termination hearing still needs to be extensive enough to guard against mistaken decisions, and accordingly, the employee is entitled to notice, ***an explanation of the employer's evidence***, and an opportunity to present his side of the story. *See Loudermill*, 470 U.S. at 546, 105 S.Ct. at 1495; *Brasslett*, 761 F.2d at 836. If an employee is fired without these pre-termination protections, normally the constitutional deprivation is then complete. *Kercadó–Meléndez*, 829 F.2d at 263.

Id. at 12-13 (emphasis added).

Finally, as has been noted, as a general rule providing a teacher with a *de novo* evidentiary hearing *after* he or she has been provided with adequate notice of the charges against him – as is required under the Tenure Act, *see* RIGL § 16-13-4(a) and as took place here – is itself a sufficient remedy for a due process violation occurring before a teacher's employment has been effectively terminated.[37] There does not appear to be any reason to depart from this

---

mistake.

[36] *See, e.g., Cotnoir, supra*, 35 F.3d at 12 (failure to produce report summarizing investigation deprived tenured professor of "opportunity to respond to, or defend himself against the evidence presented"); *Otero v. Bridgeport Housing Authority*, 297 F.3d 142, 151 (2d Cir. 2002) (employee must be provided with something more than "some semblance" of the evidence against him); *Newman v. Board of Education*, 594 F.2d 299, 305 (2d Cir. 1979) (entitlement to investigative documents continues in post-termination phase).

[37] *See, e.g., Ciprian v. Providence School Bd.*, 2009 WL 4479251 (Superior Court, 2009) (Lanphear, J.) (affirming adequacy of post-termination procedures); *Richardson, supra*, RIDE slip op. at 10 (declining to award actual damages and following "better rule on procedural violations" by "ensuring that the required procedures are furnished without delay"); *Hobson v. South Kingstown School Committee*, RIDE (April 4, 1988), slip. op. at 14 ("better rule, as established in recent cases where employee dismissal is not accompanied by proper procedures is to

general rule here.[38]

3. The School Committee's failure to meet its burden of proving that its suspension and dismissal of Mr. Viner had been for "good and just cause."

"Sexual harassment" is defined Under Title IX as "unwelcome conduct of a sexual nature," including "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature." *See* Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. (Apr. 4, 2011);[39] *see also* "Staff Policy on Sexual Harassment" adopted by the School Committee, Respondent's Ex. 4. at 1-2 (defining term). It is a serious and shockingly common occurrence which demands the careful attention of administrators and educators. According to a 2011 report:

> forty-eight percent of middle and high school students reported at least one sexual harassment experience during the 2010-2011 school year.[40] Forty-four percent of students were harassed in person, while thirty percent of students said they were harassed either through Facebook, text messaging, or email.[41] Furthermore, the

---

order that the procedures be furnished without delay"); Ruzicho and Jacobs, 1 Employment Practices Manual, § 7:13 (Westlaw 2016) ("Levels of administrative review with procedures worthy of an adversarial judicial proceeding are unlikely to trigger liability regardless of the inadequacy of the pre-deprivation process) (footnote and citations omitted).

[38] This is not like those few cases where special factors rendered a post-termination hearing, or some other remedy, ineffective. *See, e.g., Baird v. Board of Ed.*, 389 F.3d 685 (7th Cir. 2004) (state breach of contract action did not provide adequate due process to protect rights of school superintendent facing termination whose pre-termination hearing fell short of due process requirements); *Sonnleitner v. York*, 304 F.3d 704 (7th Cir. 2002) (length of deprivation and delay can nullify effectiveness of post-termination remedy); *Stallworth v. City of Evergreen*, 680 So.2d 229, 235 (Ala. 1996) ("To hold that a procedurally adequate post-termination hearing remedies the deprivation inflicted on a discharged employee by an earlier decision based on a pre-termination hearing completely devoid of due process of law would be to render the United States Supreme Court's holding in *Cleveland Board of Education* a nullity").

[39] Available at http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf. In its *Revised Sexual Harassment Guidance* ("Revised Guidance") dated January 19, 2001, the U.S. Department of Education noted that sexual harassment can deny or limit, on the basis of sex, the student's ability to participate in or to receive benefits, services, or opportunities in the school's program" and "is therefore, a form of sex discrimination prohibited by Title IX." *See id.* at § I (at http://www2.ed.gov/about/offices/list/ocr/docs/shguide.html#_ednref6).

[40] Citing Jason Koebler, *Survey: Nearly Half of Students Sexually Harassed in School*, U.S. News & World Report (Nov. 9, 2011), http://www.usnews.com/education/blogs/high-school-notes/2011/11/09/survey-nearly-half-of-students-sexually-harassed-in-school (citing a 2011 report by the American Association of University Women).

[41] Citing *id.*

> likelihood that a student with mental disabilities will be sexually assaulted is significantly higher.[42]

See Fromer, Mosi and Nelson, *Sexual Harassment in Education* (hereinafter, "*Sexual Harassment*"), 17 Geo.J.Gender & L. 451, 453 (2016). Even a cursory review of the pertinent literature makes clear that the response to charges of sexual harassment by many, if not most, school districts is ineffective, which usually is evidenced by a failure to act. As noted by one commentator, "most teachers who sexually abuse students remain in classrooms," *see* MacKinnon, *In their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 Yale L.J. 2038, 2061 (2016),[43] and it is increasingly the case that "accounts of institutional betrayal litter the mainstream press, social media and Title IX case law." *Id*.[44]

Here, the Superintendent's initial recommendation to the School Committee, like the Statement of Cause eventually adopted by the Committee, were based upon: (a) admissions allegedly made by Mr. Viner in the August 24 meeting with the Superintendent. *See* ¶ 18 (a),

---

[42] Citing *id*.

[43] Citing Shakeshaft, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, at 45 (U.S. Dep't. Educ., 2004), http://www2.ed.gov/rschstat/research/pubs/misconductreview/report.pdf [[http://perma.cc/9EY6-FZGK] and Willmsen & O'Hagan, *Coaches Who Prey*, *Seattle Times* (Dec. 17, 2003), http://old.seattletimes.com/news/local/coaches/about.html [[http://perma.cc/B22V-HEC6]). School districts that fail to properly recognize and address the problem can be subject to civil liability, but only if the plaintiff establishes:

> [f]irst, the sexual harassment must be so severe, pervasive, and objectively offensive that it deprives the victims of access to the educational opportunities or benefits provided by the school. Harassment must almost always occur on multiple occasions in order for the school to be found liable. Second, the school must have actual knowledge of the harassment. 'To have actual knowledge of an incident, school officials must have witnessed it or received a report of it.' Third, the school must be deliberately indifferent to the harassment. 'To impose liability, school officials' response to known harassment also must have been clearly unreasonable in light of the known circumstances.'

Sexual Harassment, *supra*, at 460-461; *see generally Gebser v. Lago Vista Independent School District,* 524 U.S. 274 (1998) (school can be liable for monetary damages if a teacher sexually harasses a student, an official who has authority to address the harassment has actual knowledge of the harassment, and that official is deliberately indifferent in responding to the harassment).

[44] For practical information about steps that schools can take to prevent and remedy all types of harassment, including sexual harassment, *see Protecting Students from Harassment and Hate Crime, A Guide for Schools*, issued jointly by the U.S. Department of Education and the National Association of Attorneys General. The Guide is available at the Department's web site at www.ed.gov/pubs/Harassment; *see also* U.S. Department of Education, *Sexual Harassment Resources* (including, inter alia, a Checklist for a Comprehensive Approach to Addressing Harassment), at http://www2.ed.gov/about/offices/list/ocr/sexharassresources.html.

supra; and (b) the Viner Report. *See* ¶ 13, *supra*; *see also* Respondent's Exhibit 1 at 3. And the School Committee relied upon a portion of the District's Sexual Harassment Policy which made reference to "[u]nwelcome sexual slurs, epithets, threats, verbal abuse, derogatory comments or sexually degrading descriptions or sexually suggestive recordings," as well as "[u]nwelcome sexual jokes, stories, drawings, pictures or gestures." *See* ¶ 38, *supra* (quoting §§ 2 and 4 of the Policy).

As to the verbal comments that Mr. Viner allegedly admitted in the August 24, 2015 meeting with the Superintendent, which were, at least in most material respects, subsequently admitted in testimony before the undersigned – such as referring to a student as "a ten out of ten," calling students "babela," calling attention to a student's inappropriate clothing by using a nickname like "Crop Top Kelsey," or using various nicknames or "terms of endearment," compare ¶¶ 18 and 51, *supra*[45] – there is no doubt that *none* of these comments were in any way appropriate, and as noted, should have resulted in some disciplinary action. That conclusion, however, is quite different from concluding that they amounted to sexual harassment under the District's Sexual Harassment Policy or other applicable law – either individually or in their totality.

It certainly is the case that uttering the inappropriate comments identified in the Statement of Cause could, under certain circumstances, constitute sexual harassment, as contemplated by the District's Sexual Harassment Policy. Their utterance even might justify the termination of a teacher without regard to principles of graduated discipline, depending upon

[45] While admitting that he asked two male students where they had been when they returned from the bathroom, Mr. Viner denied that there was any sexual innuendo. *See* ¶ 51(d), *supra*; *see also* testimony of M.R. (¶ 46(c), *supra*), and the testimony of J.L., D.D., K.T., E.G. and B.P. (¶ 48(c), *supra*) (denying that Mr. Viner made such a sexual innuendo or joke). In addition, it should be noted that the Superintendent's testimony as to admissions allegedly made by Mr. Viner at the August 24 meeting with respect to conduct that was not included in the Statement of Cause, *see* note 17, *supra*, is not particularly relevant. The Tenure Act's mandate that a teacher be provided with a Statement of Cause would have little meaning if the goalpost could be moved after the fact.

tone, context and other *sui generis* factors. Here, however, the evidence taken in its totality does not support the School Committee's claim that their utterance by Mr. Viner justified his dismissal without prior warning.

Indeed, eight out of the nine students who testified before the undersigned did not believe that Mr. Viner had a sexual motive when making the comments which the District deemed inappropriate.[46] Moreover, as noted R.J., whose report to her mother initiated the investigation into Mr. Viner, made clear in her testimony before the undersigned that she did not believe that Mr. Viner's alleged "kiss" on May 5, 2015 "was intended to be sexual, but rather was intended to comfort her." *See* ¶ 43, *supra*, citing May 10 Tr. at 41, 55-56. And while reputation is no guarantee of probity, especially in the context of sexual harassment,[47] it certainly is worth noting that Mr. Viner had not one complaint involving inappropriate comments or conduct of a sexual nature in his twenty-two years of teaching, as well as an excellent reputation among his students and among many of his peers. *See* ¶¶ 1 and 47-48 and notes 20 -21 and 25, *supra*.[48] And it is worth repeating that Mr. Viner's Principal – who worked in the same building with Mr. Viner for five or six years, *see* June 10 Tr. at 15 – stated at one point that she had "no idea" whether Mr. Viner was just innocently . . . joking around with his students," *see* DL&T Tr. at 21, and after two hearings, had not herself come to a conclusion as to whether or not Mr. Viner had actually engaged in the alleged conduct which precipitated the investigation which resulted in his dismissal. *See* June 10 Tr. at 115 and 118-119.

---

[46] *See* ¶¶ 47-48, *supra*. The one student who did not so testify, H.D., also admitted to having intentionally failed her NECAP examination "[t]o fuck over Viner." *See* ¶ 27, *supra*, quoting Ex. B to the Viner Report (Respondent's Ex. 3).

[47]If nothing else, the sex scandals involving high level officials within St. George's School in Newport, Rhode Island, the Catholic Church and other prestigious institutions should make clear that reputation is no guarantee against offensive behavior. *See, e.g.,* MacKinnon, *supra*, 125 Yale L.J. at 40 (citations omitted).

[48] The School Committee's claim that the testimony of M.R., K.T. and E.G. "contradicted Mr. Viner's claims," *see* School Committee's Supp, Mem. at 10-11, is simply not supported by the record as a whole, despite the minor inconsistencies in the testimony. *See* Mr. Viner's Reply Mem. at 5-9.

More troubling than the inappropriate comments, whether admitted or not, or the uncorroborated allegation that Mr. Viner "kissed" R.J. on the cheek/ear to comfort her during an anxiety attack, is the allegation by R.B. recounted in the Viner Report that "Mr. Viner comes over to her every day and massages her shoulders and neck and makes crude comments and calls her baby," *see* ¶ 17(a) *supra*, citing the Viner Report (Respondent's Ex. 3) at 3, an allegation which was denied by Mr. Viner. If such conduct actually had occurred, it would have justified immediate dismissal, without prior warning or gradual discipline.

H.D. evidently did tell Attorney Lombardo that Mr. Viner "would often massage the shoulders of another student, [R.B.]." *See* Viner Report (Respondent's Ex. 3) at 3. Yet curiously, she made no mention of the fact during her testimony before the undersigned. Perhaps more significantly, R.B., *who did not testify before the undersigned*, told a very different story to the School Committee than she told to Attorney Lombardo. Thus, R.B. evidently reported to Attorney Lombardo that "Mr. Viner comes over to [R.B.] every day and massages her shoulders and neck and makes crude comments and calls her baby." *See* Viner Report at 4. Yet, before the School Committee, R.B. testified that:

> A: He rubbed my shoulders once, but I just kind of shrugged and that was end of it.
> Q: Did he ever touch you, physically contact you again?
> A: No.

SC Tr. at 10.

Of course, rubbing a student's shoulders even once could well be grounds for dismissal. Yet, when one compares the relevant hearsay, it is hard to credit any of R.B.'s testimony. And it is worth reiterating that: (a) the Viner Report contained no evaluation or comment as to the credibility of the students interviewed. *See* May 25 Tr. at 156, 160; June 10 Tr. at 83-84; (b) many of the students who testified at the RIDE hearing (including J.O.) were never interviewed

by the author of the Viner Report. *See* ¶ 47-48, *supra*; and (c) the author of the Report never even spoke with Mr. Viner.

Thus, the only evidence that Mr. Viner ever laid a hand on R.B. is based entirely upon inconsistent hearsay and double hearsay, i.e., the statements of H.D. and R.B. contained in the Viner Report and R.B.'s testimony before the School Committee. Although is it within the discretion of the undersigned to base a finding of fact entirely upon hearsay evidence, *see Foster-Glocester*, note 10 *supra*, 854 A.2d at 1018-19, the record here does not support the exercise of such discretion since:

(a) as noted, when under oath before the School Committee, R.B. substantially modified her claim. *See supra*, citing SC Tr. at 10;

(b) for whatever reason, R.B. failed to testify before the undersigned;

(c) H.D. made no mention of the alleged conduct in her testimony on May 10;

(d) the credibility of both R.B. and H.D. were called into question by other students. *See* note 23, *supra*; and

(e) the student who sat behind R.B. (E.G.) testified before the undersigned that she had never observed the alleged conduct. *See* May 25 Tr. at 310-11, 318.

Moreover, as noted, it is at best unclear whether the Principal, the Superintendent, or the School Committee ever reached any firm conclusions as to whether much of the specific conduct attributed to Mr. Viner in the Viner Report actually occurred, even after sitting through two hearings. Thus, the Principal's testimony before the undersigned on June 10 – months after the evidentiary hearings before the DL&T and then the School Committee – can fairly be construed as indicating that she still didn't know whether Mr. Viner had actually "kissed" R.J. *See* June 10 Tr. at 118-119; and the School Committee's formal notice of its December 7 decision made no specific findings of any kind. *See* ¶ 32, *supra* (citing Respondent's Exhibit 2).

This is not to suggest that a superintendent and/or a principal cannot properly delegate the handling of a sexual harassment investigation to attorneys. In such cases, it might be that neither official would reach their own conclusions as to all the relevant facts, but instead rely upon the conclusions of others. Yet, such reliance is not appropriate when, as here, the report of the attorney who conducted the investigation at the Superintendent's request did not address the credibility of those making the relevant allegations.

It may well be that, as the Principal told the School Committee, she and her "new administrative staff" had "erred on the side of caution" and "asked the attorneys to come in and make sure we were doing something that was totally hands off so it could be a very fair investigation." *See* ¶ 30, *supra*. Yet, the evidentiary record indicates that this "totally hands off" approach was taken to an inappropriate extreme. Indeed, it appears from the record that everybody in charge – the private attorneys that were hired, the Principal and the Superintendent – just assumed that the various sometimes contradictory allegations made by the five students whose interviews were contained in the Viner Report were accurate, and failed to draw their own conclusions based upon competent evidence. Indeed, as noted, the author of the Report did not herself come to any of her own conclusions as to the credibility of those students who were interviewed, and did not even speak with many of the students who testified before the undersigned, or even to Mr. Viner.

Thus, as noted, the School Committee based its decision to suspend and dismiss a teacher who served without incident for twenty-two years without prior warning or gradual discipline based largely, if not entirely, upon the bare, contradictory allegations of five students, without the benefit of any meaningful evaluation as to their credibility or follow-up by the adults charged with doing so. By contrast, the undersigned did not find the students making the material

allegations against Mr. Viner, i.e., R.J. and H.D., any more or less credible than the far greater number of students who testified that Mr. Viner was an "excellent teacher" who never used "vulgar language," "sexual comments" or "sexual innuendo" in front of them. *See* ¶¶ 48-49 and notes 20-21, *supra.*

In addition, contrary to the School Committee's inference that Mr. Viner's decision not to testify at its December 7, 2015 evidentiary hearing should be held against him, *see* School Committee's Supp. Mem. at 3-4, the decision, rather than evidencing any consciousness of guilt, was more likely a tactical response to the School Committee's failure to more specifically identify the charges and evidence against him. And little time need be spent addressing the allegation in the Statement of Cause that Mr. Viner "encourage[d] students to cheat on exams," *see* Petitioner's Ex. 1 at 3, as: (a) Mr. Viner's testimony flatly denying the allegation, *see* ¶ 52(b), *supra*, was not rebutted; and (b) the Principal made clear that there was "no link" between the alleged cheating on exams and the alleged sexual harassment. *See* June 10 Tr. at 119.

In summary, the School Committee failed to meet its burden of proving that there had been "good and just cause" to justify its December 7, 2015 decision to suspend and then dismiss Mr. Viner. With respect to the appropriate remedy, courts have recognized that "'employment, especially in a career such as education, is more than a way to make money; it is a profession with significant non-monetary awards,' and consequently money damages may be a hollow victory.'"[49] Thus, reinstatement, in addition to an appropriate award of back pay, is appropriate.

4. ORDER

For all the above reasons:

1. The School Committee's December 7, 2015 decision to suspend Mr. Viner without pay for the 2015-16 school year and then terminate his employment is hereby reversed; and

[49] *Baird*, note 37, *supra*, 389 F.3d at 692 (citations omitted).

2. The School Committee shall:

(a) reinstate Mr. Viner as a tenured teacher at the High School forthwith, with the credit for the seniority he would have obtained had he not been suspended and dismissed;

(b) provide him with a teaching assignment comparable to the assignment that he had prior to his suspension and dismissal as soon as practicable;

(c) pay him an amount in back pay and benefits equal to the amount of salary and benefits he would have received had he not been suspended and dismissed, from the date of the suspension and dismissal until the present date; and

(d) from the date of this decision going forward, pay him the salary and benefits he would have received had he not been suspended and dismissed.

For the Commissioner,

____

Anthony F. Cottone, Esq.,
Hearing Officer

____

Ken Wagner, Ph.D.,
Commissioner

Dated: December __, 2016