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**THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:)	
)	
DEBORAH GUDGER,)	OEA Matter No. 1601-0087-16
Employee)	
)	
)	Date of Issuance: December 28, 2018
v.)	
)	
D.C. PUBLIC SCHOOLS,)	MICHELLE R. HARRIS, Esq.
Agency)	Administrative Judge
)	
)	
Sara Safriet, Esq., Employee Representative)	
Nicole C. Dillard, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On September 2, 2016, Deborah Gudger (“Employee”), filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Public Schools’ (“Agency” or “DCPS”) decision to remove her from service due to IMPACT scores. On October 5, 2016, Agency filed its Answer to Employee’s Petition for Appeal. This matter was assigned to the undersigned Administrative Judge (“AJ”) on October 18, 2016. On October 27, 2016, I issued an Order Convening a Prehearing Conference for December 19, 2016. On November 11, 2016, Employee, by and through her counsel, filed a Consent Motion for a Continuance citing to schedule conflicts for Employee’s counsel, and requesting the Prehearing Conference be rescheduled for a date after January 17, 2017. On November 21, 2016, I issued an Order granting Employee’s Motion and rescheduling the Conference for January 27, 2018. On December 30, 2017, the undersigned issued an Order Rescheduling the Conference to February 10, 2017 due to a schedule conflict. On January 17, 2017, the undersigned issued an Order for a Telephonic Conference to address discovery issues with the parties. The conference was held on January 30, 2017. Following the Telephonic Conference, and due to outstanding discovery, the undersigned issued an Order on January 31, 2017, rescheduling the Prehearing Conference to March 6, 2017.

On February 21, 2017¹, Employee filed a Consent Motion for a subsequent Telephonic Discovery Conference. The Discovery Conference was held on February 17, 2017. On March 1,

¹ Employee submitted a courtesy copy via email, but the filed copy arrived and was entered into the record on February 21, 2017.

2017, Employee filed a Motion to Compel Discovery. On March 2, 2017, Agency filed its Opposition to Employee's Motion. On March 6, 2017, a Prehearing Conference was held in this matter and both parties were present. Following the Prehearing Conference, on March 7, 2017, I issued an Order on Employee's Motion to Compel and ordered that Agency respond by April 6, 2017. Further, Employee was ordered to complete all outstanding depositions by May 8, 2017. Additionally, I set a briefing schedule for this matter in this Order. Agency's brief was due on May 22, 2017, and Employee's brief was due on or before June 19, 2017. A Status Conference was scheduled for June 28, 2017. On March 28, 2017, Agency filed its Statement of Compliance with the March 7, 2017 Discovery Order. On May 12, 2017, Agency filed an Amended Prehearing Statement. On May 23, 2017, Employee filed a Consent Motion to Extend the Briefing scheduling citing to counsel's heavy caseload and travel schedule. Despite these issues not being mentioned during the Prehearing Conference, on May 24, 2017, I issued an Order Granting Employee's Motion and extending the briefing schedule. Agency's brief was now due on or before June 12, 2017, Employee's brief was due on or before July 10, 2017.

Agency filed its brief on June 12, 2017. On July 5, 2017, Employee filed a Motion to Extend Time to file Brief until July 17, 2017, citing that Employee's counsel did not receive Agency's brief until June 16, 2017. On July 5, 2017, I issued an Order granting Employee's Motion. Employee filed her brief on July 17, 2017. On August 8, 2017, Agency filed a Motion for Leave to file a Sur-Reply brief. On August 8, 2017, I issued an Order Granting Agency's request and required the Sur-Reply brief be submitted on or before August 25, 2017. Agency submitted its brief in accordance with the deadline. Following a review of all briefs submitted by the parties, and the record, the undersigned determined that an Evidentiary Hearing in this matter was warranted. As a result, on October 11, 2017, I issued an Order scheduling a Status Conference for November 13, 2017, for the purpose of determining a date for the Evidentiary Hearing. Following the Status Conference on November 13, 2017, I issued an Order Convening an Evidentiary Hearing for February 14, 2018. The Evidentiary Hearing was held on February 14, 2018, and was continued on two subsequent days, March 16, 2018, and April 4, 2018. Following the receipt of the transcript from the Evidentiary Hearing, I issued an Order on April 27, 2018, requiring parties to submit Closing Arguments on or before May 31, 2018.² On May 23, 2018, Agency filed a Joint Motion for an extension of time to file closing arguments, citing that the parties were engaged in settlement negotiations. I issued an Order granting Agency's motion and required closing arguments be submitted by June 18, 2018. On June 14, 2018, Employee filed a Joint Motion to extend the time for closing arguments. As a result, on June 18, 2018, I issued an Order granting the Motion and required closing arguments be submitted on or before June 29, 2018.

On June 27, 2018, Employee filed another Motion for an Extension of time to file closing arguments, citing that there were discrepancies with the exhibits in the transcripts and that more time was needed.³ On June 28, 2018, I issued an Order granting Employee's Motion and required closing arguments be submitted in this matter on or before July 18, 2018. Both parties complied with this Order. The record is now closed.

² A duplicate Order was sent on May 7, 2018, to Employee's representative because the April 27, 2018 copy was sent to an old address.

³ The court reporting services did not include all exhibits with the transcript of the hearing. The undersigned has communicated via email with the parties on how to move forward should any discrepancies be discovered. Specifically, should a party reference an admitted exhibit that has not been included in the summary done at the conclusion of the Evidentiary Hearing held on April 3, 2018, they should identify the document and reference the transcript volume and page number where it was contained. The party identifying this discrepancy should notify the other party of the issue.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether Agency's action of terminating Employee from service through IMPACT was done in accordance with all applicable laws, rules or regulations.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

SUMMARY OF TESTIMONY

An Evidentiary Hearing was convened in this matter over the course of three days, February 14, 2018, March 16, 2018, and April 4, 2018. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Employee and Agency presented testimonial and documentary evidence during the course of this matter to support their positions.⁴

Agency's Case in Chief

Dawn Hilton ("Hilton") Tr. Pages 28 – 218

Hilton was employed at DCPS as a Program Manager at Early Stages. Hilton's responsibilities included supervising the work performance of staff and taking care of day-to-day functions of the programs. Hilton explained that during the school year of 2014-2015, she was Employee's direct supervisor. Hilton testified that Employee was a family care coordinator, and was responsible for various administrative tasks associated with the evaluation process for children with disabilities, including reaching out to families, updating the database to reflect communications and

⁴ For the protection and privacy of the students involved in this matter, any references made with regard to their statements or otherwise will be denoted by the initials or alphabetical numerations.

assisting families in the program. Hilton stated that Employee received training when she was hired. Employee was assigned to Shirley Emile, who was a high performing family care coordinator (FCC) and Hilton coached Emile how to train Employee. Hilton indicated that Employee was provided instructions on how to use the online manual, the SEDS database (special education records) and QuickBase. Hilton explained that she had check-ins with Employee to maintain her progress and answer any questions Employee may have had. In addition, Hilton had follow up meetings with Emile to ascertain how Employee was doing. Hilton testified that she had individual weekly check-ins with Employee and that she also had an open door policy to address any issues that may have come up. Hilton said that Employee attended professional development opportunities available for family care coordinator roles, including monthly meetings where specific duties and responsibilities would be addressed.

Hilton explained that Employee was made aware of the policies regarding her position through conversations, documentation, and by observing events prior to taking on her own cases. Most of the documentation used at Early Stages was found in the online manual, which Employee had access to. Hilton cited that the online manual included a document called "Early Stages Intake Process Guidelines for FCCs." Hilton said that this document described the steps that a family care coordinator should take when initially reaching out to a family for an evaluation appointment. Hilton explained that the online manual was designed for the entire program, so all responsibilities and situations that may occur were included in this document. Hilton indicated that Employee also had access to performance documents, policies for attendance and leave, DCPS guidelines and the District Personnel regulations.

Hilton testified that she was the manager responsible for evaluating Employee. Hilton stated that Employee was provided a copy of the IMPACT guidelines, which for family care coordinators was IMPACT Group 20. Hilton noted that they created sub-rubrics for IMPACT to specifically address the roles and responsibilities of family care coordinators. Hilton indicated that the rubrics for IMPACT were included in the online manual at the start of the IMPACT cycle. Hilton explained that rubric included cores standards (CS) which were specific items DCPS reviewed for the positions. Hilton cited that IMPACT Group 20 was broad, so core standards were specified for the Early Stages job functions and allowed them to measure employees' performance based on work they are expected to do.

Hilton explained that in terms of scoring for each category that they would randomly select students' records and evaluate the completion of the record based on the guidelines provided and would determine whether a family care coordinator was doing their job. Hilton testified for core job functions scores, that a score of three (3) would have meant that a Family Care Coordinator ("FCC") performed their job consistently, and that a four (4) would mean that they went "above and beyond performance expectations. A score of two (2) meant that there were inconsistencies found and a score of one (1) meant that an employee was not doing their job or rarely did their job as expected. Hilton explained that for the category of positive rapport, that they evaluate the quality of the intake process and whether the FCC followed that process, again through evaluating student records. For customer service, FCCs were evaluated based on how they communicated with families and the effectiveness for any type of correspondence. With regard to communication, FCCs were reviewed on professionalism, communication with colleagues and managers and others involved in the process. Hilton indicated that prior to the start of IMPACT; all of this information was reviewed with Employee. Hilton explained that the IMPACT tool was used in evaluating Employee during the 2014-2015 school year.

Hilton evaluated Employee for Cycle 1 of the IMPACT cycle and had a conference with Employee on February 2, 2015. Hilton testified that she would evaluate and select scores which were then put in a spreadsheet for calculation. Hilton explained that for this round of IMPACT that they did whole numbers and did not round scores. As a result, Employee was scored at a 3.75 for positive rapport, which in a whole number resulted in her final score being 3.0. This was the same scoring method applied across all categories for this IMPACT cycle. Hilton cited that she was unsure of who decided that whole numbers would be used for scoring for this cycle, as it was determined before she was in her position. Hilton explained that this process was used for every FCC.

Hilton explained that when she pulled a record, she would look specifically at the status of the case and where the student was in the process and whether the FCC had completed all of their required responsibilities in the allotted timeline. Hilton said that she wrote notes based on what she saw in the QuickBase database and the SEDS records. She would make a notation of whether the FCC met the standards and if they did not, she would then note what was missing or what had not been completed to be used for the IMPACT scoring. Hilton also explained that Core Professionalism is considered in IMPACT scoring and includes scores based on whether a person has met standards for attendance, on-time arrival and adhering to policies and procedures. Hilton said that Core Professionalism can result in a deduction of points, though she was unsure of what the specific points where, indicated that it plays a role in the final IMPACT score.

Hilton testified that she had a conference with Employee on June 11, 2015, and that her scores significantly improved from Cycle 1 to Cycle 3. Hilton recalled that Employee was receptive of comments after Cycle 1, and that she was aware of areas of growth and that they continued to work on those during the IMPACT cycle and that as a result improvement was noted in Cycle 3. Employee did not receive any deduction in core professionalism in that cycle. In the Cycle 3 evaluation, Hilton noted that they again reviewed the records together and that Employee was aware of her successes and areas where she needed to improve. Hilton indicated that in June or July employees receive emails with their final IMPACT scores from the IMPACT team. Hilton said she did not generate the final calculation for scores and did not make any deductions, and as a result did not know what the final rating would be at the end of both cycles. Hilton said that she spoke with Employee after she received her final scores and Employee as disappointed with the “Developing” rating.

Hilton indicated that at the end of the IMPACT cycles for the 2014-2105 year, the management team at Early Stages met to discuss how each cycle went. Hilton testified that the biggest change decided upon at that meeting was a decision with regard to how to round IMPACT scores. In the 2014-2015 school year, scores were not rounded, but were just given whole number values, but after the management team discussed, they decided to round scores for the 2015-2016 school year. Hilton said that the rounding of scores was uniformly practiced at all Early Stages sites in the District. Hilton explained that under the old method for rounding if an employee received a score of 3.75, in the 2014-2015 year that would have just been a whole number and scored as a 3; but with the new rounding implemented in the 2015-2016 school year, that score would be rounded up to a 4. In the new rounding system scores with a .5 or higher were rounded up (i.e. 3.5 rounded to 4.0) and scores of .4 and lower were rounded down (i.e. 3.4 rounded to 3.0). Hilton explained that this rounding policy was decided upon and was applied to all employees of Early Stages, at the Minnesota Avenue and Walker Jones locations.

On cross examination, Hilton testified that she was the supervisor at the northeast Early Stages location. Hilton cited that in her deposition that she said that she “had to rate Deborah on how

she thinks she performed in these areas” as it related to the core professionalism scores. Hilton cited that the deposition testimony was incorrect and that they cannot score an employee based on the scores they think they should have received, but based on IMPACT scoring guidelines. Hilton said that for both schools years, she created and used an excel spreadsheet to score the FCCs on their core standards. Hilton cited that she reviewed the same three student records to calculate completion of due diligence, based on the exhibits reviewed. Hilton noted that the student’s records that were reviewed were not available during the hearing. Hilton explained that the records were reviewed in a “live database”, meaning that it was active and that there is no way to go back and pull the records she utilized while evaluating Employee’s IMPACT scores. Hilton cited that because the records could not be pulled, there is not a way to evaluate mistakes that may have occurred.

Hilton explained that there is not a “set in stone” of what qualifies as above and beyond in scoring, and that there is no rule that shows what an FCC would need to do to get a score of four for IMPACT. Hilton indicated that a score of one means meeting basic standards, but that there is nothing specific to say about what “above and beyond” would mean. Hilton explained that with regard to scoring, they evaluate the records to see if the FCC followed all the appropriate processes in scheduling the cases etc. With regard to scoring for due diligence, if an FCC had scheduled all of the students in the time required, that would have resulted in a score of three. Alternatively, if only two students had been completed in time that would be a lower score of two. Hilton could not recall using any type of equation to figure out scores for due diligence. After being read a portion of her deposition in this matter with regard to the equation, Hilton testified that it involved two different IMPACT cycle years, and that at some point there was a percentage based system in place, but could not recall which IMPACT cycle it was used. Hilton cited that she could not recall which year (2014-2015 or 2015-2016) that the percentage was used. Hilton explained that in her deposition testimony it appears she was overlapping two different IMPACT years in answering questions about any calculations of scores and weights, and reiterated that she did not recall with specificity about calculating due diligence for Cycle I of the 2014-2015.

Hilton also testified that due diligence is reviewed in accordance with the “Early Stages Guidelines” which consist of the intake process guidelines and tasks lists listed on the complete and accurate SEDS and Quickbase forms or documents. Hilton cited that she used the excel sheet to review student’s records to ascertain whether Employee had completed the specified tasks on the list. When asked about assessing FCCs completion of tasks, specifically the acknowledgement of a case within a specified time period (three days), Hilton cited that there wasn’t a set rule for completion. Hilton indicated that failure to acknowledge in this time frame may or may not have changed the score.

Hilton reiterated that scoring for the 2014-2015 Cycles were rounded in whole numbers, and as a result, Employee’s score of a 3.75 for one component would have received a final score of 3.0, and that this was applied across all scores. Hilton explained that this “whole number” system was in place when she began the evaluation process, and before she was employed by Agency, and as a result these rules were followed during the IMPACT scoring cycle. Hilton explained that the policy changed in the 2015-2016 year because the management team met and decided to round up (i.e. 1.5 =2 and 1.4=1). Hilton opined that this rule was more in lines with basic rules of math and that rounding would be more reflective of scoring. Hilton recalled that she, Sara Arguello and center directors were present for this meeting. Hilton could not give any examples of certain scoring. Hilton explained that she was not an FCC, but worked with FCCs and became manager in 2014.

On redirect examination, Hilton testified that she had evaluation conferences with Employee. Hilton reiterated that she reviews multiple records for each employee across the IMPACT cycle, but will review an entire student record on the same day. Hilton testified that Employee did not raise any issues regarding miscalculation or mistakes at the post-evaluation conference. Hilton said that if Employee had raised concerns that she would have given them consideration. Hilton explained that the excel sheet used is not given to employees, but only utilized by managers to review, enter comments and provide scores.

Sarah Arguello (Tr. Vol I Pages 225-276; Tr. Vol II. Pages 5-175).

Arguello was a center manager at Early Stages DC. Arguello testified that Employee was under her management starting in December 2015 at Walker Jones location in NW DC on New Jersey Avenue. Arguello explained that Employee was responsible for being a liaison between Early Stages and the parents, scheduling appointments and providing them with information. Early Stages is responsible for the initial special education eligibility testing evaluations, determination and IEP writing for preschool aged children in the District of Columbia. Arguello explained that Employee was originally trained at the Minnesota Avenue Early Stages location under the management of Dawn Hilton, and that there were ongoing trainings in the form of family care meetings, professional development sessions and other things of similar nature. There were no differences in the policies and procedures between the two Early Stages sites. Arguello stated that she would often have informal meetings with Employee, and also held check-ins and evaluations with her. Arguello explained that Employee was made aware of IMPACT through meetings that were held with all FCCs and that it was posted in the online manual.

Arguello explained that they used a sub-rubric in IMPACT for core job functions for more specific measures of FCC work. Arguello stated that at meetings, Early Stages managers would discuss what they would be measuring under Core Job functions, collaborative rapport and other sections so that scoring would be uniform across all Early Stages locations. Following these meetings, managers would then meet with the FCCs to review it and provide them with documents about IMPACT. Arguello indicated that she evaluated Employee in the 2015-2016 year. Arguello said that they used the “components of a complete and accurate Quickbase record for FCCs” to review the records that FCCs are responsible for. Records are pulled at random and different files may be used for different sections. Core Job functions measured two different items, so three random files were pulled for each of those times. Different files were pulled in order to gain a broader scope of a FCCs work. Arguello said that whatever was determined in the management meeting was what was used for evaluation and scoring.

Arguello explained that FCCs are evaluated in two cycles each year. Arguello noted that she had a conference in Cycle 1 with Employee on February 2, 2016. Arguello testified that each Core Standard is outlined in the sub-rubric of how it will be measured, with scores ranging from one to four. Arguello explained that Core Professionalism can affect IMPACT cores if they're slightly below standards or significantly below standards in that there will be a deduction from their overall score. For another cycle, Arguello did not have a conference with Employee because Employee was on leave and cited that she made two email attempts to meet with her despite the leave, but they never met. In Cycle 3, Arguello gave Employee a score of “2” for core standard one, and said that she sometimes completed the core job functions in a timely manner and that the three files that were pulled for completion and accuracy were not consistently complete and accurate. Employee was also rated as a “2” for positive rapport. Arguello explained that sometimes Employee provided and obtained all of the information necessary during the Intake process with families and that sometimes

she built positive rapport. Arguello said Employee sometimes responded to inquiries and requests from stakeholders but that in communication logs reviewed from the SEDS database were not consistently completed.

Arguello also scored Employee with a “one” for Core Standard Five-Adaptability. Arguello explained that Employee was scored this way because in challenging situations and times of high stress, she did not maintain composure with colleagues and management and also make “at-risk” actions without management guidance. Arguello said there was decline in Employee’s scores from Cycle 1 to Cycle 3 of this school year, in that most scoring areas fell from ratings of a three down to twos and that there were inconsistencies in Employee’s work. Arguello also indicated that because of significantly below standard scores, Employee also received a -20 point deduction for Core Professionalism. Arguello cited that these were the result of behaviors that were in a written warning in April and a reprimand in May, specifically Employee’s decision to leave a meeting that she was required to attend and failure to follow policies for a Spanish speaking child. Arguello said that despite the reprimand, Employee’s termination was based on overall IMPACT scores, not on the disciplinary action.

Arguello testified that when a child speaks more than one language that they are legally required to provide access to the evaluation in their native language or language they are exposed to. Employee did not take the steps needed to evaluate the student in that language. Arguello said that Employee was dishonest about that as she said that the parent said they only spoke English, but later forwarded an email that was dated prior which said that the child was fluent in English and Spanish. This led Arguello to believe that Employee knew that the family spoke Spanish. Arguello also explained that Employee was required to go to an eligibility meeting, but contacted the director saying that she needed to meet a parent at the other Early Stages site and asked if she could miss the eligibility meeting, but went to the meeting before the director replied, and actually had emailed him after the meeting had already begun. Arguello said that the signature Employee needed to get could have likely been retrieved from someone else. Arguello could not recall whether permission for Employee to attend was granted. Arguello said there was also a time Employee was advised that she was uploading and sending an incorrect letter to multiple families, but Employee claimed it was computer issues.

Arguello also explained that the 2015-2016 Cycle 3 spreadsheet was used to evaluate the sub-rubric and it showed the percentage weight that each item under core standard was valued. Essentially this chart would calculate the scores. The weights were determined when the management team met prior to the school year. Arguello did not meet with Employee during the Cycle 3, but said Employee would have had access to her IMPACT rating through the IMPACT database. Arguello said that she could do math and calculate Employee’s final scores, but that the finalize button in the IMPACT system would give the overall score, but could not recall if it provided the total final year score. Arguello said that she did not speak to Employee about her score after Cycle 3. Arguello said that in the 2014-2015 year that whole rounding was used (i.e. 1.5 = 1) but in the 2015-2016 year scores were rounded up (1.5=2 or 1.4 =1). Arguello said that these changes were made prior to the start of the school year. Arguello said that there was no point in which she or Ms. Hilton used different systems of rounding.

On cross-examination, Arguello cited that Ms. Hilton completed Employee’s IMPACT ratings for 2014-2015 year at the Northeast location of Early Stages and that she did the ratings for the 2015-2016 year. Arguello explained that the Employee’s final IMPACT rating was “minimally effective.” Arguello said that the rubric was used and provided more details than the guidebook for

Core Standard scores. Arguello cited that the scores and corresponding comments are input into the score sheet. For Cycle 1, three files were pulled and were reviewed for due diligence which measured whether Employee had scheduled these cases within ten days. If Employee had scored three out of three, then the score would have been rated as a “four”, two out of three would have received a rating of “three”, and so on. Arguello’s comments reflected that three of the records that were pulled were all scheduled within ten days, which would have meant a score of four. However, Arguello rated Employee as a two.

Arguello indicated that for the 2015-2016 year, they did employ a rounding up system, where by anything with a “.5” or higher would be rounded up, and anything with a “.4” or lower would be rounded down. Arguello was involved in the decision with regard to whether to round up or down for the 2015-2016 year, but does not remember why the decision was made, or what she said in her deposition. Arguello said that the records are pulled from live databases, so that it would not be possible to check the records that were pulled for the evaluation, as they change over time. Arguello explained that for IMPACT Cycle 1, she looked at six student records for core job functions. Arguello’s notes cited that Employee completed the due diligence process within ten days of being assigned, which should have resulted in a rating of “four”, however Employee was given a rating of “three.” Arguello stated that it may be a mistake, but since the record is not available there is no way to confirm her comment to the score rating.

In another rating, Arguello cited that Employee did not meet standard based on a failure to document four events from different dates in 2016. However, two of the dates were documented correctly. Further, Arguello testified that the comments with regard to copying and pasting emails into logs were not correct, but could not recall whether that would affect whether she met standards or not. Arguello could not recall whether the policy for how to log emails changed between Cycle 1 and Cycle 3 of the 2015-2016 year, but said that it can change, and that if it did, they would create a new guidance document and have a meeting or otherwise. Arguello could not recall doing that. In Cycle 1, Arguello had rated Employee as having met standards for SEDS communication log, where she reviewed a record where Employee had copied and pasted the emails into the logs. Arguello commented about communication logs not being for internal communication, but could not recall if those were just notes or if it were something that impacted Employee’s IMPACT score. Arguello also had comments that she was unsure as to whether they were a mistake or not, but because the records were not available, there was no way to verify. Arguello was unable to recall why certain weight percentages were given in categories.

For Cycle 3 of the 2015-2016 year, Arguello rated Employee as met standards for CP1 and CP2 and significantly below standards for CP3 and CP4. Arguello indicated that she did not recall ever giving a score to an FCC based on what the FCC believed their score should be, rather the score should be based on her opinion/evaluation. Arguello explained that Employee was given a written warning for inexcusable neglect of duty for choosing to leave an eligibility and IEP meeting. Arguello said that there was no meeting where Employee came to her and said she could not stay due to a disability, but that later, Employee provided many reasons including a disability. Arguello told Employee she was not aware of any disability and that she would need to file ADA paperwork for accommodations if she needed accommodations for not attending meetings. Arguello thought it was not appropriate to ask Employee what the nature of her disability was at that point. Arguello said that with the information she had then and now, that she believes that Employee should have remained for the meeting. Arguello testified that Employee took FMLA leave and was out sick at certain times during Cycle 3. Arguello also said she thought Employee was dishonest with regard to a situation with a bilingual student and that she failed to follow the appropriate procedure. Arguello explained

that if Employee would have had members from the bilingual team present at the evaluation of the student, that she would not have been marked for CP3. Arguello said if a student is bilingual and spoke both English and Spanish, then an interpreter or a bilingual team member would be needed. Arguello said that Early Stages will first use Spanish speaking staff for Spanish speaking families. In referencing the online manual about interpreters from 2014, Arguello indicated that if another language is spoken in a home, an interpreter should be requested for evaluation. Arguello cited that they do not need interpreters because they have Spanish speaking staff. Arguello could not recall if the student actually spoke English proficiently in the situation involving Employee.

Arguello explained that in an initial conversation with Employee, she was not aware of the dishonesty, and that the situation was deemed a miscommunication between the both of them, but could not recall the date of those conversations. Arguello indicated that there may be times when an FCC has duties that require them to go to the other Early Stages site at the request of management. Arguello could not recall if there was a specific policy for FCCs regarding going to other Early Stages office for duties. Arguello also rated Employee as significantly below standards for CP4. Arguello believed the justification for rating Employee this way was because of the written warning and written reprimand, but could not confirm either way. Arguello also noted an issue with discourteous treatment based on the way Employee had communicated with an evaluation coordinator with regard to obtaining an interpreter. Arguello was not present when Employee had this interaction with the evaluation coordinator, and did not recall whether she talked to Employee to ascertain her side of the story regarding the incident. Arguello also did not recall if she had provided any notice to Employee that she could respond to the written reprimand and warning. Arguello was unable to recall specific changes in performance that led to drop in Employee's positive rapport (CS2) in Cycle 3. Additionally for customer service (CS3) Employee's score dropped from a 3 in Cycle 1 to a 2 in Cycle 3. Arguello noted that Employee had sometimes responded to inquiries or request from parents calling, but that according to assessed communication mods the required scheduling or reminder call communications were not completed for two of three students. Arguello said she was aware that Employee would be subject to termination for receiving a score of minimally effective after a rating of developing. Arguello testified that she could do math and determine a final IMPACT score, and believes she did so in Employee's scoring. Arguello said that she emailed the IMPACT office inquiring what happens when someone would be terminated due to the IMPACT scores and if they would automatically receive a letter indicating their separation.

Arguello testified that her notes about copying and past full emails into the SEDS communication logs was just a note and not something that was considered in her nominating standards. Arguello cited that she assumed this was true since she did not mark Employee down for that in other files. Arguello could not recall Early Stages record retention policies and could not recall what if anything she did to preserve the records once she knew Employee was going to be terminated. Arguello said that employees are still responsible for documenting even on days that they are out. Arguello cited that even if Employee has no knowledge of what happens because she wasn't there, she was still responsible to access database systems where the documents were required to be completed. Arguello further testified that she did not meet with Employee in Cycle 3, as Employee did not respond to her request or offer for a meeting.

On redirect examination, Arguello cited that the notes with regard to copying and pasting did not negatively affect Employee's rating, but was just a note to remind Employee about it. Arguello indicated that after Employee left a meeting in April that was the first time she notified her of a disability. Arguello said Employee did not disclose to her whether she had applied for accommodations. Arguello said that Employee was given the written reprimand right before she went

out on FMLA leave. Arguello cited that she did not receive any information from the EEO office or LER with regard to Employee's disability. With regard to interpretation services, Arguello cited that it refers to outside interpreters that are requested to come and that they do not need Spanish services because there are two teams that are bilingual in Spanish, which means they don't have to pay additional interpreter service fees. Arguello said that an interpreter is needed if another language is spoken in the home. Even a child or parent expresses that they are language dominant in another, bilingual services are still required.

Arguello testified that an email from Employee dated March 30, 2016, cited that the student was bilingual in Spanish and English, which meant that Employee knew that the student would have needed the Spanish speaking services. A subsequent email also conveyed Spanish speaking in the student's household, leading Arguello to believe that Employee knew about the child being bilingual at the latest date of March 30th. Arguello also stated that an FCC is required to get a supervisor's approval for a home visit. Arguello explained that when Employee was out for an extended time, she did not transfer her caseload to another FCC, and as a result, she was still responsible for her cases. Arguello said that she has mentally done the math for final IMPACT scores before finalizing scores in the IMPACT systems and that unique cases like Employee's are instances where she had done that. Arguello reiterated that she reached out to Employee to schedule a conference over multiple dates. Employee did not respond and Arguello sent the scores without a conference in Cycle 3. Arguello did not know when Employee learned about her scores. Arguello indicated that she did meet with Employee to discuss scores in Cycle 1. Arguello cited that the bilingual student had an IEP test in English. Arguello reiterated that because they have bilingual team members they don't have to pay for an additional interpreting service, but just will have a member of the bilingual staff present for testing when needed. Arguello agreed with a statement that an employee is not responsible for completing work on a day they are out.

Alain Cantave ("Cantave") Tr. Vol II Pages 177 – 291

Cantave was employed by Agency as a manager on the IMPACT operations team. His job responsibilities including management of the day to day businesses of the IMPACT evaluation system for DCPS school-based staff and he has been with Agency for approximately four years. Cantave explained that the goal of IMPACT is to set clear expectations for all school-based staff members and to ensure that school leaders are able to assess staff properly. Cantave indicated there during the 2014-2105 school year, there were about 27 IMPACT groups. He explained that there are 20 group numbers; however some group numbers have subgroups in them. Cantave said that Employee was in Group 20 which covers all other staff members that do not fit neatly in one of the other 19 numbered groups. Cantave indicated that there are guidebooks for each of the IMPACT groups which are made available to all employees online on the DCPS website and in the individual employee's dashboard. Cantave further explained that Group 20 employees have two evaluations during Cycle 1 and Cycle 3. The evaluations are based on the rubric chosen by that group by the close of the cycle. There is also a post-evaluation conference or two attempts will be made to hold a conference by the end of each cycle. Cycle 1 traditionally ends around later January/early February, and Cycle 3 ends in early June. If after two attempts are made and a conference is able to be scheduled by the deadline for IMPACT, then the reports are uploaded and no longer required to be a part of the evaluation system.

Group 20 employees have two components which they are evaluated on, the first of which is core standards. Cantave testified that the core standards identify the work that employees do throughout the cycle. The second component that is reviewed is core professionalism which is scored

as a deduction. There are four standards of core professionalism, on time arrival, attendance, policy/procedures and respect. Cantave cited that if an employee does not meet those standards based on the determinations made by their evaluator, then they can receive a deduction at the close of the school year from their points. Cantave explained that the Core Standards for Group 20 are positive rapport with students and families; customer service; communication and adaptability. Cantave indicated that the core standards are automatically calculated in the IMPACT system and are weighted equally. Cantave said that the evaluation conferences take place between the employee and evaluator to have a conversation about expectations and about whether or not an employee has met those expectations and next steps. Because Group 20 is a “catch-all”, school leaders with Group 20 employees create sub-rubric to identify specifically what they will be assessing for each particular component. It is up to the manager to determine what numerical score (4, 3, 2, 1) an employee will receive. Cantave cited that comments are required for the primary rubric with the score that is provided. Cantave explained that for example, a manager cannot say in comments that an employee is doing an amazing job and then give them a score of 2. The comments that are put in the IMPACT database have to align with the scores that are given. Cantave said the amount of detail and length of comments don't necessarily equate to stronger or less strong evaluations. Cantave iterated that it is expected that clear expectations are set with a regards to the development of the sub-rubric.

Cantave testified that the IMPACT evaluation system is a framework, but that the IMPACT office does not control what each individual school or program manager does to define or qualify their scores. Cantave said that the core professionalism deduction is based on a scale of meets standards which results in no deduction. A score of slightly below standards is a deduction of 10 points and a significantly below standards is a 20 point deduction. Deductions are non-cumulative within a cycle, but are cumulative outside the cycle, which means if an employee receives three significantly below standards within a cycle, it is not a 60 point deduction, and it is just 20 points. The database takes the lowest deduction and only applies that one, which means an individual can receive up to 40 points of deductions across an entire school year, but only 20 in a cycle. Evaluators are required to provide more detailed comments with regard to core professionalism since there are deductions. Evaluators are required to identify to some degree what happened that resulted in the reduced score. Cantave explained that if a school creates a sub-rubric, it's secondary to the IMPACT rubric because the IMPACT rubric is what ultimately calculates the final score for final ratings. Employees can receive one of five final ratings in IMPACT; ineffective, minimally effective, developing, effective and highly effective which are based on the points that employees receive in the school year. Cantave said that administrators have to document scores in the database and that once numbers are in, the database will make calculations.

Cantave explained that if an evaluator submits scores where the comments do not align, that with core professionalism there is a review that is run. For overall scores, there is not a review completed for any level of sufficiency or alignment. Cantave testified that if an employee files and appeal, that's when the IMPACT team would look into the scores that were placed into their primary rubric evaluation. Cantave said that employees are able to review their scores when the database is available after the calculation of scores. Cantave cited that once the evaluator has hit the finalize button on the IMPACT system, they are locked out of the assessment and are not allowed to lower scores at that point, however scores are allowed to be raised after finalization. An evaluator can save a score before finalizing by hitting the “save” button while entering a report in. It will not be viewable to the staff member and changes can still be made. Once the “finalize” button is selected, the score cannot be manipulated.

In reviewing Employee's final report in the 2014-2015 year, Cantave cited that Employee did not receive any deductions for core professionalism and her final IMPACT rating was "developing." Cantave explained that because Employee was non-union she would have received a letter that stated that if a subsequent rating was minimally effective or ineffective that she would be subject to separation. If Employee had received a subsequent developing, effective or highly effective rating, she would not have been subject to termination. Cantave indicated that in Employee's 2015-2016 IMPACT score, she received a deduction of a "significantly below standards", which dropped her total score by 20 points and resulted in a "minimally effective" rating for the year. Cantave said that there is no requirement for conversations outside of the conference that are required in IMPACT. Cantave explained that a Chancellor's Appeal is an internal Agency process where an employee with a low score has the opportunity to appeal that score or rating to the chancellor. Cantave indicated that Employee filed a Chancellor's appeal at the end of the 2014-2015 school year. Cantave cited that an impartial review board is convened, which is comprised of three members of DCPS, including the Deputy Chief of IMPACT, one instructional superintendent and the third is a direct or deputy chief from DCPS that's not in the IMPACT office. The board will review all of the appeals and any ancillary information, and may ask the IMPACT team to provide information. The board makes a recommendation to the chancellor, after which the chancellor reviews the recommendations and makes a final decision to grant or deny the appeal. If an employee is still at Agency, they will receive a notice on their dashboard about the results of the appeal, if they are no longer employed or no longer have access, then a certified letter is sent to notify of the results. Cantave explained that a favorable Chancellor's appeal may not necessarily change your IMPACT score, despite that it may change some scores, but if the changes are not enough, then there will not be a change in the rating.

Cantave explained that Employee challenged her 2015-2016 minimally effective rating through a Chancellor's Appeal. Cantave indicated that the type of documents needed in the review at a Chancellor's Appeal depend on the allegations that are levied. The review team looks for whether procedure was followed and the alignment across standards. Traditionally, the documents that are reviewed look at those two items. The appeal does not make "corrections" to an IMPACT report, but if an appeal has been granted, there have been reinstatements, and removal of step holds etc. Cantave testified that Agency follows DC regulations with regard to the appeals process.

With regard to Employee's CP3 and CP4 and the rating of "significantly below standard" for discourteous treatment of others and dishonesty, Cantave explained that core professionalism deductions can be affected by respect and policy/procedures. Cantave said that there are time when an employee may receive a discipline (written warning or reprimand) and not receive any core professionalism deductions and vice versa, but that ultimately it's up to the school leader and there is no requirement, as IMPACT is an evaluation process, not a disciplinary process. A separation because of disciplinary issue is a different process.

On cross examination, Cantave reiterated that the final IMPACT scores for the 2015-2016 school year were automatically calculated by the database. Where the Core Professionalism indicated "2/4" on Employee's sheet that indicated the date for the end of Cycle 1 as February 4, 2016. Cycle 3 would have ended somewhere around June 16, 2016. Cantave cited that the final IMPACT report is at the end of the school year. Cantave said that the database for managers to enter in their scores and reports is not open at the beginning of the cycle, but typically opens up about 60 percent of the way through the cycle, and evaluators can start adding information, but cannot finalize anything until the end of the cycle. Cantave explained that once the evaluator finalizes, in this instance, Ms. Arguello, there are no other actions to complete for IMPACT. Cantave says that the final IMPACT ratings are not shown until after they are calculated by the IMPACT team and the

database goes live. Cantave testified that the database goes down near the end of Cycle 3 so that school leaders can do entries into the database and plug in all information. Once complete, the IMPACT team will send an email to school leaders indicating that these are the tentative scores for employees and to review for any errors, but scores can only be raised. The IMPACT team also gives school leaders the opportunity to “save staff member”. This happens when a person’s scores shows that they may be subject to separation, but a school leader may interject and say that they want to give the person another chance, so they have the opportunity to exempt them from separation process. A person cannot continuously be “saved”, so if they continually rate someone low, then that person is not viable for DCPS. Following this process, the database will go live for everyone and everyone can be made aware of final IMPACT ratings.

Cantave testified that because Employee was a non-union member, she was not eligible step holds, so the negative consequences of her IMPACT rating would be a warning letter or separation letter. Cantave explained that if an employee receives a rating of ineffective at any point, it is subject to separation, even on the first time. If you receive two consecutive minimally effective ratings, that is also subject to separation. Three consecutive developing ratings are subject to separation. If you receive a developing and drop to minimally effective, that is also subject to separation. However, if you received minimally effective, and then go up to developing you would not be subject to separation, because the rating has gone up.

Cantave cited that managers set their expectations, and if they shift, managers can change what they are looking for and what they expect from staff members. For example if what the managers were looking for in Cycle 1 can change in Cycle 3 can change. There is no requirement that once a school year has started that a manager cannot change expectations. Cantave indicated that the IMPACT team does not tell managers what the level of expectation is for their staff members. So if a manager reaches out and indicates that they want to change their expectations, and would like to update, the IMPACT team would say that they can and suggest that they communicate that clearly to their staff. The communication to staff could come in any number of ways. Cantave indicated that there are high level trainings conducted about the IMPACT system, but it’s not a formal part of managers’ training. Cantave further explained that there is no requirement for keeping documents that are looked at to rate FCCs outside of the evaluation that is entered into the system, and he was unaware of DCPS document retention policy. Cantave was familiar with the SEDS and Quickbase system, citing that the managers call Quickbase a “live database” where information is always updating.

Cantave stated that the only information for Chancellor’s appeal must be submitted through the online portal and that it has a certain number of characters, other documents cannot be attached and this was true for both the 2014-2015, and 2015-2016 year. Cantave cited that the member of the appeal board would not have spoken with Ms. Arguello or Ms. Hilton about her appeal. There are follow up questions that may be asked and then information is presented to the impartial review board. Cantave could not recall any specific questions for Employee’s chancellor’s appeal. Cantave further explained that the chancellor’s appeal is not an adversarial process, so Employee did not get to request any information to support her appeal. Cantave was not aware of when Employee was on FMLA leave but that as of August 5, 2016, she should have had access to her dashboard. Cantave indicated that Employee’s access to IMPACT was not restricted, but that he could not speak to any other system. There was no hearing for the Chancellor’s Appeal, as it is not a face to face process. No one reached out to Employee for follow up about her appeal.

Employee's Case-in-Chief

Deborah Gudger ("Employee") Tr. Vol. II Pages 292-335 and Vol III. Pages 1-190

Employee was employed as a Family Care Coordinator (FCC) with Agency since 2014. She began working at the Minnesota Avenue site for a year and was supervised by Dawn Hilton. In September 2015, Employee moved to the Walker Jones site. Employee explained that she was in IMPACT Group 20 and that in the 2014-2015 school year she was evaluated by Dawn Hilton, and in the 2015-2016 school year, she was evaluated by Sarah Arguello (formerly Sarah James). As an FCC, Employee cited that she was responsible to act as a liaison between families and Early Stages to assist families with evaluation and eligibility processes, as well as other case management duties. Employee indicated that she enjoyed her job as an FCC. Employee stipulated that many of the records that were used to review for her evaluations (SEDS, Quickbase, and Spectrasoft) were not produced. Employee testified that in 2015-2016 IMPACT cycles, her scores decreased between Cycle 1 and Cycle 3. Employee opined that she did not change the way she interacted with management between Cycle 1 and Cycle 3, nor did she change the way in which she performed that would have resulted in the decrease in scores. Employee indicated that she felt as though she deserved a "meet standards" score for Cycle 3 because she has always interacted with management in a professional and respectful manner. Employee also maintained that she had a good working relationship with all of her colleagues and with the families.

Employee testified that she received a "developing" IMPACT rating for the 2014-2015 school year, and that she received notice of the score in July 2015 via mail. Employee indicated that she submitted a Chancellor's Appeal of her score in August of 2015. Employee received notice of her 2015-2016 "minimally effective" rating and subsequent termination via mail on July 18, 2016 and submitted another Chancellor's appeal in August 2016. After submitting her appeal, Employee later received a letter which indicated that her appeal had been denied. Employee explained that in Cycle 1, her IMPACT score was not reduced due to copying and pasting emails in to SEDs logs, but that in Cycle 3, her score was reduced by Ms. Arguello. Employee said that they were told to copy the emails for detailed communications. Employee indicated that she was never told to stop pasting whole emails into the logs. Employee also copied and pasted into SEDs logs in the 2014-2015 school year.

Employee indicated that she was out on leave during the last two weeks of March 2016 and the first day of April. Employee cited she was out part of the day on March 25, 2016, five hours on March 29, 2016, a full day on March 30, 2016, four hours on March 31, 2016 and the entire day on April 1, 2016. Employee indicated that she was out on sick leave on those days. Employee said that during that time, when she was out, Arguello would begin setting up coverage from another team member. Employee explained that when she returned from leave on April 5, 2016, she received a warning letter. Employee said no one talked to her after she returned and that it was common practice that when you were assigned to cover a case for someone that you fulfill the duties required, including documentation in the databases. Employee also explained that the reason she did not seek out a Spanish interpreter for a student was because the parent indicated that the child's dominant language was English, despite exposure to Spanish in the home. Employee said that in the meeting she had with the student, that she had two individuals present who were bilingual in English and Spanish, as they were members of the bilingual team. There were challenges with scheduling the meeting with the child due to behavioral issues. However, on the meeting that was held, the school psychologist and another member of the bilingual team were present, but given the child's behavior, the psychologist felt it best to reschedule to another time. Employee said that that the child was tested on directives in English and she learned of this through discovery for her appeal at OEA.

Employee testified that the student was not assigned to the bilingual team because his dominant language was English. Employee said there is a policy for providing interpreters for students. Employee said that the policy says that an interpreter can be arranged for any language, but that Spanish was not needed since there were two evaluation teams that were bilingual. Employee indicated that her interpretation of this policy meant that since this child had some exposure Spanish, that she had the bilingual evaluators on the team. Employee referred to documents which indicated that the child had been tested in English at Early Stages. Employee indicated that parental consent is required for evaluations, and that the child's mother did not consent to having a Spanish interpreter. Employee explained that on April 5, 2016, Arguello sent her an email indicating that the testing for the child could not be completed because bilingual services were not in place. Employee did not address it on April 5th, but later on April 12th when in a meeting with Ms. Arguello. Following this meeting, Employee sent an email memorializing the conversation, and cited that she initially forgot when she learned that the student had been exposed to Spanish and didn't recall the specific service dates that were in place before the initial evaluation. On the day of the testing on April 5th, Employee asserted that the mother told Arguello that it was picture day at the school and that she would not be able to stay the two to three hours to complete the scheduled evaluations. Employee said that everyone on the team agreed and that Mariela Alda, the speech pathologist, who was also on the bilingual team, was able to conduct a portion of her testing, since speech language was the primary reason for the referral, that's where they began. Employee testified that the evaluations were not completed because of the child's behavior and the mother schedule for school pictures, not because of the lack of Spanish interpretation. At the April 26th evaluation, there were other Spanish speaking members on the team present, including Lorna Sanchez, Mariela Alga and Toni Minor. The evaluation was not completed at that time either because of the child's behavior issue, so the psychologist, Lorna Sanchez said it was in the best interesting to discontinue the evaluation at that time, and was not due to the lack of Spanish interpretation services.

In another email, on April 12th Employee indicated that neither she nor the other team members learned of the child's Spanish exposure until the date of the child's appointment. Employee said that she followed up with Arguello when she found out she was cited for being dishonest with regard to this situation to provide clarity for what had occurred. The discourteous treatment comment came after a report from her coworker Toni Minor, reported to Arguello that Employee had talked to her in a rude manner. Employee explained that Arguello never came to ask her side of the story as to what happened before issuing the written reprimand for the behavior, but only received information from Ms. Minor. Employee also testified that she left an eligibility meeting on March 24, 2016, because she was having an anxiety attack. Arguello was sitting in the hallway near the main office when she left the meeting, but told Employee that she had to go back. Employee says Arguello asked what was wrong, and that Employee said "I just can't" and walked into the bathroom. After leaving the bathroom, Employee said that she went back to talk to Arguello and the meeting was ending and she did not return to it. Employee explained to Arguello that she left the meeting due to her disability, namely that she was having an anxiety attack. There was another comment about a failure to attend an IEP meeting. Employee explained that on April 29, 2016, her evaluation coordinator (EC) partner agreed that FCC duties were not needed in an eligibility meeting, so she did not attend the meeting at all. Employee said that she and her EC partner also agreed that she would get the consent form signed for the child to be tested. The parent who needed to sign the consent had a bus connection near the Minnesota Avenue location, so Employee agreed to meet him there to get his signature. Employee maintained that she was never trained on any off site visits, but on home visit policies. Employee said that Ms. Arguello was not there on the day of this, so she emailed the Early Stages Director, Sean Campagnucci to let him know that she was going to the Minnesota

Avenue site to obtain a consent form. Employee said that it was common practice to have to go off site for work duties.

In another comment on her CP3, Arguello noted that Employee was dishonest about procedures for case closures. Employee testified that she had received an email in April from Arguello regarding the use of incorrect due diligence case closure letters. After the email, Employee said that she began to use the correct letters, but that before Arguello pointed it out, she did not know that the previous letters she was using were incorrect. Employee explained that she thought Ms. Hilton had entered in her 2015-2016 IMPACT scores because when she went to her computer the screen showed that Dawn Hilton as the evaluator for Cycle 3. Employee took a picture of the screen. Employee noted that it was her understanding that she would not be rated for days that she was not at work. Employee reiterated that she was locked out of her email account while she was out on FMLA leave. Employee approximated that she discovered she was locked out around June 2016. Employee said that Arguello gave her information regarding her appeal rights after Employee received notice of her termination. Employee testified that in an email dated July 26, 2016, Arguello explained her appeal rights. However, Employee cited that Arguello did not tell her she could respond to the written warning or written reprimand. Employee indicated that all she was told was that the reprimand would be a part of her file. Employee said that her termination date from Early Stages was August 5, 2016 and that the date she was scheduled to return from FMLA was August 10, 2016, after being out since May 4, 2016.

On cross-examination, Employee testified that she prepared a sworn affidavit. Employee explained that when she began at Early Stages in 2014, under the supervision of Dawn Hilton that she was assigned to another employee Shirley Emile to help train Employee regarding her duties and responsibilities as an FCC. Employee cited that she had regular check-ins with her team and individual meetings with Ms. Hilton during her tenure at the Minnesota Avenue Early Stages. During those meetings she could discuss issues and other things regarding her job. Employee said her time with Emile was limited, but she was able to frequently ask questions. Employee testified that she was evaluated in Cycle 1 and Cycle 3 for the 2014-2015 school year by Dawn Hilton and had post-evaluation conference to discuss scores. Employee said that she did not understand Hilton's comments for her scores after Cycle 1, and that she told her she did, but that Hilton did not go into detail about it. Employee iterated that she filed a Chancellor's Appeal in the 2014-2015 school year and cited therein that Hilton did not discuss any document or records related to discrepancies prior to February 2, 2014. For the 2015-2016 year, Employee explained that she did not have a post-evaluation conference after Cycle 3 because she was out on FMLA and was not able to access her IMPACT dashboard. Employee indicated that she was only able to access the IMPACT database after making several calls. Employee said that in her termination notice, she received July 18, 2016, appeals rights were there, despite previously testifying that she only learned of appeal rights in an email from Ms. Arguello on July 29, 2016. Employee cited that she understand that the Chancellor's Appeal was different from filing an appeal at OEA. Employee testified that she did not make an attempt to reach out to Ms. Arguello to discuss the reasons behind the IMPACT score, but only asked her for the information.

Employee said that when she came to the Walker Jones Early Stages that she was familiar with the Departments policies and procedures. She also said she had regular check-ins and meeting with Arguello and other FCC wide-staff meetings. Employee said that she took issue with all of the comments Arguello listed in her IMPACT comments with regard to Core Standard 2. Employee said that on days she was absent she did not transfer cases, but that coverage was assigned by the supervisor at a time when and individual calls out. Employee said that the only time FCCs work

among themselves is to trade off date of coverage is when there is advanced knowledge. Employee said she never saw any written requirement or policy for coverage. Employee said that when she returned from leave back to work that she did not have to check in QuickBase database for her cases.

With regard to Spanish speaking students, Employee testified that the interpreter policy does not mention anything about a student's dominant or subordinate language with regard to the test for the need for interpretation services. Employee explained that as an FCC, she does not do any testing, but the initial intake. Employee cited that the bilingual evaluation team has the ability to do evaluative services in a second language if needed. Employee explained that a parent must consent to foreign language services. Employee said that the team members that she had at the student's meeting were a part of the bilingual team, but not everyone. Employee said that FCCs don't make the determination for the language a child is tested, that is made by the parent. Employee said that Arguello indicated that she was deducted for failing to acknowledge when she was aware of the student's exposure to Spanish.

Employee testified that when she left the eligibility meeting that she said "excuse me" and got up, but nothing else. Employee maintained that the management team was fully aware of her disability at the time. Employee said she left the meeting due to an anxiety attack. Employee said that Arguello wanted to know how all of a sudden she had an attack, and Employee told her she was already stressed, and that there were things in the meeting that could have possibly exacerbated it. Employee said that Arguello did tell her about the need to seek an accommodation. Employee said she tried to secure ADA paperwork twice, once in December 2015 and again some time later. Employee explained that with regard to this discourteous treatment comment, that it was during a situation where a child was acting out and she said to her colleague that she "will have to interpret yourself when you settle this child before he hurts himself", but that Employee had remained calm.

When Employee left to get signatures, she left an eligibility meeting. Employee said that it was common to go to the Minnesota Avenue site. Employee explained that she had used the same disclosures for some time before she was notified that they were the incorrect ones to use. On redirect, Employee testified that there was no policy that said that you cannot assign bilingual team members to your team. Employee also testified that while there is no policy for leaving work, that the policy for home visits is that prior approval is needed for safety reasons.

Donielle Powe ("Powe") Tr. Vol 3. Pages 191 – 196

Powe testified that she is the Director of Labor Relations and Employee Management at DCPS. Powe recalled drafting an affidavit for the instant matter which states that if an employee is on authorized leave status they are not responsible for their work-related duties for that workday and "an authorized leave status is leave status that has been approved by DC Public Schools." Powe explained that this includes sick leave, family medical leave under the FMLA. Powe explained that if someone calls out sick they are required to submit medical documentation and in most cases it will be approved unless there is reason to believe that it's fraudulent. An employee is entitled to be off work for three days or less without showing medical documentation. On cross examination, Powe testified that if an employee is approved for FMLA, for the days that they are out, they are not responsible to do work on those day, and would not be responsible until they returned to work.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

IMPACT

IMPACT is the performance evaluation system utilized by DCPS to evaluate its employees. Based on the record in the instant matter, DCPS conducted annual performance evaluations for all of its employees through IMPACT, and used this system to evaluate employees during the 2014-2015 and 2015-2016 school years.

During each school year, Employee's position was classified with Group 20, and she was evaluated during Cycles 1 and 3 of those years. For the 2014-2015 school year, Employee attended two post evaluation conferences with Supervisor Dawn Hilton following each cycle. For the 2015-2016 school year, only one evaluation conference was held on February 2, 2016, after Cycle 1 with Sarah Arguello. The IMPACT evaluation for Group 20 was composed of the following components, specifically:

Core Standards (CS): For Core Standards, employee in Group 20 received scores that add up to 100% of their score. For each cycle an employee would receive a score in one of the following components ranging from a four (highest) to a one (lowest). The standard would then be averaged to form an overall score ranging from one to four. At the end of both cycles, the scores would be averaged together to calculate an overall IMPACT rating.⁵ Core Standards Components included:

- CS1: Core Job Functions
- CS2: Positive Rapport with Students and Families
- CS3: Customer Service
- CS4: Communication
- CS5: Adaptability

Core Professionalism (CP): This component measured four (4) professional requirements for all school-based personnel. The requirements included (1) Attendance; (2) On-Time Arrival; (3) Policies and Procedures; (d) Respect. Employees could receive three levels: "meets standard", "slightly below standard", or "significantly below standard". If an employee received a "meets standard" score, then there would be no change to their final impact score. However, if an employee received a slightly below standard or a significantly below standard, then their final impact score would be subject to a deduction.⁶

DCPS personnel assessed through IMPACT in the 2014-2015 and 2015-2016, received a final IMPACT score and rating at the end of the school year based on the following:

- (1) Ineffective = 100-199 points
- (2) Minimally Effective = 200-249 points
- (3) Developing = 250-299 points
- (4) Effective = 300-350 points

⁵ Employee Evidentiary Hearing Exhibits 4 and 5 Impact Guidebook 2014-2015, and 2015-2016.

⁶ *Id.*

(5) Highly Effective = 350-400 points

In the instant matter, Employee received a final IMPACT rating of “Developing” in the 2014-2015 year, and a score of 290; and received a “Minimally Effective” with a score of 230 for the 2015-2016 school year.⁷ A “minimally effective” following a “developing” rating subjects an employee to separation from their positions with DCPS.

Governing Authority

D.C. Official Code §1-617.18 grants DCPS the authority to create and implement its own tools for evaluating employees. IMPACT was the evaluation system used by Agency to evaluate its employees during the both the 2014-2015 and 2015-2016 school years.⁸ Further, DCMR §§ 1306.4 and 1306.5, provides that the Superintendent of DCPS has the authority to set procedures for evaluating its employees.⁹ The aforementioned sections of the DCMR provide that each employee shall be evaluated each semester by an appropriate supervisor and rated annually prior to the end of the year, based on procedures established by the Superintendent. In the instant matter, the IMPACT process as previously described was the evaluation procedure for Agency in aforementioned school years. Employee was a non-union member at the time of her termination. Accordingly, in reviewing this matter, the undersigned will address whether Agency followed the procedures it developed to evaluate its employees and will not substitute judgement for that of the agency, but rather limit this review to determine if managerial discretion has been legitimately invoked and properly exercised in accordance with IMPACT guidelines.

Analysis

In the instant matter, Employee was evaluated in both school years by her respective supervisors at the Early Stages centers in the District. In the 2014-2015 school year, Employee was working at the Minnesota Avenue Early Stages site and was evaluated by her supervisor Dawn Hilton and received a final IMPACT rating of “Developing.” Employee filed a Chancellor’s Appeal, arguing that the scoring was not warranted. Employee’s appeal was denied. Employee was then transferred to the Walker Jones site for the 2015-2016 school year where she was supervised and evaluated by Sarah Arguello. At the end of this school year, Employee received a final IMPACT rating of “minimally effective.” Because of Employee’s previous “developing” rating in the 2014-2015 school year, Employee was separated from service in accordance with IMPACT guidelines. Employee filed another Chancellor’s Appeal which was subsequently denied. Employee asserts that the IMPACT scores were improper “due to the fact that DCPS IMPACT evaluators did not adhere to the evaluative process outlined in the IMPACT rubric.”¹⁰ Further, Employee argued that the scoring systems for IMPACT were arbitrary and capricious.¹¹ Additionally, Employee argued that the IMPACT scores (for 2015-2016) were affected by a written reprimand and written warning that was

⁷ Employee’s Prehearing Statement at Page 2 (March 6, 2017).

⁸ Agency’s Answer (October 2, 2017).

⁹ DCMR §§ 1306 provides in pertinent part:

1306.1 - Official performance evaluation ratings for all employees of the Board of Education shall be inclusive of work performed through June 30th, unless otherwise specified in this section.

1306.4 - Employees in grades ET 6-15 shall be evaluated each semester by the appropriate supervisor and rated annually, prior to the end of the school year, under procedures established by the Superintendent.

1306.5 - The Superintendent shall develop procedures for the evaluation of employees in the EB schedule, EG schedule, and ET 2 through 5, except as provided in § 1306.3.

¹⁰ Employee’s Amended Prehearing Statement (May 7, 2017).

¹¹ Employee’s Closing Argument (July 18, 2018).

received and she was not afforded protections under DCMR Title 6, Subtitle B Chapter 16.¹² Employee also asserts that the records used by evaluators were not provided, so they are unable to assess whether the evaluators' scores were appropriate. Employee also argued that Arguello inappropriately lowered her score for assignments that were not completed while she was out on leave. Further, Employee avers that the scoring systems that were utilized, specifically in the 2014-2015 school year, which was whole number rounding (scores were just given whole number values such that a score of 3.5 would be rounded to 3.0) were arbitrary and capricious.

Agency asserts that it appropriately followed IMPACT and that the Employee's separation was warranted pursuant to IMPACT guidelines. Further, Agency asserts that it followed all IMPACT processes and guidelines in both the 2014-2015 and 2015-2016 school years and that Employee was provided access to the IMPACT and Early Stages Guidebooks which contained the rubrics upon which scores would be based.¹³ Agency indicates that both of Employee's supervisors, Dawn Hilton and Sarah Arguello met with Employee throughout the respective school years to discuss performance and expectations for work. Agency admits that there was a calculation error in the 2015-2016 IMPACT scores, wherein the evaluator's comment did not align with the score given, but maintains that this was harmless error and Employee's still would have received "minimally effective," rating, subjecting her to separation from service.¹⁴

IMPACT scores are set forth through a rubric designed for the different groups established within the system. Employee's position as a Family Care Coordinator (FCC) was designated in Group 20 and was evaluated based on the rubric and scoring system established for her group. Additionally, the management at Early Stages established a "sub-rubric" by which employees were provided details for expectations within the rubric for scores. The rubric and sub-rubric remained the same for the school years, but the scoring was different. In accordance with IMPACT guidelines, evaluator comments were to align with the scoring associated within the rubric and sub-rubric. In other words, if an evaluator assessed a certain score, the comments should align to explain the reason for that score. Employee was scored and rated under this system for both years. Employee argues that the 2014-2015 school year rounding system was arbitrary and capricious. Specifically, Employee argues that Agency's choice to round whole numbers (i.e. 3.5 or higher would only be scored as a 3) was arbitrary and capricious and resulted in lower scores for Employee. However, Agency is given great discretion in establishing its scoring and policies for its implementation of IMPACT.¹⁵ Further, this method was used for all FCCs in the respective school year. Agency has the discretion to establish the scoring policies in accordance with IMPACT guidelines. This rounding system was established at the beginning of the evaluation year, and as a result, all employees were provided notice in the IMPACT Group 20 guidebooks with regard to this system. Further, I find that Agency's choice to change the system for the 2015-2016 school year was in also their discretion, and has no bearing on the choice made for the prior year. Agency made the decision before the beginning of the new evaluation year, and employees were provided notice that scores would be "rounded up" for the 2015-2016 year (i.e. 3.5 = 4; 3.4=3, etc). While the undersigned finds the whole rounding scoring system used in the 2014-2015 year to be mathematically atypical for most common standards in numerical rounding and fractions, as previously mentioned, this system was set forth at the beginning of the evaluation period and all staff were made aware of this system and were subject to the same

¹² Employee's Amended Prehearing Statement (May 17, 2017).

¹³ *Id.* at Pages 10-11.

¹⁴ Agency's Closing Brief at Page 15 (July 18, 2018).

¹⁵ *Shaibu v D.C. Public Schools*, Case No. 2012 CA 003606 P (January 29, 2013). The Court held that principals enjoy near total discretion in ranking their teachers when implementing performance evaluations.

rounding across the entire Group 20 FCCs. As a result, the undersigned finds that Agency's choice to round numbers in the 2014-2015 school year was within their discretion and was conducted in accordance with IMPACT guideline established for that school year.

Employee received a developing rating for her 2014-2015 IMPACT final score, and as a result, a "minimally effective" or "ineffective" rating in the subsequent could result in her termination. At the end of the 2015-2016 year, Employee's final rating was "minimally effective." Here, Employee was evaluated by a different supervisor, Sarah Arguello, for the 2015-2016 year. At primary issue with this evaluation cycle are the miscalculations of scores of the Core Standards for Employee. Specifically, in Cycle 3, Arguello designated Employee's CS1 score as a three; however the comments reflected that Employee's work constituted a score of a four.¹⁶ Agency cites that even though this would have resulted in a higher score for this component, that it would not have changed Employee's final rating from "minimally effective" and as a result is harmless error.¹⁷ Employee argues that without the records to verify, it is impossible to ascertain whether other such comments and components are misaligned for this IMPACT cycle.¹⁸ The undersigned agrees.

Because all of the pertinent records utilized for the evaluations were not available for review; the undersigned finds that there is a lack of substantial evidence to make a determination as to whether Arguello's evaluation comments and scores appropriately aligned for the other ratings and scores she issued for the IMPACT evaluation to show that this error was harmless in nature. For this component three files were pulled and were reviewed for due diligence which measured whether Employee had scheduled cases within ten days. If Employee had scheduled all three out of three, then the score would have been rated as a "four", two out of three would have received a rating of "three", and so on. Arguello's comments reflected that all three of the records that were pulled were all scheduled within ten days, which by the rubric scoring, would have resulted in a score of four, but Arguello designated a three for Employee. IMPACT guidelines provide that evaluator's comments must align with the scores given in order to provide a fair assessment for employees.¹⁹

Arguello explained during her testimony that she was unable to ascertain whether this was a mistake or not. Agency cites to the D.C. Superior Court decision in *Shaibu v. D.C. Public Schools*, wherein the Court held that substantial evidence for a positive evaluation, does not establish a lack of substantial evidence for a negative evaluation.²⁰ Further, Agency avers that Arguello's evaluation was based on factual evidence, and that Employee's recollection of the events would be different.²¹ Agency also avers that Employee has not provided any evidence that controverts statements in the IMPACT evaluation.²² The undersigned disagrees.

While the Court in *Shaibu* held that "it would not be enough for [employee] to proffer to OEA evidence that did not conflict with the factual basis of the evaluator's evaluation, but that would support a better overall evaluation;" the undersigned finds that the circumstances surrounding the instant evaluation, in particular with regard to the misalignment of the comments with the actual

¹⁶ Agency's Closing Brief at Page 15 (July 18, 2018). See also Evidentiary Hearing Tr. Vol II at Page 14-18 (March 16, 2018). For this rubric, Employee was reviewed for due diligence in scheduling students within 10 days of being processed. Arguello's comments cite that of the three files review, Employee had scheduled all the students within 10 days of being assigned. However, Arguello only gave Employee a score of 3, wherein the comments show that this should have been scored at a 4 for Employee.

¹⁷ Agency's Closing Brief at Page 15 (July 18, 2018).

¹⁸ Employee's Closing Argument at Page 46 (July 18, 2018).

¹⁹ Evidentiary Hearing Transcript – Testimony of Alain Cantave (March 16, 2018).

²⁰ Case No. 2012 CA 003606 P (January 29, 2013).

²¹ Agency's Closing Brief at Page 22 (July 18, 2018).

²² *Id.* at Page 26. (July 18, 2018).

scores, exhibit the factual basis to controvert statements in the IMPACT evaluation.²³ Further, as a result of these errors, and without the entire record to review and verify whether the scores and comments did appropriately align, the undersigned finds that Agency has failed to provide substantial evidence to rely upon for this IMPACT rating to show that it properly adhered to IMPACT guidelines in its administration of this evaluation that resulted in Employee's termination.

Employee also received lower Core Professionalism scores in Cycle 3 of the 2015-2016 year, specifically in areas including policy and procedures and disrespect. Employee's score reflects two situations one involving a child who spoke more than one language, and another for discourteous treatment of a colleague, which resulted in a written warning and written reprimand. With regard to the discourteous treatment, Arguello testified that she received a complaint from another employee that Employee had been rude to her. Arguello admitted that she was not present when the incident occurred and could not recall whether she talked to Employee to ascertain her side of the story. Employee maintained during her testimony that she did not speak to the other employee in a rude manner. Arguello did not indicate that she had conducted any investigation into the complaint, but instead "documented it within the reprimand and warning."²⁴ Employee also was deducted for failure to complete work assignments during a time in which she maintains that she was on leave. For the reasons previously stated with regard to the lack of a full record and the failure of comments to appropriately align in Cycle 3 of the 2015-2016 evaluation pursuant to the IMPACT process, the undersigned finds that Agency has not met its burden to show that it administered this instant action in accordance with IMPACT guidelines.

ORDER

Based on the foregoing, it is **ORDERED** that the Agency's action of terminating Employee from service is hereby **REVERSED**. It is further **ORDERED** that:

1. Agency shall reinstate Employee to her last position of record and reimburse her all back-pay, and benefits lost as a result of her removal; and
2. Agency shall file with this Office, within thirty (30) days from the date on which the decision becomes final, documents evidencing compliance with the terms of his Order.

FOR THE OFFICE:

MICHELLE R. HARRIS, Esq.
Administrative Judge

²³ *Janelle Johnson v. D.C. Public Schools*, OEA Matter. 1601-0175-11, *Opinion and Order on Petition for Review* (April 14, 2015).

²⁴ *Id.*