OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

JAY MOSKOWITZ, Appellant	:	
v.	:	TTA No. 01-20
CENTRAL BUCKS SCHOOL DISTRICT, Appellee	:	

OPINION AND ORDER

Jay Moskowitz ("Appellant") appeals to the Secretary of Education from the decision of the Board of School Directors ("School Board") of the Central Bucks School District ("District") dismissing him from the position of Supervisor of Special Education.

FINDINGS OF FACT

A. Background

1. Appellant was a Supervisor of Special Education for the District at all relevant times prior to his dismissal from employment.

2. The District's Supervisors of Special Education are supervised by and report to the Director of Special Education.

3. Appellant was placed on administrative leave with pay on August 13, 2019 after it was discovered that he had backdated an IEP.

4. On or about August 22, 2019, Appellant received notice of his *Loudermill* hearing (Ex. District-3A). On or about August 28, 2019, an amended notice of allegations was provided to him. (Ex. Dist-3B)

5. The *Loudermill* hearing occurred on September 10 and 12, 2019. Appellant was represented by counsel at the hearing. (Ex. Dist-4, 5)

6. Following the hearing, Appellant was suspended without pay pending dismissal proceedings. (Ex. Dist-6)

7. On or about October 22, 2019, a Statement of Charges was provided to Appellant regarding his dismissal. The School Board approved the Statement of Charges at a public meeting on October 15, 2019. (Ex. Dist-7)

8. Appellant's dismissal hearings before a committee of the School Board occurred on November 6, 13 and 22, 2019.

B. Deficiencies in Student IEPs, Depriving Services to Students, and Legal Noncompliance

9. Appellant was responsible for Students 1, 2, 3, 4, 5 and 6 in his capacity as a Supervisor of Special Education. (11-6-19 N.T. 132-133) [1]

10. As a Supervisor of Special Education, Appellant was required to: (a) provide leadership of special education and special services programs and the day-to-day management needed to maintain and improve the quality of these programs, (b) prepare and monitor the special education and special services budgets and the District's special education plans in compliance with existing governmental regulations, (c) supervise development, implementation and evaluation of individual educational programs ("IEPs"), and (d) ensure District compliance with state and federal standards and regulations relating to the operation of special education programs. (Ex. Dist-2)

11. Appellant knew or should have known the applicable rules to ensure that the IEPs were prepared correctly and met legal requirements. (11-6-19 N.T. 41-42)

[1] "N.T." refers to the Notes of Testimony taken at Appellant's dismissal hearings and is preceded throughout this Opinion by the hearing date. The names of the involved students were omitted to protect their privacy.

12. Appellant admitted that an IEP is a legal document, that an IEP can be legally enforced, that an IEP must be legally correct and that an IEP must be developed in accordance with law. (11-6-19 N.T. 45-46)

13. Appellant admitted that if an IEP is not prepared or implemented correctly, it could subject the District to liability, including liability for compensatory education and payment of tuition to a private school. (11-6-19 N.T. 45-46)

Student 1

14. Appellant was responsible for Student 1's educational program and the writing of the student's IEP. (Ex. Dist-4, p.18)

15. Student 1's IEP needed revisions in 2019. (Ex. Dist-8, 11-6-19 N.T. 54)

16. The rewriting of Student 1's IEP was due no later than May 23, 2019. On that date the IEP would expire. (Ex. Dist-8)

17. Appellant did not have the IEP rewritten in a timely manner or write a timely IEP for Student 1. (11-6-19 N.T. 54)

18. Appellant did not realize the IEP was out of compliance until August 2019, when he created a new IEP for Student 1. (Ex. Dist-9, Ex. Dist-33)

19. Appellant did not schedule a new IEP team meeting or issue a new invitation to an IEP team meeting. Instead, Appellant called a teacher who was on sick leave to write a new IEP for the student when the teacher was able to come back to work. (11-6-19 N.T. 103)

20. Appellant backdated Student 1's new IEP by placing the date of May 22, 2019 on the IEP as the "IEP Team Meeting Date." No IEP team meeting occurred on that date. (Ex. Dist-9, p.1)

21. When Appellant's misconduct was reported to his supervisor by another employee, Appellant's supervisor looked up Student 1's IEP on the District IEP Writer software system[2] and found that on August 7, 2019, Appellant had prepared a backdated IEP for Student 1. (Ex. Dist-33, Ex. Dist-9)

22. Student 1's IEP for the 2019-2020 was not prepared in a timely manner. (11-6-19 N.T. 48; 11-22-19 N.T. 22)

23. Student 1's 2018-2019 IEP expired on May 23, 2019, yet Appellant did nothing until August 7, 2019, to address the expired IEP. (11-6-19 N.T. 48)

24. Appellant did not ensure that an IEP team meeting was convened or that a new IEP was prepared on a timely basis for Student 1. (11-6-19 N.T. 133-134; 11-22-19 N.T. 22)

25. By the time that Appellant was placed on administrative leave with pay on August 13, 2019, there was no invitation to attend an IEP team meeting sent, no NOREP[3] prepared, or anything else done regarding the expired IEP. These tasks should have been done prior to May 23, 2019. (11-6-19 N.T. 53-54).

Student 2

26. Student 2's IEP also was deficient. Specifically, regarding Student 2:

a. The IEP was confusing as to the location where the student would be receiving certain services. (11-6-19 N.T. 142; 11-22-19 N.T. 25-27, 30)

[2] IEP Writer is the software program that the school district uses to prepare special education documents and to manage the IEP services to students.

[3] NOREP is an acronym for notice of recommended educational placement, an education term of art. The NOREP explains the parents' rights to agree or disagree with the school district's proposed educational placement of their child set forth in the IEP, as well as the parents' hearing rights and other procedural rights. A NOREP is required any time the school district proposes to change the student's program or placement.

b. The reasons for Extended School Year services were not sufficiently described in the IEP. (11-6-19 N.T. 142)

c. The reasons for Extended School Year services were not sufficiently set forth in the IEP. (11-6-19 N.T. 142)

d. Regression and recoupment descriptions or data were not set forth in the IEP. (11-6-19 N.T. 142-143)

e. There was no evidence or insufficient evidence to support the out-of-district placement that was stated in the IEP. (11-6-19 N.T. 143-144;11-22-19 N.T. 26-28)

f. The above-noted items (a - e) were legally indefensible. (11-6-19 N.T. 141; 11-22-19 N.T. 25-30)

Student 3

27. Student 3's IEP also was deficient. Specifically, regarding Student 3:

a. There was insufficient data in the IEP regarding behavior levels. (11-6-19 N.T. 147)

b. There was a lack of description of the interventions that the student has been provided and how the student reacted to the interventions. (11-6-19 N.T. 147; *see also*, 11-22-19 N.T. 27-30)

c. There was no new functional behavioral assessment. (11-6-19 N.T. 147; 11-22-19 N.T. 32)

d. No board-certified behavioral analyst was part of the IEP team. (11-6-19 N.T. 147-148; 11-22-19 N.T. 33)

e. The IEP did not have sufficient program modifications, specially designed instruction or accommodations addressing the student's behavioral issues. (11-6-19 N.T. 149; 11-22-19 N.T. 35-36)

f. There was a lack of explanation why the student was eligible for Extended School Year services. (11-6-19 N.T. 150)

g. There were an insufficient number of "Specifically Designed Instruction" items related to behavior in the IEP. (11-6-19 N.T. 152-153)

h. As a result of the foregoing deficiencies, the IEP was not legally defensible. (11-6-19 N.T. 153)

Student 4

28. Student 4's IEP also was deficient. Specifically, regarding Student 4:

a. The student's IEP was untimely prepared. (11-22-19 N.T. 39)

b. On August 2, 2019, Appellant sent an invitation to attend an IEP team meeting to the parents that did not include a regular education teacher as required. (11-6-19 N.T. 90; 11-22-19 N.T. 39-40)

c. Because the invitation did not include a regular education teacher, Appellant had to be reminded by counsel for the District to reissue the invitation. (11-6-19 N.T. 90; 11-22-19 N.T. 40)

d. Appellant admitted that this was his mistake and that he "owns it." (11-6-19 N.T. 91)

e. Appellant offered no justification for his failure to issue a proper and legally compliant invitation.

f. After being directed to reissue a new invitation, Appellant prepared a new invitation on August 7, 2019, but did not change the date of the document. (11-6-19 N.T. 91-92)

g. Even after being told to issue a new invitation that included a regular education teacher, Appellant failed to do so when he reissued the invitation on August 7. He improperly named Jennifer Opdyke to serve as the regular education teacher. She was not employed as a regular education teacher and did not have certification as a regular education teacher in the secondary level. (11-6-19 N.T. 92-94)

h. The person who was intended to fill the role for the regular education teacher was not appropriate for that role, she was not the regular education teacher of the child (11-6-19 N.T.154-155).[4]

i. Appellant admitted that he "got it wrong" by including Jennifer Opdyke on the invitation. (11-6-19 N.T. 53, 94)

j. Appellant did not include a speech therapist on the IEP team (11-6-19 N.T. 53, 94). He admitted that a speech therapist should have been included on the team. (11-6-19 N.T. 95; Dist-4, P.131)

k. The Extended School Year grid was not filled out completely as required. (11-9-19 N.T. 156-157)

l. Executive functioning goals were not initially included in the IEP as required. (11-6-19 N.T.157-158)

[4] Federal regulations require that a regular education teacher "of the child" be a member of the IEP team if the student is going to receive any regular education placement. The regulations provide that: "The public agency must ensure that the IEP Team for each child with a disability includes— * * * (2) Not less than one regular education teacher ***of the child*** (if the child is, or may be, participating in the regular education environment)" 34 CFR §300.321(a) (Emphasis added).

m. The parent concern section was not updated as required. (11-6-19 N.T. 158)

n. The IEP was not legally defensible. (11-6-19 N.T. 159)

Student 5

29. Student 5's IEP also was deficient. Specifically, regarding Student 5:

a. The student was not provided with Extended School Year Services as required. (11-6-19, N.T 44-45)

b. Appellant failed to have a NOREP issued for the Extended School Year Services. (11-6-19 N.T. 165-166; 11-22-19 N.T. 43-44)

c. Despite being responsible for ensuring that the student be provided with Extended School Year Services, Appellant did not know whether the student was getting these services. (11-6-19 N.T. 97-98)

d. Appellant's failure to ensure that Student 5 received the Extended School Year Services persisted throughout the summer. The student was denied required services during this time period. (11-6-19 N.T. 134; 11-22-19 N.T.43-45)

e. The District sent a "Permission to Evaluate"[5] in order to complete a reevaluation, but it was not returned. Appellant did not do anything to get the PTE form signed and back from the parents. (11-6-19 N.T. 164-165)

f. The District's legal counsel advised Appellant to reissue the permission to evaluate, but Appellant failed to do so. (11-6-19 N.T. 165)

[5] A Permission **to** Evaluate or PTE is another education term of art. A PTE is completed when a student's IEP team determines that an evaluation or reevaluation is necessary to determine if the student has or continues to have a disability and needs special education services.

g. On June 19, 2019, Appellant emailed the student's family indicating that the IEP team was recommending regular education placement for mathematics, but Appellant failed to offer an IEP team meeting in violation of law. (11-6-19 N.T. 165-166)

h. The related services grid was not in the IEP as required. (11-22-19 N.T. 43)

i. The NOREPs were not sent out in a timely manner. (11-22-19 N.T. 42-43)

Student 6

30. Student 6's IEP also was deficient. Specifically, regarding Student 6:

a. Appellant participated in the IEP team meeting by phone, but he failed to have the IEP state that he had done so. Appellant also did not sign the IEP. Either his signature of a notation that participated by phone was required on the IEP. (11-6-19 N.T. 167)

b. No NOREP was issued as required. (11-6-19 N.T. 167)

c. The IEP did not close the discussion whether a change in placement would be made as required. (11-6-19 N.T. 167)

d. A referral to a new placement was not made as it should have been. (11-6-19 N.T. 167)

e. The student should have been provided with homebound instruction, but he was provided no such instruction. (11-6-19 N.T. 169; 11-22-19 N.T. 49-50)

f. Appellant's failure to ensure that the student received homebound instruction persisted throughout May and June. The student failed to receive the required homebound instruction during this time period. (11-6-19 N.T. 103; 11-13-19 N.T. 122)

g. Although the student had needs in mathematics, no specially designed instruction with regard to mathematics was included in the IEP. (11-22-19 N.T. 48)

h. The student's IEP was not legally defensible (11-6-19 N.T. 169).

C. Employee Disciplinary Policies and Practices

31. The School Board adopted policy 317 regarding employee discipline. (M-1; 11-13-19 N.T. 22-25)

32. The District adopted procedures regarding employee discipline. (M-2; 11-13-19 N.T. 22-25)

33. District policy and procedures regarding employee discipline reference different levels of possible employee discipline. (M-1, M-2; 11-13-19 N.T. 22-25)

34. Neither District policy nor procedures require that any given level of discipline be imposed for any particular type of employee wrongdoing. Instead, the level of discipline is dependent upon the egregiousness of the employee's conduct. (M-1, M-2; 11-13-19 N.T. 25, 31; 11-22-19 N.T. 197)

35. District policy also does not require that a specific level of discipline be imposed before discharge. (11-22-19 N.T. 197; M-1 and M-2).

DISCUSSION

A. Motions to Quash and/or Dismiss

The District filed multiple motions in the present matter, which are now ripe for disposition. The motions are granted, in part and denied, in part. Regarding (1) the information that the District claims is attorney-client privileged and (2) the determination of the Referee in Appellant's Unemployment Compensation matter, the motions are granted. Otherwise, the motions are denied.

1. The Attorney-Client Privileged Information

The purpose of the attorney-client privilege is to "promote full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Nesselrotte v. Allegheny Energy, Inc.*, 242 F.R.D. 338, 340 (W.D. Pa. 2007) (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)). Communications are protected by the attorney-client privilege when: (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication is made is (a) a member of the bar of a court and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed by (a) his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or assistance in some legal proceeding and not (d) for the purpose of committing a crime or tort and (4) the privilege has been claimed and not waived by the client. *Id.* The privilege applies not only to communications from the client to the attorney, but from the attorney to the client as well. *In re Linerboard Antitrust Litigation*, 237 F.R.D. 373, 381 (E.D. Pa. 2006). Under Pennsylvania law, the attorney-client privilege pertains to communications between attorneys for governmental entities and their government clients. *Ario v. Deloitte & Touche, LLP*, 934 A.2d 1290, 1294 (Pa. Cmwlth. 2007); *see also Gould v. City of Aliquippa*, 750 A.2d 934 (Pa. Cmwlth. 2000). The governmental client is the Central Bucks School District Board of School Directors.

In this matter, the information in question discusses matters directly related to Attorney Michael Levin's legal representation of the District's legal interests and to the present matter in particular. The privilege is not waived. As attested to by the School District's Superintendent, the document was provided to Appellant inadvertently. Attorney-client privilege is not waived

by inadvertent disclosure. See *Bd. of Sup'rs of Milford Twp. v. McGogney*, 13 A.3d 569 (Pa. Cmwlth. 2011). In fact, only the Board of School Directors can waive the privilege. *Id.* Not even a school board president has the power or individual right to waive a school district's privilege. *Sampson v. Sch. Dist. of Lancaster*, 262 F.R.D. 469 (E.D. Pa. 2008) (school board president could not waive attorney-client privilege on behalf of school district under Pennsylvania law without approval of board). Accordingly, the information in question is protected by the privilege and will not be made part of the record. That information is hereby quashed.

2. The Reversed Unemployment Compensation Referee's Decision

I also quash the decision of the Unemployment Compensation (UC) Referee in Appellant's UC matter, that was reversed on appeal. The UC Board of Review reversed the Referee's decision and denied the Appellant UC benefits due to his willful misconduct. In addition to being reversed, the UC Referee's decision was based upon a different record including testimony and evidence not contained in the record before me. My review is limited to the matters of record. Accordingly, the UC Referee's decision is hereby quashed.

B. Substantive Grounds for Dismissal

Appellant's dismissal was pursuant to Section 1122 of the School Code, which provides that "[the] only valid causes for termination of a contract . . . with a professional employee shall be immorality; incompetency; . . . intemperance; cruelty; persistent negligence in the performance of duties [and] willful neglect of duties[.]" 24 P.S. §11-1122. A tenured professional employee, such as Appellant, may only be dismissed for the reasons set forth in Section 1122 of the School Code. *Foderaro v. Sch. Dist. of Philadelphia*, 531 A.2d 570, 571 (Pa. Cmwlth. 1987), *appeal denied*, 542 A.2d 1372 (Pa. 1988).

Commonwealth Court has held that the Court needs to find only one of the grounds for the dismissal valid in order to affirm the Secretary's dismissal of the appeal of a professional employee."). *Horton v. Jefferson County-DuBois Area Vocational Technical School*, 630 A.2d 481, 483 (Pa. Cmwlth. 1993). Appellant argues that the District failed to establish grounds for his termination from employment. I disagree. Following a thorough review of the record, I find that there is sufficient evidence to sustain the Appellant's dismissal due to his willful neglect of duties. I affirm the dismissal on that basis.

Willful neglect of duties by a professional employee has been defined by Commonwealth Court as "[A]n intentional disregard of duties by that employee.... [T]here is no requirement of a continuous course of conduct in this charge." *Williams v. Joint Operating Committee of Clearfield County Vocational-Technical School*, 824 A.2d 1233, 1236 (Pa. Cmwlth. 2003). In interpreting Section 1122 of the School Code, Commonwealth Court has defined "willfulness" as having "the presence of intention and at least some of power of choice." *Cowdery v. Bd of Educ. of the Sch. Dist. of Philadelphia*, 531 A.2d 1186, 1188 (Pa. Cmwlth. 1987). "Neglect" may be defined as "1: to give little attention or respect to; *disregard* 2: to leave undone or unattended to especially through carelessness." *Merriam-Webster's Collegiate Dictionary* 775 (10th Ed. 2001). In the present matter, the District demonstrated that the Appellant willfully disregarded his duties. Appellant knew or should have known the applicable rules to ensure that the IEPs were properly prepared and that students received the educational services to which they were entitled. (11-6-19 N.T. 41-42). Therefore, I conclude that Appellant simply chose not to properly perform his duties adequately regarding several students for whom he was responsible. The District established that Appellant, through his own neglect, did not make sure that the IEPs of these students were legally compliant nor did he make sure that these students received the services

that the District was obligated to provide to them. The District established that these duties were integral to Appellant's job as Special Education Supervisor and that he neglected them willfully. Appellant failed to provide any credible evidence to rebut the District's presentation, which was bolstered by the testimony of expert witness, Andrew Klein.[6] Appellant's misconduct regarding Student 1 was particularly disturbing in that he backdated the student's IEP to cover-up his carelessness and failure to complete the IEP in a timely manner. The attempted cover-up is troubling behavior that calls into question Appellant's trustworthiness. I would be remiss if I required the District to tolerate Appellant's conduct.

Regarding the attempted cover-up, Appellant's testimony simply is not credible. He testified that the IEP Writer software program required him to insert a date into the field for an IEP team meeting date, and that he had to put content into the IEP in order to save it (11-6-19 N.T. 31, 53, 55). He testified that he put the date in "to open up the IEP," then alternatively testified that he did not even put in the date, but that was "the date that popped up" (11-6-19 N.T. 51- 53). He added that "you have to put in a date so that the teacher can place-hold it for the IEP." and that one has to put in a date or "it will not save" (11-6-19 N.T. 52-55). I do not find the Appellant's explanation to be credible. In contrast, the school district presented credible evidence to rebut Appellant's attempt to blame the software program for his own attempt at subterfuge. The District credibly established that the software program does not work the way Appellant described. (Compare 11-6-19 N.T. 31, 52-55 and 11-6-19 N.T. 136-137). I find that

[6] I reject Appellant's claim that the testimony provided by the District's expert witness, Andrew Klein, was improper. The claim is meritless. Appellant had every opportunity to call his own expert witness to rebut Mr. Klein's presentation, but he failed to do so. I find Mr. Klein's testimony to be credible.

the Appellant tried to hoodwink others into believing that he had timely dated Student 1's IEP in May when actually he falsely backdated it months after it had expired.

I also decline Appellant's invitation to resolve credibility in favor of Appellant's witnesses. While I acknowledge that several individuals testified at the hearing that Appellant typically discharges his duties with fidelity, the testimony of Appellant's witnesses does not outweigh the District's credible presentation that Appellant willfully neglected his duties with regard to the six students at issue and attempted to cover up his own neglect by backdating a student's IEP. The District should not be required to overlook Appellant's lack of attention to the educational services being provided to these students. The District correctly held Appellant accountable for his disregard for these students.

Appellant also argues that he should have been disciplined in a progressive manner. Again, I disagree. If an employee's misconduct is egregious, as it was in the present matter, progressive discipline is not required where termination is based upon willful neglect under the School Code. In addition, progressive discipline is not required by District policies in this situation. (M-1, M-2; 11-13-19 N.T. 25, 31; 11-22-19 N.T. 197).

Here, Appellant intentionally backdated an IEP to cover up his own failures regarding timely IEP preparation, failed to ensure the completion of legally compliant IEPs for several students, and failed to ensure that they received the programs and services to which they were entitled. Appellant's willful neglect directly relates to his required duties as Supervisor of Special Education for the District. Therefore, I find that the District's action in terminating Appellant's employment was appropriate under these circumstances.

Based on the above, there is ample evidence in the record to support Appellant's dismissal due to his willful neglect of duties. Accordingly, the following Order is entered:

OFFICE OF THE SECRETARY OF EDUCATION
COMMONWEALTH OF PENNSYLVANIA

JAY MOSKOWITZ, Appellant	:	
v.	:	TTA No. 01-20
CENTRAL BUCKS SCHOOL DISTRICT, Appellee	:	

ORDER

AND NOW, this 30th day of September 2020, the Central Bucks School District's dismissal of Jay Moskowitz is hereby affirmed.

Date Mailed: October 1, 2020

Pedro A. Rivera
Secretary of Education