

NEW YORK STATE EDUCATION DEPARTMENT

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In the Matter of the Disciplinary Proceeding between

**DEPARTMENT OF EDUCATION,
Complainant-Employer**

**OPINION AND AWARD
SED 30941**

v.

John Leftridge,
Respondent-Tenured Teacher

Pursuant to Education Law Section 2590 (j) (7)
And Section 3020-a

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Before Michael A. Lendino, Esq., Hearing Officer

APPEARANCES:

For the Department of Education:

**Howard Friedman, Esq., General Counsel to the Chancellor
By Larry Mutz, Esq.**

For the Respondent:

**Richard E. Casagrande, Esq., General Counsel, NYSUT
By Gregory Ainsley, Esq.**

Pursuant to the provisions of New York State Education Law §3020-a, the New York City Department of Education (the Department) filed charges on or about March 20, 2017, against John Leftridge (the "Respondent"), a tenured teacher, charging him with incompetence and insufficient service, neglect of duty, misconduct and unwillingness and/or inability to follow procedures and carry out normal duties during the 2014-2015, 2015-2016, and 2016-2017 school years. The undersigned was appointed to hear and decide whether there is just cause for the proposed disciplinary action against the Respondent.

A pre-hearing conference was held on April 26, 2017. I conducted hearings in this matter on June 1, 6, 7, 27, and 28 at the Offices of the New York City Department of Education (the "Department"), 100 Gold Street, New York, New York. An official stenographic recording of the proceedings was made.

Both parties were represented by counsel in this proceeding and had a full and fair opportunity to adduce evidence, examine and cross-examine witnesses and to make argument in support of their respective positions. All the witnesses were sworn or affirmed. Closing arguments were heard on June 28, 2017, and the record was closed on July 6, 2017, upon receipt of the final transcript of record.

SPECIFICATIONS

1. During the 2014-2015, 2015-2016 and 2016-2017 school years, Respondent failed to properly, adequately and/or effectively plan and/or execute lessons as observed on or about the following dates:
 - a. October 31, 2014;
 - b. January 9, 2015;
 - c. March 12, 2015;
 - d. March 31, 2015;
 - e. April 23, 2015;
 - f. June 22, 2015;
 - g. October 7, 2015¹; and,
 - h. November 17, 2015.

2. Respondent failed, during the 2014-2015, 2015-2016, and 2016-2017 school years, to fully and/or consistently implement directives and/or recommendations for pedagogical improvement and professional development provided in observation conferences with administrators and/or outside observers; instructional meetings; teacher improvement plans; one-on-one meetings with administrators, school based coaches and/or outside observers, as well as, school wide professional development, with regard to:
 - a. Proper planning, pacing, and/or execution of lessons;
 - b. Using appropriate methods and/or techniques during lessons;
 - c. Designing coherent instruction;
 - d. Using assessment in instruction;
 - e. Student engagement; and/or
 - f. Using appropriate questioning and discussion techniques.

¹ During the hearing, Respondent sought to have this Specification dismissed since the charges indicated October 17, 2015 and the observation clearly indicates October 7, 2015. I found this to be a typographical error and denied the motion to dismiss. Respondent received the October 7, 2015 observation during discovery and was on notice. There is no October 17, 2015 observation and the charge further specifies "on or about." (Tr. 135-140).

The Foregoing Constitutes:

1. Just cause for disciplinary action under Education Law section 3020-a;
2. Incompetent and/or inefficient service;
3. Conduct unbecoming Respondent's position;
4. Conduct prejudicial to the good order, efficiency, or discipline of the service;
5. Neglect of duty;
6. Substantial cause rendering Respondent unfit to properly perform his obligations to the services; and
7. Just cause for termination.

Background

Public School 93 is located in the Bedford Stuyvesant Section of Brooklyn. There are approximately 300 students and about sixteen (16) teachers.

Sandra Philip (Philip) has been the principle of P.S. 93. Ms. Philip holds a Bachelor's Degree in English and a Master of Science Degree in Education. She also holds a Professional Diploma in Administration. (Tr. 304).

Ms. Philip taught grades five (5) and six (6) until 1993. She then became a math coach. She then became an assistant principal, which she did for three (3) years. She has held the position of principal for the last nine (9) years. (Tr. 305).

Janeice Bailey (Bailey) has been the assistant principle at P.S. 93 since 2009. Ms. Bailey holds a Bachelor's Degree in Accounting and Sociology, a Master's Degree in Education and an advanced certification for assistant principal for administration. (Tr. 37).

Ms. Bailey began her career in 1989. She has been a Common Branch teacher and a math staff developer. She has been an assistant principle since approximately 2001. (Tr. 34). Ms. Bailey previously served as assistant principal at Junior High School 268 (2001-2002) and Middle School 117 (2003-2009).

Patricia Hanley (Hanley) is currently assigned as an assistant principal in Queens. She holds a Bachelor's of Science in Marketing, a Master's Degree in Education and a School

Building Leadership certificate. She has been employed by the Department of Education for seventeen (17) years.

Ms. Hanley had served as elementary school teacher for five (5) years in the south Bronx and then for three (3) years in Queens. She became a literacy coach for five (5) years. She entered the Leadership Program, served as a trainer in Queens, and became a peer validator for two (2) years.

John Leftridge (Respondent) is a tenured teacher employed by the Department of Education for sixteen (16) years. He holds Bachelor of Arts in Education from Wagner College and is currently enrolled in a Master's program at Adelphi University in Sports Management. He holds a teaching license for Common Branches, pre-Kindergarten to sixth (6th) grade. He is also a Public School Athletic League certified coach.

Respondent has been employed at P.S. 93 where he worked for ten (10) years as a physical education teacher. He was moved into the classroom as a common branches teacher during the 2013-2014 school year.

At P.S. 93, Respondent has also served as a coach for co-ed and girls' basketball. He served as a UFT delegate from 2010-2012 and as a chapter leader for the 2013-2014 school year. However, due to the pendency of another 3020-a case, he had to step down. That case was subsequently dismissed. Due to the pendency of the previous 3020-a case, Respondent was moved to a different location, P.S.3. Respondent did not enter the classroom again at P.S.13 until the commencement of the 2014-2015 school year.

Motion to Dismiss

During the pre-hearing conference, Respondent moved to have Specification 1f, the June 22, 2015 observation, dismissed. Respondent argued that under the Advance System guide, observations during the 2014-2015 school year were to have been completed by June 5, 2015. (Tr. 8). June 22, 2015 was beyond that date.

The Department argued that there was no legal basis to dismiss the Specification based upon the assertion that it violates some guideline in Advance. There is no rule that specifies that an observation done after the date in the Advance Guidelines does not count towards a 3020-a procedure. (Tr. 8-9). The Department also argued that Respondent went on a Line of Duty Injury (LODI) on April 23, 2015, and was incapacitated for several weeks, putting him past the deadline. This then placed the principal in the position of violating his due process by not completing the six (6) required observations. (Tr. 12).

Respondent indicated that there might have been an appeal regarding the rating. Respondent also stated that the June 5 language in the manual is definite. (Tr. 13). The Department argued that if there were an appeal held, a hearing officer for the appeal would possibly have ruled on this issue. (Tr. 14). No ruling was introduced at this hearing.

I did not grant the motion to dismiss the specification. There is nothing that was shown to me in the CBA to indicate the observation must be done by a specific date. There was also insufficient evidence that the Advance Guidelines bind the parties such that the observations must be completed by a specific date. (Tr. 16-17). Further, there is the notion of impossibility. (Tr. 18). It was stated by the Department that the leave was extensive. During the hearing, it became clear that Respondent held himself out until June 22, 2015, despite his leave ending on May 29, 2015.

I did grant Respondent permission to renew the motion, if an appeal indicated that a hearing officer/arbitrator had dismissed the Specification. (Tr. 18). No renewal of the motion was made during this hearing.

Respondent's Position

Respondent posits that for the majority of Respondent's career he served as a physical education teacher. Upon changes in the license and certification requirement, Respondent was removed from his appointment as a physical education teacher and

placed in the classroom as a conventional teacher commencing with the 2013-2014 school year.

Shortly after returning to the classroom, Respondent was reassigned to P.S. 3 as a result of 3020-a charges. He remained there for the 2013-2014 school year. The charges were ultimately not substantiated and dismissed, and he was returned to P.S. 93 for the 2014-2015 school year. Respondent posits that this was detrimental to Respondent as he was just returning to a conventional classroom and deprived him of the professional development offered at P.S. 93 during 2013-2014.

Respondent also expresses concern regarding the effect that testifying in the 3020-a proceeding brought against him had on the P.S. 93 administrators and their relationship with him.

Respondent states that he was returned to P.S. 93 at the commencement of the 2014-2105 school year. Respondent proffered that his teaching in a classroom for a different grade, grade five (5) instead of grade three (3), deprived him of a meaningful opportunity to acclimate with the curriculum for the students.

Respondent acknowledges that he was going through a particularly difficult period in his personal life. He suffered the loss of his father in October of 2014, not long after his mother's passing, which resulted in difficult family circumstances. This had a large impact on his emotional health. He stated he was diagnosed with depression and anxiety. Respondent explained that this impacted his performance during the 2014-2015 school year. He has been able to control this with medication; but it took some time to find an appropriate regimen that worked for him. Respondent testified that while he is still on medication he submits that he is able to carry on with his professional duties.

Respondent asserts that he is open to rehabilitation and has tried to seek assistance on his own to improve his performance. Respondent introduced Respondent's Exhibit 7 (R-7), which was a class he took on his own between the 2014-2015 and 2015-2016 school

years to improve his performance.² He further took additional courses in the spring of 2017, which were introduced as Respondent's Exhibits 8 and 9 – using “questioning and discussion techniques” workshop (R-8) and “using assessment in instruction” workshop (R-9).³

Respondent offers that he has been getting assistance in managing his depression and anxiety, and has demonstrated his willingness to make improvements and take advice. No one has seen him teach in over fifteen (15) months. He feels he is ready to return to the classroom.

Respondent asks that elements of just cause authored by Carroll Daugherty in *Enterprise Wire Co.*, 46 LA 359 (1966) be considered. Further, Respondent argues that the Department bears the burden of proving the charges by a preponderance of the evidence as referenced in *Martin v. Ambach*, 67 N.Y.2d 975 (1986). Further, if the evidence is equally balanced or if it leaves the fact finder in such doubt as to be unable to decide the controversy in favor of the Department, a ruling against the Department and in favor of Respondent must result.

Respondent cites to *Board of Education v. Arno Arrak*, Decision No. 12114, 28 Education Department Reports 302 (1989). Respondent states that pursuant to *Arrak*, the relative question in an incompetency case is whether the teacher can provide a valid educational experience. In reviewing the teacher's competency, *Arrak* directs Hearing Officers to look at certain factors as to whether Respondent:

1. had requisite knowledge of the subject matter;
2. could communicate content facts;
3. could motivate and interest students;
4. maintain a classroom environment reasonably conducive to learning;
5. had the ability to assess and evaluate student performance.

² Certificate is dated July 28, 2015.

³ R-8 is dated April 6, 2017 and R-9 is dated March 30, 2017.

Respondent posits that a dominant component was not rated in many observations with respect to classroom environment and in those where it was rated, Respondent received an effective rating. Further, Respondent sought professional development and attended workshops in areas of assessment.

In the event that any charges are sustained, the Respondent maintains the Hearing Officer should be guided by the principle that the purpose of this proceeding is not to punish but to determine fitness to teach. This principle is articulated in Bott v. Board of Education, 41 N.Y.2d 265 (1977). Additionally, Section 3020-a(4) codifies that the purpose of 3020-a is to remediate and not to punish.

Respondent further argues that in NYC DOE v. P.O., SED 21438, the Hearing Officer found that in order for termination to be the appropriate sanction, he would need to find the Respondent incompetent and unable to provide a valid educational experience for the students. Further, he must find that there is no reasonable expectation of rehabilitation.

Respondent argues that Respondent did not have even two (2) years of incompetency charges against him. Further, Respondent has taken and found a medication regimen that is helpful to him and on his own sought out professional development in areas of concern expressed by his administrators. The administrators have not seen him teach in over one and one-half years. Accordingly, there can be no conclusion that Respondent cannot be rehabilitated.

Respondent concludes that the Department has to not proven by a preponderance of the evidence that Respondent meets the definition of incompetency and would be unable to continue with his professional duties if returned to the classroom. Respondent is capable of providing a valid educational experience.

Department's Position

The Department proffers that no one has ever seen the Respondent teach. In the eight (8) observations presented, Respondent never taught. He was not prepared. His lessons were incoherent. Respondent could not recall the bulk of the lessons during the hearing. The lessons lacked planning and structure.

While the Department understands that Respondent was a physical education teacher prior to the 2013-2014 school year, it is not an excuse for poor performance. The Department states that it makes sense that a teacher in these circumstances might struggle and have questions. However, it would be expected that the teacher would engage the administrators and learn to utilize the skills cultivated over the previous years to the new situation. There is an expectation that the teacher who wants to do a good job would expend effort and hard work in order to achieve positive results. Respondent, however, did not give any evidence of struggling or effort. Respondent did not do anything.

The Department proffers that each observation is an example of thoughtful educators attempting to give advice to an individual who was not going to do anything. The Department states that there is no need to review each observation, as Respondent did not controvert them. Further, the Department argues that the observations could not have been of great importance to Respondent, as he did not recall seven (7) out of eight (8) of them.

The Department posits that the administrators met with Respondent and provided explicit advice for each observation. They sat with him and discussed their concerns. He was provided an opportunity to answer. The Principal summed up Respondent's demeanor in her testimony when she stated that he just stared at her. He did not evidence a teacher who is interested in improvement. The Department proffers that Respondent's observations were ineffective or less than effective and did not even meet the standard of Arrak or any other measure of competency.

The Department proffers that the feedback from the administrators went unaddressed in each observation. Although the timeframe in this case is not a long one, the eight (8) observations are sufficient to determine Respondent's competency. He is not only incompetent, he never really taught.

Respondent did not rebut the observations. He claimed he was not sure how to do so, notwithstanding, having previously served as a union representative. If one looks in the

contract, the procedure is simple enough – one gives it to the administrator. Respondent did not take the effort to do this.

The Department proffers that for the June 22, 2015 observation (D-13), one the Respondent recalled, Respondent could not explain anything. . Everything he touched on was incoherent and had nothing to do with educating children.

Respondent described in detail the game he had students doing. The Department posits that it is unclear if Respondent was referring to this class or prior gym classes. Respondent spoke of students doing push-ups, spinning die, and doing something about the classroom perimeter. He claimed all was planned out but the lesson plan he had prepared had disappeared. Department argued that this had little to do with mathematic.

This lesson occurred immediately upon returning to school after he absented himself from school for two (2) months due to having allegedly injured himself. He was due to return to work on May 29, 2015. The Department proffered that Respondent knew the option that he selected for observations at the beginning of the school year. After the fifth (5th) observation, Respondent suddenly injured himself and stayed out of work for several weeks beyond the return date. He returned on June 22, 2015, which is beyond when teachers are normally observed. The Department submits that Respondent came in unprepared.

The administrators knew that Respondent needed to have six (6) observations and walked in on the lesson, which he described as an English lesson wherein the students were to write three (3) paragraphs about books that they had read while he was absent. The Department states that this is not a lesson or a plan. Having students write three (3) paragraphs in a full 45-minute session shows a lack of planning.

The Department argues that Respondent has offered nothing to upset any of the evidence from the observations. Department continues that it has meet the burden for Specification 1 beyond a preponderance of evidence.

Department proffers that despite Respondent periods of unavailability, there was evidence of the professional development offered to the Respondent. The Administrators spent full periods discussing observations, which they had. There were intervisitations documented by D-9 and D-10. There was a non-evaluative walk-through (D-12) used as a learning tool for Respondent to correct problems in his teaching. There was an attempt at a teacher improvement plan and other professional development in which the Respondent did not deny participating.

There is no evidence that Respondent ever implemented the advice he was given in any good faith, consistent way. The Department argues that based upon the witness testimony, it is unlikely that Respondent could be rehabilitated.

The Department stated that the testimony of the peer validator, per agreement, was not offered to establish Respondent's competency on the day of the observation. It was offered, relative to Specification 2, to demonstrate that Respondent did not implement the advice and recommendations given by the administrators by the time of his October 2015 observation. The peer evaluator's observation confirmed that Respondent had not implemented the recommendations made to him as she saw the same type of lesson the evaluator saw.

The Department submits that the administrators' testimony, corroborated by the peer validator's testimony, provide sufficient evidence to sustain Specification 2.

The Department posits that these cases have another step. In sum, there are a lot of cases, there is Arrak, and there is just cause. The Department proffers a four-step process when it comes to 3020-a competency as used in NYCDOE v. Michael Ramsaroop, SED 25437.

The Department has to establish that there is a deficiency. Second, the Respondent must be on notice of the deficiency. Third, the Department must have attempted to remediate the deficiency. Finally, the Department must establish that despite the remediation, the Respondent is still incompetent. The evidence demonstrates that all four prongs of this test have been satisfied.

The Department posits that Respondent knew who the peer validator was and that she was there because of his ineffective ratings. Within a month of her visit, Respondent again allegedly had an accident with a back injury. Respondent testified that he could not sit or stand for lengths of time, which the Department states are things a teacher does all day. Respondent indicated he was incapacitated so much that he could not do his job.

However, during cross-examination, it was revealed he volunteered to assist at football games. He testified that he held the door open for the team. The pictures are posted on his Facebook page as Department Exhibit 18 (D-18), showing his experiences. He is sitting and standing. He then states he only went for a short time to volunteer. The Department argues that it is clear from the pictures that he could sit and stand.

The Department argues that Respondent is a manipulator of the system and should not benefit from his being absent for “so-called” injuries during a period when he was only receiving negative evaluations. The photographs are demonstrative of Respondent’s bad faith. Respondent should not benefit from the fact he was missing and not getting professional development when he was “off doing who knows what” with his “back injuries.”

The Department understands that an individual can go through a kind of mental health issue when faced with the death of a loved one. The Department specifically states that it does not disparage the personal difficulties Respondent faced. However, the Respondent had the opportunity to engage his administrators then they were in the classroom and observing him. He also knew how to take leave, as he had taken several.

The Department proffers that the first time these issues are heard is during the 3020-a trial. Respondent indicates he is better now and can teach again, despite no evidence. The Department proffers that the way that this is coming up, being mentioned in this hearing for the first time, does not speak well of Respondent’s credibility.

Respondent brought out in his testimony a lawsuit, which he filed against his administrators alleging Title 7 violations. The Department cross-examined him about

several others ones, which had been dismissed. The Department argues that this is a pattern of Respondent, accusing his administrators of being racist against him, being sexist against him, and discriminating against him based on his disabilities. He was not referencing mental health disability. He was talking about his back issue.

The Department proffers that when asked about specifics concerning the acts of racism and sexism he suffered, he could not distinguish which administrators had made such a comment. The document he signed was signed in July 2015. Yet, Respondent claimed the discrimination he faced was in September or October of 2015. The Department argues it should be of grave concern when a person is bouncing around allegations of events that haven't yet occurred.

The Department argued that the training Respondent received in R-9 (March 30, 2017) was received after the charges were served and after Respondent was removed from the classroom. He testified that the training was useful to him and he was able to apply it to the classroom. The Department offers that this does not make sense.

The Department argues that Arrak no longer has precedent. It has not been followed in a majority of case. By example, the Department cites to the case of Ramsaroop, *supra*, wherein Arrak was not relied upon. Arrak is a very low standard. Most arbitrators hold teachers to a higher standard.

In Ramsaroop, the arbitrator recites the burden of the Department to prove by a preponderance of evidence the specification. The specifications go to the core of Respondent's competence as a teacher and his ability to provide a valid educational experience. In order to find that termination is the appropriate sanction, the Respondent must not only be unfit to perform his/her duties, there must be a finding that the Respondent cannot be rehabilitated. It is appropriate to consider the efforts made by the Department and the extent to which Respondent was receptive to such efforts.

The Department proffers that in Ramsaroop the arbitrator stated that the targeted teacher must be open to improving his pedagogy and be willing to accept and implement

recommendations made from the administration. The Department argues that such conditions do not exist with this Respondent.

The Department cited to additional cases of Respondents who were terminated after few observations and/or did not implement any of the advice provided to them to improve their performance.

The Department posits that Respondent spoke of his enrollment at Adelphi for a Sports Management degree. This has nothing to do with teaching despite statements from Respondent indicating it had been helpful in the classroom. However, Respondent spoke of how it helped him deal with custodians and janitors, and he knows the layouts of stadiums. He also spoke of color schemes and sponsorship. However, these are all related to managing professional and collegiate sports. The Department proffers it does not see how these relate to teaching.

The Department argues that it is arguing on behalf of the students whom the Respondent has failed. Respondent has failed the students. There is no evidence to suggest that Respondent would improve in the future. The Department argues that Respondent should be terminated.

Discussion and Opinion

I have carefully reviewed the transcripts of testimony, all documentation in evidence and arguments made by counsel; I make the following findings in this matter. I am going to address the specifications in chronological order.

Specification One

During the 2014-2015, 2015-2016, and 2016-2017 school years, Respondent failed to properly, adequately and/or effectively plan and/or execute lessons as observed on or about the following dates.

Specification 1a- October 31, 2014

Specification 1a is established by the testimony of Philip (Tr. 322-344) and Department Exhibit 14 (D-14). Components 1a, 3b, 3c, 3d, and 1a (p&p) were rated ineffective. Component 2d was rated as developing.

Philip noted that Respondent did not correct errors by students. She testified that Respondent seemed confused (Tr. 326). Questions were rapid fire and convergent with a single response answer. The question did not invite student thinking. (Tr. 331). The lesson had no defined structure and the pace was too slow. (Tr. 335). Students were not aware of the assessment criteria. (Tr. 337). Respondent did not have any approaches to the lesson in his lesson plan. (Tr. 341).

Philip testified that during the post observation Respondent took copious notes but did not say anything. (Tr. 344).

Respondent introduced an email to Philip dated September 2, 2014, entered as Respondent's Exhibit 3 (R-3). He testified (Tr.468-469) that he was lacking materials including books. He stated that Philip advised him that Mr. Holmes would assist him. He testified further that he did get the books during the following week or two. (Tr. 470).

Respondent also introduced a second email to Philip dated September 8, 2014, entered as Respondent's exhibit 4 (R-4). R-4 was a request for removal of materials from his classroom as he felt more space was needed. He also stated that as of that date he had no computers. Respondent testified that he did not receive a response. (Tr.470-472).

Respondent did not testify if the issues presented on the first days of school had an impact on his performance in this or in subsequent observations. Respondent did not have any recollection of this particular lesson. (Tr. 480; 580). He offered no testimony concerning the observation. I find that there is insufficient evidence to refute the testimony of Philip. Specification 1a is sustained.

Specification 1b-January 9, 2015

Specification 1b is established by the testimony of Bailey (Tr. 50-80) and Department's Exhibit 2 (D-2). Components 1a, 1b, 3b, 3c, and 3d were rated as ineffective.

Bailey noted in her observation many of the same deficiencies that were observed by Philip in D-14. Respondent did not model for the students. There were no charts or notations. The lesson pan did not portray what the teacher intended to teach. (Tr. 57).

Bailey also noted that Respondent also changed the date on the chart paper to make it appear that the lesson was taught the day before on January 8, 2015. She also explained that the 4R program⁴ was taught on Friday⁵ and per Respondent's schedule, it should have been taught during the second period, which she attended.

Bailey testified she wasn't sure what the lesson was. The lesson plan indicated a group skit, but students were doing individual skits. (Tr. 60). Individual students performed skits with no follow-up elicitation by Respondent or conversation amongst students concerning the skits. (Tr. 60). Bailey noted Respondent moved the lesson to a spelling test before the current lesson was completed. (Tr. 62).

Bailey noted the learning tasks and activities were poorly aligned with the instructional outcomes. There were no higher order questions. (Tr. 68). Respondent did not promote conversation amongst the students (Tr. 71). Students were not aware of the assessment criteria, there was no monitoring of student learning and feedback was absent. Bailey testified she could not ascertain if the students understood the essence of the skit (Tr. 75).

⁴ I note the 4R program stands for Reading, Writing, Request, Resolution. Bailey testified that the 4R program related to character development. By example, it helped children deal with disciplinary behaviors and diversity. (Tr. 53).

⁵ January 9, 2015 was a Friday.

Bailey noted that Respondent was cited with many of the same recommendations for improvement in this lesson as in the previous observation, D-14.⁶ Bailey testified that during the post-observation meeting Respondent did not ask questions but just took notes. (Tr. 79).

Respondent did not have any recollection of this lesson (Tr. 480; 580). He offered no testimony concerning the observation. Specification 1b is sustained.

Specification 1c- March 12, 2015

Specification 1c is established by the testimony of Philip (Tr. 348-365) and Department's Exhibit 15 (D-15). Components 2a and 2d were rated as effective. Components 1a, 1b, 3b, 3c, 3d, 4e, 1a (p&p), and 1e (p&p) were rated as ineffective.

Philip observed the lesson for approximately forty-five (45) minutes. (Tr. 350). Philip noted that the lesson plan provided by Respondent and the lesson did not match. (Tr. 352). Respondent was attempting to teach this as a reading lesson but he did not plan for it. Philip testified that he was just trying to do it "off-the-cuff." The result was neither effective for him nor the students. (Tr. 355). Respondent read from an iPad with his backs to the students. (D-15, p1).

Respondent did not have an instructional outcome in terms of what was presented. Students were behaved but Philip could not say they were learning. (Tr. 356). There was no discussion. There was no differentiation as the class was grouped as a group. (Tr. 358). As in previous lessons, the learning tasks were not aligned with the instructional outcomes and there was no structure to the lesson. Philip opined that the students would have been better in small groups. (D-15, p2). Students did not have the assessment criteria. Respondent's feedback was of limited poor quality. (Tr. 362).

⁶ Bailey references December 1, 2014 as the previous observation, which is the date when Respondent signed for the observation report, which is D-15.

Philip referenced the non-evaluative observation of February 23, done to help the teacher learn. (Tr. 363). In that observation, Respondent was provided with next steps, which included providing student with clear expectations and a plan to support varied learners with appropriate resources. (D-15, p3). Philip expected the recommendations made to have been implemented and they were not. (Tr. 363).

During a post-observation meeting, Philip stated Respondent did not ask questions but just took notes. He did not respond to questions. She noted, "Just like what he does now [in the hearing], he just stares at me." (Tr. 365).

Respondent did not have any recollection of this lesson (Tr. 480; 580). He offered no testimony concerning the observation. Specification 1c is sustained.

Specification 1d-March 31, 2015

Specification 1d is established by the testimony of Bailey (Tr. 85-131) and Department's Exhibit 3 (D-3). Components 1a, 1e, 3b, 3c, and 3d were rated as ineffective. Component 2d was rated as developing.

Bailey stated that the objective of the lesson concerned the students making revisions to their work. A rubric was attached to the work wherein feedback would have been provided. For the students to make the connection, the teacher should model. Respondent did not model. (Tr. 89). The feedback Respondent gave did not provide the student with any direction for improving their work. (Tr. 91). Respondent did not show his knowledge of the content. Thus, the students could not do the task effectively. (Tr. 93).

The learning objective was to utilize the rubric (example attached to D-3) to improve student writing. The objective was not written in a form that assessed what the children should have learned and should have been able to do by the end of the lesson. (Tr. 96). Respondent did not model for the students thus no understanding was provided to them as to how they would have been assessed and the tools used to assess them. (Tr. 99).

Bailey expected to see systems in place for managing student behavior as this observation was done in March and those expectations should have been established in September. In this lesson, one child was running about. Respondent indicated to students that the noise level was too high, but he did nothing else. (Tr. 101-102).

The recurring theme of asking low-level questions, which did not challenge students to think, marked this lesson. (Tr. 103). Respondent's feedback to the students was not effective for the students to communicate about their work. (Tr. 106). Bailey gave an example of one student who was at grade level three (3). Respondent did not provide feedback to the student on moving to the next level. (Tr. 108).

Further, students did not appear to be aware of the assessment criteria and Respondent did little to monitor student learning. Bailey found that it was unclear how Respondent's inadequate feedback would assist students in assessing their work. (Tr. 111). Respondent did not circulate to ascertain or direct the students as to what they were supposed to do, nor did he assess where they were in the process. (Tr. 114).

Bailey testified that the lesson plan, which Respondent produced, did not explain what he knew concerning the content he was going to teach. The information was scant and it was poorly put together. Bailey provided a template (D-3, p5), which Respondent could use to improve his lesson planning. This stands in sharp contrast to the lesson plan provided by Respondent (D-3, p7), which Bailey stated was "an abomination." (Tr. 130). She continued that it was totally unacceptable that a teacher would come to the classroom unprepared to teach.

Bailey noted no improvement in this lesson from the January 9, 2015 observation she performed. (D-14). During a post observation meeting, Respondent took notes but did not ask any questions or engage in dialog concerning the lesson. (Tr. 116-117).

Respondent did not have any recollection of this lesson (Tr. 480; 580). He offered no testimony concerning the observation. Specification 1d is sustained.

Specification 1e-April 23, 2015

Specification 1e is established by the testimony of Philip (Tr. 367-387) and Department's Exhibit 16 (D-16). Components 1a, 1e, 3b, 3c, 3d, 4e, 1a (p&p), 1e (p&p), and 4e (p&p) were rated as ineffective.

Philip noted that Respondent signed the observation report on June 22, 2015, because he was out of work until then related to an incident that occurred on April 20, 2015, wherein he allegedly bumped into one of his students and fell, injuring his back. (Tr. 368-369). His Line of Duty Injury (LODI) was approved through May 29, 2015. However, Respondent did not return to work until June 22, 2015. The medical office had denied Respondent's extension beyond May 29, 2015. (Tr-369-372).

This class was a mathematics lesson. Respondent did not correct a student who gave wrong answers concerning triangles. Students did not have enough time to work on the lesson, which Philip testified Respondent admitted in the post-observation meeting. (Tr. 374).

As in previous observations, students did not have a copy of the worksheet. Philip did state that the lesson corresponded to the lesson plan. However, it was not clear what Respondent wanted the students to do. The lesson related to triangles, but the learning objective was not clear. (Tr. 376-377).

Philip continued that only a few students participated in answers to questions asked. She noted that questions were not listed on his plan. Respondent had been taken on an April visitation into another 5th grade teacher's classroom. He received a copy of that lesson plan. He observed not only that there were questions in the plan, but also how this teacher differentiated. (Tr. 378).

This lesson had the students remain in the whole class setting as in the previous observation Philip performed (D-15). Respondent did not differentiate. (Tr. 380). Further, Respondent continued to provide poor feedback. Students were not aware of the

assessment criteria. Philip testified that the students did not learn in this lesson. Philip stated "...one student voiced as much." The student expressed that she did not understand how to classify triangles. Respondent did not respond. (Tr. 382).

Despite the professional development, intervisitations, and the non-evaluative observation, Respondent did not incorporate what he had learned into his teaching. (Tr. 383). Philip noted that an error had been made by Respondent. A student corrected him. (Tr. 384).

Philip opined that Respondent refused to plan. She explained all the objectives to Respondent who had no response for her other than a blank stare. (Tr. 386-387).

Respondent did not have any recollection of this lesson (Tr. 480; 580). He offered no testimony concerning the observation. Specification 1e is sustained.

Specification 1f-June 22, 2015

Specification 1f is established by the testimony of Bailey (Tr. 262-278) and Department's Exhibit 13 (D-13). Components 1a, 3b, 3c, and 3d were rated as ineffective.

Bailey testified there was no activation for what students understood or knew in terms of the pending lesson. Questioning was simple. Bailey would have expected some questioning of the students to ascertain what they understood or the knowledge they gained during his absence in order that he might move forward. (Tr. 268-269). There were no poignant questions asked regarding the lesson. (Tr. 270).

The students were supposed to be making up a game based upon the content they had learned throughout the year. Bailey testified that Respondent provided no guidance to the students as to what they should be doing other than thinking of a concept. (Tr. 271). Bailey testified that the lesson plan, (D-13, p7), Respondent provided her indicated the students were to do math. (Tr. 272). Bailey saw no evidence during this observation as to what lesson plan Respondent actually implemented. (Tr. 273).

Bailey noted that students were not aware of the assessment criteria. There was no guidance, no directive, and no roadmap for the students. (Tr. 275).

Bailey stated that despite Respondent's extended absence, it was the teacher's responsibility to come prepared to teach on the day he returned to the classroom. (Tr. 275-276).

Bailey discussed planning with Respondent as nothing had changed regarding creating a lesson plan or planning in general.

Respondent testified (Tr. 486-499) concerning this observation. Respondent testified that the lesson concerned the student using what they had learned to create a game for the class. The game would be similar to what was in physical education. The math piece in the game, as this was a math class, centered on jumping jacks and push-ups. (Tr. 489).

Respondent said his classroom was crazy. It was broken, down ready to be boxed up. He stated it was being boxed up by the substitute teachers who were there during his almost two-month absence. (Tr. 492). Respondent stated that both Philip and Bailey observed him. The observers came during the writing lesson; but they stayed during most of the part of the lesson wherein students were creating a game. (Tr. 493). The finished product did not come until the next day.

Respondent testified he differentiated because the students had a choice to choose the game they wanted to create. They had prior knowledge on games that were played before. (Tr. 495). Students were well behaved. (Tr. 496).

Respondent testified that he asked questions. The questions were higher-level because they concerned creating the game and the students had to think it through. (Tr. 497). Students were engaged because they had paper out and were writing on it. He gave them leeway to work with another student and answered questions as they arose. (Tr. 498).

Respondent performed assessment by going around the room and making sure the students were participating. The assessment wasn't on levels. The assessment was for the students to see if they could create. (Tr. 498).

Respondent testified on cross-examination that the lesson plans attached to D-13 are not the ones he used that day. The actual lesson plan is missing. (Tr. 569). Respondent asserted that he gave Bailey math and ELA lesson plans for that day. However, he did not produce any at this hearing. He stated he didn't know where they might be. (Tr. 570-571). Respondent stated he did not give her the ones attached to D-13. (Tr. 488; 572). He stated that those had been left behind in his classroom when he took his LODI. The lesson plan, which he alleges that he provided, would have reflected the plan for the lesson Bailey observed. (Tr. 573).

Respondent testified he differentiated by utilizing different books which the students had to read. (Tr. 574). Students were utilizing mathematical components in this game the students were to create.

Respondent and Bailey presented two different version of the same facts. Bailey testified that Respondent gave her the lesson plan attached as D-13, p7. This plan did describe a game that would be created by the students and completed the next day. This conforms to Respondent's testimony that he was observed during the bulk of the game preparation, but the finished product was not ready until the next day. (Tr. 493-494). I credit Bailey's testimony that this was the plan that Respondent provided to her.

I also credit Bailey's testimony that Respondent was not prepared for this lesson. I concur with the Department's argument that he didn't expect this to occur this late in the year.

Respondent was absent for almost two (2) months. Normally, observations are not performed this late into the school year. Respondent was supposed to have returned May 29, 2015, to work. Bailey testified that the medical office had not approved an extension

of his leave. By returning on June 22, 2015, Respondent made it impossible for the administration to complete the required six (6) informal observations earlier.

I concur with Bailey's statement that a teacher must come prepared to teach on the day the teacher returns to school, I do not find that Respondent was prepared. Respondent also did not demonstrate improvement over previous observations. I credit the testimony of Bailey. Accordingly, Specification 1f is sustained.

Specification 1g-October 7, 2015⁷

Specification 1g is established by the testimony of Bailey (Tr. 138-171) and Department's Exhibit 4 (D-4). Component 2a was rated as effective. Components 1a, 1e, 3b, 3c, 1a (p&p), and 1e (p&p) were rated as ineffective.

Bailey testified that it was confusing as to what the intended lesson was. This was a mathematics lesson. The lesson plan (D-4, pp5-7) indicated "re-teach place value and bar diagrams." Neither was present in the lesson. (Tr. 144-145). Respondent exhibited very poor planning and never presented what he intended to teach. (Tr. 146).

Bailey took issue with Respondent's lesson plan. It was neither clear nor coherent. (Tr. 148). During the March 31, 2015 (D-3) observation, Bailey had been critical of Respondent's lesson plan and had provided him with a template. Based on the current lesson plan, she stated that her previous recommendations were not thought about, and even discarded, as there was no attempt by Respondent to improve his lesson planning. (Tr. 151-152).

Bailey indicated that children were all working on the same document and did not have differentiated tasks. (Tr. 153). The exercise on D-4, p8 did not support all the varying

⁷ During the hearing, Respondent sought to have this Specification dismissed since the charges indicated October 17, 2015 and the observation clearly indicates October 7, 2015. I found this to be a typographical error and denied the motion to dismiss. Respondent received the October 7, 2015 observation during discovery ad was on notice. There is no October 17, 2015 observation and the charge further specifies "on or about." (Tr. 135-140).

types of learners in the class. (Tr. 154). Bailey noted that Respondent managed the classroom well during this observation. The students were following his directives. (Tr. 155-156).

Bailey testified the questions were low-level with an almost “ping-pong” effect. There were teacher questions and student answers. There was no extension of the questioning so that a student could respond to what another student said. (Tr. 156-157). There was nothing in the lesson plan to indicate the questions were prepared in advance. (Tr. 158). There was not enough questioning or use of depth of knowledge questions to demonstrate Respondent had effectively planned this lesson. (Tr. 159).

Student engagement was ineffective. The students were not having conversations about the tasks. Students individually worked on the tasks and some students had concerns about addition, which were not immediately addressed. It took thirteen (13) minutes before Respondent realized the students didn’t know what they were doing. (Tr. 160-161).

Bailey testified Respondent did not know his children or the extent of their knowledge. Bailey continued that had he known this, it would have been reflected in his lesson plan, which indicated various groups of students had varying assignments. (Tr. 163).

Bailey had provided lesson plan templates previously in an observation to Respondent. He again received these templates on September 1, 2015. During the post observation, Bailey discussed that Respondent’s lesson plans were not comprehensive enough and did not provide a sense of his knowledge of the content he was going to teach. She reviewed resources, area of questions to be asked, and again suggested the use of the template. She advised Respondent that her door was always open if he needed any specific assistance. Respondent did not respond in terms of specific assistance or concerning the lesson plan. (Tr. 169-170).

Respondent testified concerning this lesson. (Tr. 527-535). Respondent testified he was going over place values from a previous lesson. (Tr. 528). He acknowledged the lesson

plan was attached to D-4. His objective was math practices and fluency and ensuring the students used the R-D-W chart⁸ on the wall. (Tr. 529).

Respondent testified he did utilize groupings, mixing and placing students from different tiers in different groups in order that they might share. The students when mixed can help each other and see things a bit differently than the teacher. (Tr. 530).

Respondent testified that he modeled. He had bar graphs set up from a previous lesson. He used previous student knowledge to draw up this lesson. He felt his lesson was coherent. He explained why the lesson was done the way it was and what he had seen that the students were doing wrong. He claimed he provided the students an opportunity to practice and explained what was expected moving forward. (Tr. 532).

Respondent testified that he asked questions during the lesson about what the students felt and thought about the process. He questioned students concerning the reason neatness matters, the R-D-W, and the reason for its use. (Tr. 532-533).

Respondent thought the lesson went ok. He was not expecting the feedback he received that the lesson was ineffective and everything was terrible. (Tr. 534). He did not understand the reasoning. He also indicated that in the beginning of the year, “you’re looking at some of the things that could be a problem later in the year. So I want to build my students up.”

Respondent testified that he was told “...that’s the thing that you used prior lesson, to drive this one, and, they said, okay, that’s good. I see the kids were well behaved, or they’re doing –we see people helping other people. And then they might have said, okay, give them harder questions, and I’m like okay, but it didn’t seem like it was as harsh as they went about this....” (Tr. 535). Respondent explained the reasons he did what he did in the classroom as well as what he saw in the previous work that was handed back [by the students]. (Tr. 535).

⁸ R-D-W: read it, draw it, write it. (Tr. 529).

The difficulties with Respondent's pedagogy replay in every lesson. A review of Respondent's lesson plan (D-4, p5-7) confirms the deficiencies to which Bailey testified. I credit the testimony of Bailey. Respondent's lesson was less than effective. He has failed to demonstrate any significant improvement since previous observations. Accordingly, Specification 1g is sustained.

Specification 1h-November 17, 2015

Specification 1h is established by the testimony of Bailey (Tr. 174-193) and Department's Exhibit 5 (D-5). Component 2a was rated as effective. Component 3b was rated developing. Components 1a, 1e, 2d, 3c, 3d, 1a (p&p), and 1e (p&p) were rated as ineffective.

The lesson observed was a mathematics lesson. While Respondent utilized the template which Bailey had provided previously, Bailey saw no evidence that he had implemented the recommendations she had made. Many areas of the document were incomplete. The areas, which Respondent documented, were minimal. (Tr. 177). The document doesn't mention specificity. Bailey noted for the amount of time the students need to prepare or conduct their work, Respondent wrote "need time." The lesson plan was minimal. Bailey referred to it as "an abomination to come to class to teach children." (Tr. 178). It is a teacher's professional responsibility to plan and prepare. (Tr. 178).

Bailey noted that she had just had an observation with Respondent in October. Nothing had changed. Respondent started to use the template, but he did not take the time to prepare it properly. (Tr. 179).

Bailey noted Respondent displayed little or no understanding of the range of pedagogical approaches suitable for students to learn the content. This was a teacher-dominated lesson that addressed two word problems designated as homework. (Tr. 180; D-5, p1).

Bailey stated the students were all doing the same activity. There was no independent performance. Children were not in groups with varied resources for the groups. There

was no attempt by Respondent to implement the previous recommendations, which Bailey made concerning differentiation. (Tr. 182).

Respondent was rated effective for creating an environment of respect and rapport. However, he was ineffective with managing student behavior. Bailey noted that there was a sleeping child in the classroom. Respondent made no real attempt to awaken the student. The sleeping student was clearly in the line of sight of the other students. (Tr. 183-184).

Respondent did show slight improvement with questioning and discussion techniques, having been rated developing. However, overall Respondent's performance in this area was less than effective. The questions were of the type that a teacher would expect an answer from, but were not thought provoking. They were of such a low level that any child in that grade level would likely have been able to answer. (Tr. 185-186).

Bailey testified that the groupings of students were unsuitable to the activities. The lesson had no structure and a slow pace. Of the twenty (20) students in attendance, only five (5) students participated in the lesson. The task was not differentiated as all the students were doing the same thing. (Tr. 188).

Students were not aware of the assessment criteria. Respondent did not monitor what the students were learning. Bailey saw no evidence that the students understood the point of the lesson. The students were working in whole class instruction. There was no individual understanding by way of what the teacher could have assessed. (Tr.189-190).

Bailey testified that Respondent's lesson planning was atrocious. (Tr. 190). There was no improvement in planning. Respondent displayed little understanding of the prerequisite knowledge important to student learning. Respondent displayed little understanding of the range of pedagogical approaches suitable to student learning. This was borne out by Respondent's lesson plan. (D-5, p4).

Bailey had a post observation meeting in which she expressed her disappointment with the entire lesson plan. There was no planning for this lesson. Bailey noted, as in other post observation meetings, the Respondent did not ask questions. He took notes.

Respondent testified that he had no independent recollection of this observation. Respondent recalled the post-observation in that the template was discussed. He did not recall discussion concerning his classroom management or the sleeping student. (Tr. 539). He stated on cross-examination he indicated he only recalled that the administrators never discussed the student who was sleeping. (Tr. 601).

Respondent offered little or no testimony to refute the testimony of Bailey. He barely recalled the observation itself. Bailey rated Respondent effective or developing where appropriate. She noted the areas wherein he made a small attempt at improvement, but she was overall disappointed in his poor lesson planning and overall performance. I credit the testimony of Bailey. Accordingly, Specification 1h is sustained.

Specification Two

Respondent failed, during the 2014-2015, 2015-2016, and 2016-2017 school years, to fully and/or consistently implement directives and/or recommendations for pedagogical improvement and professional development provided in observation conferences with administrators and/or outside observers; instructional meetings; teacher improvement plans; one-on-one meetings with administrators, school based coaches and/or outside observers, as well as, school wide professional development, with regard to:

- a. Proper planning, pacing, and/or execution of lessons;*
- b. Using appropriate methods and/or techniques during lessons;*
- c. Designing coherent instruction;*
- d. Using assessment in instruction;*
- e. Student engagement; and/or*
- f. Using appropriate questioning and discussion techniques.*

Bailey and Philip held post-observation meetings with Respondent after every observation and provided feedback for Respondent to improve his pedagogy. There were multiple attempts at remediation made on Respondent's behalf. (See Remediation

below.) During each of those post-observation sessions, Respondent took notes; but he said very little.

I am mindful of Respondent's arguments. Respondent had been a physical education teacher until he was moved into a conventional classroom for the 2013-2014 school year. Respondent also was held out from performing those duties because of a 3020-a case pending during that school year, for which the charges were dismissed. I am also cognizant of certain personal problems Respondent experienced as well as his 2-month LODI during the latter half of the 2014-2015 school year, as well as his 15-month LODI commencing at the end of November 2015. However, during the time Respondent was in the classroom, he did receive ample remediation.

Respondent's difficulty implementing the remediation efforts is demonstrated in the method he handled Bailey's instruction concerning his lesson plans. Bailey provided Respondent with a template to utilize for his lessons plan during the post-observation meeting related to the March 31, 2015 observation. (D-3, pp 6-8).

For the November 17, 2015 observation, Bailey described Respondent's lesson plan as atrocious. (Tr. 190). A review of the lesson plan (D-5, pp 6-7) confirms Bailey's testimony. There is very little written on the plan. The plan reflects an individual who was either incapable of formulating a lesson plan or who had no interest in so doing.

Philip's testimony related to the April 23, 2015 observation (D-16) clearly summarizes the frustration of the Administration towards Respondent's performance. Philip stated that Respondent had been given opportunities not only "... for the intervisitations, not only the non-evaluative observation, but we had professional development every Monday or Tuesday, and by this date, April, my comments are seeming repetitive because I'm not seeing any improvement." (Tr. 383).

Philip continued that either Respondent was ignoring her or he felt he could do whatever he wanted. However, children do not have the choice as to who is their teacher. Philip had the expectation as a licensed teacher that when feedback is provided, Respondent

should put it into practice immediately. She continued "...and here it is day two of the New York State math exam. It speaks for itself." (Tr. 383)

Hanley was assigned to be a peer validator⁹ for Respondent. Hanley testified concerning the peer validator observation she performed on October 13, 2015. (Tr. 418-448). Hanley rated Respondent developing for component 2d and ineffective for component 2a, 3b, and 3d.

Hanley found for component 2a that the patterns of classroom interactions, both between teacher and students and amongst students were mostly negative, inappropriate, or insensitive to students' ages. For 2d, she observed that standards of conduct appeared to have been established. However, the implementation was inconsistent. Respondent tried, with uneven results, to monitor and respond to student behavior.

For component 3b, Hanley's observations were similar to that of Philip and Bailey. Respondent's questions were of low cognitive challenge, with single correct responses, and were asked in rapid succession. Interaction between Respondent and the students was predominately recitation style with Respondent mediating all questions and answers. Respondent accepted all student contributions without asking the students to explain their reasoning. Only a few students participated in the discussion.

For component 3d, the students did not appear to be aware of the assessment criteria. There was little or no monitoring of student learning. Feedback was absent or of poor quality.

Hanley's observation almost exactly mirrors the observations of Bailey and Philip. This observation was done in mid-October of the 2015-2016 school year. The observation is clearly demonstrative that Respondent did not implement the remediation and

⁹ Respondent initially objected to the testimony of the peer validator due to the circumstances in this case. However, the parties agreed that the peer validator's testimony could be permitted during this hearing with respect to Specification 2, in terms of implementation of directives that were provided by the administration at P.S. 93. (Tr. 288-302).

professional development, which he had received. Accordingly, I find that Specification 2 has been proven in its entirety.

Allegation of Discrimination

Respondent testified that he did not have a good relationship with his administrators, Bailey and Philip. (Tr. 474). He believed this was related to the dismissed 3020-a case that had been brought against him. He also stated this was related to his having served as a chapter leader. In this position, he brought complaints about students, safety, and other issues. (Tr. 474-475).

Respondent felt “unsupported and a mistrust because I had made reports, calls, called parents, social workers and various techniques to deal with the violence in that [his] class.(Tr. 478). He believed that administration had given him in his class all the students that were known to not get along with each other. (Tr. 478). Respondent entered an email to Philip dated October 28, 2014 as Respondent’s Exhibit 5 (R-5). In this email, he complained of the student behavior being such that it impeded learning in his classroom.

On October 31, 2014, Philip did an observation of Respondent (D-14). In the observation, Philip rated Respondent as developing for managing student behavior, noting that Respondent attempted to maintain order in the classroom, referring to classroom rules, but with uneven success. There is no reference in this observation to an out-of-control classroom. There is reference that Respondent displayed little understanding of prerequisite knowledge and range of pedagogical approaches important to student learning of the content. There also was little monitoring of student learning.

I do not find sufficient evidence in the record to support Respondent’s claim that the administrators gave him a class wherein no one got along or were worse behaved than other students in the school. There is evidence that Respondent was ineffective in his teaching skills.

The evidence in the record also supports that both Bailey and Philip were concerned with Respondent's success and offered him various opportunities for professional development to improve his performance. (See section on Remediation.)

Respondent testified that, during the 2014-2015 school year, he filed a complaint alleging employment discrimination in the United States District Court for the Southern District of New York. A copy of the lawsuit was entered as Respondent's Exhibit 6 (R-6). Respondent testified he felt discriminated against based upon his gender. He felt he received no assistance in the classroom. He further alleged all the female teachers had SMART Boards and technology and he had to search for everything. (Tr.513). He alleged that when he said he had problems with students Philip would say to him, "...you're a man. You should be able to control them..." (Tr. 514).

A stipulation of settlement resolved the case. The only part of the settlement read into the record concerned the repair of an electrical outlet and the SMART Board in classroom 301 at P.S. 93. This was signed by one party on March 28, 2016 and April 2, 2016. (Tr. 524). I note that this was signed during the period of November 20 2015 and February 13, 2017, when Respondent was on leave related to a LODI.

Respondent testified that the outlet and the SMART Board were not repaired. This affected his ability to utilize the computer with the SMART Board. All the other things the other teachers could do with the SMART Board, Respondent testified he could not do. (Tr. 523).

On cross-examination, when asked about specifics concerning the acts of racism and sexism he suffered, Respondent could not distinguish which administrators had made such a comment. (Tr. 589-590). The amended complaint he signed was signed in July 2015. Yet, Respondent claimed the discrimination he faced was in September or October of 2015:

Q: "All right. Well, I was sitting here as you explained this to me, correct me if I'm wrong, but you just said they discriminated against you based upon the injury you sustained in April 2015 by not accommodating

you in September and October of that year, right? Didn't you just say that? Yes or no."

A: "Yes, I did."

Respondent was then handed the complaint, which he admitted he had signed in July 2015. This confirmed his statement immediately preceding in which he testified he filed the complaint on July 5, 2015.

On cross-examination, Respondent further testified that he filed another discrimination claim on February 7, 2017¹⁰ with the division of Human Rights. (Tr. 595-596). When queried if he filed the discrimination claim based upon his lower back and that he was a male, Respondent could not recall if it was because of gender. (Tr. 595). When pressed further he stated, "I know what I accused them of, but I didn't know that-every detail that I put in there at this time." When shown the document related to the February 7, 2017 claim, he then recalled it was not due to gender.

In R-6, Respondent checked off a long list of reasons he felt he was discriminated against. It indicated that he complained that there was discrimination because of his lower back issue and because of gender. Respondent was also asked if he filed a complaint of discrimination based upon his having once served as a union chapter leader. Respondent agreed that this complaint was dismissed. (Tr. 598-599).

The Department cross-examined him about several others ones, which had been dismissed. The Department argues that this is a pattern of Respondent's, accusing his administrators of being racist against him, being sexist against him, and discriminating against him based on his disabilities. He was not referencing mental health disability. He was talking about his back issue.

Respondent seems confused in his statements. He testified that the repairs to the electric outlet and the SMART Board stipulated to in spring of 2016 had not been done. Respondent did not return to work until February 13, 2017. It is not clear from his

¹⁰ The February 7, 2017 complaint was not offered into evidence.

testimony to when he is referring. Similarly, it is not clear how Respondent can make a claim of discrimination in July 2015 related to events in September 2015, which have not yet occurred.

Respondent's statements concerning discrimination are accusations without supportive evidence. Based upon the record of evidence before me in this 3020-a proceeding, I do not find there is any evidence to conclude that there was discrimination against the Respondent by the school administrators.

Remediation

When considering charges of incompetency, a determination must be made as to whether the teacher was afforded appropriate remediation, typically in the form of professional development. The record reflects that the Department offered the Respondent various forms of assistance and professional development during the 2014-2015 and 2015-2016 school years. Respondent was on LODI from November 20, 2015 through February 13, 2017.

The Department notes that the Respondent was provided with feedback and comments for every observation. Bailey and Philip met with Respondent after each observation. They were very detailed in their comments on each observations and next steps for improvement. Respondent received professional development in the form of advice, recommendations, counsel, and instruction. He was offered to make intervisitations to other teachers.

As a result of ineffective observations, several intervisitations were arranged in the class of Ms. Pulliam¹¹ who was considered an effective teacher. Bailey testified as to each intervisitations, which were aimed at assisting Respondent in improving his pedagogy. (Tr. 215-225; 226-229; 231-235). After each intervisitation, Bailey and/or Philip debriefed the Respondent. Each intervisitation was memorialized and entered as a

¹¹ Ms. Pulliam did not testify at this hearing.

Department Exhibit. The intervisitations occurred on February 10, 2015 (D-10), February 23, 2015 (D-12), and March 27, 2015 (D-9).

After the post observation conference for the March 31, 2015 observation (D-3), Bailey provided Respondent with a lesson plan template introduced as Department's Exhibit 11 (D-11).

The Department also offered Department's Exhibit 6 (D-6). Bailey testified that this was the professional development, which was provided by the school during 2014-2015. (Tr. 196). The professional developments covered the full spectrum. Respondent attended all of the professional developments included in D-6. Bailey testified further regarding the scope of the professional development offered, which included mathematics, ELA, and reading. Bailey further expanded on issues with Respondent's planning, which she sought to assist him in remediating. (Tr. 197-203).

Bailey testified as to the professional development offered during the 2015-2016 school year. This was entered as Department's Exhibit 7 (D-7). D-7 went from the beginning of the school year only through November 20, 2015. Respondent was out on LODI for the remainder of the school year.

Philip also testified concerning a non-evaluative observation, which was performed on Respondent on February 23, 2015. Philip references this in D-16. This is a learning opportunity for the teacher. The purpose is to observe, provide feedback, and focus on the areas of difficulty in the teaching. (Tr. 363). Philip met with Respondent afterwards. In discussing growing and developing in D-16, p2, Philip noted that next steps were provided to support Respondent's instructional growth.

Bailey testified that she met with Respondent to put a Teacher Improvement Plan (TIP) in place for the 2015-2016 school year. At the meeting, Bailey testified Respondent did not offer any suggestions for the TIP. Bailey wrote up a TIP, which has been entered as Department's Exhibit 8. (D-8). Bailey testified that she discussed the TIP with the

Respondent. She stated Respondent did not have any questions concerning the TIP. (Tr. 210-213).

Based on the record, I conclude that the Department made a good faith effort to provide the Respondent with appropriate and varied opportunities at remediation through the professional development and assistance specified.

Line of Duty Injuries

Respondent also experienced a Line of Duty Injury (LODI) on April 20, 2015, which held him to be out of work from April 27, 2015 through June 22, 2015. Respondent claimed that a child had pushed him, resulting in a back injury. (Tr. 142). Respondent claimed a second LODI from the end of November 20, 2015 through February 13, 2017. Respondent alleged that a student tripped him in the classroom, causing a lower back injury. (Tr. 610).

I find the coincidences of Respondent's injuries to be troubling. The first LODI occurred after a series of very poor observations, which were ineffective. This accident was the result of Respondent being pushed by a student, causing Respondent to fall. (Tr. 142). It occurred on April 20, 2015. Respondent had a bad observation on April 23, 2015, his fifth for the 2014-2015 school year. Respondent stayed out from April 27, 2015, until June 22, 2015, despite medical clearance only through May 29, 2015.

A second LODI occurred in the fall of 2015. As the Department correctly stated, Respondent knew who the peer validator was and that she was there because of his ineffective ratings. Within a month of her visit, and three days after receiving another ineffective evaluation on November 17, 2015, (D-5), Respondent again allegedly had an accident with a back injury. According to the Respondent, this accident was caused by a student who tripped Respondent as he walked past the student. Respondent stayed off the job for fifteen (15) months as a result.

Respondent testified that this November 2015 injury was a serious injury. Respondent testified that he could not stand for long periods of time, even sitting in the car for hours hurt, and he experienced numbness down his leg. (Tr. 611). Respondent reiterated that he could not stand or sit for long periods of time. He was in constant pain which prevented him from doing his job. (Tr. 611).

During cross-examination, it was demonstrated that Respondent attended football games during the period of incapacity. Respondent identified pictures from his Facebook page, which were dated November 20, 2016, December 9, 2016, December 29, 2016, and December 30, 2016¹². These were introduced as Department's Exhibit 18 (D-18).

Respondent agreed that this was during the period he was out on leave for lower back injury. (Tr. 614). Each of the four pictures shows Respondent with friends at football games. He stated that parents of students invited him and he was only a spectator. He then testified that:

Q: "...I just want to make sure I understand what it is I'm seeing a photo of."

A: "You're seeing a photo of me with kids that I know, and me volunteering."

Q: "Okay. So, you're volunteering and not just being a spectator then, right?"

A: "Right."

Q: "Okay. What do you mean volunteering?"

A: "Just helping out."

Q: "Helping out in what capacity?"

A: "As a volunteer."

Q: "What does that mean?"

A: "Well, do you want me to open a door or-or be there, I'm there." (Tr. 618).

Respondent explained each of the football events. He then tried to say he didn't hold doors; he opened them. He sat with his friends and the players and discussed football. Respondent further admitted that this was in the middle of the timeframe that put Respondent out of commission for work for a year and a few months. (Tr. 625-626).

¹² There is an additional photo from July 2016, which Respondent asserted was a report. (Tr. 615). It has not been considered.

The Department argues, and I concur, that it is clear from the pictures that Respondent could sit and stand.

The Department argues above that Respondent is a manipulator of the system and should not benefit from his being absent for “so-called” injuries during a period when he was only receiving negative evaluations. The photographs are demonstrative of Respondent’s bad faith.

I find that these pictures and Respondent’s testimony are highly problematic. Respondent’s conduct is indicative of potential fraud and/or leave abuse. However, that has not been charged in the instant matter and I make no finding in that regard.

However, the conduct cannot be ignored. Viewing this in its very best light, Respondent’s conduct is demonstrative of bad faith on his part. This conduct is reflective of Respondent’s veracity and mindset. It weighs heavily concerning his overall credibility. Respondent admitted to performing the same or similar activities that he would do in the classroom. Yet, he testified he was in constant pain and could not do his job.

I find further that Respondent’s actions and testimony related to the second LODI cast severe doubt as to Respondent’s true desire and ability for remediation. During the period that Respondent was able to attend football games from November 2016 forward at a minimum, he offered no evidence of making any attempt at remediation. There is no testimony that he made attempts to do so by seeking on-line sources, or that he contacted his administrators to ascertain what could be done from home, or that he might be able to return to the classroom. The first photos are from November 20, 2016. Respondent did not return to duty until February 13, 2017. I find that Respondent’s actions demonstrate that his interests lay elsewhere than the classroom.

Findings and Penalty

Principal Sandra Philip (Philip) and Assistant Principal Bailey (Bailey) testified as to the observations of Respondent. As recalled by both observers, the observations of Respondent's classes during the 2014-2015 school year and those performed for the 2015-2016 school year repeatedly revealed some or all of the same deficiencies. These included planning and practicing techniques, designing coherent instruction, questioning and discussion techniques, engaging students in learning, and using assessment in instruction.

I found both Philip and Bailey to be credible and convincing witnesses. Their testimony was consistent with the reports they drafted at or near the time of the observations. Respondent did not offer any responses during the hearing to the majority of the observations.

Respondent testified to certain personal issues, related to the death of his father and other related family concerns, which caused him to be take leave time during October of 2014. It also caused him to suffer from anxiety and depression, which he sought to control through medication. He contends this affected his performance.

While I am mindful of Respondent's situation, there is insufficient evidence in the record that this was the cause of Respondent's poor classroom performance. Respondent did testify that he suffered from depression related to his personal circumstances. He believed that this affected his performance. (Tr. 483-484). Respondent testified he never went on leave related to mental health issues. (Tr. 584).

No medical or other evidence was introduced to substantiate that Respondent's depression was such that it could have adversely impacted his performance. If Respondent's circumstance was such that it would have affected Respondent's performance over a substantial period, Respondent could have advised his administrators and could have taken leave. He did not do so.

Respondent testified that he had a poor relationship with his supervisors and that he felt unsupported by them. This statement is unsupported by the record. The evidence supports that both Philip and Bailey made multiple efforts to assist Respondent with his professional development. Respondent's remaining an ineffective teacher was a consequence of his failing to follow what he learned through professional development.

Respondent argues that I should follow that standard established in Arrak, supra, which defines incompetency as performance that falls below the minimal level expected of a reasonable teacher. Even if I used this more lenient standard, I find that the Department has established that Respondent's performance fell below the minimally acceptable level for an effective pedagogue.

The Department cites to the case of NYC Department of Education v. Theresa Hardaway, SED 20119. While the case is distinguishable because of the misconduct, the arbitrator found three observations sufficient to prove the Respondent's incompetence. The Respondent herein, as the Respondent in Hardaway, refused to follow the advice, counsel, and instruction given by the administration to improve his pedagogy.

I note the four-step process when it comes to 3020-a competency used in NYCDOE v. Michael Ramsaroop, SED 25437, proffered by the Department.

In the instant matter, as in Ramsaroop, the Department has established that there was a deficiency in Respondent's pedagogy. Second, the Respondent was on notice of the deficiency through the observations, post-observation meetings with administrators, and the Department's remediation efforts. Third, as stated above, the Department attempted to remediate Respondent's deficiency. Finally, the Department has established that despite the remediation, the Respondent is still incompetent. The evidence demonstrates that all four prongs of this test have been satisfied.

I have carefully reviewed the transcript of record, all documentary evidence presented by the parties, and my assessment of the credibility of the witnesses and the arguments and case law submitted by the parties. I find that the Department has proven, by a

preponderance of the evidence, that Respondent is culpable of the Specifications 1a through 1h and Specifications 2a through 2f, which are sustained.

The conduct proven constitutes just cause for disciplinary action under Education Law Section 3020-a; incompetent and/or ineffective service; conduct unbecoming Respondent's position; conduct prejudicial to the good order, efficiency, and discipline of service; neglect of duty; misconduct; substantial cause rendering Respondent unfit to properly perform his obligations to the services.

Respondent has been found guilty, by a preponderance of the evidence, of incompetence and the Specifications stated above. Further, the Department has made extensive, genuine remediation efforts. The question, then, becomes one of penalty.

In 3020-a proceedings, evidence of poor pedagogy or even misconduct does not necessarily determine the outcome. This is because 3020-a disciplinary charges are not intended to be punitive; but rather, they are "a determination of the fitness of the teachers against whom they have been brought to continue to carry on their professional responsibilities." Bott v. Board of Education, 41 N.Y.2d 265 (1966). Rather, dismissal necessitates proof that a teacher is both ineffective and not capable of being remediated

I have found that Respondent has demonstrated that he is ineffective as a pedagogue. I find further that additional measures to correct his deficiencies would be futile.

Respondent did not enter into meaningful discourse with the administrators during any post-observation meeting. Philip's statement in D-16 (the April 23, 2015 observation) accentuates that Respondent has resisted feedback on teaching performance from supervisors. Respondent had made no effort to assume professional responsibilities. Philip stated that, "To date (of that observation), no evidence of learning was reflected in his practice." This theme carried throughout for Respondent's observations.

For remediation to be successful, the pedagogue must be open to the need for correction and demonstrate a willingness to accept and implement recommendations received from

the administration. Respondent did not acknowledge his own deficiencies or the need to correct his pedagogy. Bailey tried repeatedly to help Respondent improve his lesson plan. The lesson plan from the November 17, 2015 observation (D-5) contained, on examination, only scant comments, some scribbling, and nothing of pedagogical value. I find this to be indicative that Respondent was either unable or not interested in improving his lesson plans.

Respondent introduced R-9 and R-10 to show Respondent was serious about remediation. It is unclear from the record whether he knew of the pending 3020-a charges as both certificates were issued after the serving of the charges. However, even considering these two courses, they do not serve to invalidate the consistently ineffective observation reports. Further, they do not address Respondent's failure to address the concerns of his supervisors and implement the recommendations made with each observation.

In addition, I found above that Respondent's actions and testimony related to his absence from his second Line of Duty Injury casts severe doubt as to Respondent's true desire and ability for remediation.

Respondent did not acknowledge his own deficiencies or the need to correct his pedagogy. I find that this Respondent did nothing to improve his pedagogy and did not teach. Based on the evidentiary record, I find that there is no basis in the record that the Respondent would engage in any meaningful efforts to change his pedagogy. His lack of participation in the observation conferences and his failure to improve his pedagogy demonstrate that Respondent is unwilling or unable to improve his pedagogy. I do not find that an additional opportunity at remediation would be fruitful.

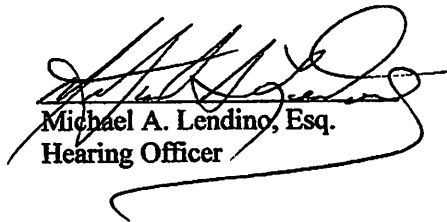
Respondent does have sixteen (16) years of service. However, I find that Respondent's conduct is such that his length of service has no bearing on the penalty to be imposed. Respondent offers no basis to conclude that were he to be allowed to remain in the employ of the Department of Education that his performance would be different in any way from that which led to these charges.

Accordingly, I find that the Department has established just cause for termination.

Award

1. Specifications 1a, 1b, 1c, 1d, 1e, 1f, 1g, and 1h, are sustained.
2. Specifications 2a through 2f are sustained.
3. The appropriate penalty for Respondent's proven incompetence is termination from service.

Dated: 6 August 2017
Bronxville, N.Y.

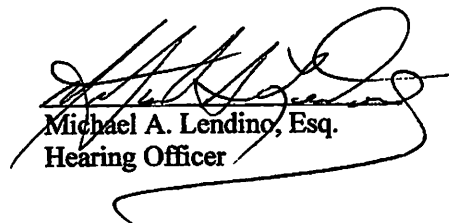


Michael A. Lendino, Esq.
Hearing Officer

STATE OF NEW YORK)
)
COUNTY OF WESTCHESTER)

I, Michael A. Lendino, Esq., do hereby affirm upon my oath as arbitrator that I am the individual described herein and who executed this instrument, which is my Award.

Dated: 6 August 2017
Bronxville, N.Y.



Michael A. Lendino, Esq.
Hearing Officer