UNIVERSITY OF THE STATE OF NEW YORK
STATE EDUCATION DEPARTMENT

In the Matter of the Administrative Hearing]

Between] **OPINION & AWARD**

Department of Education of the City School District of the City of New York,]
Complainant,- Employer] **Gloria Johnson**
Arbitrator

and] **SED 27,285 and 27,977**

Noah Berkley - Tenured Teacher;]
Respondent

Section 3020-a Education Law Proceeding

APPEARANCES:

For the Complainant: Clorissa Cook. Esquire
NYC Department of Education
Office of Legal Services

For the Respondent: Lori Smith, Esquire
Office of Richard E. Casagrande

Introduction

The instant Charges and Specifications were filed by the Department of Education of the City School District of the City of New York ("Complainant," "Department," "DOE ") against Noah Berkley ("Respondent") pursuant to Section 3020-a of the Education Law of the State of New York. As a result of the filing of these Charges, a request for hearing was filed on June 22, 2015. The undersigned was designated by the parties to serve as Arbitrator.

On July 9, 2015, the Respondent served upon the Department a Demand for Bill of Particulars and Production of Documents (Ex. R1). Respondent also filed a Motion to Dismiss on July 9, 2015. A pre-hearing conference in the matter of SED#

27285 was held on August, 10, 2015. It was transcribed. Thereafter hearing days were held on October 5 and 6, 2015. Subsequently, on October 15, 2015, a conference call was held with both parties attending; which consolidated SED # 27,977 with the existing (SED# 27,285) case. A second Motion to Dismiss was filed on October 15, 2015; in the consolidated matter. Hearings resumed in the two consolidated cases on October 26 and 27. On November 10, 2015 the scheduled hearing was cancelled due to a counsel's illness. Hearings resumed November 17, and 20, and December 3, 2015.

In the instant matter, two (2) pre-hearing conferences were conducted and the consolidated case was heard on seven (7) full hearing days during which both parties were afforded full and fair opportunities to examine and cross-examine witnesses, submit evidence, and present arguments in support of their respective positions. On the eighth hearing day, December 4, 2015, the parties completed oral summations in lieu of briefs. At the parties' request and joint consent, the record remained open until post hearing submissions were received. Submissions were received on December 11, 2015 and December 28, 2015. The record closed on December 28, 2015.

THE CHARGES AND SPECIFICATIONS

SPECIFICATIONS (Group 1 – SED 27285)

NOAH BERKLEY (hereinafter referred to as "Respondent"), under File # 0849405, is a tenured teacher formerly assigned to P.S. 33, located within District 10 in the Bronx. During the 2014-2015 school year, Respondent engaged in indecent exposure, inappropriate touching, corporal punishment, conduct which could constitute a crime, conduct unbecoming his profession, misconduct and neglected his duties as follows.

SPECIFICATION 1:
On or about January 30, 2015, Respondent inappropriately pinched and/or placed his hand on Student A's thigh.

SPECIFICATION 2:
On or about January 29, 2015, Respondent, while inside of a student Bathroom:
a.) Exposed his penis to numerous students.
b.) Urinated in the student bathroom while in the presence of numerous students.
c.) Immediately next to students whom were urinating.

SPECIFICATION 3:
As a result of committing one, some, or all of the actions as specified within Specifications 1-2 above. Respondent knowingly acted in a manner likely to be injurious to the physical, mental and/or moral welfare of children less than seventeen years of age.

The foregoing constitutes:

- Just cause for disciplinary action under §3020-a of the Education Law;
- Conduct unbecoming Respondent's position or conduct prejudicial to the good order, efficiency, and discipline of the service;
- Substantial cause rendering Respondent unfit to perform properly his obligations to the service;
- Indecent Exposure;
- Inappropriate Touching;
- Corporal Punishment;
- Conduct which could constitute a crime;
- A Violation of the Chancellor's Regulations;
- Neglect of duty; and
- Just cause for termination.

CONSOLIDATION: Specifications Group 2 (SED 27977)

NOAH BERKLEY (hereinafter referred to as "Respondent"), under File # 0849405, is a tenured teacher formerly assigned to P.S. 33, located within District 10 in the Bronx. During the 2012-2013, 2013-2014, and 2014-2015 school years, Respondent engaged in corporal punishment, conduct which could constitute a crime, conduct unbecoming his profession, excessive lateness, misconduct and neglected his duties as follows.

In Particular:

SPECIFICATION 1:
On or about and in between September 9, 2014 until April 20, 2015, Respondent:
a.) Kicked Student A in the leg.
b.) Punched Student A in the stomach.
c.) Slapped Student A in the face.
d.) Stated words to the effect of: I don't care.

SPECIFICATION 2:
As a result of committing one, some, or all of the actions as specified within Specifications 1 above, Respondent knowingly acted in a manner likely to be injurious to the physical, mental and/or moral welfare of a child less than seventeen years of age.

SPECIFICATION 3:
During the 2012-2013 school year, the Respondent was excessively late on ten (10) occasions:

1.) Monday, December 3, 2012	47 minutes
2.) Monday, December 10, 2012	7 minutes
3.) Friday, February 1, 2013	8 minutes
4.) Tuesday, February 5, 2013	2 hours, 32 minutes
5.) Tuesday, March 12, 2013	15 minutes
6.) Monday, April 8, 2013	7 minutes
7.) Wednesday, May 1, 2013	30 minutes
8.) Wednesday, May 8, 2013	9 minutes
9.) Friday, May 10, 2013	10 minutes
10.) Monday, May 20, 2013	16 minutes

SPECIFICATION 4:
During the 2013-2014 school year, the Respondent was excessively late on eleven (11) occasions:

1.) Tuesday, September 24, 2013	42 minutes
2.) Thursday, September 26, 2013	13 minutes
3.) Friday, October 25, 2013	30 minutes
4.) Wednesday, October 30, 2013	7 minutes
5.) Wednesday, November 6, 2013	7 minutes
6.) Friday, January 24, 2014	7 minutes
7.) Friday, February 7, 2014	59 minutes
8.) Thursday, March 6, 2014	7 minutes
9.) Wednesday, April 23, 2014	9 minutes
10.) Thursday, May 29, 2014	57 minutes
11.) Wednesday, June 11, 2014	20 minutes

SPECIFICATION 5:
During the 2014-2015 school year, the Respondent was excessively late on fifteen (15) occasions:

1.) Thursday, September 4, 2014	6 minutes
2.) Thursday, September 11, 2014	22 minutes
3.) Wednesday, September 17, 2014	8 minutes
4.) Monday, September 22, 2014	14 minutes
5.) Thursday, October 2, 2014	6 minutes
6.) Thursday, October 16, 2014	12 minutes
7.) Wednesday, December 3, 2014	26 minutes
8.) Wednesday, December 10, 2014	9 minutes
9.) Wednesday, December 17, 2014	8 minutes
10.) Monday, January 12, 2015	39 minutes
11.) Friday, February 27, 2015	6 minutes
12.) Wednesday, March 18, 2015	10 minutes
13.) Wednesday, April 1, 2015	9 minutes

14.) Monday, May 18, 2015 2 hours and 23 minutes
15.) Wednesday, May 27, 2015 1 hour and 26 minutes

The Foregoing constitutes:

- Just cause for disciplinary action under §3020-a of the Education Law;
- Conduct unbecoming Respondent's position or conduct prejudicial to the good order, efficiency, and discipline of the service;
- Substantial cause rendering Respondent unfit to perform properly his obligations to the service;
- Corporal Punishment;
- Misconduct;
- Excessive Lateness;
- Conduct which could constitute a crime;
- A Violation of the Chancellor's Regulations;
- Neglect of duty; and
- Just cause for termination.

STATEMENT OF FACTS

Respondent has been employed as a teacher with the New York City Department of Education for over ten (10) years, at Timothy Dwight Elementary School; P.S. 33 in the Bronx. (Tr. 1410). He began teaching at P.S. 33 upon his completion of a Teaching Fellows Program that required him to complete two (2) years in a "high need" school. Thereafter, he opted to remain at Timothy Dwight for an additional eight (8) years. (Tr. 1410). Timothy Dwight Elementary is the second largest elementary school in New York (Tr. 901). The majority of the student body consists of children who live significantly below the poverty level who have academic and personal needs. The majority of the students participate in the free lunch program. (Tr. 1216). The Teaching Fellows Program advertises seeking to attract professional adults who are engaged in other fields of endeavor. Prior to teaching, Respondent had a ten (10) year career in customer service. He also worked as a dance instructor and competed pro-am and professional. (Tr. 1412).

Respondent has a Bachelor of Arts degree in English with a theater minor from Montclair State University. He also has a Master of Arts degree in Urban Science Students from Mercy College (Tr. 1505). Respondent has dual teaching certification, in elementary and common branches, as well as special needs.

Names of students throughout this decision are consistent with Exhibit D3 attachment G for case 1. Names of students in consolidated case 2 are 2B,(for Student A) the others are : V, W, X, Y and Z.[1]

POSITIONS OF THE PARTIES

Department's Position

The Department successfully met its burden of proof. There is just cause for termination. Respondent had the benefit of notice, due process, fair and thorough investigations. His rights were not violated. Students are entitled to attend classes in a school environment in which the adults charged with educating them do not cause them fear or discomfort. See, *New York City Department of Education v. NV,* November 30 2005. However, the behavior of Respondent caused several students at P.S. 33 physical and mental harm and discomfort; through his conduct unbecoming his position, indecent exposure, inappropriate touching and corporal punishment of a student as well as excessive lateness during the 2012-2013, 2013-2014, and 2014-2015 school years.

The testimony of his character witnesses confirmed that Respondent is a good teacher. However, in this instance being a good teacher was not enough and cannot erase several bad decisions Respondent made and the resulting misconduct and violations that now require his termination.

Group 1 (SED 27285) Specification 1

On January 29, 2015, Respondent entered the auditorium reportedly on his way to another class. He saw Student A seated alone, sat beside him engaged in a conversation which was observed by first-hand witness, Leoncia Martinez a school aide who was monitoring a group of children in the auditorium seated in an area a few rows behind Student A. Respondent's conduct attracted her attention. (Tr. 185).

[1] A separate key is available to facilitate counsels' review and protect the students' identities.

On cross-examination, Respondent alleged he went out of his way to approach Student A, because he was not dancing and looked out of place. There were approximately 200 children in the auditorium, many of whom were dancing in the aisles during in-door recess. Respondent decided to approach Student A, a student with whom he was familiar and encourage him to dance. Respondent's stated well-meaning objective failed to match his actual; conduct, unwanted physical contact with the student.

Respondent described his physical contact as a "clap" on the knee, but the contact was described by Investigator Pellizzi and Ms. Martinez as grabbing the thigh when he stood to walk away from the student. Respondent's contention that there is no direct evidence regarding the challenged touch or physical contact with the student is not true. Ms. Martinez personally observed Respondent enter the gym, sit next to Student A, and saw his hand go down on the area of Student A's leg, as he stood up to leave the area. The only thing that was not witnessed is the nature of the touch that Respondent imposed on the student as he walked away. Ms. Martinez immediately approached the student and spoke to him in Spanish to clarify what she had just seen and verify whether Respondent made physical contact when she saw his hand go down as he walked away. (Tr. 170).

Investigator Pellizzi's handwritten note describes that Respondent used his index finger and thumb to grab the area of the student's thigh above the knee, and squeezed. When Pellizzi interviewed the student, he said it hurt a little and he said "ouch." Thus, DOE argued what was considered an act of "encouragement" by the Respondent - was an act of discomfort to the student, as reported by Ms. Martinez and Mr. Pellizzi, a mandated reporter. On cross-examination, Respondent admitted there were other ways to encourage the student such as a thumbs-up and words of encouragement without touching. (Tr. 1480). DOE argued grabbing or pinching a student's leg, or putting one's body weight on it causing the child to say "ouch" as he rose to leave the auditorium was not encouragement. Physical contact with the student causing him to say "ouch" indicates corporal punishment. Assuming *arguendo*

that it is not considered corporal punishment, it is at a minimum inappropriate touching, which based upon the student's reaction, caused him objectionable discomfort.

Corporal Punishment (Group 2; Specifications 1 and 2)

Student 2B sustained corporal punishment; at the hands of Respondent. Respondent requests that this specification be dismissed based on Student 2B's failure to recite all the acts of misconduct set forth in the specification when she testified at the hearing. However, the record contains the testimony of the student's mother, who stated her daughter Student 2B reported corporal punishment to her; when she said Respondent grabbed her arm, punched her stomach, slapped and kicked her. She was unable to tell the exact time the event occurred. She said "it happened a while ago, a long time ago." When asked by her mother why she did not tell her when it happened, the child responded, "well, I forgot." (Tr. 468). Student 2B's mother testified she knows when her daughter is telling the truth and that is why she made a complaint to P.S.33 administrators. She testified that she specifically asked her daughter if she was telling the truth or playing around and her daughter responded "no, Mom, I'm telling you the truth." (Tr. 469).

Every precaution was made to ensure an atmosphere comfortable for a six year old witness. Student 2B was distracted, allowed to spin in her chair. Her mother was present in the room while she testified. The room was arranged such that she did not have to look at the Respondent if she did not so desire. The DOE attorney tried to question her about her original allegations. Nevertheless, she only testified about an incident that occurred when Respondent told her to go stand by the cubby, when other students were talking to her; whom he did not chastise. She testified that he used his foot to physically contact her thigh area; i.e., clarified as "scooting" or moving her over. (Tr. 515). As she continued to spin around, she was asked whether Respondent touched her with anything else, and she responded "no." Subsequently, she was asked if she remembered telling her mother that Respondent hit her. She responded

"yes." When asked whether she told her mom the truth or a lie, she said she told the truth. (Tr. 515).

DOE contends that looking collectively at Student 2B's testimony regarding corporal punishment and the bathroom incidents (in consolidated case 1) provides a total picture of what was happening to students as a whole, in their educational environment at Timothy Dwight Elementary School; P.S. 33. The Department also argued that Respondent's request to dismiss specification 1 for vagueness and an overly broad time frame, should be denied. There was testimony by early childhood education professional Ms. Ceara that five and six year olds have no concept of spatial time. This impacted Student 2B's ability to express the exact time of an incident. Nevertheless, the Department argued there was enough specificity for Respondent to mount a defense. Student 2B told her mother the unpermitted touching happened during a timeframe when Respondent was her prep teacher. (Tr. 487). The record shows that Respondent was her prep teacher in the first grade during the 2014-2015 school year. (Tr. 1488).

Corroborating evidence for Student 2B's account of events is gathered from the testimony of her mother, as well as Assistant Principal (AP) Ceara, who procured the initial statements during the investigation Mr. Castro completed. (Tr. 971). The investigation was conducted appropriately with each student being interviewed individually. (Ex. D13). In Exhibit 13, Student 2B stated Respondent "… kicked me on the leg, he punched me on my stomach, smacked me on my face, and grabbed me and my arm. He smacked me for no reason and he said he didn't care. We were doing the math work when this happened." Her statement to Ms. Ceara (Tr. 909) is further corroborated by what she told her mother and by her classmate who said she had seen Respondent do this to other people. This report was taken when Student 2B was interviewed on April 20, 2015. One student who did not appear as a witness at the hearing, stated in her statement to the investigator that sometimes the Respondent grabs the children by the arm hard and they say "ouch." That student acknowledged

she had seen him do this in the classroom to Student 2B. She also said she "…saw him punch [Student 2B] on her stomach." (Ex.13).

DOE contends the Respondent inaccurately interpreted Student 2B's classmate Student X's testimony as Respondent took her softly by the arm and placed her on the rug. Conversely, DOE contends the student actually testified Respondent took her arm and softly placed her on the rug. It is also noteworthy that the Respondent acknowledged that he held Student 2B's hands to guide her through the students when he brings her through a group of children to sit next to him near the front. DOE contends the word "softly" does not make a difference. Irrespective of whether he took her arm softly or not, it shows he made physical contact with her. DOE also pointed out that the student testified "one time I was playing with the blocks, so he grabbed me by my arm a little hard. And then I saw him grab Student 2B by her arm when she was trying to go to the rug to leave for lunch." (Ex. D13).

There is testimony on the record that the students' statements were properly acquired and processed. They were interviewed one at a time by Ms. Ceara. (Tr.913). Ms. Johnson carried the children to the office. According to Ms. Johnson, the students did not discuss their testimony or the occurrences with each other. They talked about random things. They were interviewed one at a time by Ms. Ceara, outside the presence of each other. Ms. Johnson also testified five and six-year-olds would not talk about what just happened. Thus, kindergartners and first graders would not get together to discuss the case or get the stories aligned. It is noteworthy that Student V and Student W said they did not see anything irrespective of the fact that Student 2B said they were present during her encounter with the Respondent. Thus, it cannot be said that the students got together and fabricated a story against the Respondent. DOE contends that Student Y and Student X saw what happened to Student 2B and their statements of support her testimony.

DOE pointed to the fact that Ms. Johnson testified there is constant noise in the open classroom environment where children are reading, singing, talking and many activities are going on simultaneously.

Contrary to Respondent's argument, hearsay statements are allowed in teacher terminations. They can be supported as long as they are believable, probative and relevant. The students' statements are reliable. The investigation was conducted by Ms. Ceara and Ms. Pagan was present to type what the students stated. Their inconsistencies make them believable. The statements are not carbon copies of each other. The case of *Giles v. Schuyler, Chemung, Tioga Board v. Board of Cooperative Educational Services*, 604 NYS 2d 345. (1993 appellate division third Department) provides that hearsay statements are permissible. If one examines Student 2B's and her mom's testimony together with Student X's testimony, the composite provides adequate evidence.

Hearsay – Group 1 and 2 Specification 1 (Exhibit D1)

Respondent protested that Student A did not testify at the hearing and his hearsay statement should not be used. However statements given to Investigator Pellizzi can be considered based upon case law, and given weight by the Arbitrator. Terminations can be supported by hearsay evidence, as long it is believable relevant and probative. The statements of Student B and Student A are probative believable and relevant. The handwritten notes of investigator Pellizzi (Ex. D3) provide corroboration that on January 29, 2015, Respondent grabbed Student A's thigh.

During the investigator's interview with Student A, he demonstrated how Respondent grabbed his leg; using his right hand and pinching him with the right hand using his index finger just above the knee. He stated it hurt to the point that he said "ouch." He also demonstrated to Ms. Martinez what occurred and Ms. Martinez's testimony at the hearing corroborates the student's written synopsis. In addition, Ms. Martinez's statement is corroborated by the notes of Investigator Pellizzi who was told by Student A that Respondent came over to him, sat, talked and grabbed his thigh when he stood up; which hurt a little. The student's statement is corroborated by Ms.

Martinez who saw his hand go down and she immediately approached the student asking what happened. The student told her that Respondent grabbed his leg. The reports in this case are factual and specific to the issues. Therefore, they should be taken as sufficient proof that is relevant and able to be relied upon to support termination. *Diehsner v. Schenectady School, City School District*, 152 A.D. 2d 796; 543NY 2d 576 (1989 Third Department). When a statement is made contemporaneously to a person who has a duty to accurately report that statement, then the statement that is being made is sufficiently relevant and probative; irrespective of the fact that it is hearsay. It is adequate to support termination. In the instant case, the investigators had a duty to ensure that they accurately reported the events in order to generate their report, ensure the accuracy and validity of documents being used in the report such as the Special Commissioner of Investigation (SCI) report (Ex. D3) by Pellizzi. The investigator testified at the hearing that the statements were accurate representations of his interviews with the students done soon after the occurrence. They are labeled February 4 or February 12 which is within two weeks of the January 29 and January 30 occurrences.

Department Exhibit 13 is a school-based OSI report regarding Student 2B. Ms. Ceara and Mr. Castro provided sworn testimony that Ms. Ceara took the initial statements soon after she was aware of the incident. The students' interviews were done individually, in compliance with the requirements. Both of these reports were done in the normal course of business by persons who are required to report accurately. Thus, they are reliable hearsay evidence.

Group 2, Specification 2 (Exhibit D1)

Evidence in the student bathroom incident of January 30, 2015 was corroborated by Respondent himself. Respondent denies he personally had a conversation with Ms. Santos regarding prohibitions against him using the students' bathrooms. The Department contends it does not matter with whom he had the conversation, what is relevant is that he admits an administrator told him not to use the students' bathrooms. (Tr. 1441). He was given notice and made aware prior to

January 30, 2015. Respondent contends he saw other people go in and out of the boys' bathroom. Principal Santos stated when it was brought to her attention, she spoke to those other people and they have not done it again. Conversely, Respondent, who was previously warned, elected to go back into the boy's bathroom.

Respondent cannot deny he was in the bathroom. Not only did he admit it, he was seen there by eyewitnesses: Student D and Ms. Vielman. To the extent that Respondent was previously warned, he was progressively disciplined. The first time was a verbal warning - not to go into the bathroom; a year before the January 2015 occurrence. When he was verbally warned, he stated he would not go into the students' bathroom to use it again. (Tr.1525).

The Department acknowledged the UFT Union told Principal Santos there is a problem with bathroom shortage. However, that does not excuse inappropriate behavior on the part of a tenured teacher who has previously been told not to use the students' bathrooms when children are present. According to Ms. Vielman, the staff bathroom on the cafeteria level is usually unlocked and the doors open. However, there previously were times when it is locked and one had to get a key from Ms. Ladesma. However, on the date in question in January 2015, the door was open. (Tr. 391-392).

Ms. Vielman was asked whether or not she liked or disliked Respondent. Ms. Vielman responded that she likes everyone with whom she works. Then she was asked whether she believed Respondent made sarcastic or unpleasant comments about her. She responded yes she did, but did not pay him attention or answer back. She just ignored him. When asked "because you are afraid you might get angry, is that right?" She said "oh yes." (Tr. 392). Respondent used this testimony to show that there was a tendency for Respondent to make sarcastic or unpleasant comments to Ms. Vielman and this possibly could be the basis to show bias or lack of credibility.

DOE contends there was no evidence that Ms. Vielman filed a false report of what she saw in the bathroom. She told the truth to the investigator as well as during

her testimony at the §3020-a hearing. Ms. Vielman testified she went into the bathroom, because she heard children playing. After calling out to them a number of times, and knocking on the door, she warned them she was entering the bathroom, because they did not comply with her request to come outside the bathroom. Before entering, she blew a whistle – as a warning, then entered the bathroom. That is when and how she saw Respondent near the window. This was admitted by Respondent, whose testimony corroborates he was at the urinals near the window. That admission also comports with Investigator Pellizzi's report. In addition, of the children who were present in the bathroom (Student D) testimony placed Mr. Berkley in the middle set of urinals. (Ex. D4C). Student D also placed himself and his cousin Student C at the next set of urinals closer to the door. Respondent's counsel argued Student D said Respondent was "far." However, considering Ms. Ceara's testimony, space and time may be varied when estimated by young children. Student D also said he could see Respondent urinating and he could see what he called his "peener." (Tr.263). Student D said he could see it but not close; it was far away. He also gave his account to the investigator, Pellizzi. The investigator spoke to students Student D as well as Student C.

Before he entered the hearing, Student D's cousin, Student C could not calm down. He had an episode early in the morning and spent a great deal of time loudly crying and upset. The DOE Counsel intervened, trying to get him to calm down, but he came into the hearing and could not stop spinning in the chair. Student C testified he had never been to the bathroom. After several questions, DOE stopped questioning. Respondent chose not to cross examine.

DOE argued that the third student who was in the bathroom with Respondent is Student B1. Ms. Vielman was not sure about his name at the hearing. She referred to him as Matthew. Respondent contested that DOE alleged Matthew and Student B1 were the same person. However, DOE argued Ms. Vielman went to the classroom and pointed out the students who came to the interviews during the investigation; i.e. Student D, Student C , Student B1. No one named Matthew was interviewed.

There are problems with Respondent's explanation for having entered the boys' bathroom. Initially, he indicated there was a possibility he might have left Ms. Williams' class which is located on the same floor as the cafeteria. She reportedly arrived late which diminished his time to get to his next class. Allegedly, he had to go to the bathroom with urgency. Since he was running late to his next class, he dashed into the boys' bathroom. It was a violation for him to go into the bathroom, especially since he saw children were present.

Respondent alleges he did everything possible to put space between him and the children; so he positioned himself at the last urinal. DOE questioned why he did not go into one of the empty stalls which had doors. On cross-examination, he was asked if he heard the children playing before he walked into the bathroom. His response was he could not remember. DOE contends when he walked into the bathroom and saw children playing, he could and should have turned around and walked back out; which would have put space between him and those children. When he reached the divide, he could have stopped and said "… this is a bad idea, and turned around and walk out." Instead, he walked to the farthest urinal. He passed several stalls to get to the urinal. In fact, a stall was right behind him when he used the urinal. He walked past five boys playing around in a bathroom. Then he allegedly "leaned into the urinal" in an effort to prevent exposing himself. DOE contends some things do not have to be read or written in a manual. Your UFT representative doesn't have to tell you. It is a matter of common sense

DOE argued the Respondent has a son which should have given him "parental common sense". He has been active in the professional corporate world as a businessperson and now a second career which should have given him a teacher's commonsense. DOE challenged the veracity of a statement that in a bathroom full of children he leaned into a urinal to hide himself and rationalized they could not see. He had no way of knowing what the children could see. Student D stated they could see. Even though he did not testify to such at the hearing, Student C told the investigator they could see. (Ex. D3). Both Student B1 and Student C said Student D was

standing next to Mr. Berkeley and he could see his penis. Student D did not acknowledge standing next to Respondent, but admitted to the investigator he saw Respondent's "peepee." (Ex D3).

When Ms. Vielman walked into the bathroom, she saw Respondent standing at the last urinal. Ms. Vielman was the only one in the room who was close to Respondent's height. Everyone else was approximately waist height to the six (6) foot tall Respondent DOE argued a six (6) foot tall person leaning into a urinal trying to hide his genitals from children who are waist high, has no concept of what they saw. DOE asked the Arbitrator to disregard Respondent's argument that the children could not see him when they likely could see him "full on."

Prior Warning

Irrespective of the fact that it may have been Mr. Castro and not Ms. Santos, Respondent acknowledged that he was told not to use students' bathroom. Respondent testified that he saw other people using the students' bathroom, including staff and parents. The first time he commented that he didn't know or was sorry may be acceptable, but the second time he entered, he was on notice. He had been warned yet he walked in to the bathroom knowing students were present. There was no emergency so important that he had to go and use the bathroom in front of students. Assuming *arguendo* that he had an emergency, he could have used a stall which provided a door to close. However there was an adult option on that floor, the staff bathroom which he testified was 20 feet away. (Tr. 1520) Indeed, Respondent went to the staff bathroom to wash his hands when Ms. Vielman saw him to leave the children's bathroom. On the other hand, Respondent testified he could not remember if he washed his hands or went to the staff bathroom. He also did not recall if he tried the staff bathroom door before he went to urinate in the children's bathroom.

This is a serious matter. Young students were playing in the bathroom, as a salaried, tenured teacher plans to urinate in their presence; when he had other viable

options. There were five stalls where he could close the door. However, he walked by the stalls.

Ms. Vielman had no motive to lie. Respondent's testimony corroborates her testimony. He acknowledged he urinated exactly where she said he stood. Ms. Vielman also placed a child next to him. She had no motive to fabricate the story. Ms. Vielman testified that she received the rule in writing stating that staff is prohibited from using students' bathrooms. She said it was received on a document in a folder given to staff members.

Group 1 Specification 3 (Exhibit D1) and Group 2 Specification 2 (Exhibit D5)

Both specifications focus on knowingly acting in a manner that is dangerous to the physical, mental and moral welfare of a child less than 17 years of age. An unwanted unpermitted touching by a teacher, is not in the best interest of the mental and moral welfare of a child, irrespective of whether the touch was done as alleged encouragement.

The impermissible touching in the auditorium was witnessed by Ms. Martinez. Student A told her as well as the investigator it hurt him to the point that he said "ouch." Thus, the touching was clearly hurtful and caused physical discomfort.

Viewing the penis of one's teacher under whatever circumstances - an exposure to five-year-old kindergarten students who are playing in the bathroom can be injurious to the mental and moral welfare of those children. Urinating requires the intentional conscious act of removing one's penis from their pants. There is no other way to perform urination and when this is done by a salaried tenured teacher in front of a student, it is injurious. Irrespective of his alleged "precautions," there is no way Respondent could have insured the students not seeing his penis. The record shows he was not successful. The statement of Student B was that he was able to see Respondent's "peepee," which he also called his "peener" at the hearing.

Five-year-old children are impressionable. There is no way to measure the deleterious impact of seeing a teacher who was not supposed to be in the student

bathroom, expose himself and urinate in front of them. The act is misconduct that is unbecoming his profession. It is also conduct that could constitute a crime.

Regarding Student 2B, if one slaps, kicks, punches or grabs a five-year-old kindergarten student that is criminal conduct. It can be physically and mentally injurious to her. The statements of Student 2B and her mother combined with the statements of Students X and Y, provide insight to what happened around April 20, 2015, in P.S. 33.

DOE contends that Student 2B was punched, kicked, and slapped by Respondent. In another forum, this could be criminal conduct; although in the instant case it is viewed and charged as misconduct. Corporal punishment is conduct unbecoming the profession of a tenured teacher. It is also a violation of the Chancellor's Regulation that renders him unfit to perform his obligations to the service.

Group 2, Specifications 3, 4 and 5 (Ex. D5)

Contrary to Respondent's contention that there is no rule about lateness, there is a rule. Respondent's supervisor Assistant Principal Castro stated anything more than 10 lateness per school year is considered excessive (Tr. 638). Respondent testified that he did not consider his lateness is to be excessive, because there was an average of one a month. On cross examination, the DOE attorney asked Respondent if lateness was a problem for him, and he said "yes." He experienced problems with the train delays, medications and insomnia. However, it has always been the administration's position that arrival after 8:01 a.m. is late. Having a reason does not erase the lateness. Chancellor's regulation 601 requires regularity of service. Ten (10) or more latenesses a year are considered excessive. A review of the Respondent's time cards for each year; Ex.D9 for the 2012-2013 school year, Ex. D10 for 2013-2014 school year and time cards Ex. D11 for the 2014-2015 school year shows that Respondent exceeded the limit. Timecard punches showed when he was late and the EIS report delineated whether a lateness was excused, or unexcused. During the hearing, payroll secretary, Debra Ianniello examined each of the latenesses, as to whether Respondent had exceeded the allotted amount of time such

that it would impact his amount of pay; i.e., as a pay reduction. (Tr. 697) She testified that as of May 10, 2013, Respondent met his limit set forth in number nine (9) of Specification 3; and it was starting to cost him money. The evidence showing whether or not Respondent had a time and attendance problem is the time cards and EIS report; not the rating given by the principal at the end of the year.

Respondent went through each of his latenesses recorded in the specifications. He admitted that number 4 of specification 3 for Tuesday, February 5 – showed he was two hours and 32 minutes late that day. Respondent gave reasons why he was late, but that does not erase the lateness. Each of the timecards was authenticated by Ms. Ianniello.

Group 2, Specification 4

Late arrival number 5 representing documentation regarding November 6, states two (2) minutes on the EIS report was charged seven (7) minutes in the Department's specifications. DOE Counsel contends it looks like a 7, but Ms. Ianniello stated it was 2 minutes - as opposed to 7.

Additionally, Respondent contends that Specification 4, late arrival number 6 for January 24 states seven (7) minutes late, but the charge should be dismissed. He contends he was not seven (7) minutes late. DOE contends the charge should remain. DOE contends if the Arbitrator determines it is a 2 (as opposed to 7) and dismisses number 5; Respondents still would be left with 10 latenesses which is considered excessive by both the Chancellor's regulations and the testimony of AP Castro; Respondent's immediate supervisor who stated 10 lateness a year is excessive for the 2013-2014 school year.

Group 2, Specification 5

Late arrivals numbers 14 and 15 for Monday, May 18 and Wednesday, May 27; Respondent contends he was given letters. Principal Santos testified that if letters were given, inviting him to meet with the Principal, those latenesses were excused. However, Respondent testified that on Wednesday, May 27 (number 15), he called to

confirm the presence of the UFT Representative and discovered Mr. Castro would not be available. Mr. Taylor notified him at 8:30 a.m.; which was 30 minutes before he was scheduled to meet at 9:00 a.m. Therefore, DOE considers that as a late time to ascertain whether or not the parties he was meeting would be present. Assuming *arguendo* that the Arbitrator gives credence to the fact that Respondent was supposed to be at the school (and excuses those two occurrences) that still would leave 13 days considered excessively late.

Transit delays-

Respondent testified that his start time is 8:00 a.m. He leaves his apartment at 7:15 a.m. DOE contends that if the trip takes approximately 45 minutes to commute, he is cutting his trip close; i.e., knowing that trains are problematic. Respondent could get to work on time, if he took an earlier train.

Insomnia-

Respondent testified he got a slow start in the mornings, because of insomnia and the medication he was taking. Further, Respondent testified that his lateness problem is not new. In a three-year period, he has experienced problems with lateness. DOE argued the medication nor the train cannot serve as an excuse. Respondent has a professional obligation to get to work on time, without excuses. The contract requires him to be at work at 8:00 a.m. each morning.

Group 2, Specification 5

Wednesday, September 17, he arrived at work at 8:08 a.m. On December 17, 2014, he was not at work until 8:08 a.m. On September 11, he was 22 minutes late. The Chancellors regulations required him to be present for regular service, on time. Respondent justified his lateness by saying other teachers were late. However, DOE contends that other people's lateness does not mean it is correct and does not excuse his misconduct. Irrespective of why he was late 2 hours and 32 minutes on February 5, he was not present at work to fulfill his functions. He was warned several times about lateness.

Ms. Ceara testified about lateness and progressive discipline. She said Respondent received a verbal warning and a letter for lateness. There is at least one counseling memo and two letters in evidence regarding Respondent's attendance. There were 10 occurrences of lateness in the 2012-2013 school year; 10 or 11 dates in the 2013 2014 school year and in Specification 4 there were at least 15 dates in the 2014 2015 school year.

The case of *DOE v. HK*, SED #4442 by Arbitrator Diane Lushewitz dated April 11, 2008 a Respondent had various reasons for being late; including medical. She submitted doctor's notes regarding depression, but she was excessively late two consecutive years. The seriousness and frequency of her lateness and absence justified termination. Also the case of *DOE v. MP*, SED #6152 (Arbitrator Alan Symonette, 2008) ineffectiveness based on pattern of lateness and absence over a two year period that impacted effectiveness – justified termination. Respondent was regularly unavailable and unable to get along with coworkers and administrators.

DOE argued there is no requirement for progressive discipline with respect to corporal punishment. See the matter of the *Department of Education v. NV*,SED #5002 (Arbitrator Martin Scheinman 2005). See *also Department of Education v. MH* SED #5412 (Arbitrator Andree Y. McKissick, 2008); *Department of Education v. EC*, SED # 7331 (Arbitrator Mary Crangle, 2008); and *Department of Education v. HF*, SED #17154 (Arbitrator John Woods, Jr., 2011)

Respondent's Position

Respondent contends the Department's failure to conduct a fair investigation prevents DOE from establishing just cause and meeting its burden to prove misconduct. The charges are not only untrue, they are stigmatizing. The claims of knowingly acting in a manner likely to be injurious to the physical, mental and/or moral welfare of a child less than seventeen years of age set forth in exhibits D1 and D5 should have been handled in-house. However, the environment and culture at Timothy Dwight Elementary School, P.S.33 is one that instills fear and intimidation in

staff who are surrounded with multiple investigations currently being conducted. Teachers are afraid that very thin evidence will be used to bring unnecessary charges against them. (Tr. 1186).

Group1, Specification 1

The basic circumstances of Specification 1 are undisputed. Respondent acknowledged while traveling through the auditorium on his way to his next class, he observed and sat beside Student A, who he encouraged to join others who were dancing. At the end of the conversation, he clapped his hand on the student's knee and encouraged him to engage in the pleasurable exercise of dancing. (Tr. 1477-80). There was no testimony from the student, but his statement contained in Exhibit D3. It is unlikely that a student would have reported such a benign incident. Basically nothing happened. The investigation was precipitated by Ms. Martinez who allegedly observed the Respondent move his hand as he was getting up to walk away. She approached the student to ask what they were talking about and if Respondent touched his leg. At that time she described what the boy said as the clamping motion. This is corroborated by the investigation notes. However, her testimony escalated at the hearing; i.e., changed to describe a grabbing motion up high on his thigh; which is inconsistent with the investigator's notes.

Respondent argued he would not have attempted to molest the child in the presence of 200 other students and staff members. He simply tried to encourage a shy non-participating student to try and activity (dancing) that he himself enjoyed. Respondent had taught dancing and competed as a professional. (Tr. 1479). However, Respondent testified he has learned his lesson and will never touch a student again. In the future, he will give a thumbs-up or some other non-contact sign of encouragement. (Tr.1480).

Respondent also renewed his hearsay and right of confrontation arguments. Respondent contends it is well settled that hearsay may not be relied upon when it is not corroborated by direct evidence. Arbitrator Siegel in the case of *DOE v. JB* SED

15,224 (issued December 30, 2010) - held that it is fundamentally unfair when the Respondent cannot confront the accusing witness . Respondent Berkley further argued it is well established that hearsay cannot be used to corroborate hearsay. *See, DOE v PN , SED* Case #10-694 (Arbitrator Siegel, 2011).

Group 1, Specification 2

Specification 2 alleges Respondent exposed his penis and urinated in the presence of students in the student bathroom while students urinated beside him. P.S.33 is an old building with a scarcity of adult bathrooms. There are 4 bathrooms for 122 adults. The only other bathroom on the first floor where the cafeteria is located, was frequently locked such that teachers had to request a key. Only recently, was the bathroom made available to staff other than cafeteria workers, but this new availability of the bathroom was not formally announced to teachers. (Tr. 1113). Ms. Vielman testified it is frequently locked and teachers have to request a key. (Tr. 364) In an emergency or when there was little time to get to the bathroom, on the cafeteria level, there was no alternative choice if the staff bathroom was bolted or occupied. Respondent made an on the spot judgment to rush into the student bathroom; which is quite large with 12 urinals and five stalls; as opposed to checking the staff bathroom which is frequently locked or occupied. There is evidence that other adults also use the student bathroom. This was admitted by Principal Santos. (Tr.1111). Ms. Vielman also testified that male staff use the student bathroom despite the announcement. It was a practice at the school - known to the staff.

When Respondent entered the bathroom, there were five or six children playing in the middle and near the sink. He elected to go to the very last urinal down near the window, so as not to attract attention or have conversations with students. He took every precaution. He leaned into the urinal, so that he could conceal himself as much as possible. Respondent acknowledged on cross-examination that he did not think about the possibility of using a stall. He normally uses a urinal. He had an emergency and just intended to run in and run out. The students' testimony corroborates the

Respondent's story. Student D was adamant about the fact that the students were standing far away from the Respondent (Tr. 241) and he was facing the wall (Tr. 269). At no time did the student testify Respondent exposed his penis. When asked to demonstrate, he held his hands in front of him, but did not say he saw the penis. He testified Respondent was urinating. Student D testified Respondent was not near him or other students. (Tr. 247).

There is concern about the accuracy of the investigation in that the cover letter of Exhibit D3 states that Student D was standing next to Respondent, urinating. However Student D testified that Respondent was far away. His statement is consistent with his testimony. Student D stated in his statement to the Investigator "I was using the bathroom. He wasn't right next to me." (Ex. D3). It is amazing how something so critical could find its way into the investigation and be unsupported by the student's statement or the notes.

With respect to the auditorium incident – a teacher going out of his way to encourage a student has been transformed by hyperbole and unfounded accusation into warranting a §3020-a proceeding and proposed termination.

There was inconsistency in Vielman's statements that she gave her supervisor compared to what is contained in the investigative report. Neither account said anything about Respondent looking at a child who was standing next to him; or that he turned and looked at the wall when he saw her. None of the children's statements corroborate that he exposed himself, looked at the kid, or stood next to a student urinating. Student D's cousin said something about Student D being next to Respondent, but Student D did not acknowledge it in his written statement to the investigator or at the hearing. Respondent contends Ms. Vielman's failure to name Student B1 is evidence of her lack of credibility. She named Matthew- a child who was no longer at the school. Matthew's name never came up in any interview, report or notes and no student named Matthew was interviewed.

Respondent asserts that if two students were standing next to him, Vielman could not see Respondent's hands holding his penis. Her testimony looks like an evolving narrative. In one statement she allegedly said, "You have got to get out of here" and in another she said nothing –just watched him go down the hall and walk into the other bathroom. None of her coworkers testified although she said 20 of them were nearby. Respondent believes that Ms. Viellman's anger towards him negatively impacts her credibility. Vielman admitted she was annoyed and made angry by Respondent's comments about her not working hard. (Tr. 329).

Respondent acknowledged that in 2013, AP Castro told him to avoid the student bathroom and he said he would try not to do it again. Two years later, he used it again when an emergency arose. However, the alleged rule he is accused of violating is not written anywhere. It is not in the handbook, rulebook or law refresher.

Respondent was not progressively disciplined. He only got a verbal warning – no written reprimand and no proposed suspension before suggested termination. Moreover, he never was told he could be terminated for this conduct. Both the lateness infractions and using the bathroom should be progressively disciplined – as opposed to being forced into a §3020-a proceeding for proposed termination. *DOE* v *VD,* No. 22,041, p. 26 (Busto, 2013); *DOE* v. *MP,* SED No. 25,283 (Woods, 2015); *DOE* v. *AD*, SED No. 23,637 (Cullen, 2014)

Group 1, Specification 2 and 3 should be dismissed. Both should have been handled in-house with a verbal or written warning.

Specification 3 It is inappropriate to allege criminal conduct in a §3020-a proceeding. Specification 3 is derived from Specification 2 which is inappropriate and defective, Specification 3 should be dismissed. The record contains no evidence showing Respondent "knowingly" acted in a manner likely to injure the physical, mental and/or moral welfare of students in Specifications 1 and/or 2.

SECOND SET OF SPECIFICATIONS (Exhibit D5)

Group 2, Specification 1

The time frame that this Specification encompasses, was a full school year. Based on *Ronga* [2] the time of the alleged violation needs to be more specific. Specification 1 is unsupported and vague. During the designated school year Respondent was floating and would have been in Student 2B's class a limited number of times. If the act occurred, it should be given a specific date and a much more narrow time span than a full school year.

Student 2B testified that Respondent used his foot to move her over when she was seated on the floor near the cubby. She alleges his foot touched her on the outer thigh. Her friend Student X testified that once she saw Respondent grab her softly by the arm and move Student 2B to the rug. Student X's rendition is consistent with Respondent's testimony. He admits that he sometimes holds a student's hand or wrist to stabilize them as he moves them closer to the front of the class to control disruptive behavior. There was no testimony that there was a kick, a punch or a slap as set forth in the charge in the Group 2, Specification 1.

Student 2B did not present as a child without freedom to speak. She was clearly angry with the Respondent for having told her to move over to the cubby and not having similarly chastised the other student(s) with whom she was speaking. Her testimony at the hearing did not support the charges.

Written statements and investigator's synopsis that are presented in the record are hearsay. Hearsay is only to be used to corroborate. Hearsay is not to be used as direct evidence. See, *New York City Department of Education v. JB, SED No.* 15,224, *pp.* 13-14, *19-20* (Siegel, 2011): While hearsay evidence is

[2] In *Ronga v. New York City Department of Education*, 114 A.D.3d 527, (2014), the court held that a tenured employee cannot be found culpable of charges in a 3020-a case that are unconstitutionally vague.

admissible, it may not be relied upon to sustain a finding of guilt when not corroborated by other direct evidence. Uncorroborated hearsay evidence is unreliable and fundamentally unfair to find guilt without benefit of confrontation. *See also, New York City Department of Education v. PH,* SED No. 10,694, pp. 25-27 (Siegel, 2011); and *New York City Department of Education v. JB,* SED No. 15, 224, pp.19-20(Siegel, 2011).

Student 2B's statements are not credible. She alleged the misconduct occurred at her table that is approximately 3 feet wide and 4 feet long; which accommodates six children. She indicated two of her friends, Student X and Student Y were present at the table when the incident allegedly occurred. It is not credible that a teacher would engage in the alleged behavior with so many students present. Two male students at the table Student W and the Student V had no recollection of such misconduct. The other students who were seated at the table do not fully corroborate Student 2B's testimony. No one went to Ms. Johnson, their teacher and said Respondent slapped or punched me, or I saw it happen to another student. Moreover, this is an open environment classroom with very low partitions. No adult from the surrounding classes heard any commotion.

This Specification should be dismissed.

Group 2, Specification 2

This Specification also should be dismissed. The record contains no evidence showing the physical, mental or moral welfare of student XYZ was endangered by Respondent's alleged conduct. The Department also failed to prove that Respondent acted "knowingly."

In its October 15, 2015 Motion to Dismiss Respondent argued this specification incorporates elements included in the criminal offense of Endangering the Welfare of a Child, set forth in New York Penal Code § 260.10. Respondent contends the Department wants the Arbitrator to find his alleged misconduct constitutes criminal conduct. Consequently, Respondent moved that this specification should be

dismissed, because based on Education Law and Article 21G of the parties' collective bargaining agreement, and the precedent cited in its motion. Respondent argued the Arbitrator lacks authority or competent jurisdiction to issue a decision regarding whether Respondent committed a crime. Thus, Specification 3 must be dismissed. See, *In Appeal of BOCES of Southern Westchester* (Gerald J. Murphy), 32 Ed.Dept. Rep. 358, 361-62. (1992). Respondent also cited SED cases determining that Arbitrators in cases brought pursuant to Education Law § 3020-a, lack authority to determine a crime has been committed. See, *In the Matter of SA* SED No. 26, 179 (Arbitrator Doyle Pryor, March 24, 2015); which found that §3020-a Specifications that contain charges that allege criminal conduct has been committed or that the alleged misconduct could be criminal , "have no place in this kind of civil administrative proceeding." See also, *Matter of MP* SED File No. 23, 080 (Arbitrator Howard J. Stiefel, April 23, 2014).

The issue has also been resolved in a number of §3020-a prehearing conferences. *See, in the Matter of IW* (SED 17,459; Arbitrator Joyce Klein); *Matter of MR*, SED No. 18,628 (Patricia Cullen); *Matter of DB*, SED No. 9,113 (Debra Gaines), and *Matter of HG*, SED File No. 4984 (Arthur Riegel November 9, 2004).

Group 2, Specification 3

For several years Respondent's evaluation stated his attendance was satisfactory. Moreover, Principal Santos said the first year of attendance problem gets a satisfactory rating and the next year, if it does not improve, it becomes a U rating.

The 2 hours and 32 minutes at number 4 should be stricken. Respondent called in sick and was asked to come in later, if he felt better. He accommodated but when he arrived it was counted as late. There is no clear rule regarding attendance and lateness. A lot of discretion is allowed, for example for transit delays and meetings. When asked to define what is excessively late, Principal Santos said it is based on the average percentage of people who are late. Respondent contends that is a number that is hard to configure, in that a large number of people are late.

Moreover, people are being charged with making and complying waith a rule and they don't know what it is. There is no notice of the standard.

Group 2, Specification 4

Examination of number five (5) in Specification 4 shows that Respondent was seven (7) minutes late. This should be dismissed. Respondent contends that this was a four (4) minute lateness. (See, Ex. D8). In addition, Respondent should have had benefit of the grace period that was discussed on the record by the Principal. (Tr. 671) Nothing charged in Specifications 3, 4 or 5 is charged that is below five (5) minutes. This verifies that a five (5) minute grace period exists. September 24 and November 14 were both four (4) minutes late; but not charged, because they are under five (5) minutes each. The allegation that he was seven (7) minutes late on January 24, 2014 involved a transit delay according to the EIS statement. Therefore, the seven (7) minute charges for numbers 5 and 6 should be dismissed. When those two erroneous entries are considered Respondent's total number of lateness is nine which brings him below the standard (10) excessive range.

Group 2, Specification 5

Respondent did not receive notice, except one time in November. Thereafter, he received no notice that lateness was a problem throughout the 2014-2015 school year. Now, he has been considered for discharge based upon a non-existent lateness policy.

Number 14 and 15 should be deleted based upon Exhibits R4 and R5; which represent letters from Principal Santos and AP Castro scheduling personal disciplinary conferences with Respondent – scheduled for May 18 and May 27, 2015. Principal Santos testified that adjustments for administratively scheduled conferences should not be counted as lateness. On the 27th Respondent was told to come to PS 33 at 9:00 a.m. When he called his union steward, he was told AP Castro was not at work that day and his meeting with cancelled.

Number 11 (February 27, 2015 – for 6 minutes) and number 13 (April 1 – for 9 minutes), the EIS system showed as travel delays. Therefore, those two days should be removed from his record as lateness. Another inaccuracy is that number 4-Monday, September 22, 2014 – is denoted as fourteen (14) minutes late. However, the record shows he was only four (4) minutes late. There has been no proof that he was late fourteen (14) minutes. Moreover, he should be given the discretionary grace period.

Based upon the DOE standard, Respondent's lateness should be dismissed as *de minimus*. His lateness has improved since he stopped the insomnia medicine in August. In mitigation, Principal Santos, Assistant Principal Castro and Assistant Principal Ceara describe Respondent as good teacher. Parent Vasquez also testified he was a good teacher for her child. Respondent has learned from this case. He will not touch another child or use another student bathroom. They were innocent acts, not acts of misconduct.

Cases regarding lateness that support Respondent's request that his alleged misconduct for lateness be considered as *de minimus* and deserves dismissal or very light punishment include the following:

- A fine of $1000 was imposed for a tenured teacher who was late 90 times in three school years and was absent 11 times in one year. See, *Department of Education of the City of New York v. WMad., SED No.* 26,348, *pp.* 3-6 *(Kinsella, 2015).*
- A fine of $500 was imposed for lateness 74 times in three school years; *See, DOE v. VP, pp.* 5-7 *(Gaines, 2014).*
- In the case of *DOE v. WM,* a fine of $2000.00 was imposed for lateness 43 times in one year combined with two other sustained charges. See, *DOE v. WM., SED No.* 26178, *pp.* 17-19 (Brown, 2015). In addition to being found excessively late, this Respondent was given 5 written notices and 5 meetings. The $2,000 fine also covered two additional charges that were sustained in addition to lateness.

Comparatively, Respondent does not merit a termination. Based on the above cited comparatives, his lateness charges should not be sustained. However, if a penalty is imposed, he would merit a verbal warning or minor penalty.

Hearsay

Hearsay is an insufficient basis to sustain charges when it's not corroborated by direct evidence; such is the case with corporal punishment matters set forth in Exhibit D5, relating to Student 2B.

In the case of *New York City Department of Education v. JB, SED* No. 15, 224, pp.19-20 (Siegel, 2011): a student was given multiple opportunities to say the Respondent committed acts of physical aggression by grabbing the student by the elbow. The student's testimony was that the teacher yelled and did something else that did not support the specified charges. Consequently, the teacher's corporal punishment charges were dismissed. The hearsay evidence was not supported by direct evidence; so the charges could not be sustained. The Specifications and charges regarding Student 2B should be dismissed.

There is precedence for dismissing charges in their entirety where no direct testimony was offered in support of hearsay. Section 3020-a Hearing Officers have determined reliance on investigator's report was insufficient to carry the Department's burden of proof. See, *Department of Education of the City of New York v. MW,* No. 25,199, pp.9-16 (McKeever, 2015). The failure to testify in support of charges demands dismissal of those charges.

FINDINGS AND DISCUSSION

Section 3020-a of the Education Law of the State of New York requires a Hearing Officer to: (1) base the findings on each charge; (2) base the determination concerning disciplinary action solely on the record of the proceedings; and (3) set forth the reasons and the factual basis for the determination. It is established that in order for the Department to prove its case, the appropriate evidentiary standard that applies

in Section 3020-a hearings is preponderance of evidence; i.e., that is, it is more probable than not that the Respondent engaged in the conduct set forth in the Charges and Specifications. In accordance with these requirements and consistent with the above evidentiary standard, the following Findings of Fact and Conclusions are set forth.

This decision will examine each of the specifications set forth in Case 1 and thereafter examine Consolidated Case 2; using the same specification numbers initially assigned.

CASE 1, SPECIFICATION 1:

On or about January 30, 2015, Respondent inappropriately pinched and/or placed his hand on Student A's thigh.

This Specification is sustained.

Respondent argued Specification 1 should be dismissed, because the student who was impacted by his alleged touching/misconduct did not testify at the hearing. Consequently, there was no direct evidence regarding the touch, or the nature of the touch. Respondent contends hearsay cannot be used to corroborate or substantiate hearsay statements given by the student during the investigation. Further, Respondent points out that the student's statement contained in exhibit D3 corroborates Respondent's testimony; unlike Ms. Martinez's testimony which changed and evolved at the hearing. According to Respondent, initially Martinez said the student described a clamping motion, then later at the hearing, her testimony changed to describe a grabbing motion up high on his thigh.

The Arbitrator finds neither the investigator's summary nor his hand written notes in Exhibit D3, state that Ms. Martinez stated or described a clamping motion or clapping motion; as described by Respondent in his testimony at the hearing. (Tr. 1479). The investigator's formal report (Ex.D3) attached to the recommendation for disciplinary action sent to the Chancellor by Special Commissioner of Investigations Condon (by Regina Loughran) on page 2 of 2 states when Vincent Pellizzi interviewed

School Aide Leoncia Martinez on February 12, 2015, she stated she personally observed Respondent drop his hand and it appeared that Respondent touched the student's leg. This prompted her to ask the student; what happened. He reportedly replied, "He (Berkley) touched my leg." Thus, his typed report does not attribute "clamping or clapping" motion, or statement to school aide Leonica Martinez. Further, the investigator's handwritten note states , "(Student + Leoncia) used a grabbing motion of [sic] thigh just above the knee…" Thus, the Arbitrator finds the statement of Ms. Martinez prior to the hearing given to Investigator Pellizzi did not describe a clamping motion and the student's statement given to the investigator in Exhibit D3 does not state Respondent did a clamping or clapping motion [3].

The witnesses do not corroborate what the Respondent stated at the hearing with respect to "clapping" on or just above his knee. Investigator Pellizzi interviewed Student A on February 12, 2015. His written synopsis of his conversation with the student states, "when Berkley stood up he grabbed Student A's thigh, (Student A demonstrated a pinching motion by using his thumb and index finger while grabbing his right thigh directly above the right knee.)" (Emphasis added). Thus, the neutral investigator's typed summary states the student stated the Respondent grabbed his thigh which was compounded by a pinching motion. (Ex. D3)

The Arbitrator's examination of what purports to be Ms. Martinez's handwritten note states, "I went to the boy and he told me that Mr. Berkley grab his thigh and squeeze him hard." (See, attachment C of exhibit D3). During the hearing, Ms. Martinez's testimony did not escalate. She spoke through an interpreter and sometimes pronunciations had to be clarified as in the difference between "thing" and "thigh." (Tr.189). However, the Arbitrator finds that Ms. Martinez did not change her testimony and diminish her credibility. It was consistent with what she told Investigator Pellizzi and comports with her written statement given to Assistant Principal Ceara. At the hearing, when she initially demonstrated what the student showed her, DOE's

[3] Respondent alleged he clapped the student on his knee as an indicia of encouragement. (Tr. 1479, 1481)

Counsel started to describe the witness' physical acts on the record, but Respondent's Counsel indicated she could not see – and asked to have her demonstrate again. At DOE Counsel Cook's acquiescence, the Arbitrator described on the record what Ms. Martinez was demonstrating; as both Counsels observed.

> THE HEARING OFFICER: Yes. Sit in your chair so you'll be seated. The kid was seated, correct?
>
> WITNESS: Like this. He told me like this.
>
> THE HEARING OFFICER: Okay. So let the record reflect that the witness stretched out her hand on her mid-thigh and she pressed into the flesh visibly.
>
> WITNESS: I don't understand that.
>
> [INTERPRETER EXPLAINS]
> WITNESS: Mm-hmm. (Tr. 171).

School aide Martinez did not change her testimony. The word "mid-thigh" was placed in the record based on what the Arbitrator saw her demonstrate; in the presence of both Counsels. (Tr. 171).

Hearsay

As stated above, Respondent argued that since student A did not testify at the hearing, his statements are hearsay and there is no direct evidence to support the allegations in Specification 1. Thus, Respondent argued the specification must be dismissed. Respondent contends hearsay is an insufficient basis to sustain charges when it is not corroborated by direct evidence. Further Respondent asserts it is fundamentally unfair when the Respondent cannot confront the accusing witness.

The Arbitrator finds that the weight of the evidence shows there was an inappropriate pinching and placing of Respondent's hand on Student A's thigh; as set forth in Specification 1. (See, Ex. D1; Tr. 122; Tr. 171). Ms. Martinez was an eyewitness. While she did not feel the touch, she personally observed the Respondent's hand drop contemporaneously with the motion made to complete the act of pinching and grabbing the student's thigh. (Tr. 170). As an eyewitness, she

provided direct evidence; in that she described exactly what she saw personally and contemporaneously; while the act of misconduct was being committed by Respondent. (Tr. 170-71;185).

DOE argued that case law provides that the Arbitrator can justify termination based on hearsay evidence that is believable, relevant and probative. The statement of Student A is probative believable and relevant. His statement to school administrators is corroborated not only by the first hand observation by Ms. Matinez as captured on her translated handwritten note(Exhibit D3 attachment C), but also by the intake complaint form when the matter was called in by Assistant Principal Ceara. This form is dated the same day as the incident; January 30. All of the evidence generated at the school level comports with both the handwritten notes of investigator Pellizzi (Exhibit D3) and his typed Investigator's Final Report setting forth the details of the inappropriate pinching, grabbing and touching of the student's thigh.

The Arbitrator finds there is a preponderance of evidence to support the Student's account, irrespective of the fact that he opted not to attend the hearing. Student A demonstrated what Respondent did to him to Investigator Pellizzi (Tr. 122) and Ms. Martinez (Tr. 171); both mandated reporters testified before the undersigned Arbitrator who had the ability to view their demeanor, determine their credibility in light of their written statements made at or near the time they spoke to the student and had him show and tell them what happened. There has been no showing of bias on the parts of Martinez and Pellizzi. The Arbitrator agrees with the DOE that Martinez and Pellizzi's observations and reports regarding the students' demonstrations of Respondent's misconduct and statements he made to them are factual and specific to the issues that must be determined in this case. (Ex. D3; Tr. 120 -122; Tr.143). Thus, the Arbitrator can and will take them as sufficient proof that she can rely upon to support Respondent's termination. See, *Diehsner v. Schenectady School*, City School District, 152 A.D. 2d 796; 543NY 2d 576 (1989 Third Department) which was cited by DOE to support the concept that the student's statement made contemporaneously to

Pellizzi an experienced professional investigator [4], who had a duty to accurately report that statement; is sufficiently relevant and probative irrespective of the fact that it is hearsay. It is adequate to support termination. Pellizzi had a duty to accurately report the information he collected, generate an accurate report, and ensure the accuracy and validity of documents he attached to and used to formulate his report sent to the Chancellor by the Special Commissioner of Investigations. (Ex. D3; Tr. 89).

Investigator Pellizzi testified at the hearing that he interviewed the student involved in Specification1 and the boys involved in Specification 2 on February 4 and 12; i.e., within less than two (2) weeks of the January 29 and January 30 acts of misconduct. (Tr. 162). He testified that the statements included in his report were accurate representations of the students' interviews; done in the normal course of business. (Tr. 89-90). It is noteworthy that Investigator Pellizzi' stated one of the major responsibilities in his job at SCI is to investigate cases in which there are "sexual allegations or inappropriate relationships between students and staff members." (Tr. 78).

Respondent argued this is a matter that would have gone unreported, but for the fact that the work environment is one that is charged with fear and accusatory atmosphere. Further, Respondent's Counsel argued that Respondent would not have attempted to molest the child in the presence of 200 other students and staff members in the auditorium.

However, the Arbitrator finds given the totality of circumstances – considering the closeness in time of his inexplicable acts of misconduct done on two contiguous days – January 29 and January 30, this raises heightened concern about his unbecoming conduct and aberrant acts involving two sets of young male children in close time proximity. Clapping, squeezing or putting pressure on a child's thigh which he described as hurting a little – causing him to say "ouch" is not normal behavior expected of a tenured teacher. Certainly, such a questionable unbecoming act has no

[4] Investigator Pellizzi is a former police officer who routinely is assigned to investigate allegations of inappropriate communication (sexual and nonsexual) between students and staff members. He also has prior experience with Administration for Children Services where he investigated child abuse and neglect. (Tr. 75-77).

place in a school environment. No parents will want to send their children into an environment where such hurtful touching is allowed in the name of "encouraging a student to dance." While the question of molestation was not otherwise articulated in the hearing and the accusation was not made as part of the charges, sexual overtones remained a topic by *innuendo* at the hearing; i.e. especially when one considers the misconduct set forth in Specification 1 (the auditorium incident), in concert with the aberrant behavior set forth in Specification 2 wherein Respondent exposed his penis by urinating in the presence of kindergartners in the boys' bathroom; just one calendar day before he committed the inappropriate pinching and placing his hand on Student A's thigh in Specification 1. There is also the unanswered question of why the Respondent remained immobile and the boys did not respond by leaving the bathroom while Ms. Vielman was repeatedly calling them to come out, banging on the door, and blew her whistle. When she entered, he still was holding his penis, which she described as being in his cupped hands, and he did not deny. (Tr. 1465, 1468-70

The Arbitrator agrees with the Department of Education; i.e., that physical contact with the student that caused him to say "ouch" [5] was an unwelcome, impermissible touching that caused the student pain or discomfort. DOE categorized this act, *inter alia*, as corporal punishment. However, the Chancellor's Regulation A-420 (Ex.D2) defines corporal punishment "as any act of physical force upon a pupil for the purpose of **punishing** that pupil." (emphasis added). The Arbitrator is not convinced that the physical force imposed on Student A was intended to "punish" him. There was no evidence or argument that Respondent appeared to be trying to chastise or punish Student A. Respondent's attorney argued he was trying to "encourage" him to partake in an activity that Respondent himself as a former dancing instructor found pleasurable. DOE also did not raise an argument that Respondent's imposition of physical force on Student A was intended to punish him for not dancing.

[5] See Exhibit D3. Inspector Pellizzi testified Student A demonstrated what was done to him by Respondent using his thumb and index finger pinching his right thigh and said it hurt a little and he said "ouch" when it occurred. (Tr. 122 lines 9-14).

Considering the parties' arguments and evidence of record, the Arbitrator finds Respondent's explanation is not credible. As he admits, there were a number of ways he could have encouraged the student. Causing him pain or discomfort is inexplicable. Respondent argued an interested committed professional went out of his way to "encourage" a student and his act of encouragement was transformed by hyperbole and unfounded accusation to propel him into warranting a §3020-a proceeding. However, the Arbitrator finds Respondent's questionable outward acts and the aberrant behavior he exhibited, contradicts his statement that he was trying to encourage the student. Painful experiences are not encouraging to malleable young male students.

It is noteworthy that the misconduct challenged in Specification 1 occurred one day after the misconduct charged in Specification 2. Both specifications involve totally different students impacted by the misconduct of Respondent that was witnessed by two different adult mandated reporters. Both acts of misconduct by Respondent involved young male students and the touching of their, or exposure to his body parts. In Specification 1, a student's body part (his thigh) was uncomfortably, inappropriately and impermissibly touched by Respondent. In Specification 2, young kindergarten students were exposed to the Respondent tenured teacher's exposed body part (his penis); i.e., seeing his penis while he stood at an unobstructed urinal and urinated in the student's bathroom.[6] The fact that both acts occurred within approximately 24 hours is disturbing. This serves to escalate the gravity of the offenses; given the age of the children, the nature of the offense and close proximity in the time of both acts of misconduct on school property.

SPECIFICATION 2:

On or about January 29, 2015, Respondent, while inside of a student bathroom:

a.) Exposed his penis to numerous students.

[6] All three students stated they saw Respondent's penis. (Ex D3; Tr. 119 , 122– testimony and interview notes of SCI Investigator Pellizzi).

b.) Urinated in the student bathroom whiie in the presence of numerous students.

c.) Immediately next to students whom were urinating.

This Specification is sustained

Progressive Discipline and Prior Notice

Respondent argued he was not progressively disciplined, in that he only got a verbal warning before termination was proposed. He contends there was no written warning and he was not told he could be terminated for such a violation or act of misconduct. Respondent also argued the rule he is accused of violating is not written anywhere; i.e., not in the rules, Staff handbooks (Ex. D19, 22, 24), Law Refresher Memo (Ex. D 21.23), or opening-day folder. (Ex. D20) Conversely, Ms. Vileman contends that she and other staff get a packet that contains rules and it contains information that staff is not allowed to use children's' bathroom when students are present. (Tr. 366)

Regarding prior discipline, DOE contends that to the extent that Respondent was previously warned not to use the students' bathroom again, he was progressively disciplined. Principal Santos testified that she personally counseled Respondent, approximately a year prior to the instant occurrence; i.e., when it was reported to her that he was seen exiting the boys bathroom. (Tr. 1071). Respondent acknowledged that he was counseled and admitted that he promised not to use the students' bathroom again. However, he states that the administrator with whom he spoke was Mr. Castro, not Principal Santos. (Tr. 1441).

The Arbitrator agrees with the Department. Irrespective of who in the school administration counseled Respondent, he admitted that he was forewarned. [7] Moreover, there are some acts of misconduct, as the Department argued, that are a

[7] Respondent testified he heard it in a staff meeting and once from Mr. Castro in 2013 or 2014 (Tr. 1441)

matter of common sense. They simply are not done in the presence of young impressionable, innocent children, by a responsible professional, tenured teacher. The Arbitrator finds that extensive progressive discipline is not required when an act is so repugnant, egregious and patently offensive as to have exposed one's sexual appendage and/or caused an injurious impact to kindergarten children; who each independently told the Investigator they saw Respondent's "peepee" as he stood openly urinating in their presence in the designated student bathroom urinals after having walked past 5 stalls with doors. (Ex. D3, Tr. 119, 122, 145). [8]

It is significant that he was explicitly told **not** to use the students' bathroom and admittedly disobeyed that direct order. Walking into the students' bathroom with the intent to urinate; after being told not to enter the bathroom with the purpose of using it when students are present; is an inexplicable act of disobedience or insubordination. The Arbitrator is not impressed that Respondent argued other teachers and adults have also used the students' bathrooms. (Tr. 1448). Respondent has not provided evidence of any similarly situated teacher who was specifically personally warned not to go into the student bathroom again - thereafter returned in violation of that direct order. Moreover, the record is void of any documentation that other teachers have gone back into a student bathroom, after being told not to re-enter and thereafter exposed himself by urinating in the presence of children who he found playing there.

As the DOE pointed out, Respondent had adult bathroom options. Staff designated bathrooms were on every floor. (Tr.1454). Assuming *arguendo* that he had an emergency, Respondent had an adult option on the cafeteria level. (Tr. 1454). The demonstrative photograph taken by DOE's Counsel shows the staff bathroom on the cafeteria level was in close proximity to the student bathroom that he elected to use. (Ex. D4e, f, g) Reportedly, the staff bathroom was less than 20 feet away. In fact, Respondent said it is approximately 20 feet away for the boys' bathroom (Tr. 1520) and the letter to the Chancellor (from Special Commissioner of Investigation Condon)

[8] Investigator Pellizzi testified the boys told him they saw Respondent's peepee and they each pointed to their "private areas" Tr.145

states, “Vielman also showed the investigators the faculty bathroom which was approximately 10 to 15 feet away from the boys’ bathroom.”[9]

The Arbitrator was impressed that Respondent did not aggressively pursue the argument that he had an emergency or urgent need to use the boys’ bathroom. No believable or compelling facts were placed on the record to support this theory. Moreover, Respondent did not argue that he tried the door of the staff bathroom and found it locked or occupied. When asked if he tried the door of the staff bathroom – he responded “I don’t recall checking.” (Tr. 1519, 1455) Notwithstanding, he argued the staff bathroom is usually locked. (Tr. 1452, 1454) and the availability of that bathroom was not formally announced to teachers (Tr. 1113).

Respondent also argued that Ms. Vielman testified the staff bathroom is frequently locked and teachers have to request a key. However, the Arbitrator finds that Ms. Vielman testified that when school is in session the bathroom is supposed to stay open, so that all staff can use it. She was specifically asked by DOE counsel, at what point is the bathroom locked? (Tr. 365) She responded, “…when school is not in session.” (Tr. 365) Further, she testified that when Respondent left the boys’ bathroom, she had an unobstructed view of him as he walked down the hallway and went into the staff bathroom. (Tr. 397, 391, 392). Respondent stated he did not recall going to the staff bathroom after he left the boys’ bathroom. (Tr. 1475). It is noteworthy that when asked if he checked the staff bathroom before going into the boys’ bathroom, he said “I don’t recall checking.” (Tr. 1519).

DOE vigorously argued that instead of unzipping his pants, releasing his penis and urinating in the presence of the students who he admitted occupied the bathroom when he entered, Respondent could have used one of the five or six stalls that had doors he could close. On cross examination, Respondent had no explanation for why he physically walked pass the five (5) stalls with doors that would have protected him

[9] April 22, 2015 letter to Chancellor page 2 (Ex. D3).

from the view of the students who he acknowledged were playing in the middle of the bathroom. He remarked that he did not think about the possibility of using a stall – he normally uses the urinal unless he has to eliminate solid waste. (Tr. 1472) Nevertheless, he testified that he made every reasonable effort to ensure that he did not attract attention to himself. (Tr. 1465) Upon entering the bathroom, he took precaution number one; i.e., to walk to the end of the bathroom where he took precaution number two – to lean into the urinal so that the boys could not see his genitals. (Tr. 1464). The Arbitrator finds his "precautions" did not work. The students did in fact see his penis. (Tr. 119, 122, 263, 355; Ex. D3). Each one of the boys who were interviewed stated he saw Respondent's "peepee."

Respondent argued it was not possible for the students to see his penis because he leaned into the urinal and probably wore a large sweater; but was not sure. He said "I think I had a sweater on." (Tr. 1465). However, Specification 2 charged him with having exposed his penis to the students. The evidence shows that he did. (Tr. 263, 356, 363; Ex. D3) Respondent argued that it is not possible that Ms. Vielman could see what she demonstrated in the hearing – if her testimony is true; i.e., that boys were standing near him as he urinated. Respondent argued Vielman's line of sight would not have been able to see his hands cupping his penis – as she described; if children were standing near him. The Arbitrator gives no weight to this argument. Respondent testified he is six feet tall (Tr.1528). The average 5 year old kindergartener is approximately 38 to 42 inches tall [10]. The adult in the room, Ms. Vielman would easily be able to see over the kindergarten boys' heads at the distance shown in the photographs – if she were in a straight line 180 º view at the door. Any deviation in a 180 º degree line of sight would give her an even more excellent visual opportunity to see exactly what she described on the record as both hands at his private area in a cupping fashion with "... his head was tilted to the right side like he was talking to the boys." (Tr. 356-7).

[10] Pediatric Growth Charts – Center for Disease Control and Prevention. October 2015.

Eneida Vielman's testimony was credible, reliable and convincing. She described she clearly saw Respondent standing at the urinal with his penis outside his pants, being held in his hands within her and the students' clear view. (Tr. 356,357) Respondent denies that children were close to him – but did not deny he had his penis in his hand when Ms. Vielman entered the bathroom. (Tr. 1470)[11]. What is also disturbing is that Ms. Vielman heard the boys making noise in the bathroom, called out to them several times and blew her whistle before entering the bathroom. (Tr. 357). The Arbitrator notes that in the time it took her to call out to the boys several times, bang on the door and blow her whistle – not only did the students not leave the bathroom, but it is noteworthy that Respondent did not put his penis back in his pants. Both the Respondent and Ms. Vielman testified that he still was standing at the urinal when she entered the room. (Tr. 1470) In addition, when asked what the boys were doing, Vielman stated they were urinating or pretending to be urinating as they too stood in front of urinals. Her testimony is compelling. (Tr. 355). Vielman said "I saw his head tilted to the right like he was talking to the boys. " She said she had an unobstructed view.

> … THE WITNESS: And I don't know if he was talking to them, but he was looking at them. So when he saw me, he just straightened his face, and he just looked forward.
>
> THE HEARING OFFICER: What did he do with his hands?
>
> THE WITNESS: No, he just stayed where his hands just waiting. Then when I yelled, again, get out of the bathroom, so when all the boys run out, I came out with them, and then he followed and went to the other bathroom.

Thus, the Arbitrator finds there is preponderance of evidence Respondent committed the conduct described in Specification 2 a); i.e., exposed his penis to numerous kindergarteners who were playing in the student designated bathroom and b.) urinated in the presence of the students.

[11] Respondent on direct said he did not realize Ms. Vielman was going to enter the bathroom "… it was embarrassing, it was awkward … I just stayed staring straight." She immediately retreated … and called the boys again" (Tr. 1470). Ms. Vielman also testified when he saw Respondent, "…he just straightened his face … he just stayed there." (Tr. 357)

Respondent pointed out that Student D was adamant about the fact that the students were standing “far” away from the Respondent (Tr. 241); i.e., Respondent was not near him or other students (Tr. 247). However, Respondent’s Counsel acknowledged that Student D’s cousin (Student C) said something about Student D being next to Respondent, but Student D did not acknowledge it at the hearing.

The Arbitrator finds that although Student D’s cousin, Student C, testified at the hearing that he did not go into the cafeteria in January, which he later changed (Tr. 315); and had never been in the bathroom or seen an adult in there; later when asked if he had gone to the bathroom with his cousin, he responded “maybe.” (Tr. 316). Then when asked what he told the investigator, he said “nothing.” (Tr. 319).

It is noteworthy that Student C had a “disciplinary” problem before entering the hearing that reportedly involved his principal, but reportedly was not case related. (Tr.335). Hearing participants and the Arbitrator could hear him crying for more than thirty minutes earlier in the day. His Mother, Ms. Guerra said she told him he was coming “to court” but did not express that he would see the Respondent teacher. (Tr. 334). The Arbitrator’s observation of the student is that he was very agitated, nervous and upset. Both Ms. Guerra and the Arbitrator expressed concern that he was greatly upset by the hearing process. (Tr. 366). He spun in his chair, looked down frequently and tried to take a position of blanket denial, non disclosure and defiance.

When he was interviewed at school (within two weeks from the day of the occurrence), Student D told Investigator Pellizzi that he was in the bathroom urinating and saw Respondent in the bathroom. Student B and Student C were in the bathroom with Student D at that time. According to Investigator Pellizzi’s typed report, Student D, Respondent was standing next to him urinating. He did not recall hearing a whistle. (Ex. D3; pg. 2).

Student C told the investigator that he could see Respondent’s “pee pee.” Also Student B1 told the investigator he was not urinating, but Student C and Student D

and Respondent were all urinating. He also stated Student D was looking at Respondent's "pee pee." (Ex. D3) When the Investigators asked Student B if he saw Respondent's "pee pee," he said "yes." Student B acknowledged he heard Ms. Vielman's whistle.

As DOE pointed out, the Respondent could not determine by "leaning in" to the urinal that little 3 to 3 ½ foot students standing at eyelevel with his waist and genitals would not be able to see his penis. Respondent's statement is not supported by the record. He contends that none of the children's statements or testimony corroborate that he exposed himself, looked at the kids, or stood next to a student who was urinating. (Tr. 269). Respondent proposed an interesting argument - i.e., that no student testified Respondent exposed his penis. Rather when asked to demonstrate, the student held his hands in front of him, but did not say he actually saw the penis. Rather, he testified Respondent was urinating. The Arbitrator rejects Respondent's argument. Student D unwaveringly testified he saw Respondent's "pee pee" (Tr. 262), which he also called his "peener" (Tr. 263) and indicated he was "peeing." (Tr. 250). The evidence is clear that Respondent acted inappropriately and exposed his penis.

Respondent's argument fails - that Eneida Vielman's testimony is not reliable, because she named a child (Matthew) who was no longer at the school. The record contains credible corroborated evidence that Ms. Vielman actually went to the classroom and identified the students who she saw in the bathroom. (Tr.384). Those were the boys who were interviewed. (Ex. D3) As the DOE pointed out, the person who Vielman thought was named Matthew[12] was actually Student B1 – one of the boys she identified in class who were interviewed by Investigator Pellizzi. Mistaking or forgetting the name of a student (during the October 6, hearing day) who she positively identified at a time close to the January 2015 occurrence is not a harmful error.

[12] Matthew was a homonym to the name of the young boy who she identified.

Respondent argued Vielman may be biased. Vielman admitted she was annoyed and made angry by Berkley's comment about her not working hard (Tr. 329). Even so, she did not fabricate him being in the bathroom. Respondent acknowledged he was in the bathroom and that -she saw him there. (Tr. 1468-70). In fact, he stated that when she entered the bathroom he basically froze with embarrassment. (Tr. 1470). He admitted he remained standing at the urinal. (Tr. 1470). He also admitted he "stayed starring straight" and Vielman retreated and called the boys again. (Tr. 1471). The statements of two of the boys corroborate that Vielman called out to them, banged on the door and blew her whistle before she entered the bathroom. (Ex.D3). The statement of one of those students [13] placed Student D as standing next to Respondent and the other described Student D as specifically looking at Respondent's "pee pee." Student's D's statement indicates he did not hear the whistle. (Exhibit D3 Item 7). These statements are consistent with Ms. Vielman's account. Bias has not been shown on the record.

SPECIFICATION 3:

> As a result of committing one, some, or all of the actions as specified within Specifications 1-2 above. Respondent knowingly acted in a manner likely to be injurious to the physical, mental and/or moral welfare of children less than seventeen years of age**.**

This specification is sustained.

Respondent repeated some of the arguments made by his motions to dismiss, filed in July, 2015 and October 2015. All arguments made were considered and the materials and cases submitted were read. The Arbitrator denies the motion to dismiss filed by current Counsel on October 15, 2015; as a decision was previously issued on the initial motion.

Respondent contends, *inter alia*, the Arbitrator does not have jurisdiction to issue a decision regarding a charge that alleges a violation of the penal code, because

[13] See Exhibit D3 Item 6 the statement of Student C placed Student D next to Respondent urinating and the Statement of Student B indicates "Student D was looking at Mr. Berkley's "pee pee." Exhibit 3D Item 5

such a determination is outside the scope of her authority. The Arbitrator finds, while the language in Specification 3 may be similar to that contained in the criminal statute; it merely sets forth the general concept of misconduct. The Arbitrator has jurisdiction to hear cases that adjudicate misconduct that possibly could also constitute a crime; irrespective of whether a criminal charge has been filed and/or adjudicated. The fact that a tenured teacher has not been charged with a crime does not preclude his conduct from being determined to be in violation of the Education Law. Counsel for Respondent further argued the term "knowingly" has a special technical connotation formulated in the area of criminal law.

The instant matter does not purport to resolve a criminal matter and it is not required. Notwithstanding, the Arbitrator finds the Respondent was fully aware and knew what he was doing. He made a conscientious decision to enter the bathroom after having been told not to do that again by his administrative superior. As DOE argued, he walked by several children who were playing in the bathroom, stood at a urinal, pulled his zipper down, released his penis and leaned forward in an alleged effort to conceal it. DOE argued he had other more effective options; i.e., five (5) stalls with doors would have concealed him or the adult bathroom 10-15 feet away – which he testified he did "not recall" testing the door to see if it was occupied; before going into the boys' bathroom. (Tr. 1455, 1473, 1519). Additionally, the Arbitrator finds that as a teacher, Respondent had an obligation not only to conceal himself (if in fact he had an emergency) but also to urge the students to comply with Vielman's repeated instructions to them – as she stood knocking, blowing her whistle and calling them several times to exit the bathroom. (Tr.1468) [14]

The Department cited a number of examples showing it is well established that administrative tribunals have used definitions contained in penal laws when making determinations about employee misconduct; and in drafting specifications that tract criminal statutes. Many §3020 Hearing Officers have ruled on charges that tracked

[14] Respondent acknowledged that Vielman called out to the boys " maybe two or three times" and "[t]hey did not respond , they continued playing, so she actually entered the bathroom…" Tr. 1468

criminal language similar to the instant case, *See, State Department of Education v. LF SED* #19, 705 (Arbitrator Douglas Abel, 2013). See also *Department of Education v. CT*, SED #25, 125 (Arbitrator Haydee Rosario, 2015).

The Arbitrator agrees with the DOE which argued viewing the penis of one's teacher under whatever circumstances; consciously exposing it to five-year-old kindergarten students who are playing in the school bathroom can be injurious to the mental and moral welfare of those children. This was not an unconscious, accidental or unintentional act. Urinating requires consciously and intentionally removing one's penis from inside to the outside of their pants.

The Arbitrator finds the substantiated allegations of misconduct in Specification 2 could within itself merit termination without the rest of the consolidated case that was presented at the hearing. The unexpressed aspect of this case is troubling. Neither the Investigator nor the Counsels explored in depth the area that was fleetingly mentioned in Ms. Vielman's account. The Arbitrator questions what was going on in the bathroom distracting the students such that Ms. Vielman called out to the boys several times, banged on the door (Tr, 355) and blew her whistle (Tr. 356) as a signal she was coming in. It is undisputed that she unsuccessfully called out to them several times - to exit the bathroom. None of her clamorous actions produced a response among the kindergarteners or the tenured teacher – to exit the bathroom as she repeatedly requested. The Arbitrator finds this seasoned aide's statement that she was banging on the door, calling out to the boys and blowing her whistle is corroborated by two of the students (B and C) who told the Investigator Pellizzi they heard it. When Vielman entered she saw, three boys were either urinating or "pretending" to be urinating and the adult in the room was still holding his penis – as she demonstrated to be his posture with cupped hands. (Tr. 356). Respondent did not deny he was still standing immobile at the urinal when Vielman entered the room. He stated he was "embarrassed" and imagined so was she. (Tr.1470). The Arbitrator was further concerned that Vielman described Respondent as looking over at the child in

the urinal next to him and when he saw her, he "straightened his face … but stayed there" and turned his head to look forward at the wall. (Tr.357). Although Respondent challenged this as an inconsistent statement, the Arbitrator finds Ms. Vielman's testimony credible and compelling.

Respondent argued the charges set forth in this case are untrue and stigmatizing. The Arbitrator finds that the charges are strongly substantiated by the evidence of record. The Department has presented a preponderance of credible, reliable evidence that Respondent committed the egregious acts of misconduct as charged in specifications 1 and 2. His acts were done in a manner likely to be injurious to the physical, mental and/or moral welfare of the children less than seventeen years of age; as set forth in Specification 3.

CONSOLIDATED CASE # SEP 27,977

SPECIFICATION 1:

On or about and in between September 9, 2014 until April 20, 2015, Respondent:
a.) Kicked Student A* in the leg.
b.) Punched Student A in the stomach.
c.) Slapped Student A in the face.
d.) Stated words to the effect of: I don't care.

Allegations of Specification 1 Were Not Vague and Overly Broad

Respondent contends that this specification should be dismissed because it is vague and overly broad. The time frame that this specification covers; i.e., "on or about and in between September 9, 2014 until April 20, 2015;" basically encompasses a full school year. Respondent contends that based on the principles and holding in the *Ronga*[15] case, the time of the alleged violation should be more specific. He contends he is entitled to be given a specific date, so as to allow him to narrow time and mount his defense. Also the fact that there is no date and time specified – adds to the likelihood that the allegations are purely fabricated. Conversely, DOE argued Assistant Principal Ceara testified that young children do not have a good grasp of

[15] *Ronga v. New York City Department of Education*, 114 A.D.3d 527, (2014)

spatial time. (Tr. 917) This impacted the ability of DOE to give Respondent specific details regarding the time frame.

The Arbitrator finds the lack of specificity with respect to time in this case is a significant weakening factor in determining the strength of this charge. As Respondent points out, in *Ronga,* the court held that a tenured employee cannot be found culpable of charges in a §3020-a case that are unconstitutionally vague. Notwithstanding, the Arbitrator finds Respondent had sufficient specificity to mount a defense. The student told the investigators that the event occurred when Respondent was her prep teacher. The record shows he was her prep teacher in the 2014- 2015 school year. According to exhibit D13, Student A's Mother approached the parent coordinator and Student A's teacher on April 20th "to report an incident that happened last week." While the Arbitrator is concerned about the lack of narrowing the time frame, the charge is not so grossly unspecific and vague as to prevent the Respondent from mounting a defense. He has been told where and how the act allegedly happened and to whom and in which classroom; while he served as prep teacher. Moreover, Respondent admitted to some of the alleged conduct (with explanation) such as holding Student 2B's wrist, applying no pressure with his hand to stabilize her balance and guiding her through groups of students to the front of the room where he could better control her activity. (Tr.1497-98).

Respondent Was Accorded Due Process

Respondent argued the Specification should be dismissed, because it was not sufficiently specific to meet the due process standard. Conversely, DOE argued that Specifications 1 and 2 are sufficiently specific to make Respondent aware of the nature and scope of the charges against him, so that he could prepare an adequate defense. The failure of a charge to specify the definitive date of an incident and of a witness to testify to the correct date does not, in and of itself, necessarily undermine the weight of testimony, which demonstrated, in this case, that an incident did, in fact, occur. See, *Wayne-Finger Lakes Board of Cooperative Educational Services* (Donald Bogart), Decision No. 13,226 (1994); citing, (*Appeal of Friedland*, 25 Ed Dept Rep 25).

The Arbitrator finds that when considered alone, this Specification 1 in part two (2) of the case would be insufficient to support discharge; e.g., given the weakening factor of the unspecified time and the diminished weight of the evidence created by the less than strong level of hearsay supporting this charge. Moreover, unlike part one (1) of this consolidated case, there is no strong eyewitness providing direct evidence and the young student herein did not recite on the record that she was slapped, punched in stomach as set forth in the specification. Although she testified that she told her Mother the truth, this (considered alone) does not rise to the substantial level of evidence that would support a termination.

The Corroboration of Eyewitnesses

Respondent argued it is not credible that a teacher would engage in the alleged behavior with so many students present in the classroom. Further, Respondent contends the other students who were seated at the table do not fully, corroborate Student 2B's testimony. Respondent also pointed out that no student went to their teacher, Ms. Johnson to report that he slapped, kicked or punched them or that they saw it happen to another student. There were no adult eyewitnesses to the alleged misconduct. The only eyewitness who testified at the hearing besides Student 2B, was her classmate Student X. Student X testified that Respondent "… grabbed her (Student 2B's) arm softly and put her back on the rug". (Tr. 591). Additionally, a report prepared by Assistant Principal Castro (Ex. D13) based on statements taken by AP Ceara, [16] stated that one student "Y" who did not come to the hearing to testify, stated that sometimes Respondent grabs the arms of students hard and they say "ouch." Student Y stated she saw Respondent do that to Student 2B and she also saw him punch Student 2B on her stomach. (Ex. D13).

Assistant Principal Castro's report dated May 1, 2015 found that Student 2B's allegations were substantiated. (Ex. D13) He indicated at the hearing that AP Ceara interviewed the student witnesses and thereafter he (Castro) reviewed their

[16] AP Ceara interviewed the students and AP Castro prepared the written report at Exhibit D13 (Tr. 855; Tr.932)

statements, credited Student 2B's account of what transpired and concluded the allegations of corporal punishment were substantiated. (Ex. D13; Tr. 872).

When Student 2B testified at the hearing, she did not give substantially all of the facets of her prior statement that was made to Assistant Principal Ceara. However, when Student 2B was asked on the record at the hearing whether she told the truth when she confided in her Mom; she said she was telling the truth. (Tr. 575). While her admission is significant, it is noteworthy that she did not delineate specifically what she told her Mother.[17] Thus, there is no direct evidence presented at the hearing from Student 2B or any eyewitness that Respondent slapped her and stated "I don't care." [18]The Arbitrator will accept the statements of Students X and Y as they were given to a mandated reporter , (AP Ceara) and thereby entitled to a high level of acceptability; in light of the fact that AP Castro further evaluated the statements and used them to make his determination of "substantiated."

Notwithstanding, the Arbitrator finds that some of the allegations made by Student 2B were not corroborated ; i.e., that she was slapped on the face or that Respondent said "I don't care." None of the statements typed by Ms. Pagan while AP Ceara conducted the student interviews supports a finding that Student 2B was slapped or told "I don't care." (Ex.D13). The record is clear however, that Respondent physically contacted her leg with his foot. This was demonstrated at the hearing. Statements of classmates support her allegations that Respondent punched her in the stomach and

Written Report Is Not Unreliable, Hearsay

The Arbitrator finds that Student A's statement was made closer to the time of the event. It was given to a mandated reporter who also served as the initial in-school investigator. The report initiated by AP Ceara and concluded by AP Castro was

[17] Some weight will be given because her Mother said she told her she was kicked and slapped. Student X and Student Y statements also give some level of support.
[18] The Report of Investigation contains no witness statement to support these charges. (Ex. D13).

reliable. In addition, when Student 2B was asked on the record at the hearing whether she told the truth when she told her Mom the Respondent kicked, punched and slapped her, she said she was telling the truth. (Tr. 575). The Arbitrator notes that Student 2B was quite actively spinning in her chair and exhibited nervousness as she attempted to testify. The Arbitrator also finds that the information Student 2B gave to Assistant Principal Ceara contemporaneously with her interview; regarding the allegations of corporal punishment; is credible, reliable and relevant.

Respondent challenged the statements in the written report as unreliable, hearsay that should not be given any weight, because they are not corroborated by requisite direct evidence. Administrative proceedings are not bound to the same evidentiary standards as courts of law (State Administrative Procedure Act 306; Wayne-Finger Lakes Board of Cooperative Educational Services (Donald Bogart), Decision No. 13,226 (1994); citing *Freyman v. Board of Regents of the University of the State of New York*, 102 AD2d 912, app. dismissed 64 NY2d 645; *Matter of Jerry v. Bd. of Ed*., 50 AD2d 149, app. dismissed 39 NY2d 1057, (mot for lv to app den 40 NY2d 847).

The Arbitrator finds Student 2B clearly testified Respondent impermissibly contacted her thigh with his foot in order to move her over on the rug. (Tr. 515). Slapping her in the face was not corroborated. However, Student X testified she saw Respondent take her softly by the arm (Tr. 591), which DOE contends qualifies as objectionable contact. The Arbitrator notes an inconsistency, in that the investigation report states Student X stated Respondent grabbed Student X's arm a "little hard." This student also reported that she saw Respondent grab Student 2B's arm when she tried to exit the rug and go to lunch. (Exhibit D13).

Respondent acknowledged he sometimes holds disruptive students by their wrists and arms without pressure, in order to stabilize and guide them through when he is bringing them to the front of the class to sit near him. (Tr. 1497-8). On the other hand, Student Y (who did not appear at the hearing) stated during the in-school investigation that she has observed Respondent grab children's arms hard until they

say “ouch” and one time she saw him do that to Student 2B. Student Y reportedly also told AP Ceara she saw Respondent punch Student 2B on the stomach. (Ex. D13)

As DOE argued, hearsay is allowed when it is supported, believable, relevant and contemporaneously stated to an investigator who has the duty to accurately report evidence such as that provided in the instant case at exhibit D13 by Assistant Principals Ceara and Castro. See, *Giles, supra.* The hearsay evidence was supported by the student statements given to Mandatory reporter Ceara.

Progressive Discipline

The Respondent argued that he was entitled to progressive discipline for the alleged corporal punishment. Respondent cited, *DOE* v *VD,* No. 22,041, p. 26 (Busto, 2013), which the undersigned Arbitrator finds is distinguished; in that it contained an element of self defense; which is not an issue at Bar. Respondent also cited for support, *DOE* v. *MP,* SED No. 25,283 (Woods, 2015); and *DOE* v. *AD*, SED No. 23,637 (Cullen, 2014) both of which are distinguished. In the latter of the two cases, the charge(s) was dismissed because it did not involve an attempt at discipline. The student in AD was asleep and the Respondent’s physical action was of the magnitude that did not compel termination, so a lesser fine was imposed. Each of the cited cases cited by Respondent were reviewed and found distinguishable.

DOE argued progressive discipline is not required for corporal punishment. *Department of Education v. NV,* SED #5002 (Arbitrator Martin Scheinman); *Department of Education v. MH*, SED # 5412 (Arbitrator Andre McKissack, 2008); *Department of Education v. EC*, SED # 7331 (Arbitrator Mary Crangle, 2008).

There are some school systems that allow painful infliction of touching through corporal punishment.[19] However, New York prohibits the practice. Hurtful touching is not allowed. Thus, the Arbitrator finds that Respondent was not entitled to be progressively disciplined for that aspect of his charge that involves corporal

[19] As of September 2014, nineteen states allowed corporal punishment. See Washington Post Article dated September 18, 2014, “Nineteen States Still Allow Corporal Punishment in Schools.” Thirty one states, including New York have banned corporal punishment.

punishment. His use of his foot against Student A's leg was intended to discipline or redirect her. Moreover, the Arbitrator finds Respondent is **not** allowed to inflict corporal punishment more than one time or o a continual basis, before he can be sanctioned, suspended or terminated.

SPECIFICATION 2:

As a result of committing one, some, or all of the actions as specified within Specification 1 above, Respondent knowingly acted in a manner likely to be injurious to the physical, mental and/or moral welfare of a child less than seventeen years of age.

The same arguments made in Case #1 above were made by both parties case #2.Slapping, kicking and punching a 5 year old is misconduct that is unbecoming a teacher's profession. It is also conduct that could be criminal in another forum. New York is one of 31 states that has outlawed corporal punishment.

As stated above, the Arbitrator finds it is permissible to use a criminal statute as guidance in drafting specifications pursuant to §3020-a. Moreover, in the instant Education Law §3020-a proceeding, the Department is not requesting a finding that a crime has been committed by Respondent; which would require proof beyond a reasonable doubt. The legal standard required in a §3020-a proceeding is preponderance of the evidence. It appears there is adequate precedence that under Education Law §3020-a, Respondent as a tenured teacher can be disciplined for misconduct that is unbecoming or that involves moral turpitude, i.e., conduct that is consistent with a crime. See, In the matter of *, Department v. L. F.,* SED 19705 (Arbitrator Douglas Abel; 2013), supra. Irrespective of whether the specifications in a 3020-a case track a criminal statute, the charges in a 3020-a matter must be proved by a preponderance of evidence which is not the same standard that is required to find someone is criminally liable; i.e., a matter totally outside the Arbitrator's jurisdiction.

SPECIFICATION 3:

During the 2012-2013 school year, the Respondent was excessively late on ten (10) occasions:

1.) Monday, December 3, 2012	47 minutes
2.) Monday, December 10, 2012	7 minutes
3.) Friday, February 1, 2013	8 minutes
4.) Tuesday, February 5, 2013	2 hours, 32 minutes
5.) Tuesday, March 12, 2013	15 minutes
6.) Monday, April 8, 2013	7 minutes
7.) Wednesday, May 1, 2013	30 minutes
8.) Wednesday, May 8, 2013	9 minutes
9.) Friday, May 10, 2013	10 minutes
10.) Monday, May 20, 2013	16 minutes

LATENESS

At the hearing Respondent's timecards were thoroughly and painstakingly authenticated by Ms. Ianniello. (Tr. 644) et seq.

Specification 3

Respondent challenged number 4 of Specification 3 which cited him as having been late on Tuesday, February 5. He does not deny he arrived two (2) hours and 32 minutes after the official starting time. He admitted he was late that day. The Arbitrator notes Respondent reportedly called in sick that morning. He was asked to come in if he felt better later. He complied. Upon his arrival he was charged as late. This seem patently unfair. Respondent should have been allowed to use leave and not be negatively impacted for having complied with the request to come into the facility – when he was ill. The record shows there is some flexibility and discretion employed. This lateness should have been abated, or given the opportunity to use leave. This is one instance the DOE argument must fail that providing a reason for lateness does not

erase the fact that he was late. This specification is sustained; with the exception of number 4 of Specification 3.

SPECIFICATION 4:

During the 2013-2014 school year, the Respondent was excessively late on eleven (11) occasions:

1.) Tuesday, September 24, 2013	42 minutes
2.) Thursday, September 26, 2013	13 minutes
3.) Friday, October 25, 2013	30 minutes
4.) Wednesday, October 30, 2013	7 minutes
5.) Wednesday, November 6, 2013	7 minutes
6.) Friday, January 24, 2014	7 minutes
7.) Friday, February 7, 2014	59 minutes
8.) Thursday, March 6, 2014	7 minutes
9.) Wednesday, April 23, 2014	9 minutes
10.) Thursday, May 29, 2014	57 minutes
11.) Wednesday, June 11, 2014	20 minutes

Specification 4

Respondent challenged number 6 of Specification 4 which occurred on January 24. Reportedly he was seven minutes late. However, he contends that the charge should be dismissed, because he was not seven minutes late. He contends he was two (2) minutes late. The Arbitrator finds there is evidence that the EIS System showed a transit delay affecting Specification 4 number 6. Therefore, it is dismissed.

DOE contends if the Arbitrator determines it is a 2 (as opposed to 7) and also dismisses number 5; Respondents still would have 10 late arrivals which the Chancellor's Regulations has determined are excessive. Respondent's supervisor Assistant Principal Castro testified 10 late arrivals was considered excessive for the 2013-2014 school year. (Tr. 639) The Arbitrator finds specification 4 is substantiated, with the exception of number 6; which are dismissed. Number 5 is also dismissed.

SPECIFICATION 5:

During the 2014-2015 school year, the Respondent was excessively late on fifteen (15) occasions:

1.) Thursday, September 4, 2014	6 minutes
2.) Thursday, September 11, 2014	22 minutes
3.) Wednesday, September 17, 2014	8 minutes
4.) Monday, September 22, 2014	14 minutes
5.) Thursday, October 2, 2014	6 minutes
6.) Thursday, October 16, 2014	12 minutes
7.) Wednesday, December 3, 2014	26 minutes
8.) Wednesday, December 10, 2014	9 minutes
9.) Wednesday, December 17, 2014	8 minutes
10.) Monday, January 12, 2015	39 minutes
11.) Friday, February 27, 2015	6 minutes
12.) Wednesday, March 18, 2015	10 minutes
13.) Wednesday, April 1, 2015	9 minutes
14.) Monday, May 18, 2015	2 hours, 23 minutes
15.) Wednesday, May 27, 2015	1 hour and 26 minutes

Specification 5

Respondent challenged numbers 14 and 15 of Specification 5. Both dates represent scheduled meeting times that Respondent was supposed to meet with management; i.e., on Monday, May 18 and Wednesday, May 27. Exhibit R4 is a letter from Principal Santos dated May 12 inviting Respondent and his union representative to a disciplinary conference. Exhibit R5 is a letter from AP Castro regarding a scheduled disciplinary conference.

Numbers 14 and 15 of Specification 5 are dismissed.

DOE argued that after the deletion of the two challenged items (14 and 15), the Respondent remains qualified for excessive lateness in that 13 unexcused days remain that were considered excessively late. Further, he was warned several times about lateness. Ms. Ceara testified that Respondent was counseled about lateness and received progressive discipline. She said he received a verbal warning and a letter regarding lateness. (Tr.1096-7)

With respect to lateness, DOE argued, there were 10 dates of lateness in the 2012- 2013 school year; 10 dates of lateness in the 2013 2014 school year and more than 10 dates in the 2014 2015 school year. Therefore, based on the rule that ten (10) late occurrences are considered late, Respondent was excessively late during the aforementioned school years.

CONCLUSION

Both parties cited cases supporting their positions. All were read and considered by the Arbitrator. As a tenured teacher, Respondent has statutory protections under the Education Law, such as property rights in his continued employment [20] and the right not to be discharged at will. See, *Matter of Gould v. Board of Education,* 81 N.Y.2d 446 (1993); *see also Adrian v. Board of Education,* 60 A.D.2d 840 (2d Dep't 1978); *Clayton* v. *Board of Education of Central Dist. No. 1,* 49 A.D.2d 343 (3d Dep't 1975), *rev'd on other grounds,* 41 N.Y.2d 966 (1977); *Moritz v. Board of Education,* 60 A.D.2d 161, 166 (4th Dep't 1977). His rights have been protected and he has been accorded fairness and due process in this just cause determination.

Respondent's conduct was unbecoming his position. His conduct was prejudicial to the good order, efficiency and discipline of the service. There is substantial cause rendering Respondent unfit to perform his teaching obligations.

[20]Statutory property rights and liberty interests exist for tenured teachers in their jobs. *See Bd. of Regents v. Roth,* 408 U.S. 564 (1972); *see also Perry* v. *Sindermann,* 408 U.S. 593 (1972); *Ronga* v. *New York City Department of Education,* 114 A.D.3d 527 (L ' Dep't 2014); *Bevan v. New York State Teachers Retirement Sys.,* 44 A.D.2d 163 (3d Dep't 1974). *Mot. for lv. to app. den.,* 35 N . Y . 2 d 641 (1974).

The Arbitrator finds his misconduct involved indecent exposure, in appropriate touching and corporal punishment in violation of Chancellor's Regulations A420 (Ex. D2)

Having taken into account all of the authorities cited and the arguments of both parties, the Motion to Dismiss Specification three (3) is hereby DENIED.

AWARD

Consolidated Case 1

1. Specification 1 is sustained.
2. Specification 2 a, b and c are sustained.
3. Specification 3 is sustained.

Consolidated Case 2

4. Specification 1 a and b are sustained.

   Specification 1 c and d are dismissed.
5. Specification 2 is sustained.
6. Specification 3 is sustained.
7. Specification 4 is sustained.; with the exception of number 6
8. Specification 5 is sustained; with the exception that numbers 14 and 15 are dismissed.

For the reasons set forth above, there is just cause for termination.

Gloria Johnson, Arbitrator

DATE OF AWARD: January 28, 2016

AFFIRMATION

I, Gloria Johnson, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument which is my Opinion and Award

Gloria Johnson
Arbitrator