

THE STATE EDUCATION DEPARTMENT  
THE UNIVERSITY OF THE STATE OF NEW YORK

In the Matter of the Charges Preferred By

**NEW YORK CITY DEPARTMENT OF EDUCATION,**  
Complainant,  
-against-

**BOUBAKAR FOFANA,**

Respondent

**Section 3020-a Education Law Proceeding (SED File # 8,234)**

**BEFORE: ARBITRATOR JAY M. SIEGEL, ESQ.**

**OPINION  
AND  
AWARD**

NYC  
JAN 11 2008  
OSPRA

APPEARANCES:

FOR NEW YORK CITY DEPARTMENT OF EDUCATION  
New York City Department of Education Office of Legal Services  
By: Laura Hemans Brantley, Esq., Of Counsel

FOR RESPONDENT BOUBAKAR FOFANA  
By: Boubakar Fofana, Pro Se

**BACKGROUND**

On or about May 16, 2007, the New York City Department of Education (Department) preferred charges (Joint Exhibit 1) against Boubakar Fofana (Respondent) pursuant to Section 3020-a of the Education Law and the Collective Bargaining Agreement (CBA) between the Department and the United Federation of Teachers (UFT). The undersigned was designated to serve as Arbitrator and render and final and binding determination pursuant to Section 3020-a of the Education Law and the CBA.

A pre-hearing conference was held at the offices of the Department on September 21, 2007. Hearings were held at the same location on February 12, 2008, May 7, 2008,

May 14,2008, May 28, 2008, June 3, 2008, June 4, 2008, June 11,2008 and June 16, 2008.

At the pre-hearing conference and the first hearing, the Respondent was represented by Antonio Cavallaro, Esq., on behalf of James R. Sandner, Esq., of the New York State United Teachers (NYSUT). From March 5, 2008 to the conclusion of this hearing, Respondent represented himself due to NYSUT's withdrawal as counsel in this proceeding.

On March 3, 2008, Respondent wrote the Arbitrator a letter informing the Arbitrator that he was a plaintiff in a federal court proceeding, Teachers4Action, et al v. Bloomberg, the New York City Department of Education, the United Federation of Teachers, et. al. (Hearing Officer Exhibit 1). Respondent requested that the Arbitrator adjourn the proceeding and refrain from adjudicating the matter until the federal action was completed. The Arbitrator rejected that request by letter dated March 31, 2008 (Hearing Officer 2).

The parties were accorded full and fair hearings, including the opportunity to present evidence, examine and cross-examine witnesses and make arguments in support of their respective positions. An official stenographic record of the proceedings was taken. The record was closed on November 6,2008, upon the Arbitrator's receipt of written closing arguments from the parties.

### THE CHARGES

The Charges (Joint Exhibit 1), in pertinent part state:

During the 2004-05 and 2005-2006 school years, Respondent rendered incompetent and inefficient service, engaged in verbal abuse, insubordination and disclosed confidential student information.

**IN PARTICULAR:**

Specification 1: On or about September 30,2004, Respondent rendered an unsatisfactory lesson as detailed in an observation report by Assistant Principal Yvonne Adonai, who noted that Respondent failed to:

- A. Properly prepare a lesson plan.
- B. Have a lesson plan during the class.
- C. Engage the entire class in the lesson.
- D. Ask higher level questions.
- E. Have latecomers sign into class.
- F. Respond to student questions.

Specification 2: On or about October 1,2004, while conducting a parent teacher conference, the Respondent said to Parent Trotman words to the effect:

- A. Now I see why your daughter behaves the way she does, you raised her.
- B. That it would be best for the both of us if Ms. Trotman removed her daughter from Respondent's class.

Specification 3: On or about October 25,2004, Respondent rendered an unsatisfactory lesson as detailed in an observation report by Principal Dr. Michael Wiltshire, who noted that Respondent failed to:

- A. Properly present information.
- B. Engage the entire class in learning.
- C. Utilize various instructional modalities.
- D. Present a student centered class.
- E. Show sensitivity to students.
- F. Properly manage the classroom.
- G. Include a motivation in the lesson.
- H. Have a lesson plan.
- I. Have an AIM.

Specification 4: On or about December 6, 2004, the Respondent:

- A. Told Student DD words to the effect of you are stupid and confused.
- B. Told Student KS words to the effect of get the hell out of the classroom.
- C. Threw a piece of paper at student M.B.

Specification 5: On or about and in between April 12, 2006 and April 20, 2006 the Respondent maintained the website [www.mathspell.com](http://www.mathspell.com) that contained the following, including, but not limited to:

- A. Names of students.
- B. Photographs of students, including Student N.A. and Student L.J.

Specification 6: On or about and in between April 12, 2006 and April 20, 2006, the Respondent maintained the website [www\teacherabuse.com](http://www.teacherabuse.com) that contained the following, including but not limited to documents that:

- A. Included the names of students.
- B. Included the grades of students.
- C. Included student attendance records.
- D. Described misconduct of named students.

Specification 7: On or about and in between April 12, 2006 and April 20, 2006, the website [www.teacherabuse.com](http://www.teacherabuse.com) maintained by Respondent contained a link to [www.mathspell.com](http://www.mathspell.com) as described in Specification 6.

Specification 8: During the month of December 2006, the Respondent refused to return and/or refund a Teacher's Choice check issued in the amount of \$245.00 as required to do so by Principal Dr. Michael Wiltshire.

#### **The Foregoing Constitutes:**

- Just Cause for disciplinary action under Education Law Section 3020-a;
- Conduct unbecoming Respondent's position, or conduct prejudicial to good order, efficiency, and discipline of the service;
- Substantial cause rendering Respondent unfit to perform properly his obligations to the service;
- A violation of Chancellor's Regulations A-421 and A-820;
- Insubordination;
- Incompetence and/or ineffective service;
- Neglect of duty; and
- Just cause for termination.

#### **BACKGROUND FACTS**

Respondent has been working as a teacher for the Department since 1989 (1730)<sup>1</sup>. He obtained a Bachelors Degree in Mathematics and Physics from Marie Curie University in Paris (1728). During the 1980s, he was an instructor at the university level for two years in the Ivory Coast. He also worked at a market research company and taught mathematics in Libreville, the capital city of the central African country of Gabon (1729).

<sup>1</sup> Numbers in parenthesis correspond to the page numbers in the transcript.

Respondent came to the United States in 1988 (1729). He enrolled in a Master's Degree program in Business Administration at Adelphi University and obtained his degree in 1990 (Respondent's Exhibit 25). In the meantime, Respondent started working for the Department as a substitute teacher (1729). Respondent obtained his permanent teaching license in 1992 (1730).

In 1996, Respondent entered a doctoral program in management at Rutgers University. He took a variety of courses about mathematics models and computer information systems (1730 & Respondent's Exhibit 23). He did not complete that program. (1732). However, in 2005, he received his Master of Science degree in Computer Science from the New Jersey Institute of Technology (Respondent's Exhibit 24).

Respondent started working at Erasmus Hall High School in 1994. He received tenure in Mathematics from the Department in 1995 (1734).

The Department filed disciplinary charges against Respondent in 1998 (1735). After several hearing days in 2000, Hearing Officer Alan Viani dismissed all of the charges except for the charges alleging that Respondent was excessively absent and excessively late during the 1998-99 school year (Respondent's Exhibit 31). Respondent received a Letter of Reprimand for being guilty of those charges (Respondent's Exhibit 31).

Respondent was subsequently assigned to Canarsie High School (1740). Respondent worked there until March 20, 2003, at which time he was reassigned to Middle College High School, the site where the current charges arose (1740).

The principal at Middle College High School both in 2003 and at present is Dr. Michael Wiltshire (537). In March 2003, Dr. Wiltshire was told by his Deputy Superintendent that he needed to reassign Respondent to Dr. Wiltshire's building from March 2003 to the end of the school year (539). Dr. Wiltshire testified that was told by the Deputy Superintendent that he could assign Respondent as he deemed fit (541).

When Respondent arrived at Middle College High School in March 2003, he and Dr. Wiltshire realized that they had known each other in the past (544, 1744). Respondent testified that in 1994, he had assisted Dr. Wiltshire with a group of mathematical and computer science problems while Dr. Wiltshire was attending a doctoral program at Columbia University (544). Respondent testified that he completed five assignments of computer programming work for Dr. Wiltshire and that Dr. Wiltshire paid him \$250.00 for completing the work (1737-1754). In support of this assertion, Respondent produced a document prepared by him and addressed to "Mike" that states, among other things, "this is to help you understand the files/programs involved in the project and their organization on the disk" (Respondent's Exhibit 9). Respondent testified that this was the document he gave to Dr. Wiltshire in 1994, along with a floppy disk containing the work product (1737-1754).

After Respondent arrived at Middle College High School, Dr. Wiltshire and he disagreed as to whether his assignment to Middle College High School was permanent or temporary. The letter Respondent received from the Department informing him of his assignment to Middle College High School was silent as to both issues (Respondent's Exhibit 6). It simply states that effective March 17, 2003, he is to report to Middle College High School.

Dr. Wiltshire and Respondent testified differently as to the assignment Respondent was given from March 2003 to June 2003. Dr. Wiltshire testified that he assigned Respondent to teach a group of students that Dr. Wiltshire had been teaching statistics to, as well as assigning him to cover other classes (542-543), Respondent testified that he was assigned to a more regular program, namely, teaching a full statistics course and another course (1757).

In May 2003, Dr. Wiltshire informed Respondent that he could not return to Middle College High School in the next school year (1758). Respondent thought this was unfair because he believed that the March 2003 assignment to the school was a permanent assignment (1761). Respondent also felt that he was being removed from the school by Dr. Wiltshire to silence him about the computer programming problems he had solved for Dr. Wiltshire while Dr. Wiltshire was pursuing his doctoral degree (1761). Dr. Wiltshire testified that Respondent's March 2003 assignment was of limited duration (i.e., from March 2003 to June 2003) because Dr. Wiltshire had not declared a vacancy for that position and had not gone through the usual procedure for filling a vacancy (543544).

Respondent prepared a letter dated May 12, 2003 that described the computer programming services he had provided to Dr. Wiltshire while Dr. Wiltshire was in his doctoral program. The letter also complained about Dr. Wiltshire's unwillingness to let him remain at Middle College High School (Respondent's Exhibit 5). Respondent distributed the letter to the staff at Middle College High School (1761).

Dr. Wiltshire issued Respondent a letter dated June 23, 2003, which states in pertinent part:

You informed me in our last conversation that you were assigned to Middle College High School this semester as a regular appointed teacher. I indicated to you that this was not possible because I had not declared a vacancy in mathematics, your license area. After consulting with the Director of Personnel, he informed me that you were at Middle College High School in the capacity of an ATR. This means that at the end of the semester the regional personnel office is responsible to find you a new school (Respondent's Exhibit 10).

In the summer of 2003, Respondent was assigned to Middle College High School to teach summer school (545). The summer school was supervised by Dr. Wiltshire and two other principals. Dr. Wiltshire testified that he was reluctant to give Respondent an assignment, but that he gave him a summer school assignment after a few days (545). Respondent contends that he was not given an assignment of classes until there were so many students enrolled that the administration had no choice but to assign him (1769).

Respondent was not assigned to Middle College High School or to any other school in the 2003-04 school year. In the 2004-05 school year, Respondent was again assigned to Middle College High School (546). Dr. Wiltshire initially objected to Respondent's reassignment (546). He was later told by his Superintendent that the school that Respondent had previously worked at had since been closed and, as such, Respondent was permanently reassigned to Middle College High School (546). Thereafter, Respondent was given an assignment at Middle College High School that included a course known as M\$5, an introduction to trigonometry class (547).

On September 30, 2004, Middle College High School Assistant Principal Yvonne Adonai conducted a formal observation of Respondent. Ms. Adonai testified that Respondent "was not prepared." (25). She said that when she entered the room, the kids were told by Respondent that they were going to review a test. After the kids protested, Respondent switched gears and wrote on the blackboard "what's a function and what's a

relation." (25). Ms. Adonai said that some students started arguing about what Respondent was teaching them and that the argument lasted virtually the entire period with the blackboard question never being resolved by Respondent (26). Ms. Adonai rated the lesson as unsatisfactory (Department Exhibit 1).

Respondent testified that the class that Ms. Adonai observed on September 30, 2004 had only been formed two days earlier due to overcrowding (1794). He testified that on September 28, 2004, which was the first day the class ever met, he let Ms. Adonai know that the class was chaotic. Respondent said that on September 29, 2004, he again complained to Ms. Adonai about the behavior of the class (1804).

Ms. Adonai conducted a post-observation conference with Respondent shortly after the September 30, 2004 observation (27). Ms. Adonai testified that the post-observation conference did not go well. She said that Respondent told her that she could not help him because he was more qualified than her (31-32). She also testified that she suggested that Respondent visit Mr. Husbands' first period math class, but that Respondent said that was ludicrous because he was better qualified and more experienced than all of the teachers in the Department (31).

On September 30, 2004, Dr. Wiltshire formally observed Respondent teaching a class other than the one Ms. Adonai observed that same day (549). Dr. Wiltshire found the lesson to be unsatisfactory (549). Dr. Wiltshire criticized Respondent's lack of lesson planning, his time management and his failure to have a clearly delineated aim (Department Exhibit 5).

Around the same time that Ms. Adonai and Dr. Wiltshire conducted their first formal observations of him, Respondent had a negative interaction with a parent of a

student. One of the students in Respondent's newly formed class was L T (1814). Respondent called L T's mother on September 29 or 30, 2004 to let her know that he was having a behavioral problem with LT in class. Respondent asked L T's mother to come to school to meet with him (1814). L T's mother agreed to meet with Respondent and the meeting was scheduled (1814).

On the morning of October 1, 2004, Respondent was called on the school's public address system, to come to the principal's conference room (1815). Unbeknownst to Respondent, Ms. Adonai, L T's mother and Ms. Lowe, the parent coordinator of Middle College High School, were all in the room (1815). Respondent told them that LT had not behaved in class on September 28, 2004 and he showed a referral he had written about LT (1819). L T's mother jumped to her feet, pointed her finger at Respondent and in a loud voice called him a liar (1819). Respondent then stated words to the effect of "now I see why your daughter behaves the way she does, you raised her." (1820 and Department Exhibit 2). Ms. Adonai subsequently wrote a memo to Respondent criticizing him for his negative interaction with the parent (Department Exhibit 2).

On October 25, 2004, Dr. Wiltshire conducted his second formal observation of Respondent (Department Exhibit 5). Dr. Wiltshire testified that Respondent had not implemented any of the recommendations he had made the previous month (549). He also testified that the classroom management was "very, very poor." (549). Dr. Wiltshire rated the observation as unsatisfactory (549 & Department Exhibit 5). In spite of these criticisms, Dr. Wiltshire acknowledged during cross-examination that the two unsatisfactory ratings he gave Respondent did not establish that he was incompetent

(711-712). According to Dr. Wiltshire, the two unsatisfactory ratings demonstrated areas where Respondent needed additional support (711).

In December 2004, some of Respondent's students lodged a verbal abuse complaint against him (559). The complaints alleged that Respondent said to one student that he was stupid or confused and told another student to get the hell out of the classroom. Dr. Wiltshire reported the complaint to the Department's Office of Special Investigations (OSI). OSI immediately directed Dr. Wiltshire to have Respondent removed from the building (560). Respondent never returned to teach at Middle College High School.

OSI did not commence an investigation into these complaints until March 2005. OSI did not complete its investigation report on these complaints until March 22, 2006 (Department Exhibit 13). None of the students who were allegedly verbally abused by Respondent appeared to testify at this 3020-a proceeding.

Ms. Adonai and Dr. Wiltshire testified that in December 2004, they heard that Respondent had established a website called mathspell.com (568). Respondent testified that Dr. Wiltshire knew about the website as early as October 2004 because Respondent mentioned it to students in every lecture he gave (1835). According to Respondent, when Dr. Wiltshire observed Respondent on October 25, 2004, Dr. Wiltshire heard Respondent make several references to the website.

The website included tutorials in subjects Respondent was teaching, homework assignments, and academic awards for students who were excelling in Respondent's classes (1846). Pictures of two of the five students achieving academic excellence were posted on the site (1848). Respondent testified that the reason that the pictures of the

three remaining students were not on the site was because the parents of those students did not want their childrens' pictures on the site (1848). Respondent had received parental permission to post the photos of the other two students (1853).

Respondent testified that neither Dr. Wiltshire nor Ms. Adonai ever told him to remove the pictures of the students (1859). This website remained online from 2004 to 2006 (1858). Dr. Wiltshire testified that he thought he told Respondent to remove the pictures from the website in December 2004 (568). Nonetheless, Dr. Wiltshire testified that the website was positive for students and that Respondent was trying to "celebrate what he considers the success of the student." (569).

While he was being investigated by the Department between 2004 and 2006, Respondent created a website with the address [www.teacherabuse.com](http://www.teacherabuse.com). The website alleged that he had been falsely accused of verbal abuse (Department Exhibit 10). The website alleged that this was common practice in the Department and that the Department did this to distract attention away from dismal academic failures of the Department and its principals. The website accused the Department of filing frivolous charges against hundreds of teachers. The website also included confidential student information such as student grades, class rosters and two letters written by Respondent complaining of classroom misconduct by three named students (Department Exhibit 10). Finally, the website also had a link to Respondent's other website, [mathspell.com](http://mathspell.com).

Dr. Wiltshire learned about the [www.teacherabuse.com](http://www.teacherabuse.com) website in April 2006 (573). Dr. Wiltshire promptly reported this discovery to the Department's Special Commissioner of Investigations (SCI). SCI investigators downloaded the information on the website. After conducting an investigation, SCI found that Respondent was the

registrant of the website and that it contained inappropriate confidential information, including names and class grades for approximately forty of Respondent's students, class rosters identifying twenty-seven students and letters written by Respondent about classroom misconduct by three named students identified by Respondent (Department Exhibit 10).

Finally, in December 2006, an allegation arose regarding a Teacher's Choice check that was issued to Respondent. The Teacher's Choice Program is a program whereby teachers and support staff are given an annual check that they can use to purchase materials to enhance the learning experiences of students (Department Exhibit 11).

In December 2006, Dr. Wiltshire learned that Respondent had mistakenly been issued a Teacher's Choice check (578). Dr. Wiltshire testified that Respondent should not have been issued the check because he was not teaching at the time (578).

Dr. Wiltshire was asked to conduct an investigation into the check. Dr. Wiltshire scheduled a meeting with Respondent to direct him return the money from the check, which amounted to \$245.00 (580). Respondent refused to return the money, believing that he was entitled to the money under the Department's guidelines (580).

Shortly thereafter, Dr. Wiltshire issued a letter to Respondent wherein he criticized his refusal to return the check (Department Exhibit 8). Among other things, Dr. Wiltshire stated that Respondent's actions constituted insubordination and a theft of services. He also informed Respondent that the incident could lead to further disciplinary action, including termination (Department Exhibit 8).

Shortly thereafter, the Department filed disciplinary charges against Respondent. This matter was subsequently assigned to this Arbitrator pursuant to the CBA between the Department and the UFT.

### **POSITION OF THE DEPARTMENT**

The Department contends that Respondent is guilty of the charges. It insists that termination is the only appropriate penalty in this case.

#### **Specification 1 - Unsatisfactory Lesson on 9/30/04**

The Department maintains that Assistant Principal CAP) Adonai's testimony about Respondent's September 30, 2004 lesson is evidence of his incompetency. It observes that, among other things, AP Adonai criticized Respondent for failing to have a lesson plan, failing to engage the entire class in the lesson and failing to respond to student questions. It notes that Respondent initially told the class that he was going to review a test, but that he completely changed the lesson and began discussing a mathematics concept immediately after a student asked him whether they were getting their tests back.

The Department contends that Respondent's testimony bolsters its position that Respondent had not prepared a lesson for the class AP Adonai observed on September 30, 2004. It claims that Respondent's testimony was all over the place. In the Department's view, Respondent testimony ranged from stating that he was repeating an evaluation of students from two days prior to an assertion that his original lesson plan had to do with the previous day's lesson. The Department points out that if his lesson really was a review lesson, he would have stated that at the beginning of the lesson.

The Department maintains that AP Adonai's testimony and written observation establishes that Respondent is guilty of Specification 1. It maintains that Respondent's decision to completely switch the topic of the lesson after a student asked a question is prima facie evidence of his failure to appropriately prepare for the lesson. It also contends that Respondent's classroom management was subpar.

The Department asserts that Respondent's unwillingness to accept constructive criticism from AP Adonai is extremely relevant to the disposition of the case. It observes that during a post-observation conference between AP Adonai and Respondent to discuss the September 30, 2004 evaluation, AP Adonai made suggestions to improve Respondent's instruction and classroom management. Instead of listening and taking the suggestions to heart, Respondent told AP Adonai that he was more qualified than her and the other math teachers and that she was not even qualified to observe him.

Respondent's refusal to accept assistance is also evidenced by his refusal to comply with AP Adonai's directive to Respondent to visit Mr. Husbands' first period math class twice a week. In the Department's estimation, Respondent mocked AP Adonai's suggestion that he could learn from Mr. Husbands on the basis that he had superior academic credentials to Mr. Husbands.

The Department argues that the Arbitrator should reject Respondent's testimony that he did not wish to observe Mr. Husbands because he did not get along with him. In the Department's view, this is contrary to the contemporaneous writings Respondent made in 2004 that clearly establish that he did not wish to visit Mr. Husbands' class because he felt he was superior to him.

**Specification 2 - Inappropriate Interaction with a Parent**

Turning to Specification 2, the Department maintains that the evidence establishes that Respondent engaged in misconduct when he made disparaging remarks to a parent in a meeting on October 1, 2004. The Department claims that AP Adonai credibly testified that Respondent's language and demeanor toward the parent were unprofessional and inappropriate.

The Department observes that Respondent admitted his guilt to the allegations of Specification 2(a), namely, that he told the parent "Now I see why your daughter behaves the way she does, you raised her." In the Department's estimation, the Arbitrator must reject Respondent's contention that his statement was justified because the parent's behavior was abhorrent. Regardless of the parent's behavior, Respondent was required to act respectfully and professionally toward the parent. His verbal sparring with the parent escalated an already tense situation and should not be countenanced.

Respondent's denial of the allegation in Specification 2(b), namely, that he told the parent that it would be best if Mrs. Trotman had her daughter removed from his class should be rejected. It is abundantly clear that Respondent was having a hard time with this student and that Respondent was angry with the mother during the meeting. AP Adonai's testimony that Respondent made the statement in an angry tone is much more believable than Respondent's in the context of the other goings on during the meeting.

### **Specification 3 - Unsatisfactory Lesson on 10/25/04**

The Department avers that Dr. Wiltshire's testimony about Respondent's October 25, 2004 lesson is further evidence of Respondent's incompetence. The Department contends that Dr. Wiltshire's testimony established that Respondent's lesson was unsatisfactory in that he failed to properly plan the lesson and the lesson was teacher

dominated. There was poor classroom management and time management and no summary at the end of the lesson.

Dr. Wiltshire noted that Respondent's refusal to explain the lesson to the students when they first requested him to do so was a waste of valuable teaching time. Respondent finally wrote down the steps necessary to complete the lesson seven minutes prior to the end of the period. In Dr. Wiltshire's estimation, Respondent lost an opportunity to engage the students and was insensitive to the students during his interactions with them.

Respondent's poor teaching was even more problematic because Respondent failed to implement many of the suggestions Dr. Wiltshire noted to Respondent in the September 30, 2004 observation. Respondent's refusal to incorporate the recommended changes to his lesson are evidence of his incompetent performance.

#### **Specification 4 - Verbal Abuse of Students**

The Department contends that OSI Investigator Colon's testimony, combined with his investigatory report, establishes that Respondent is guilty of Specification 4. The Department maintains that its evidence is sufficient to sustain its burden of proof because hearsay is admissible in a proceeding such as this. The standard is whether the evidence is of enough probative value as to rise to the standard of substantial evidence.

In the Department's view, Investigator Colon's testimony was unbiased and specific. He testified about an interview he conducted with student DD. Respondent allegedly told DD that he came to class stupid and confused. Investigator Colon's report also shows that student KS wrote that Respondent told her to "get the hell out of the classroom." Since this evidence is admissible and it comports with the angry and disrespectful attitude that Respondent displayed throughout the 3020-a proceeding, the

Department asserts that it is believable and more than sufficient to sustain the burden of proof on this specification.

### **Specifications 5, 6 and 7 - Inappropriate Disclosure of Confidential Student**

#### **Information on Websites Maintained by Respondent**

Specifications 5, 6 and 7 all deal with the websites maintained by Respondent during the 2005-06 school year. According to the Department, there is no doubt about Respondent's guilt on Specification 5. Respondent acknowledged that on his website, mathspell.com, he posted the names and photographs of several students.

The Department objects to Respondent's assertion that he had parental permission to post pictures of students on the website. It does not make sense that parents would complain to the school administration about the website if they had given Respondent permission to post the pictures. The Department notes that Dr. Wiltshire was not challenged by Respondent during cross-examination about his testimony that a parent complained about her child's picture being on the website.

Specification 6 deals with Respondent's website teacherabuse.com. The Department maintains that its witnesses established that Respondent posted confidential documents on this public website. The posted documents contained student names, grades, attendance records and student referrals. AP Adonai testified that she accessed the teacherabuse.com website and saw her picture, Dr. Wiltshire's picture, and student information such as grades, attendance records and student referrals. SCI investigated this website after AP Adonai informed Dr. Wiltshire about it.

The Department observes that SCI Investigator Matthew Martucci testified that he accessed both of Respondent's websites by typing in the names of the websites on his

computer at work. He unequivocally stated that Department Exhibit 10 includes much of the information that he printed off of the websites on the day that he found them.

Investigator Martucci testified that he contacted Richard Marin, the Director of Technology at SCI, to ask him to download the information he viewed on the website onto a compact disc. Investigator Martucci observed Mr. Marin download the information from the website onto two compact discs, each of which contained identical information.

The Department asserts that, contrary to Respondent's protestations, Mr. Marin repeatedly testified that he did not illegally access the information from Respondent's server. Rather, Mr. Marin testified that he was able to access the information directly from the Internet because the website had not been secured.

In the estimation of the Department, Respondent's contention that the Department illegally accessed his server cannot be true. AP Adonai, Investigator Martucci, Mr. Marin and OSI Investigator Giovanni Perez all credibly testified that they accessed the teacherabuse.com website by typing the URL "teacherabuse.com" on at least four different points in time between April 2006 to June 2008. Each time the website contained confidential student information. This evidence makes it abundantly clear that Respondent is guilty of Specifications 5 and 6. He is also guilty of Specification 7 as there is no factual dispute that a link existed from teacherabuse.com to mathspell.com as Respondent admitted during his direct examination that such a link existed.

#### **Specification 8 - Refusal to Follow Directive to Return a Teacher's Choice Check**

The Department asserts that there is a mountain of evidence establishing that Respondent is guilty of Specification 8. In the Department's view, the evidence

establishes that Respondent was directed twice by Dr. Wiltshire to return the Teacher's Choice check. Respondent's decision to ignore these directives establishes his guilt.

The Department contends that by refusing a direct order, Respondent was being confrontational and insubordinate. He was not only verbally told to return the check, but he also received a letter from Dr. Wiltshire that explained why the Teacher's Choice program prohibited him from receiving a check.

The fact that the Department made an error in issuing the check does not excuse or mitigate Respondent's actions. Respondent's decision to blatantly disregard a direct order from his supervisor establishes his guilt on this specification.

### **Department's Proposed Penalty**

The Department insists that termination is the only appropriate penalty in this case. It asserts that remediation is not possible because Respondent engaged in willful and defiant behavior for which he is without remorse. Respondent repeatedly disregarded his principal's directives and refused to make any real effort to correct his deficiencies. In the Department's view, he was openly and repeatedly hostile to intervention and assistance.

According to the Department, this is an untenable position for a tenured teacher to take. The education field is constantly evolving. Teachers in need of assistance need to be receptive and open minded. Respondent has a superiority complex that has hindered his growth. Since Respondent was unwilling to genuinely consider any remedial assistance, the Department maintains that it would be pointless for the Arbitrator to order additional remedial assistance.

In the Department's view, Respondent is incapable of working with or getting along with anyone in a position of authority. He unfairly criticized the administrators on his website and expressed a condescending attitude in his interactions with them. There is no reason to believe that Respondent's behavior toward his supervisors could improve.

The Department states that Respondent took on the responsibility of being a positive role model for his students when he became a teacher for the Department. The Department has a vital interest in employing teachers who exhibit common sense and can demonstrate restraint when faced with complicated issues. In the Department's view, with his repeated acts of corporal punishment and inappropriate use of language in the classroom, Respondent has demonstrated that he has no business working with children.

Under principles of just cause, the Department concedes that it must show that it warned Respondent that his conduct was not acceptable. Respondent was warned that his teaching needed improvement, but he refused to accept any assistance. Respondent was aware of his need to comport himself as a role model, yet he spoke inappropriately toward a parent and students. Respondent was aware that confidential student information should not be on his websites, yet he chose to post the information anyway. And Respondent disregarded directives to return the Teacher's Choice money after he was told that he was not entitled to it. This makes it abundantly clear that Respondent's record of insubordination, incompetence and misconduct is so pervasive that he no longer deserves to be employed by the Department.

According to the Department, termination has been upheld in similar cases to this case, namely, where there is culpability and a lack of remorse concerning the misconduct. Respondent's prior years of satisfactory service should not be a mitigating factor. His

unprofessional conduct and unsatisfactory performance in 2004-05 and 2005-06 show that he is unfit to teach. When this is coupled with his refusal to accept that he did anything wrong and his unwillingness to accept any assistance, it becomes clear that termination is the only appropriate penalty.

### **POSITION OF RESPONDENT**

Respondent insists that this case is a vendetta waged by Principal Wiltshire against him. Respondent claims that, in 1994, his girlfriend at the time asked him if he could help an acquaintance with some school work. The acquaintance turned out to be Dr. Wiltshire. According to Respondent, Dr. Wiltshire ultimately paid Respondent \$250.00 for computer programming work Respondent did for him while Dr. Wiltshire was pursuing his doctorate degree at Columbia.

Respondent and Dr. Wiltshire crossed paths again in March 2003. At that time, Dr. Wiltshire insisted that Respondent was assigned to the school only from March 2003 until June 2003. However, Respondent felt he had been given a permanent assignment there. Respondent and Dr. Wiltshire went back and forth about this during the spring of 2003. After Dr. Wiltshire sent Respondent a letter indicating he was no longer needed as of June 2003, Respondent distributed a letter to the staff at Middle College High School that informed the staff that he had been paid by Dr. Wiltshire in 1994 to assist Dr. Wiltshire with computer programming work toward his doctoral degree.

The Department took a full year to reassign Respondent. Then, in September 2004, Respondent was suddenly assigned back to Middle College High School and Dr. Wiltshire. Respondent views this assignment by the Department as a "set-up" against

him. He wonders why else the Department would send a teacher to a principal who clearly did not want anything to do with him. Respondent speculates that Dr. Wiltshire's supervisors told Dr. Wiltshire that if he wanted to get rid of Respondent, he should "find something on him and send him to the rubber room."

In Respondent's view, this is precisely what Dr. Wiltshire did. Within ten weeks after his arrival at Middle College High School, there were four unsatisfactory observations and an avalanche of negative letters about him. Then a corporal punishment allegation was concocted against him and he was suddenly reassigned (again) to the rubber room as of December 2004.

Respondent claims that the charges should be dismissed on due process grounds. He maintains that he was denied the right to have his case heard by a three member panel. Since a teacher's right to a three member panel was not expressly eliminated in the CBA between the Department and the UFT, the charges should be dismissed.

#### **Specifications 1 and 3 - Unsatisfactory Lessons on 9/30/04 and 10/25/04**

Respondent asserts that Specifications 1 and 3 should be dismissed. Respondent asserts that the two unsatisfactory lessons ratings submitted by the Department against him do not establish his incompetence. This is the case because Dr. Wiltshire expressly testified that the two unsatisfactory lessons did not prove incompetence. Notably, Dr. Wiltshire admitted during cross-examination that he did not file charges of incompetence against Respondent. This leads Respondent to assert that a "lawyer, non-educator" filed these charges.

Respondent maintains that Specifications 1 and 3 should be dismissed because they conflict with the spirit of the CBA between the Department and the UFT. The CBA

has a provision that states that teachers receiving an unsatisfactory rating at the end of the year for the first time may be offered the opportunity to enroll in a Peer Intervention Program (PIP). During the time of the PIP, charges may not be filed against a teacher. In Respondent's view, the Department's decision to file incompetence charges after two unsatisfactory observations occurring within 30 days of each other is obviously unjust, frivolous and in conflict with the spirit of the aforementioned PIP provision.

Turning more directly to Specification I, Respondent asserts that AP Adonai's September 30, 2004 observation was untimely and punitive. He insists that the class AP Adonai observed had only been created two days earlier on September 28, 2004. The class was created to address overcrowding. In Respondent's view, any teacher would need at least a few days to acquaint himself to the students and the class. In addition, many students were unhappy about being assigned to his class, having been taken away from friends in the other class. Thus, it was extremely premature and unfair for AP Adonai to have observed Respondent considering the newness of the class and the chaotic atmosphere.

With respect to Specification 3, Respondent asserts that the specification should be dismissed because Dr. Wiltshire's report omitted an important Power Point assignment that students worked on prior to the lesson. Respondent objects to Dr. Wiltshire's contention that Respondent told the students they should have learned to use the calculator in previous courses. Rather, Respondent states that he told the students that if they had gone online and done the previous assignment, they would understand that the "Do Now" in class that day was a repetitive assignment intended to re-emphasize the learning.

Respondent argues that incompetence charges should not be sustained given the fact that he was never given any kind of improvement plan. Respondent observes that the Department's attempt at an improvement plan was limited to having Respondent observe a peer's class at a time that was inconvenient to him. Moreover, although Dr. Wiltshire wrote to Respondent that he was to receive assistance from a "professional staff developer", Respondent asserts that he never heard from a professional staff developer.

Respondent asserts that incompetency charges must be dismissed because Dr. Wiltshire has a poor grasp of the subject of math. Respondent points out that during Dr. Wiltshire's cross-examination, Dr. Wiltshire conceded that he incorrectly described a mathematics concept that he criticized Respondent for in one of his observations of Respondent. Since this demonstrates that Dr. Wiltshire has a "poor understanding of the subject", the specification should be dismissed.

### **Specification 2 - Inappropriate Interaction with a Parent**

As to Specification 2, Respondent states that on October 1, 2004 at 7:00 a.m., he called L T's mother to discuss her behavior in class. Respondent and L T's mother agreed they would meet at 8:00 a.m. that morning to discuss L T's behavior. L T's mother did not show up at school at the agreed upon time. However, Respondent was summoned to the principal's conference room later that morning. When he arrived, LT, her mother, AP Adonai and a parent liaison were present.

Ms. Adonai asked Respondent to express his concerns, which he did. Respondent insists that L T's mother jumped to her feet, leaned over the table and started pointing at Respondent while she repeatedly said to him in a very loud voice, "you are a liar and my daughter would never behave like that."

Respondent asserts that AP Adonai did nothing to calm down L T's mother. Respondent states that he was upset and he said, "You really raised L T because that is the way she behaves in class." Respondent states that L T's mother resumed her yelling, stating that she wanted her daughter out of the class and would go to the Chancellor to get Respondent fired.

Respondent maintains that his response to L T's mother was appropriate. He notes that during her testimony AP Adonai admitted that the parent stood up and called Respondent a liar.

Respondent argues that the second aspect of the charge, that he allegedly stated that it would be best for both of us if L T's mother removed her daughter from Respondent's class, is not an actionable offense. He observes that any reasonable person would deem that appropriate in light of this confrontation.

#### **Specification 4 - Verbal Abuse of Students**

Specification 4 should be dismissed because none of the students who allegedly made these complaints appeared to testify at the proceeding. Thus, there was no reliable evidence presented and Respondent was not afforded the opportunity to cross-examine his accusers. Since the Department relied solely on unreliable hearsay evidence to support this charge, it should be dismissed. Respondent also asserts that the specification should be dismissed because Investigator Colon's report states that all of the students he interviewed did not recall the alleged incidents and that he himself found the case highly suspicious.

#### **Specification 5 - Inappropriate Disclosure of Confidential Student Information on [www.mathspell.com](http://www.mathspell.com)**

Respondent concedes that he did in fact maintain a website, mathspell.com, that contained names of students and photographs of students. Respondent states that he created this website to supplement his daily instruction. He had a "Students of the Month" page that was created to reward the best students. Respondent insists that the two pictures of students he posted on the website were posted after the parents gave him permission to do so.

Respondent charges that the Department's specification should be dismissed as Dr. Wiltshire filed a complaint about the website nearly two years after he saw it. Respondent asserts that Dr. Wiltshire's testimony that he told Respondent to remove the pictures from the website in 2004 is not believable. Respondent maintains that he would have removed the pictures if he had been asked to do so. Moreover, Respondent observes that Dr. Wiltshire never put anything in writing to him about this. Respondent surmises that Dr. Wiltshire would have put something in writing to him if he found the website objectionable. Even more compelling is the fact that AP Adonai admitted that she saw the website in 2004, yet she chose to do nothing about it. In Respondent's estimation, AP Adonai did nothing about mathspell.com because there was nothing objectionable about it.

**Specification 6 - Inappropriate Disclosure of Confidential Student Information on www.teacherabuse.com**

With respect to Specification 6, Respondent asserts that the Department accessed information from his teacherabuse.com website that the general public did not have access to. Respondent asserts that the material the Department claims to have found on his website was not posted on the site. In other words, he had not displayed that material

on the website home page and he did not have a link to the documents to make them accessible to the public.

Respondent maintains that the materials found by the Department were password protected and not accessible to the public. Respondent demonstrated during the hearing process how the information on the index to his site was password protected. In Respondent's view, since the index material for the website was not enabled, the only plausible explanation for how the Department accessed the material from his site is that the Department illegally intruded on the information found in the index to his website.

Respondent asserts that there are numerous other inconsistencies among the Department witnesses that demonstrate that his website index was hacked into. For example, whereas Department witness Richard Marin testified that he saw posted grades by clicking on links from the website, SCI Investigator Martucci testified that he saw the posted grades right on the website. In addition, Dr. Wiltshire admitted he did not see any grades on the website. To add further uncertainty about the Department's evidence, Respondent asserts that many of the index files are absent on the compact disc that the Department downloaded as evidence.

Respondent points out that the student grading form allegedly found by the Department on his website is a five page grading form. Twenty-three of the thirty-nine students were redacted. Respondent asserts that he abandoned this document and never intended for it to be seen by members of the public. In addition, the student attendance records allegedly found on the website cover a limited period of three weeks. Again, Respondent maintains that he never intended for a truncated document like this to be seen by members of the public.

Similar questions are raised by the disciplinary documents allegedly posted.

Respondent notes that four referrals were posted with student initials to protect the privacy of the students. Respondent asks why would he post other incident reports without concealing the identities of students when he concealed the identity in other parts of his site. To Respondent, the answer is quite simple. The public was never intended to see the information on his website that included student names. In short, the Department fraudulently obtained the index to his website, downloaded the material and then claimed that the material was accessible to the public.

**Specification 7 -www.teacherabuse.com Contained a Link to www.mathspell.com**

Turning to Specification 7, Respondent maintains that this specification lacks merit and is not indicative of misconduct or incompetence. This specification simply alleges that there was a link to mathspell.com on the teacherabuse.com website. In Respondent's view, both websites were permissible expressions of his free speech. Accordingly, this specification should be dismissed.

**Specification 8 - Refusal to Follow Directive to Return a Teacher's Choice Check**

Respondent claims that Specification 8 must be dismissed. He observes that the Department sent him the check and that he used the money from the check to buy important education software materials. Respondent also maintains that since he was no longer being supervised by Dr. Wiltshire at the time of the incident, that he had no obligation to comply with Dr. Wiltshire's directive to return the money, In addition, since non-pedagogical employees received Teacher's Choice money, it stands to reason that a teacher working for the Department on reassignment would be eligible to receive the check.

## OPINION

The first set of findings the Arbitrator must make is whether the Department met its burden in establishing the specifications set forth in the Statement of Charges (Joint Exhibit 1). After the Arbitrator makes a determination regarding the specifications, he will then consider the question of penalty.

Specifications 1 and 3 - Unsatisfactory Lessons on 9/30/04 and 10/25/04 Specifications 1 and 3 allege that Respondent is incompetent in the performance of his teaching duties based upon rendering unsatisfactory lessons on September 30, 2004 and October 25, 2004.

These two specifications are emblematic of much of what is legitimate and what is not legitimate about the Department's case. On the one hand, the Department is correct in asserting that the evidence regarding these observations demonstrates unsatisfactory teaching. The Department is also correct in asserting that the evidence presented shows that Respondent is defiant and unreceptive toward accepting constructive criticism.

On the other hand, as is the case with several of the specifications, there are some serious problems with the way that the Department managed Respondent and with the proof it presented in support of its charges.

Specifically, the September 30, 2004 lesson observed by the Department was only the third day that the class in question had ever met. It is virtually unheard of for a teacher to be formally observed on the third day of a class. Additionally, Dr. Wiltshire himself conceded that he did not consider Respondent to be an incompetent teacher.

Turning to September 30, 2004, based on the testimony and written observation of AP Adonai, it is clear that Respondent rendered an unsatisfactory lesson. Ms. Adonai testified in a straightforward and convincing way about what she observed in Respondent's class on September 30, 2004. The Arbitrator finds AP Adonai to be credible based on her demeanor, the specificity of her testimony and the consistency of her testimony with her written observation.

AP Adonai testified that Respondent did not have a lesson plan with him and did not appear to be prepared for the lesson (25). She said that when she asked Respondent for the lesson plan during the class, he was unable to produce it (25).

The Arbitrator finds that Respondent's lack of certainty about his plan for the class on September 30, 2004 adversely affected the lesson he presented. AP Adonai testified that when she entered the room, Respondent told the kids that they were going to review a test. After they protested, he appeared to change his plan (25). Instead of reviewing a test, Respondent wrote something on the board (25).

Ms. Adonai also expressed concerns about the fact that Respondent failed to respond to a student who asked about the aim of the class (25). She stated that after Respondent put the Do Now on the board of what's a function, he used some practical examples to explain the concept. However, the lesson went awry after the kids started arguing about some of the examples used by Respondent (26-27). AP Adonai explained that she felt the class period was wasted after the argument took over the class (27). She stated:

He [Mr. Fofana] started drawing a graph at that point on the board, but then the kids were agitated because they were arguing that they were right and he was standing there and it was back and forth with the kids. Then everyone got into it, the whole class, saying this was not right and we agree with the other kid who had

written the thing on the board. And the period ended before anything was resolved. So, as I see it that whole period was wasted (27).

Respondent's testimony regarding this specification corroborates AP Adonai's version of events in many respects. Respondent testified that this class met for the first time on September 28, 2004 (1803). Respondent explained that he administered a test that first day so he could assess the math levels of the students. He testified on the second day the class met that he taught them a lesson. However, since there were still students coming in and out of the class on that second day, he felt he should repeat the same lesson on the third day, which was September 30, 2004 (1811).

The Arbitrator finds that this is consistent with AP Adonai's testimony because Respondent himself admitted that he administered a test only two days earlier. Thus, AP Adonai's testimony that Respondent initially told the students they were going to go over the test makes perfect sense and bolsters AP Adonai's credibility. In addition, since Respondent admitted that he repeated the same lesson on September 30, 2004 that he taught on September 29, 2004, it is logical to conclude that he moved on to that lesson after the students were unreceptive to his suggestion that they go over the test he administered two days earlier. Finally, the following excerpt from Respondent's testimony does not persuade the Arbitrator that he had a well constructed plan in place for the September 30, 2004 lesson.

Now, this is where the lesson plans don't make sense, because I repeated the lesson from the 30<sup>th</sup>, I didn't have my - the lesson plan that was attached to - to the documents you initially received. It was in my bag in my regular room, the room where I am most of the time ... And - and regardless of that, this occasion did not lend itself to a lesson observation. But nevertheless I was able to - to convey some good information to the kids. And ironically, in - in her original observation, if you read it, you know, carefully, you will- you - you will notice that there was some interaction, actually a student responded, and I asked questions, et cetera, which indicate that some activity was taking place (1812).

The Arbitrator does not doubt Respondent's characterization that there was some legitimate instruction taking place during the class. However, the evidence persuades the Arbitrator that Respondent changed course during the lesson, that he did not have a well prepared lesson, that he did not manage the classroom in a constructive way and that it was not a satisfactory lesson.

Nonetheless, the Arbitrator finds that the evidence presented regarding this unsatisfactory lesson does not establish that Respondent is a completely incompetent teacher with no potential for improvement. The fact remains that the class that AP Adonai observed was a newly created class (1803). The Arbitrator credits Respondent's testimony that the class was chaotic on the first day the students met (1803). His testimony that students were upset because they were transferred from other classes into his class was unrebutted (1803). Respondent credibly testified that he complained to AP Adonai on September 28 and 29, 2004 about the fact that the class was chaotic because several of the students wanted to protest their class transfer (1804).

The Arbitrator makes mention of this because these are mitigating factors. AP Adonai observed this class while it was still in flux. Students were upset that they had been transferred from one class into Respondent's class.

In this Arbitrator's experience, teachers are never given a formal observation on the third day of class. Teachers need to be given time to get a feel for the students and to give the students a sense of their rules and style of teaching. The class that AP Adonai observed was equivalent to the third day of school because it was only the third day it was in existence. These are legitimate mitigating factors that undermine the Department's argument that Respondent is unfit to continue teaching. In the Arbitrator's view, a teacher

as experienced as Respondent should have done a better job in preparing for his lesson and managing his students on September 30,2004. However, the mitigating factors present do not allow him to be deemed wholly incompetent.

The Arbitrator has a similar take on the evidence presented regarding Specification 3. The Arbitrator finds Dr. Wiltshire's testimony that Respondent's October 25,2004 lesson was unsatisfactory to be credible. The Arbitrator finds Dr. Wiltshire credible based upon the fact that he testified in a forthright manner regardless of how his testimony affected the case against Respondent. For example, Dr. Wiltshire admitted that he told his superintendent that it was "insane" when he was told by the superintendent that Respondent was assigned to his school in September 2004, given their past history with one another (546). Dr. Wiltshire also admitted that his observations of Respondent were not intended to show Respondent was incompetent (711-712). Rather, the observations show areas where Respondent needs support (711-712).

Dr. Wiltshire's testimony, coupled with his specific testimony about the October 25,2004 observation, persuades the Arbitrator that Respondent rendered an unsatisfactory lesson on October 25, 2004. Dr. Wiltshire testified that when he went back to observe Respondent in October 2004, he felt that Respondent had not implemented any of the recommendations he made the previous month, including "basic recommendations like planning, lesson plans, having the rudiments of a lesson like the aim, the motivations and so forth." (549). He stated:

So none of those things were done. The classroom management was very, very poor. So he did receive another unsatisfactory, with additional recommendations as to what he needed to do in order to improve his classroom management, his planning, and his pedagogical skill (549-550).

The Arbitrator will not substitute his judgment for Dr. Wiltshire on a pedagogical issue such as an observation. Dr. Wiltshire possesses the expertise and qualifications to evaluate teaching staff. Since the Arbitrator deems him to be credible overall, the Arbitrator finds that Dr. Wiltshire's determination that Respondent rendered an unsatisfactory lesson on October 25,2004 must be sustained.

The fact is that Dr. Wiltshire's credibility cuts both ways for the Department. On the one hand, the Department wants the Arbitrator to accept Dr. Wiltshire's testimony that Respondent rendered an unsatisfactory lesson on October 25,2004. On the other hand, the Department completely ignores the fact that its highest ranking pedagogical witness, Dr. Wiltshire, testified that his observations of Respondent were not evidence that he was an incompetent teacher. If Dr. Wiltshire was not willing to go so far, the Arbitrator feels it would be inappropriate for him to go so far. Thus, while the Arbitrator finds Respondent's guilt to be evidence of Respondent's incompetency, it does not establish that he is unfit to competently teach students.

**Specification 2 - Inappropriate Interaction with a Parent**

The evidence establishes that Respondent is guilty of Specification 2. The Arbitrator reaches this conclusion based upon the testimony of AP Adonai and Respondent. AP Adonai testified that L T's mother asked her to attend a meeting that Respondent had asked L T's mother to attend (37-39). According to AP Adonai, Respondent was given the opportunity to explain to LT's mother what the problem was (39). AP Adonai testified that L T's mother interrupted Respondent a few times as he was trying to explain what LT was doing in class (39). She went on to testify as follows:

Mr. Fofana started again continuing to say - attempting to say what she had done. The parent told him she believed he was lying on the child. And then - at that

point it became heated, and the two of them started arguing. Now I am not responsible for the parent, so I tried to speak to Mr. Fofana. I said, Mr. Fofana, just don't respond. Don't say anything, just listen to the parent. But he continued arguing. The two of them were in a heated argument across the table. She - he ended telling the parent I see why she is like that because you raised her. The parent told him she wanted the child out of his class. I think he responded, that would be good for both of them (40).

This testimony, coupled with AP Adonai's contemporaneous written note, leads the Arbitrator to conclude that Respondent uttered both remarks to L T's mother during the exchange (see Department Exhibit 2). Notably, Respondent admitted that he made the comment to L T's mother that I see why she is like you because you raised her (1820). The Arbitrator also finds that Respondent made the comment that it would be good for both of them if the daughter was removed from his class, despite the fact that Respondent denied making that comment. The Arbitrator reaches this conclusion because he finds AP Adonai's testimony and written statement to be persuasive.

Despite these findings, the fact remains that the penalty to be assessed against Respondent for engaging in this conduct should be limited at best. The context of these remarks is highly relevant to the Arbitrator in making this determination. Respondent felt he was being verbally attacked and felt he needed to defend himself (1815-1821). He testified:

Now you understand, the lady just jumped to her feet. "You're a liar." Exactly the way I'm doing, pointing her finger, "You're a liar. My daughter will never do that." I was took aback, because even if what I'm - I'm just explaining was -let's suppose it - it's not true, her outburst, I felt, was inappropriate ... Now, I obviously I was upset. I was upset. I look at her and I say, "Now, that's the way your daughter behaved in my class. You raised her." I say exactly ... We agree. I did say that. (1819-1820).

The Arbitrator holds Respondent accountable for these remarks because a teacher is a role model and a teacher is supposed to diffuse tense situations. Respondent's

remarks served to exacerbate an already difficult situation. However, this is worthy of only a limited penalty because Respondent's behavior was not so egregious in the context of what was happening to him. He was being accused not only of being a liar as well as being pointed at and berated by the parent. During cross-examination, AP Adonai admitted that LT's mother called Respondent a liar during the argument (516). Although it would have been best for Respondent to have said nothing to the parent, his remarks were not so over the top as to warrant a penalty beyond a letter of reprimand.

The Arbitrator feels that AP Adonai's failure to intercede is also a mitigating factor. As Respondent testified, AP Adonai stated "for all this interaction, she [AP Adonai] was sitting, saying nothing. And that bothered me, because it was for her to say to CT [L T's mother] no, no, no, no" (1821). Respondent is correct in arguing that AP Adonai should have interceded on his behalf. In a meeting such as this, it is up to the administrator to serve as a mediator of sorts. Since AP Adonai clearly saw that the parent was verbally attacking Respondent, the Arbitrator concludes that good administrative practice could have avoided this situation from escalating in the way that it did. Thus, while Respondent is accountable for uttering the comment he uttered to the parent after AP Adonai asked him to say nothing, the fact remains that he should not be seriously penalized for it. His comment was not so egregious and he received no support from the administrator during this confrontation.

**Specification 4 - Verbal Abuse of Students**

Specification 4 alleges that on December 6, 2004, Respondent uttered inappropriate remarks toward two different students and threw a piece of paper at a third student. There is a large body of Education Law Section 3020-a decisions with factual

circumstances that are nearly identical to this case. In each of these cases, the Arbitrator was faced with the question of whether the complainant could meet its burden of proof on specifications where it was relying on nothing other than uncorroborated hearsay testimony. In all of these cases, the only witnesses who appeared for the charging party were investigators and administrators who testified as to the written statements they obtained from eyewitnesses and the information that these student eyewitnesses told them they observed. This is the exact scenario in this case.

All of the 3020-a decisions with these facts that this Arbitrator has read were unanimous in finding that hearsay evidence is admissible but that it may not be relied upon to sustain a finding of guilt when it is not corroborated by other direct evidence. In other words, uncorroborated hearsay testimony is not enough to sustain a complainant's burden of proof because the uncorroborated hearsay evidence is unreliable (See, e.g., *Board of Education v. AE*, wherein Hearing Officer Herzog noted that the SCI investigator's raw, uncorroborated hearsay testimony standing alone was insufficient; *New York City Board of Education v. JA*, wherein Hearing Officer Riegel stated that the Board's evidence "was uncorroborated and therefore unreliable hearsay" (quoting from Hearing Officer Sharpe's decision in *New York City Department of Education v. MT*).

Notably, in Hearing Officer Sharpe's 2005 decision *New York City Department of Education v. MT*, he observed that all of the previous 3020-a decisions involving this issue involved situations where" ... the reporter of the hearsay - the witness at the hearing - merely passed along in testimony the statements of out of hearing declarants not uttered under circumstances supplying any guarantees of trustworthiness." He went on to state

that" ... this is the weakest form of hearsay [and therefore] incapable of singlehandedly supporting Department charges."

This Arbitrator finds the prior arbitral authority to be persuasive. There is no legitimate basis under which the Arbitrator may find that the Department met its burden of proof on any the allegations raised in this specification.

The evidence presented by the Department was limited to one witness, Investigator Colon, who simply passed along information provided to him from the students. OSI Investigator Colon provided no direct evidence. He took statements from students making allegations against Respondent. He was not present when any of the alleged incidents occurred.

Under these circumstances, the hearsay must be determined to be unreliable. It cannot support a finding that a preponderance of the credible evidence proves that Respondent engaged in any of the behavior as alleged in Specifications 4(A), 4(B), and 4(C).

These specifications also must be dismissed because it would be fundamentally unfair for the Arbitrator to find Respondent guilty of any of these specifications when Respondent has not had the benefit of confronting any of the witnesses with direct evidence. Moreover, the Arbitrator did not have the benefit of observing any of the eyewitnesses' demeanor. Because none of the witnesses testified, the Arbitrator could not determine whether they were able to answer questions that were pertinent to the specifications without prompting, or whether they were able to answer questions at all for that matter. Finally, none of the witnesses was subjected to cross-examination, which is one of the most important assessments for testing the reliability of witnesses.

**Specification 5 - Inappropriate Disclosure of Confidential Student Information on mathspell.com**

Specification 5 alleges that between April 12, 2006 and April 20, 2006, Respondent maintained the website www.mathspell.com that contained information that included the names of students and photographs of two students. There is no real dispute about the contention. Respondent himself admitted that he had a website that contained names of students and pictures of two students (1833-1858). The website contained lessons, homework and tutorials (1846). It also included a student of the month page. Respondent started the website in the fall 2004 and continued to maintain the website as of the time period between April 12, 2006 and April 20, 2006 (1851-1853).

Although Respondent is technically guilty of this specification, the Arbitrator finds that only a minimal penalty should be assessed against him. The evidence establishes that both AP Adonai and Dr. Wiltshire were aware of the contents of the website in 2004. Dr. Wiltshire testified that a parent informed him in 2004 that her child's picture was on the website without her permission (568). He testified that he asked AP Adonai about the website and that she showed him the website (568). He concluded that there was nothing malicious about the website because Respondent was celebrating the successes of the students (569).

The Arbitrator finds it striking that the Department has charged Respondent for having this website up in 2006 when it was aware of the website as early as 2004. The Arbitrator finds that the facts establish that AP Adonai and Dr. Wiltshire saw the website in 2004 and determined that there was nothing problematic with it.

The Arbitrator rejects the Department's contention that Dr. Wiltshire told Respondent in 2004 that he should have followed Department protocols by informing the principal about the website and having him receive parental permission to post information about the students. It is noteworthy to the Arbitrator that, unlike some of the other allegations in this case, Dr. Wiltshire testified without certainty as to what he did about this when he learned about it in 2004. He testified as follows:

I - I think - and I'm not - you know, I do not recall exactly what transpired. But to the best of my knowledge, I think I'd asked him either to remove those students' pictures from the website or you have to seek the parents' permission (569).

As stated previously, Dr. Wiltshire was credible to the Arbitrator in many respects. He said things with certainty when he remembered them to be the case and he equivocated when he was not sure. Dr. Wiltshire's testimony on this issue was entirely equivocal.

Moreover, there is no written evidence to support the Department's contention that it warned Respondent about the need to follow appropriate protocols. The Arbitrator finds it hard to believe that Dr. Wiltshire and AP Adonai, both of whom wrote numerous critical documents to Respondent during his less than four month tenure at Middle College High School in 2004, would not have written something to him if they found it warranted criticism.

Thus, while it is entirely true that Respondent should have informed his principal about the website, and while it is entirely true that Respondent should have sought written parental permission to post pictures of students, the fact remains that Respondent

should not receive serious discipline for these infractions.<sup>2</sup> If the Department considered this to be serious, it should have addressed it at the time it became aware of the infractions. Instead, it sat back and did not even issue a written warning to Respondent.

Given these facts, as well as the fact that the administration at Middle College High School did not see this as a serious transgression on Respondent's part, minor discipline should be imposed for Respondent's actions related to this specification.

**Specification 6 - Inappropriate Disclosure of Confidential Student Information on [www.teacherabuse.com](http://www.teacherabuse.com)**

This specification alleges that in April 2006 Respondent maintained the website [www.teacherabuse.com](http://www.teacherabuse.com) that contained documents that included the names, grades, and attendance records of students and described misconduct of a few named students.

Respondent does not deny that this information was in the index of his website.

Respondent contends that he never made this information accessible to the public. Hence, he asserts that members of the Department conspired against him to illegally obtain the information from the index of his website and fraudulently claim that the information was posted on his website.

The Arbitrator concludes that the Department met its burden of proof on this specification. The Arbitrator carefully considered the evidence presented as well as the demeanor of the witnesses who testified about this specification. Based upon that consideration, I find that the information described above was posted on Respondent's

<sup>2</sup> While Respondent maintains that he received parental permission from the parents of the two students whose pictures were posted on the website, the Arbitrator determines that the appropriate protocol would have been for Respondent to inform his Principal about the website and seek written permission from the parents to post the pictures of their children. There is no proof that Respondent did this.

website and made accessible to the general public. I cannot conclude that Department witnesses did anything fraudulent regarding the proof on this specification.

The Department's proof begins with AP Adonai. She testified with specificity and without hesitation when she was asked about this allegation. She testified that a student told her about the website (61). Ms. Adonai said that she told the student to go on the computer and then she testified as follows:

She did that [go on the computer] and on the web site I saw my picture, I saw the principal's picture, and other derogatory information. There was students' information. Copies of the grade sheets that were given to Mr. Fofana where he wrote the students' grades. There were students' names clearly on these sheets and the students' grades were bubbled in. It was there on web site clear to see. Again, Mr. Fofana identified himself by saying his name and that he was a teacher at the school (61).

AP Adonai's credibility regarding this testimony is bolstered by the fact that she remembered the name of the website and the name of the student who told her about the website (61-62). It is also bolstered by the fact that what she described on the website comports with what other Department employees observed on the website and what ultimately went into evidence concerning the contents of the website (see 61-63 and Department Exhibit 10).

The Arbitrator also finds AP Adonai's testimony to be credible because it comports with Dr. Wiltshire's testimony, which was also convincing. For example, AP Adonai testified with clarity that after she observed the information on the website, she immediately contacted Dr. Wiltshire to tell him about the website and the fact that student information was posted on the site (63). Dr. Wiltshire had an almost identical and detailed recollection about these events. He testified:

She [AP Adonai] came in and told me that there was a website with all of the students' personal information and their - and their office number, which we

know that is like the student's social security number. And there were the kids' grades and all of those things on the website. Certainly, there was a difference between this website and the first website because, her now, you have students' personal information on the website, and Mr. Fofana was no longer a teacher in the school for almost two school years. So at that point, I alerted O.S.I. of the situation, and they looked at it (571).

Dr. Wiltshire's testimony is credible to the Arbitrator because it comported with AP Adonai's testimony and the testimony of SCI Investigator Matthew Mmiucci. Mr. Martucci testified that on April 12, 2006, Dr. Wiltshire telephoned in a complaint about Respondent's website to SCI (1009). He explained that he was assigned to investigate the complaint (1009). Mr. Martucci went on the computer and was able to access [www.teacherabuse.com](http://www.teacherabuse.com) and [www.mathspell.com](http://www.mathspell.com) (1009). He said that he saw confidential student information on [www.teacherabuse.com](http://www.teacherabuse.com) (1009).

Notably, Mr. Mmiucci's testimony was consistent with Richard Marin's testimony. Richard Marin is the Director of Technology at SCI. Both Mr. Martucci and Mr. Marin testified that Mr. Marin was contacted by Mr. Martucci and that Mr. Martucci asked Mr. Marin to create a compact disc of the information they had just viewed on the website (1010, 1063). The Arbitrator credits their testimony as credible not only because it was consistent, but also because their testimony remained direct and straightforward during cross-examination.

In making this determination, the Arbitrator notes that Respondent vehemently denies that he made these documents available to the general public. It may very well be true that Respondent did not intend for these documents to be available to the general public. That the Arbitrator does not know for sure. What the Arbitrator is convinced

about is the fact that all five Department witnesses testified with conviction about the fact that they were able to access these documents by simply typing in the website name.<sup>3</sup>

The Arbitrator rejects Respondent's contention that the testimony of his expert computer forensic witness, Gabriel Yarmish, established that the information was illegally accessed. Mr. Yarmish stated that that was a possible explanation. He also said that another possible explanation was that the information had not been secured by Respondent (1704).

In summary, the Arbitrator finds that the Department met its burden of proof on this specification because its witnesses convinced him that they accessed the website information by simply typing in the website on their computers. There is no evidence that Department employees conspired against Respondent to illegally obtain information that he did not make accessible to the public.

**Specification 7 - [www.teacherabuse.com](http://www.teacherabuse.com) Contained a Link to [www.mathspell.com](http://www.mathspell.com)**

Respondent is guilty of Specification 7. However, the penalty should be minor. Respondent admitted that a link existed from teacherabuse.com to mathspell.com (1861). Since the Arbitrator only attributes limited culpability to Respondent for his actions in maintaining mathspell.com (see discussion in Specification 5), there is no significant culpability for maintaining a link to that website from his teacherabuse.com website.

**Specification 8 - Failure to Follow Directive to Return a Teacher's Choice Check**

The facts presented on this specification are emblematic of Respondent's main problem, namely, his difficulty in respecting authority and complying with the requests and directives of his supervisors. Respondent went out of his way to try to prove that he

<sup>3</sup>The fifth Department witness who testified as to this specification is OS! computer forensic investigator Giovanni Perez. Mr. Perez testified that he was able to observe the information in dispute by simply typing in the website information and that he did not illegally access the information (2302-2322).

was entitled to the Teacher's Choice check because numerous non-pedagogical employees receive money under this program. He also contends that he did not need to abide by Dr. Wiltshire's directives in 2006 and 2007 because Dr. Wiltshire was not his supervisor at the time.

These arguments do not sway the Arbitrator because they miss the point. The facts establish that Respondent received the Teacher's Choice money from Dr. Wiltshire's secretary in 2006 (1879). After Dr. Wiltshire learned that Respondent received the check, he directed him to return it (579). Respondent himself admitted that he refused to return the check. He stated:

And I was flabbergasted when I was called - Mr. - Dr. Wiltshire called me and said that because I was excessed - I started laughing, because, you know, to even return the check. I thought, well, no. I cannot return it, because I already cashed it (1881).

The evidence establishes that Dr. Wiltshire not only verbally directed Respondent to return the check or the money from the check, but that he also wrote him a letter directing Respondent to return the check or the money from the check (Department Exhibit 8 & 579-580). Respondent must be found guilty of this specification because these directives were disregarded by him.

The Arbitrator also finds Respondent guilty of this specification because Respondent's behavior is inconsistent with the "obey now, grieve later" rule. Under this fundamental principle of labor relations, it is universally understood that employees are required to "follow instructions clearly delivered by persons in authority over them." (*The Common Law of the Workplace, The Views of Arbitrators*, 2<sup>11d</sup> ed. 2005, at page 319). The basic idea underlying this rule is that, with the exception of directives from

.. ..

supervisors where obedience from the employee would cause a safety hazard, employees are required to comply with the directive and seek redress by filing a grievance (*Id.*).

In this case, Respondent was well aware that the money he received came from Dr. Wiltshire's school. Since Respondent was also well aware that Dr. Wiltshire is in a position of authority over him, Respondent should have returned the money and grieved the matter if he thought he was eligible to receive the money. His decision to ignore Dr. Wiltshire's directive is contrary to the obey now, grieve later principle and warrants discipline.

### **PENALTY**

After considering the evidence in the record and the arguments of the parties, the Arbitrator determines that the Department's request that Respondent be terminated is excessive and without just cause. There are several reasons for this determination.

First and foremost is the fact that there are several specifications where Respondent is guilty but does not deserve a significant penalty for his conduct. For example, although Respondent has been found guilty of Specifications 1 and 3, his guilt on those specifications does not establish that he is incompetent to teach. The observation recorded by AP Adonai occurred on the third day that the class had ever convened. Respondent was just getting to know his students and was trying to assess their math levels. The students, several of whom were unhappy about being transferred into his class, were just getting to know him. They were both at a very preliminary stage. It seems unfair and contrary to common school practices anywhere to deem a teacher unfit based upon his performance on the third day that a class had ever convened. While Respondent

certainly could have done a better job instructing the students on September 30, 2004, a finding of incompetence cannot be sustained.

Dr. Wiltshire's October 2004 observation of Respondent is more indicative of poor teaching. However, it does not lead the Arbitrator to conclude that Respondent is unfit to teach and has no potential to improve. After all, Dr. Wiltshire, the educational expert, did not make that judgment.

Similarly, the context of Respondent's outburst toward LT's mother in Specification 2 renders Respondent's behavior to only be worthy of first step discipline such as a letter of reprimand. The Arbitrator is mainly concerned about Respondent's actions because it is consistent with Respondent's overall pattern of having difficulty accepting supervisory authority. Specifically, AP Adonai told Respondent not to respond to L T's mother. Respondent would have completely avoided this problem if he had simply listened to AP Adonai. Nonetheless, the Arbitrator finds that Respondent should only have limited accountability for this incident because the parent was behaving abusively toward Respondent, the comments made by Respondent to the parent were not too egregious and because AP Adonai should have interceded to calm the parent down. The incident may very well have been avoided if AP Adonai had done what she should have done.

Furthermore, Respondent's guilt on Specifications 5 and 7 do not warrant a significant penalty. Respondent's supervisors were aware that Respondent created mathspell.com as early as fall 2004. Both AP Adonai and Dr. Wiltshire saw the website and overall considered it a positive website for students. Their only alleged concern was

about Respondent failure to seek their approval to establish the website and his failure to receive written permission from parents to post two student pictures on the website.

If AP Adonai and Dr. Wiltshire considered Respondent's failure to seek parental permission to be a real problem, they should have sent Respondent a written warning to this effect in 2004. Since there is no written evidence establishing that this concern was ever expressed by them to Respondent, the Arbitrator questions whether this ever occurred at all. As stated above, the Arbitrator makes this determination because both AP Adonai and Dr. Wiltshire submitted numerous written documents to Respondent expressing their concern about his behavior throughout the fall of 2004. Thus, Respondent is responsible for his general failure to receive written parental permission to post the pictures of students. Respondent should be aware of his need to do this in the future. However, the Arbitrator cannot consider this to be a serious offense if his supervisors did nothing about it for more than one year after they knew about it.

The fact is that, contrary to the Department's contentions, it has failed to prove that Respondent is unfit to teach. Respondent's guilt on Specification 2 does not prove that he lacks the necessities to be a role model. The Department also failed to prove that Respondent engaged in verbal abuse toward students or corporal punishment (Specification 4). For all of these reasons, the Arbitrator determines that the Department lacks just cause to terminate Respondent from his position as a teacher with the Department.

What the Department has proven, however, is that Respondent has some pedagogical teaching problems that need improvement. More serious is Respondent's problem of accepting direction from persons in authority. The Department has proven

that Respondent has a penchant for disregarding direction from supervisors and not abiding by the reasonable requests of his supervisors. The Department demonstrated this repeatedly during the proceeding. It demonstrated that Respondent did not wish to abide by AP Adonai's suggestions for improvement in Respondent's teaching because he thought he had superior credentials to her (28). It demonstrated that Respondent did not wish to abide by Dr. Wiltshire's suggestions for improvement that were communicated to him through AP Adonai in October 2004 (558-559,47-53). It demonstrated that Respondent refused to abide by Dr. Wiltshire's directive to return the Teacher's Choice check money (Department Exhibit 8). When this pattern of behavior is coupled with Respondent's posting of confidential student information on his website teacherabuse.com, it becomes abundantly clear that, even though termination is not warranted, a suspension without pay penalty is. In the Arbitrator's view, a penalty of a two month suspension without pay is appropriate. It should make it clear to Respondent that his cumulative conduct, coupled with his penchant for disregarding supervisory directives, is unacceptable and cannot continue if he wishes to continue to be employed by the Department.

The Arbitrator has given serious consideration to the Department's contention that it is pointless to give Respondent another chance because he is unable to accept additional remediation and direction from his supervisors. The Arbitrator recognizes the Department's concerns. He too cannot be certain as to whether Respondent is willing to change his ways and accept direction from his supervisors. The Arbitrator is giving Respondent another chance because the evidence establishes that the substance of what Respondent has been found guilty of does not merit termination. The Arbitrator is also

giving Respondent another chance because there are some genuine problems with the way the Department managed Respondent and his transgressions.

For example, it is hard for the Arbitrator to fathom how Respondent ended up back in Dr. Wiltshire's school in the fall of 2004 after their checkered history. Although there is no evidence of any impropriety on the Department's part, it certainly would make anyone in Respondent's position question why in 2004 he was sent back to the building of a Principal whom he thought had animus toward him. It also reasonably led him to question whether anyone in the Department cared at all about his long term success. This undeniable backdrop to this case must be taken into account in the consideration of Respondent's behavior and the consideration of the appropriate penalty. He has had a satisfactory track record in the past. He deserves to be given another chance to prove himself in a different environment.

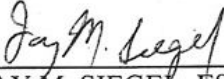
The Arbitrator is hopeful that Respondent will take this decision to heart and channel his impressive scholarship and intelligence in the right direction. Respondent cannot and should not think that he can disregard supervisory directives. He cannot and should not think that he has the right to reject suggestions for improvement of his teaching made by administrators even if he believes he is more qualified than them. And he cannot and should not think that he can post items on his website that have anything to do with student names, grades, explicit attendance records, etc., unless and until he has received express written permission from the Department and the parents of students. He must understand that he cannot enmesh students into any disputes he has with the Department.

Thus, based upon the foregoing, the Arbitrator makes the following:

AWARD

1. Respondent is guilty of Specifications 1, 2, 3, 5, 6, 7 and 8.
2. Respondent is not guilty of Specification 4.
3. The Department does not have just cause to terminate Respondent Boubakar Fofana from his position as a tenured math teacher. The Department has just cause to impose a penalty of a two month suspension without pay upon Respondent Boubakar Fofana.

Dated: January 7, 2009

  
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JAY M. SIEGEL, ESQ.  
ARBITRATOR

STATE OF NEW YORK    )  
COUNTY OF PUTNAM    )

I, Jay M. Siegel, Esq., affirm that I am the individual described herein and who executed the foregoing instrument which is my Findings and Recommendation.

Dated: January 7, 2009

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JAY M. SIEGEL, ESQ.  
ARBITRATOR