

**NEW YORK STATE DEPARTMENT OF EDUCATION
SECTION 3020-a TENURE HEARING**

In the Matter of

JORDAN-ELBRIDGE CENTRAL SCHOOL DISTRICT (“District”)

-and-

DAVID ZEHNER (“Respondent”)

SED CASE NO. 16,556

HEARING OFFICER’S DECISION AND ORDER

Frederick Day, Hearing Officer

APPEARANCES

For the District:

**THE LAW FIRM OF FRANK W. MILLER
6575 Kirkville Road
East Syracuse, New York 13057
By Frank W. Miller, Esq. and Charles C. Spagnoli, Esq.**

For the Respondent:

**O’HARA, O’CONNELL & CIOTOLI
7207 East Genesee Street
Fayetteville, New York 13066
By Dennis G. O’Hara, Esq. and Chadd S. Montgomery, Esq.**

NOTE ON TRANSCRIPT PAGINATION

Because the transcript pagination is not sequential throughout, transcript citations are as follows:

November 21, 2011 will read T 11/21/11: page number, i.e. T 11/21/11: 10;
January 20, 2012 will read T 01/20/12: page number, i.e., T 01/20/12: 55 and so on throughout.

NOTE ON EXHIBITS

District Exhibits are D plus number, i.e., D15

Respondent Exhibits are R plus number, i.e., R15

Hearing Officer Exhibits are HO plus number, i.e., HO1

Cited page numbers in exhibits are D plus number plus page number, i.e., D15 at 2.

NOTE ON NON-RECORD CORRESPONDENCE REFERENCES

Correspondence among and between the parties not contained in the record are:
COR-Date-From-To-CC (if any), i.e., COR 01/18/13 from O'Hara to Day, CC Spagnoli

NOTE ON STUDENT AND PARENT REFERENCES

All references to students and parents herein are by initials. The Respondent and the District know the identities of all students and parents referenced by initials herein.

By the provisions of the New York State Education Law, Title 4, Article 61, Section 3020-a (“3020-a”), On May 6, 2011, the undersigned was designated to hear and decide the above-captioned matter.¹ ² The undersigned presided during a pre-hearing phone conference on June 10, 2011,³ wherein the parties discussed preliminary submission dates for motions and cross-motions. Prior to the conference, on June 6, 2011, the Respondent filed a motion to dismiss for lack of specificity certain of the charges contained in the charges and specifications dated October 6, 2010 (HO1) and April 12, 2011 (HO2)⁴. On June 24, 2011, per arrangements made during the phone conference, the Respondent filed a second motion to dismiss for lack of specificity certain other charges. On August 5, 2011, the District filed a cross-motion opposing the Respondent’s motions to dismiss. Prior to ruling on the motions, the

¹ COR Letter and COR Designation - May 6, 2011, Ms. McKensie Johnson, Teacher Tenure Hearing Unit of the New York State Department of Education (Hereinafter “SED”), To Undersigned, CC Miller, O’Hara.

² When the undersigned assumed the appointment in May 6, 2011, the Respondent had already been suspended for approximately eight months (September 20, 2010) and the first charges were exactly seven months old (October 6, 2010). A second set of charges were approximately one month old (April 12, 2011), and approximately seven months after the undersigned’s appointment, a third set of charges were filed (December 7, 2011). Immediately upon appointment, the undersigned was asked to preside over and determine the matter of whether a conditional ban against the Respondent from Jordan-Elbridge School District grounds should be lifted. The ban was imposed by letter from Superintendent Lawrence Zacher on January 28, 2011. The Respondent had attempted to get the ban lifted in an Article 78 proceeding in Supreme Court, Onondaga County before the Hon. Donald A. Greenwood. (In the *Matter of David Zehner v. The Board of Education of the Jordan-Elbridge Central School District and Lawrence Zacher*, Index No. 2011-1346, RJI No. 33-11-0650, May 12, 2011) The Court declined jurisdiction over the matter. The parties then placed the matter before the undersigned. On January 19, 2012, the undersigned lifted the ban, with conditions. (T 01/19/12: 4-8)

³ Technical difficulties precluded a stenographic record of the conference. By consent, the parties proceeded without a stenographer.

⁴ These charges (HO1 and HO2) were consolidated by agreement during the phone conference on June 10, 2011.

undersigned held a phone conference with the parties to discuss hearing dates, discovery matters, and the pending motions on the existing charges, whereupon the District notified the undersigned and the Respondent of its intention to file additional charges, and that it would seek permission to consolidate the new charges with the existing charges. (T 11/21/11: 4) The undersigned reserved decision on consolidating the new charges with the existing charges pending the actual filing of the new charges, (*id.*) which the District filed On December 7, 2011. Thereafter, on January 20, 2012, over the District's objection, the undersigned consolidated the charges filed on December 7, 2011 (HO3) with the existing charges. (T 01/20/12: 42, *et sqq.*)⁵ Thenceforth, the charges filed on December 7, 2012 (HO3) were subsumed under the undersigned's authority with the previous charges (HO1 and HO2). Therefore, except as noted below, all charges contained in HO1, HO2 and HO3 are before the undersigned for resolution.

On January 18, 2012, the Respondent filed a comprehensive motion to dismiss certain specifications contained in all of the charges (R5), and the parties argued their respective positions regarding said motion on February 8, February 24, and March 5, 2012. The undersigned ruled on the motions on April 18, 2012 (HO8), dismissing certain charges, namely: the October 6, 2010

⁵ See also HO3, "These charges are intended to supplement the charges filed by the Employer on October 6, 2010 and on April 12, 2011 against the Respondent." And, "**PLEASE TAKE NOTICE**, that in accordance with §3012 and 3020(a) of the Education Law, the Jordan-Elbridge Central School District and the Board of Education of the Jordan- Elbridge Central School District...hereby charges David C. Zehner...with the following amended charges, which charges are intended to supplement and amend the 3020-a charges already served upon the Respondent and dated October 6, 2010 and April 12, 2011." (Boldface in original);

charges HO1, Specifications 1.3.1 through 1.3.5 and Specifications 3.3.1 through 3.3.7; the December 7, 2011 charges HO3, Specifications 1.13 through 1.20, and Specifications 1.25 through 1.35. On July 13, 2012, the undersigned reversed, in part, the April 18, 2012 order in compliance with the Fourth Department's ruling in the *Matter of the Arbitration Between Board of Education of the Dundee Central School District and Coleman*, 96 A.D.3d 1536 (2012), specifically, the charges contained in HO1, Specifications 1.3.1 through 1.3.5, and 3.3.1 through 3.3.7, were reinstated.

Furthermore, the District withdrew certain charges as follows: HO3, Specifications 1.9 through 1.12.

All charges not heretofore dismissed or withdrawn and those charges reinstated by the undersigned in compliance with the court's order in *Dundee*, are before the undersigned for consideration and disposition herein.

The undersigned held hearings on January 19, 20, 24, February 28, 29, April 30, May 1, 4, 29, June 25, 26, 27, July 17, 18, September 6, 7, October 15, 16, 17, 22, 23, 24, 2012; February 4, 5, 6, 7, 8, 11, 12, 14, 15, 23, 24, August 26, 27, 28, 29, September 30, October 1, 2, 3, and December 11, 2013.

The charges and specifications are numerous. There are three separate submissions filed over a period of fourteen months, that is, October 6, 2010, April 11, 2011, and December 7, 2011. Eight numbered charges (five in HO1, two in HO2 and one in HO3) accuse the Respondent of being guilty of "conduct demonstrating an immoral character," "insubordination," "conduct unbecoming

an administrator,” and “incompetence.” The eight numbered charges contain thirty-one allegations, which are then broadened by some 220 specifications.⁶ The amassed record consists of more than 8,000 pages of transcript, 186 District exhibits, and 210 Respondent exhibits. Most of the exhibits are multi-paged documents. Between them, the parties called forty-one witnesses; twenty-six for the District (including two rebuttal witnesses) and fifteen for the Respondent. The District’s witnesses testified in thirty-one days of hearing (including one day for rebuttal), while Respondent’s witnesses testified in eight days, four of which were consumed by the Respondent’s direct and cross-examined testimony.

Throughout the proceedings, the parties were afforded every opportunity to call witnesses, offer testimony and documentary evidence, cross-examine witnesses, and *voir dire* documents offered into evidence. Moreover, throughout the proceedings the undersigned ruled on numerous motions and pleadings, including pleadings to dismiss the charges, discovery matters, confidentiality claims, attorney-client privilege claims, attorney work product claims, subpoena disputes, and scope of rebuttal arguments, among others.⁷

⁶ These numbers are from the original count, not reduced by the dismissed or withdrawn charges.

⁷ On January 9, 2014, the undersigned received HO Exhibits 20 through 28 into the record, and so notified the parties. (COR 01/09/14 from HO to O’Hara and Spagnoli, CC Miller) However, not all pleadings and rulings were received into the record. Therefore, because of the enormity of the record and the numerous and ongoing procedural issues under contention, on January 9, 2014, the undersigned instructed the parties as follows: “Furthermore, I give you (the parties) leave to reference in your closing memoranda any correspondence between you and me and between each other that were copied to me, provided, of course, that you clearly identify any such correspondence referenced. When I render my decision, I will be forwarding the said decision, the entire record, the transcripts, and all correspondence to the Commissioner’s office.” (HO28)

Contained in the following discussions are my judgments regarding charges and evidence as they exist in the context of the matters brought before me by the parties. The disputants' counsel thoroughly prepared the amassed evidence, both written and testified. In methodical and often spirited direct presentations and cross-examinations, the respective counsels developed this record. As the individual who presided over the amassing of this record, and as the trier of fact, I make the appropriate judgements based upon the weight I assign the documentary and testified evidence, and the credibility of the witnesses and documents of record attested to by those witnesses. I also make appropriate inferences as indicated throughout the discussion herein. Over an extended period, I have examined this record, the transcripts, and the exhibits, along with the parties' rather lengthy and profuse memoranda. In the matter before me, the parties have made their reasonings amply available, presenting them from their respective viewpoints in the best possible light. However, I make the following judgments, rulings, decisions, and orders, influenced more by the record than by arguments, always guided by this fundamental: Seek the "best reason from those that are available."⁸

⁸ From an article by Hon. John A. Kane, "Judging Credibility," *Litigation Magazine*, Vol. 33, No. 3, ABA, Spring 2007.

The Respondent is a tenured principal at the District's senior high school, hired in February 2006. The Board of Education ("Board") granted Respondent tenure at a Board meeting on November 19, 2008, said appointment to take effect on January 1, 2009. (T 09/30/ 13: 7259-60; D154) Before his employment at Jordan-Elbridge, the Respondent was an assistant principal at North Syracuse High School and Phoenix, New York, High School. He also worked as a child care worker at a juvenile detention facility center, among other positions. He earned a Bachelor of Arts in Psychology from Syracuse University, is certified to teach mathematics, earned a Masters Degree in Education from SUNY Oswego, specializing in exceptional children, and earned his certification as school administrator from Syracuse University. (T 09/30/13: 7250, *et sqq.*)

The Respondent arrived at Jordan-Elbridge with a comprehensive professional history dating to 1985. There is no evidence that the Respondent, in his wide-ranging job experience, ever had a disciplinary problem or left any position against his will.

On September 20, 2010, the Respondent was suspended from his duties as Principal at Jordan-Elbridge high school, and on October 6, 2010, the Respondent was charged in the first of three 3020-a actions. Following is the disposition of all charges.

The charges are addressed below, *seriatim*.

The charges contained in **HO1, Charge 1**, allege, "The Respondent is Guilty of Conduct Demonstrating Immoral Character," because of his behavior in certain dealings with "Student 'A'" ("TL"), his "Repeated Misrepresentations to School Superintendent Dominick," and because he "Gave Cigarettes Back to Minor Student at the High School."

The Charges Regarding TL

The charges read:

- 1.1.1 That Student "A" was required by New York State to have successfully completed a Science sequence in order to graduate and receive a New York State High School Diploma.
- 1.1.2 That Student "A" by the date of graduation in June of 2010 did not pass the required science courses in order to graduate and receive a New York State High School Diploma.
- 1.1.3 That Respondent presented the Board President with a diploma to sign for Student "A" certifying that said Student "A" had met the requirements for a New York State High School Diploma in June of 2010.
- 1.1.4 That during the 2009-2010 school year, Respondent allowed Student "A" to Utilize the Jordan-Elbridge NovaNet credit recovery system to obtain credit for the requisite science courses needed to graduate.
- 1.1.5 That Student "A" worked on the NovaNet system from June 2010 to August 2010 to receive the required course credit to receive a New York State High School Diploma.
- 1.1.6 That on July 26, 2010 Board of Education President for the Jordan-Elbridge Central School District, Mary Alley ("Board President Alley") informed Superintendent of Schools, Marilyn Dominick ("Superintendent

Dominick") that Student "A" must complete the course work to receive a High School Diploma.

- 1.1.7 That on August 4, 2010, Associate High School Principal, Mary Madonna ("Associate Principal Madonna") presented a plan to the Jordan-Elbridge Board of Education that required the signatures of the High School Principal, Guidance Counselor and teacher for Student "A" to receive course credit for NovaNet work. Respondent was present for said meeting and presentation and assisted with said presentation.
- 1.1.8 That Respondent knew of the New York State regulation concerning credit for online courses because Superintendent Dominick informed him of same.
- 1.1.9 That on August 13, 2010 Student "A" went to the Respondent and stated that he had completed the course work on NovaNet.
- 1.1.10 That Respondent then handed Student "A" the New York State High School Diploma that was signed in June by Board President Alley.
- 1.1.11 That Respondent issued Student "A" the June Diploma without obtaining the signatures from the District's counselor or teacher on the NovaNet credit form acknowledging completion of the required work.
- 1.1.12 That when Associate Principal Madonna asked the Respondent why he issued Student "A" the June Diploma, he stated in words or substance that he did so because he knew Board President Alley would not sign a new Diploma.
- 1.1.13 That after Superintendent Dominick was informed of the matter and investigated same, she also questioned Respondent as to why he issued Student "A" a Diploma and Respondent stated to her in words or substance that he had to do it for the student.
- 1.1.14 That as of this date Student "A" still has not met the requirements for a New York State High School diploma, is attending college and is in possession of an invalid High School Diploma issued by the Respondent.

- 1.1.15 That in his capacity as High School Principal, the Respondent is not authorized to engage in conduct to certify and issue a New York State Diploma to a student that has not met the requirements for same.
- 1.1.16 That Respondent's conduct in issuing Student "A" the diploma knowing that the Student had not satisfied the New York State requirements for same is immoral conduct for which Respondent should be removed from his employment with the Jordan-Elbridge Central School District.

In deciding these particulars, I will consider only the events that occurred up to and including August 13, 2010. What happened after that date was completely outside the purview of these particulars. Also, much transpired after the District suspended the Respondent.

During the 2009-2010 school year, the student, TL, was a Jordan-Elbridge high school senior. During his senior year, TL was enrolled to take an introductory to chemistry course on a computer program educational system called "NovaNET," sold by Pearson Education, Inc. ("Pearson") (R139) Once purchased,⁹ the system can be downloaded to computers for student use either in multiple course formats or by individual courses, as needed. (R23) Pearson's promotional literature promises, "Successful learning any time, any place any pace." The literature offers programs for use in middle schools for high school preparation; programs for credit recovery "for students whose learning styles or life circumstances have resulted in lost credits.;" and programs for "credit accrual," "drop out recovery," "basic skill," "summer school," "GED and SAT/ACT prep and practice," "selected state test prep," "correctional education,"

⁹ The program is made available to component districts by the Board of Cooperative Educational Services ("BOCES")

and “extended day.” Further, the program is available for “alternative instruction,” “distance learning,” “virtual schooling,” “home schooling,” and “special education.” (R139 at 4th page) Throughout its promotional piece, Pearson emphasized flexibility and individualized learning for students who have difficulty succeeding in the conventional school environment. (*id.*)

Having failed chemistry (T 08/28/13: 7217, 7225; R197), TL was assigned on September 3, 2009 to recover the course through NovaNET (D20 at Bates 01544). Jamie Susino, a guidance counselor at the high school, registered students into NovaNET “based upon courses that they had failed.” (T 06/25/12: 2416) Ms. Susino created the individual courses from an array of courses available on NovaNET and assigned an appropriate course “based on the class that [a student] took to make sure they satisfy requirements for graduation.” (*id.* 2417)¹⁰ Ms. Susino registered TL into an introduction to chemistry course on

¹⁰ During the same school year, TL took two other courses on NovaNET, namely, Health, a course assigned on September 3, 2009 and taken from November 3, 2009 through April 29, 2010, for which he was given credit for passing; and “Intro Physics,” a course assigned on June 22, 2010 and taken from June 23, 2010 through July 16, 2010, for which he was given credit for passing. (D20 at Bates 001549-001554) As this charge is written, the Health and “Intro Physics” are not included in the charges, nor do I consider them to be. The course that the District alleges TL did not pass was introduction to chemistry.

NovaNet following her usual routine, including matching the NovaNET course with the course offered at Jordan-Elbridge. (*id.* 2426) ¹¹

By late July 2010, TL had not completed introduction to chemistry on NovaNET and was blocked in the system from completing the course. Ms. Susino went to the high school and created another username for TL to enable him to complete the same course. (*id.* 2428; D10, D20 at Bates 001555)

Throughout the school year, TL attended NovaNET sessions at the high school. During that time, the program was used, supported, and encouraged in the District and at the high school. As late as mid-June 2010, Ms. Susino sent a supportive memorandum to the Superintendent, Marilyn Dominick, and Assistant Superintendent, Sue Gorton. (R127) Through the 2009-2010 school year, TL and others (R197) moved through the system, as assigned, without incident.

Matters of concern to the Jordan-Elbridge Teachers Association (Hereafter “JETA”) were discussed between the Respondent and the JETA President in November 2009, and a general guideline was drafted in March 2010, including an agreement to allow a teaching assistant (“TA”) to supervise and assist students in the NovaNET setting. (R194 & R195) Before then, eight

¹¹ Although specifications 1.1.1-1.1.16 are absent the specific course or courses which provide the foundation for the charge, I allowed the District to proceed on the presumption that, through disclosure and discovery, the Respondent would know the foundation upon which the charge was based before trial time to enable him sufficiently to provide an adequate defense. As the charge ultimately evolved, it became apparent that the alleged “immoral conduct” ensued when the Respondent gave TL a diploma while “knowing that the Student had not satisfied the New York State requirements for same...,” because TL purportedly had not completed the required material in the introduction to chemistry course on NovaNet.

students (four successfully) participated in NovaNET during the 2008-2009 school year. During the 2009-2010 school year, ten students (all successfully) participated. (R197) ¹²

Upon NovaNET's inception at Jordan-Elbridge, the Respondent assigned a teacher aide, Barb Ely, as the "aide in the room," where the NovaNET computers were located. Ms. Susino supervised the program operations. (T 10/02/13: 7844) There is no evidence that assigning Ms. Ely to this task was opposed by anyone at Jordan-Elbridge. Ms. Dominick, the then Superintendent, was aware of the assignment. (*id.* 8213; R126

Concerns about the NovaNET program were eventually raised by the then Board President, Mary Alley, who testified that her concerns arose when the then District's attorney, Danny Mevec, informed her about an exit interview he conducted with a high school employee who was being fired. (T 02/11/13: 5704-06) ¹³ According to Ms. Alley, Mr. Mevec told her, the Board, and Ms. Dominick, that the employee had aired concerns about NovaNet during the interview. According to Ms. Alley, the Board then ordered the District's internal auditor, Alicia Mattie, to conduct an audit of NovaNET, among other topics. (*id.* 5706) Ms. Alley testified that an audit report was received and approved by the Board, and the Board then asked Ms. Dominick to establish NovaNET

¹² According to the Respondent, R197 was generated by Ms. Susino and is the list referenced by Ms. Ely in R126 at page 2. (T 10/01/13: 7582-83)

¹³ Although Ms. Alley's testimony is unclear regarding the date of the interview, the employee in question, Debbie Fay, who was a guidance office secretary, placed the interview at some time in February 2010. (T 08/28/13: 7142)

procedures. (*id.* 5706-07; R32 is the audit report dated May 12, 2010) Ms. Alley testified that she assumed that a NovaNET presentation made to the Board on August 4, 2010 was the policy and procedure in place as of that date. (*id.* 7220-21)

Ms. Alley testified that she became aware of TL and his involvement with NovaNet when she received a phone call from a female friend of TL's who was concerned that TL was in danger of not being graduated with his class.¹⁴ This person "called to express concerns that her friend wasn't going to graduate because he failed the science class." (*id.* 5707) Ms. Alley testified that this friend informed her that the Respondent told TL that he could take the class on NovaNET in just two days before graduation and still graduate with his class.¹⁵ Ms. Alley said that the friend was worried because TL was taking the class alone, without assistance, hence the friend's call to Ms. Alley. The friend wanted Ms. Alley to "intervene." (*id.* 5707-08) Ms. Alley testified that she turned the matter over to Ms. Dominick and that she received no follow-up on the matter from Ms. Dominick. According to Ms. Alley, she had a conversation with Ms. Dominick in late July 2010 and told Ms. Dominick that she would not sign a diploma for TL without a proper protocol in place. (T 02/11/13: 5709-10, 5981-82; R12) As stated above, Ms. Alley also assumed that a presentation made to the Board on August 4, 2010 was the new policy. (*id.* 720-21; D8)

¹⁴ Ms. Alley was oddly unable to provide the name of this caller, yet testified in considerable detail about the discussion.

¹⁵ There is no record evidence that this was so.

Ms. Mattie testified that she met with the Board in executive session in August 2009, at which “all the board” expressed their concerns about NovaNET.¹⁶ (T 10/16/12: 3213) Ms. Mattie testified that the Board was concerned that NovaNET was not being used as intended, it was being used in place of taking a course, there was lack of supervision, and grades were being overridden by a “lab technician,” who was passing students. (*id.* 3213 *et sqq.*) Ms. Mattie testified that she was instructed to “review the controls related around NovaNET usage.” (*id.* 3223) Ms. Mattie further testified that she interviewed Ms. Gorton, Assistant Superintendent for Curriculum and Instruction, Ms. Ely, and Beth Russ, Director of Special Education. In her search for written policies or procedures regarding NovaNET, Ms. Gorton informed Ms. Mattie that there were none. (*id.* 3224-25) Ms. Mattie then viewed the Pearson website and reviewed information that was essentially the same as contained in Exhibit R139. (*id.* 3226; T 10/24/12: 4499-4501) She also spoke to a BOCES employee, Tony Abbatiello, who told her that BOCES provided to participating districts NovaNET “policies and procedures.”¹⁷

Ms. Mattie’s audit report (R32) raised two specific concerns regarding NovaNET as they might relate to TL. Ms. Mattie was concerned that Ms. Ely,

¹⁶ This testimony conflicts with Ms. Alley’s testimony that she first became aware of NovaNET concerns following the interview between Mr. Mevec and Ms. Fay in February 2010. Ms. Mattie, if her testimony is correct, establishes the Board’s concerns with NovaNET originated six months earlier than Ms. Alley’s account.

¹⁷ Ms. Mattie did not offer any policies or procedures she may have received from or discovered at BOCES. Nor did she offer any information received from Mr. Abbatiello, except that she believed he told her that NovaNET was strictly a credit recovery program. (See, T 10/24/12: 4495)

the “Lab Technician,” could override the system and pass a student along, and she was concerned that student files lacked, among other unrelated deficiencies, “sufficient documentation” for “credit recovery usage of the NovaNET system....” (*id.* at Bates 000621) Otherwise, the audit says little else specific to these particulars. (HO1, 1.1.1-.1.116)

Mary Thomas-Madonna was hired by the District October 28, 2009 as associate principal at the high school. She is currently serving as acting principal during the Respondent’s suspension pending the disposition of the instant charges. Ms. Thomas-Madonna was employed previously at Cornelius-North Syracuse school district (“CNS”) as an administrative assistant for student services. While there, she was in charge of installing NovaNET. Ms. Thomas-Madonna describes NovaNET as a credit recovery program for “Students who have failed a course can recover the credits through computer tutorials, working alongside a teacher. And then when they’re ready, once they spend so much time in a tutorial, they test out. If they test at eighty percent or higher, they move on the next module, until they finish a series of units of study that are deemed appropriate to award them credit.” (T 01/24/12: 31) She testified that when she arrived at Jordan-Elbridge and discovered that the high school used a NovaNET program, she was interested in becoming involved because of her experience at CNS. (*id.* 32) She further testified that CNS “had teachers running the credit recovery program, working with students, at Jordan-

Elbridge High School there was a teaching assistant who ran the NovaNET program." (*id.*)

Ms. Thomas-Madonna testified that she started to express her concerns about TL to Ms. Dominick and Ms. Gorton during the summer of 2010, primarily that TL was working on NovaNET without supervision. (*id.* 50-51) She drew this conclusion by observing TL working alone at the high school during Regents week. At the time she was expressing her concerns, she had not yet made such an observation at the middle school. (*id.* 52) Sometime after high school graduation, on or about June 29, 2010, because of a reconstruction projects at the high school, TL's NovaNet computer was moved to the middle school where he continued the work needed to complete introduction to chemistry. (T 01/24/12: 55-56; 10/01/13: 7594-95)

By her testimony, it is apparent that Ms. Thomas-Madonna had differences with the Respondent regarding how NovaNET was managed at Jordan-Elbridge. She stated: "I had questioned [the Respondent] about why he had a teaching assistant working with students. I felt...students would be better served with a teacher and I was surprised that the union allowed that to happen. He shared with me that that was not a unique circumstance. Other districts used T.A.s in that capacity. And I said, that may well be good, but I don't think it's best for students; I think they need a teacher." ¹⁸ (T 01/24/12: 66) Ms. Thomas-

¹⁸ Ms. Thomas-Madonna does not dispute that other district use TAs in NovaNET settings. Further, Ms. Susino was also made aware that other districts in BOCES used TAs through conversations with the BOCES person who assisted component districts with NovaNET. (R126)

Madonna testified that she discussed her opinion that TL needed to work with a certified science teacher to help him complete his program, that she offered to assist because she was certified in science, and that the Respondent told her to go ahead. (*id.* 70) Ms. Thomas-Madonna worked with TL and met with him “three or four times,” but concluded that she was not sufficiently trained in the subject matter. (*id.* D10) Therefore, after further discussion with the Respondent, an arrangement was made to secure the service of a Jordan-Elbridge certified chemistry teacher, Maggie Estlinbaum. Ms. Estlinbaum was to meet with TL at noon on August 13 at the middle school to assist him in completing “one remaining test” in the final module to complete the course, a test he had failed four or five times before, but had achieved 63%¹⁹ on his most previous attempt.²⁰ (*id.* 71; D10; D11)

Ms. Estlinbaum testified that Assistant Superintendent, Sue Gorton, contacted her to arrange to tutor TL because, “...TL was having trouble passing a particular test on NovaNET, that he needed — was trying to get the course so he could graduate. And she asked me to come in and tutor him on this topic and help him to pass the test.” (T 02/04/13: 4588) Ms. Estlinbaum made arrangements with TL to meet at the middle school at noon, and when she

¹⁹ Although NovaNET’s passing grade was 85, the District accepted 65 as passing on the system consistent with the District’s normal passing grade. This was known to the Superintendent, Ms. Dominick, at least as early as April 2010. (R126)

²⁰ In another e-mail from Ms. Thomas-Madonna dated August 10, to the Respondent, Ms. Estlinbaum and Ms. Dominick, she lists TL’s last attempt at 53. (D12) However, the 63 grade is the one repeated on July 28 and August 6 (D10; D11), and 63 is the grade the undersigned accepts as accurate.

arrived TL was not there. Dave Shafer, the middle school principal, told Ms. Estlinbaum that TL had been there but had left. (*id.* 4590) Ms. Estlinbaum then called the high school and was informed by Ms. Thomas-Madonna and Tamar Adolf, the high school secretary, that TL had taken the test in the morning and had reported to them that he had passed. Ms. Thomas-Madonna then informed Ms. Estlinbaum that she was sending TL back to the middle school, and Ms. Estlinbaum was asked to meet with him and to open the NovaNET module to verify that TL had indeed passed the test. (*id.*) TL arrived back at the middle school, accompanied by his sister. Ms. Estlinbaum then, together with TL, entered the program and Ms. Estlinbaum verified that he had indeed passed the test. (*id.* 4592)

The Respondent testified that he set up and put the NovaNET system in place at the high school during the fall of 2008 shortly after he and Ms. Susino attended a “sales pitch” by Pearson. (T 10/01/13: 7531, 7575-76) Although NovaNET was used primarily for credit recovery, it was also sold as a credit accrual tool. The program had been used since as early as the 2008-09 school year for credit accrual at Jordan-Elbridge, with Ms. Gorton’s and Ms. Dominick’s knowledge consent, to accommodate some BOCES students whose conflicting schedules made it impossible for them to otherwise take the required health course. (*id.* 7533-34) At the time, there was no Board involvement and no Board policy regarding NovaNET. (*id.* 7534)

Karen Lang, currently a vice-principal at Homer High School, worked with the Respondent in securing NovaNET Jordan-Elbridge. Ms. Lang worked with the Respondent as Ms. Thomas-Madonna's predecessor until the fall of 2009. (T 082813: 7028-29) Ms. Lang and the Respondent together secured the NovaNET program and saw to its implementation at Jordan-Elbridge. (*id.* 7059-60) She was aware that Ms. Ely would be the person in the room with the students, and had no problem with that. (*id.* 7070) She also testified that Ms. Gorton, who was the administrator in charge of curriculum at the time, was aware of the NovaNET protocol established at the high school, including the use Ms. Ely, a TA. (*id.* 7080)

On August 13, 2013, the Respondent was aware that TL was working on NovaNET at the middle school. At Ms. Dominick's direction, the computer was set-up at the middle school because of a summer construction project at the high school. The Respondent asked Mr. Shafer to set-up the computer at the main office "where somebody was nearby if he [TL] had questions." (*id.* 7593-95) The computer was set-up in a conference room "right off the main office." (T 02/04/13: 4595; T 01/24/12: 102)

Leading up to August 13, Ms. Thomas-Madonna informed the Respondent that TL had to pass but one test to complete the course and that he had achieved a 63 on his last attempt. (T 10/01/13: 7596; D10; D11; D16) The Respondent knew that Ms. Ely had to go to the middle school to reset the test. (T 10/01/13: 7597) He also was aware that Ms. Thomas-Madonna knew of TL's

progress because he knew that she had worked with TL at the middle school several times. (*id.* 7595) According to the Respondent, based upon such knowledge and upon his understanding that TL on August 13 had completed the final module by passing the only test remaining as a barrier to his passing the module, he issued the diploma.²¹

Between the time TL was enrolled in NovaNET for introduction to chemistry in September 2009, to the time the Respondent awarded TL a diploma on August 13, 2010, there transpired in the District a flurry of activity regarding NovaNET. Whether from August 2009, when Ms. Mattie met with the Board in executive session to discuss the Board's NovaNET issues, or from February 2010, following the "exit interview" with Ms. Fay conducted by Mr. Mevec, the Board, or at least Ms. Alley, acquired a keen interest. The Board then involved Ms. Mattie, who issued an audit report on May 12, 2010, to which Ms. Dominick supplied an appropriate "Management Response" item by item. (R32)^{22 23}

In response to the audit, Ms. Dominick promised to gather the records from NovaNET to be stored in student files as suggested by the audit, Item 4, with a projected completion date of July 31, 2010 (*id.* at Bates 000621). She

²¹ The fact that TL needed to pass just that one test to complete the course was also known to Ms. Gorton, as testified to by Ms. Estlinbaum. (T 02/04/13: 4638)

²² TL was in the NovaNET program in chemistry since September 2009, eight months before Ms. Mattie's report.

²³ Ms. Mattie's audit was just that, an audit, and, in my view, had no binding effect except for any significant policy that flowed therefrom.

also stated, in response to Item 5, “Policies and procedures *will be developed*, and agreements we have as simple understandings with JETA will be codified. Included in this work will be a sign off by the Principle and either the Superintendent or Assistant Superintendent when an override is needed and when credit is to be awarded. We will also make sure that a certified teacher or counselor has direct supervision of the system.” (Emphasis added) There was no projected completion date contained in this response. (*id.*) After that, NovaNET continued as before.

Then, in late June 2010, when Ms. Alley received the phone call from TL’s “friend,” Ms. Alley raised her concern more actively with Ms. Dominick, even telling Ms. Dominick that she would not sign a diploma for TL. (R12) Although the Board discussed NovaNET concerns at a meeting on July 21, 2010, apparently in executive session, no action was taken by the Board, (R13; T 10/01/13: 7621; T 01/12/13: 5987) except that Ms. Alley vaguely alluded to some kind of “action” during an email exchange with Ms. Dominick in late July. (R12) Indeed, throughout this time, the focus was to develop a policy and, to that end, Ms. Thomas-Madonna, Ms. Janice Schue, and the Respondent met to develop a presentation to the Board outlining a proposed policy going forward, (D8) and they made the presentation to the Board at a public meeting on August 4, 2013. The Board took no action at that meeting. (R143)

On August 24, 2010, Ms. Gorton ordered NovaNET shut down “...until we have a Board approved written policy and procedures in place to implement,

monitor and assess NovaNET activity.” (R35) The Board Policy Committee was not scheduled to meet until August 25, 2010 to discuss NovaNET, among other items. (R200)

No other student who participated in NovaNET during the school year was held back or had their programs or procedures altered in any other way, despite all of the activity following Ms. Mattie’s audit, despite Ms. Alley’s misgivings and, certainly, despite Ms. Thomas-Madonna’s expressed differences with the Respondent over how the program should operate. TL was singled-out because he was unable to complete his course of study by graduation and thus carried over in NovaNET through the summer to complete, not to repeat, the very program he had started in September 2009. However, despite Ms. Thomas-Madonna’s reservations, she worked with TL until she reached a point at the very last module exam where she preferred to have a certified chemistry teacher tutor TL to help him complete that one remaining module. All during that time, despite Ms. Alley’s hearsay suspicions, Ms. Thomas-Madonna’s misgivings, and Ms. Gorton’s and Ms. Dominick’s attempts to bring about change in the NovaNET protocol, TL was permitted to continue, in full view and with full knowledge of all concerned, with the hope that he would complete his course of study on NovaNET. Indeed, as noted above, in an email exchange between Ms. Alley and Ms. Dominick, Ms. Alley was prepared to refuse TL a diploma.

An inconclusive dialog ensued between the two, with Ms. Dominick insisting that she did not “recall the board directing that students be pulled off NovaNET in May if they had already begun the course.” (R12) ²⁴ Irrefutably, to do otherwise and to bend and alter TL’s protocol to fit new laws or regulations or policies emerging just as TL was about to culminate a full year’s course of study (even assuming such new laws, regulations or policies applied), would have been tantamount to submitting TL to *ex post facto* treatment and punishment. ²⁵ TL continued through the summer under the same rules as the others who started with him, but who had completed their NovaNET courses by June.

The Respondent gave TL his diploma on August 13 as he would have routinely done for any other student completing their graduation requirements during the summer. (See testimony of Susan DePauw, T 08/27/13: 6812, *et sqq.*, and Serina Simmons, T 08/27/13: 6979 *et sqq.*; Respondent, T 10/01/13: 7606, 7608) In the past, he routinely awarded diplomas signed by Ms. Alley in her capacity as Board President, and him, as high school principal. He was aware that TL had passed his final test, thus, awarded the diploma.

²⁴ The Respondent was not a part of this dialog, he was not copied, and there is no evidence that, on August 13, 2010, he was aware of Ms. Alley’s threat to deny TL a diploma.

²⁵ Subsequently, *ex post facto* punishment is exactly what Ms. Thomas-Madonna and the District administered when they refused to send TL’s transcript to his college and forced him to return to the District to complete a four-hour laboratory “practicum” on November 5 & 6, 2010. (D19; R34A; T 01/24/12: 205; T 02/04/13: 4612, *et sqq.*) However, that matter is not before me.

Immediately upon awarding TL his diploma, the Respondent left for vacation. He planned on completing the official report when he returned. Indeed, on August 19, while on vacation, he notified Ms. Thomas-Madonna that he would sign the report when he returned.²⁶ (D18) He had no reason to believe that there were any problems with TL's status. (T 10/01/13: 7609)

The crux of these particulars is apparent, in large part, by Ms. Thomas-Madonna's testimony. She testified that the middle school secretary had informed her that TL's sister was in the conference room with him when he completed the final test on the morning of August 13. (T 01/24/12: 101-02) Ms. Thomas-Madonna testified that when she spoke to Ms. Estlinbaum that day, Ms. Estlinbaum claimed that, although she could verify that TL passed the test, "she could not verify whether that was a valid test or not." (*id.* 104) Ms. Thomas-Madonna continued that Ms. Estlinbaum told her on that day that "...she couldn't speak to it. She didn't know if he did it, if the sister did it, so she was not willing to say he successfully completed it." Further, according to Ms. Thomas-Madonna, Ms. Estlinbaum "...mentioned that she couldn't verify that he did the work and questioned whether the sister did the work or assisted at the work." (*id.* 105-06)

However, Ms. Estlinbaum testified that she had met the sister on August 13 when TL returned from the high school to the middle school to verify the test

²⁶ When the Respondent returned from vacation and attempted to retrieve TL's report, he was told by Ms. Gorton that the system had been shut down. (T 10/01/13: 7611-12) He never had any involvement or say on how the report was analyzed.

results. (T 02/04/13: 4594) She did not testify to having any suspicions that TL's sister took the test. The only assumption she made was that the sister "was...driving." She further testified that she did not on August 13 hear from any source expressing suspicions about TL not taking the test himself, and that it was not until the fall when she returned to school that she heard reports that TL's sister had been in the room with him when he took the test. The source of that information was Ms. Thomas-Madonna. (*id.* 4596) Ms. Estlinbaum testified that on August 13, Ms. Thomas-Madonna merely instructed her to send TL back to the high school after Ms. Estlinbaum reported that the system showed a passing grade on the test. (*id.* 4597)

These contrasting accounts between Ms. Estlinbaum and Ms. Thomas-Madonna's weigh against Ms. Thomas-Madonna's credibility. Furthermore, her willingness to accept hearsay and rumor, thus, by innuendo, to disparage TL and the entire of his achievements throughout the school year and on August 13 when he finally passed the one remaining test,²⁷ informs me that Ms. Thomas-Madonna had no real interest in pursuing what actually happened. She never went to the middle school to interview the secretary who purportedly told her

²⁷ It is notable that TL's experience on NovaNET epitomizes what NovaNET was designed for. Students with problems in a conventional setting are given the opportunity to learn at their own pace in a structured, repetitive fashion. TL failed the test ending his last module at least four times before passing on August 13. His last failing grade was 63%, just two points away from the passing grade acceptable at Jordan-Elbridge. The fact that he passed the test on his fifth attempt without Ms. Estlinbaum's tutoring should not have surprised anyone. Even the Superintendent, Ms. Dominick, who had personally interacted with TL "thirty-forty" times, believed that TL could have successfully completed the course on his own. (T 08/29/13: 7456)

that TL may have cheated,²⁸ she never confronted TL about the matter, and, most telling, she did not in her emails to the Respondent that day, or in the ensuing days, report her suspicions to the Respondent. Furthermore, in emails she did not copy to the Respondent, she conveyed her suspicion and innuendo to Ms. Dominick and Ms. Gorton. (D23; D24)

Moreover, when Ms. Thomas-Madonna dissected the NovaNET report on TL's work at some point after the Respondent suspension, (D20) she inserted question marks in areas that were completed under the supervision of Ms. Ely. However, there is no evidence that Ms. Thomas-Madonna ever asked Ms. Ely about any of the areas in question, even though Ms. Ely had been working with students on NovaNET for longer than two years. On the summary, Ms. Thomas-Madonna also circled areas completed at or about times during the summer of 2010 when she was purportedly assisting TL. If Ms. Thomas-Madonna had bothered to check with Ms. Ely, she may well have had some questions answered, because, certainly, as was apparent from Ms. Ely's memorandum to Ms. Dominick in April 2010, the system contained numerous idiosyncrasies. (R26) Instead, Ms. Thomas-Madonna relied on Ms. Estlinbaum, who had never before interfaced with NovaNET, had never analyzed its curriculum, and who had never taught introduction to chemistry. Further, Ms. Estlinbaum admitted that she "...mostly [compared the NovaNET curriculum] to regents chemistry in my mind because that's what I'm most familiar with." (T 02/04/13:4600-01)

²⁸ Nor, for that matter, did the District call this person as a witness. This is an important omission which infers against the District on these particular charges.

She then decided not to sign-off TL's work because she was not "comfortable signing off that this student has met the requirements of an introductory chemistry course here at Jordan-Elbridge H.S." (*id.* 4601; D20) ²⁹ Then, and most notably, *after* all this was done, the entire science department concluded that the NovaNET introduction to chemistry curriculum "was aligned with J.E.s curriculum." (T 02/28/12: 817)

Finally, Ms. Thomas-Madonna's credibility is doubtful if only by the abundantly hostile demeanor she displayed toward the Respondent throughout her testimony regarding these particular charges and others. Moreover, as the Respondent's "interim" replacement as high school principal, she had (and has) much to gain by the Respondent's not returning to Jordan-Elbridge. Ms. Thomas-Madonna was a prime figure in the events leading to these particular charges. She was clearly at odds with how the Respondent had set-up the NovaNET program at Jordan-Elbridge before she arrived, as compared with CNS. Further, she was perturbed with the fact that TL did not wait to meet with Ms. Estlinbaum on August 13 before taking the test, then she attacked the program's and TL's integrity with not so subtle suggestions that TL was dishonest and a cheat and that he took advantage of the unsupervised setting for his personal advantages.³⁰ Ms. Thomas-Madonna supplied the setting. She

²⁹ As discussed herein above, this curriculum was already approved at least as far back as September 2009 when TL was registered into the class.

³⁰ It is noteworthy that the same innuendo leaked into other correspondence as fact, including Ms. Thomas-Madonna's report to William Speck, who was Ms. Dominick's replacement as Superintendent, (D27; R31) and in a counseling memorandum from Ms. Dominick to the Respondent. (D109)

cloaked herself in what she insisted was the controlling law effective in the summer of 2010 and the proposals laid before the Board on August 4, 2013. (D5; D6)³¹ She then applied them, *ex post facto*, to TL, thus denying him his earned credit.

For the foregoing, I conclude that the Respondent is not guilty of conduct demonstrating immoral character. Therefore, I hereby dismiss in their entirety the charges contained in **HO1, 1.1.1 through 1.1.16**.

Repeated Misrepresentations to School Superintendent Dominick

The charges read:

- 1.2.1 That on May 4, 2010, Respondent informed Superintendent Dominick of a parent complaint concerning the performance of a hypnotist at the After Prom Party to be held at the Jordan-Elbridge High School.
- 1.2.2 That during the May 4, 2010 conversation Respondent stated to Superintendent Dominick that Respondent was for the first time learning of the hypnotist's performance at the After Prom Party.
- 1.2.3 That on May 5, 2010, Respondent in a telephone conference with Superintendent Dominick again stated that the first time Respondent had learned the hypnotist's performance was on May 4, 2010.
- 12.4 That on May 6, 2010, in a series of telephone conversations with Superintendent Dominick, Respondent stated that he had not approved the hypnotist performance and for the third time stated that the first time Respondent had heard of the hypnotist performance was on May 4, 2010.
- 1.2.5 That Respondent also in the May 6, 2010 telephone conversations with Superintendent Dominick attempted to then blame the class advisor for not

³¹ Updated in August 2010. (D6)

sharing with the Respondent information concerning the events of the After Prom Party.

- 1.2.6 That Respondent also during the May 6, 2010 telephone conversations with Superintendent Dominick stated that he may have signed off on a form that included a company name, but that it did not contain any information regarding a "hypnotist".
- 1.2.7 That on May 6, 2010, Superintendent Dominick then investigated and reviewed the District's invoices and found an invoice for the hypnotist signed by the Respondent dated on March 16, 2010.
- 1.2.8 That Superintendent Dominick confronted the Respondent on May 6, 2010 with her findings of the invoice signed by the Respondent and opined that the invoice was very simple, taking Superintendent Dominick less than ten (10) seconds to read and clearly stated "hypnotist" in two separate places and contained Respondent's signature dated March 16, 2010.
- 1.2.9 That Respondent's explanation to Superintendent Dominick was that he signs many things every day and that he is too busy to read everything he signs.
- 1.2.10 That Respondent in his capacity as High School Principal is expected to be truthful and honestly respond to all inquiries of Superintendent Dominick.
- 1.2.11 That Respondent in his capacity as High School Principal is expected to know of all events occurring in his building including but not limited to performances at the After Prom Party.
- 1.2.12 That Respondent in his capacity as an Administrator is expected to read everything he signs including invoices he approves and fully understand the contents thereof.
- 1.2.13 That Respondent's repeated lack of honesty to questions from Superintendent Dominick concerning events taking place at the High School and the After Prom Party demonstrates immoral conduct by the Respondent for which Respondent should be removed from his employment with the Jordan-Elbridge Central School District.

The charges in these particulars are inconsistent. On the one hand, the Respondent is being accused of telling deliberate lies to Ms. Dominick about his role in approving a hypnotist to entertain at a junior prom after-prom party, on the other, he is accused of not reading, knowing, and understanding what he signed when he approved the down payment for the hypnotist.

On March 16, 2010 the Respondent signed an “Extra Classroom Activity Account Payment Check Request Order to the Central Treasurer” form to request payment for a \$500.00 down payment to “Simplified Entertainment Inc.” (sic) for “downpayment on hypnotist show for the prom after-party.” (D54; T 09/30/13: 7355, 57) The high school secretary prepared the form on March 15, 2010. (T 05/29/12: 2128) Before the Respondent signed the form, it was also signed by the class advisor on the same day, then, after the Respondent signed it, by the student activity treasurer on March 17. (T10/02/13: 7785; D54)

On May 4, 2010, the Respondent received a call from a parent who was concerned about using a hypnotist for entertainment at a high school party. According to the Respondent, the parent, who once owned a business in the community, had retained the same hypnotist for a company party and, during the show, an employee had been embarrassed. (T 09/30/13: 7351-52) The Respondent then phoned Ms. Dominick and told her that, based upon the parent’s report, he, too, had reservations about hiring a hypnotist. In the first conversation, the Respondent told Ms. Dominick that this was the first he had

heard that a hypnotist would be the entertainment at the after prom party. Ms. Dominick's account has the Respondent "adamantly" denying that he did. The next day, the Respondent again denied knowledge of the hypnotist. On May 6, Ms. Dominick retrieved from the business office the payment request form signed by the Respondent on March 16. According to Ms. Dominick, when she again confronted the Respondent, he "adamantly" denied that a hypnotist had been employed. (T 08/29/13: 7464, 7470, 7467-68, 7472; D161; D162; D164) Then, when Ms. Dominick confronted the Respondent with the form he had signed on March 16, (D54) he claimed he was too busy to remember everything that he signed. (D164; T 10/02/13: 7793) Ms. Dominick was convinced that the Respondent "lied" to her about the hypnotist on "multiple occasions," (T 08/29/13: 7497) and the clear evidence to her was that. "He signed a document that clearly was marked that it was for the hypnotist." (*id.* 7476)

The Respondent testified that he indeed told Ms. Dominick that he did not know about a hypnotist being retained for the after-prom party. He testified that when he signed such similar documents, he gave them a "cursory scan," looking for the people who signed before him, and that he was routinely satisfied when the advisor had signed off on an expenditure. (T 10/02/13: 7785) He further testified that he typically signed "a couple of hundred" such forms per week. (T 09/30/13: 7357) For the junior prom, he signed from seventy-five to one hundred such forms, for such items as disc jockeys, bands, decorations, bouncy house, big screen television rental, movies, and any and all things for a

party. (T 10/03/13: 8168) The only prior restrictions he imposed for prom activities were for “R” rated movies and shot glasses or beer mugs used as prom souvenirs. He testified that, typically, when he signed such a form, it was not to approve a particular activity, but merely to send the item on for payment. (*id.* 8169-70)

It is apparent that the Board was involved in the hypnotist controversy. As Ms. Dominick told the Board, “This hypnotist thing has taken on a life of its own.” (D162) Also, it is apparent that a relatively insignificant event escalated when a parent or parents (those who either wanted the hypnotist blocked or wanted the hypnotist to perform), became involved. They then involved the Superintendent and the Board.³²

I am unconvinced that the Respondent lied to Ms. Dominick. His account that he simply did not remember a particular item about an event or expenditure for the junior prom until he was prompted by viewing the document he signed is most plausible. If he had recalled of the document when he first phoned Ms. Dominick about the parent’s concerns, it logically would have made no sense for him to lie knowing the recorded document was available and retrievable. Because Ms. Dominick was convinced that the Respondent lied, does not make it so, neither is her conviction tantamount to probative evidence that he lied. Because he signed the payment request form does not mean, *ipso facto*, that he was paying close attention when he signed a routine document, or that, if he

³² Indeed, according to the high school secretary, the same hypnotist was hired for the same event the following year without incident. (T 05/29/12: 2237)

was paying attention, that he would recall that particular document of the many he signed in a typical day, week, or month.

For the foregoing, I conclude that the Respondent is not guilty of conduct demonstrating immoral character. Therefore, I hereby dismiss in their entirety the charges contained in **HO1, 1.2.1 through 1.2.13.**

Respondent Gave Cigarettes Back To Minor Students At The High School

The charges read: ³³

- 1.3.1 That on or about September 15, 2010, Respondent investigated a matter at the High School where three students were alleged to have cigarettes on school property.
- 1.3.2 That upon Respondent's investigation and locker searches, three (3) students were found to have cigarettes on school grounds of the High School.
- 1.3.3 That Respondent confiscated the cigarettes and met with the students.
- 1.3.4 Respondent did not render any disciplinary action concerning the three minor students and Respondent met with the students and returned the cigarettes to the minor students at the end of the school day.
- 1.3.5 That Respondent should have known of the dangers of providing the minor students with cigarettes and the negative implications associated with returning the cigarettes to the minor students on school property thus constituting immoral conduct by the Respondent for which he should be removed from his employment in the Jordan-Elbridge Central School District.

In a memorandum dated September 9, 2010, Tallon Larham, a high school teacher, wrote a “ ‘statement’ ” at the request of Ms. Thomas-Madonna

³³ These charges were dismissed by the undersigned an April 18, 2012 (HO8) and reinstated on July 13, 2012 (HO16)

regarding what he considered to be “suspicious activity” in one of the boys’ bathrooms the day before. (D29; T 01/24/12: 235) Mr. Larham addressed his memo to both Ms. Thomas-Madonna and the Respondent. According to Ms. Thomas-Madonna, she discussed Mr. Larham’s memo with the Respondent, and they made a mutual decision to search the lockers of the three students observed by Mr. Larham the day before. (T 01/24/12: 237-38) The students NK, CJ, and AU, were known to both the Respondent and Ms. Thomas-Madonna from disciplinary proceedings the previous school year. (T 09/30/13: 7333, 7348-50)

Upon searching the lockers, Ms. Thomas-Madonna and the Respondent found two small backpacks, one with a cigarette lighter and one with a “few” cigarettes. They also found a coat with one cigarette. They took possession of the backpacks and coat, then summoned the students to the high school office. (T 09/30/13: 7335-36) The Respondent warned and lectured the students, held the cigarettes in his office, then, at the end of the day, returned the cigarettes to the students. (*id.* 7338-40) Ms. Thomas-Madonna told the Respondent that she was “very upset with his decision, disagreed with it, and was concerned about the health of the kids.” Ms. Thomas-Madonna believed that the cigarettes should not have been returned, and the students should have received in school suspension (“ISS”) for possession of the cigarettes on school property. Ms. Thomas-Madonna also reported the Respondent’s actions directly to Ms. Gorton, an assistant superintendent and Ms. Thomas-Madonna’s and the Respondent’s immediate supervisor. (T 02/28/12: 832-33)

Ms. Thomas-Madonna prepared and signed a “Disciplinary Referral” for each student, saying for each that, the “incident was logged and student sufficiently warned that there should be no recurrence...,” that “parents/guardians contacted and their help solicited...,” (with dates and times of phone calls listed) and “was warned not to bring these items to school per [the Respondent].”

The Respondent does not dispute that he returned the cigarettes to the students after lecturing and warning them. He testified that he did so for several reasons. Regarding NK, the Respondent was in close contact with his mother, and NK was working closely with the school social worker to resolve personal issues. Regarding AU, he had severe violence issues. CJ, about whom the Respondent knew less because he had transferred to Jordan-Elbridge just the year before, knew that CJ had witnessed his own mother’s suicide.

The Respondent’s policy was that students who had disciplinary issues in the previous school year started in the new year with a “clean slate.” Furthermore, from an incident from the previous year, the Respondent knew that AU’s father would want any confiscated cigarettes returned, because, upon the father’s request the previous year, Respondent asked Ms. Thomas-Madonna to return confiscated cigarettes to AU’s father. Also, the Respondent spoke to NK’s mother that same afternoon and knew that she wanted the cigarettes returned. Thus, the Respondent reasoned, since he would have to return the cigarettes in any event, he returned them to the students at the end of the day.

Finally, the respondent testified that he wanted to build relationships with these three students to alleviate disciplinary issues that arose in the past and perhaps forestall future problems. (T 093013: 7335, *et sqq.*; T 02/28/12: 842)

This charge hinges on opinion and preference rather than policy. Ms. Thomas-Madonna believed that policy dictated a stronger disciplinary response than the Respondent dolled-out and that no acceptably good reason could explain returning the cigarettes to the students at the end of the day. Ms. Thomas-Madonna relied upon the Student Handbook, which listed as a “Major Offense,” “Possession of, use of, or being under the influence of tobacco products, alcoholic beverages or being in possession of drug paraphernalia or any controlled substance without a legal medical prescription....” (D28 at Bates 003037) The Student Handbook directed that, for a “first major offense,” the “principal may suspend the student from school for a period of 1-5 days.” The Student Handbook also stated that the “principal, or his designee, shall contact the parents/guardians whenever possible, by telephone, to inform the parent/guardian of the situation.” (*id.* at Bates 003038) The use of the modal verb, “may,” suggests possibility rather than obligation, as opposed to the modal verb, “shall.”³⁴ The Respondent was not obligated to mete out an in-school or out-of-school suspension, as Ms. Thomas-Madonna rather insisted. (T

³⁴ It is noteworthy that in the same Student Handbook, in a section on “Training Rules and Team Discipline,” for student athletes, a first offense for breaking these rules requires that a student violator “will be immediately dismissed from the team with the suspension for 25 calendar days beginning with the next scheduled events.” There is no discretion allowed in the wording. However, “...the administration *may* make a referral to the guidance office for counseling and/or other services as a condition for reinstatement.” (D28 at Bates 003046) (Emphasis added)

01/24/12: 271, *et sqq.*) He used his discretion based upon all his knowledge about the students background and history, relying upon his personal experience with them, his knowledge of their problems, and his contact with them and their parents during past incidents and during the current incident. Although Ms. Thomas-Madonna was entitled to her opinion in the matter, simply because her opinion differed from the Respondent's is no cause for discipline.

These charges are without merit. I cannot find guilt where the Respondent was only exercising his prerogative as the school's principal and chief disciplinarian. The language in the Student Handbook clearly gave him latitude in such dealings. Using such latitude should not have subjected him to discipline. The Respondent used his best judgment in making the decisions he made on September 9, 2010. He had discretion, and he used it. He knew the students and he had previous dealings with the parents. He also knew that at least two of the parents wanted or would have wanted the cigarettes returned. In fact, when Ms. Thomas-Madonna made telephone contact with the parents and presumably informed them of the matter, not one parent answered her call. (T 01/24/12: 253) Moreover, Ms. Thomas-Madonna was obviously angered by the Respondent's decisions, so much so that she went over his head and reported the incident as well to Ms. Gorton. She testified, "I was extremely upset because my mother died from smoking and I took it very personally. So I went above his head, because he disagreed with me basically and said it's my decision, and I went to Sue Gorton and told her what happened." (*id.* 254) As

sympathetic as I am with Ms. Thomas-Madonna's personal tragedy, I take judicial notice that very few of us, including the undersigned, are free from similar experiences with close relatives. However, such experience does not form the basis for the Respondent being disciplined over this matter.

For the foregoing reasons, I conclude that the Respondent is not guilty of conduct demonstrating immoral character. Therefore, I hereby dismiss in their entirety the charges contained in **HO1, 1.3.1 through 1.3.5**.

The charges contained in **HO1, Charge 2**, allege, "The Respondent is Guilty of Insubordination," because of his "Failure to Follow Directions from Superintendent Dominick," his "Failure to Follow the Law," his "Failure to Submit Annual Goals, and his "Misuse of Signature Stamp."

Respondent's Failure To Follow Directions From Superintendent Dominick

The charges read:

- 2.1.2 That on April 1, 2010 Superintendent Dominick, based on a finding by the Internal Auditor, issued a memorandum to the administrators, including Respondent instructing him as to the procedures for dealing with family members in a given administrator's building.

- 2.1.3 That Superintendent Dominick required that when dealing with a family member, Respondent and all administrators were to: a) consult with another administrator before making a decision regarding the family member; b) have the consulting colleague sign off on the decision; c) place the signed document in the student or staff file; and d) provide the Superintendent with a copy of the document.

- 2.1.4 That on May 7, 2010, Respondent enrolled Student “B”, (“MZ”) Respondent’s family member in the High School with no other administrator asked to sign off on decisions for placement or programming for Respondent’s family member.
- 2.1.5 That despite clearly set forth directives from Superintendent Dominick requiring Respondent to have a second administrator sign off on decisions at the High School concerning his family members, Respondent flatly refused to do so and engaged in conduct that amounts to insubordination for which the Respondent should be dismissed from the employment with the Jordan-Elbridge Central School District.

On April 1, 2010, Ms. Dominick distributed a memorandum to all District administrators instructing them as follows: “When dealing with a family member in the school situation where you are in charge, consult with another administrator/supervisor before making the decision on how best to deal with the matter. Summarize the situation in a document, along with the decision and plan to go forward. Have your colleague sign along with you and place the document in the student or staff file. Also provide me with a copy. You may also choose to turn the entire matter over to another ALT member.” (D79)

During the 2009-2010 school year, the Respondent’s daughter, MZ, was a student enrolled at the Jordan-Elbridge high school. MZ was a student identified with a disability. There was in place an Individualized Educational Program (“IEP”) for MZ at the beginning of the school year. (D50; R172; R201) During the 2009-2010 school year, MZ twice attended residential treatment facilities. She returned to Jordan-Elbridge after the first placement without incident. (T 10/0/113: 7666, 7669-70; T 06/24/12: 2442 *et sqq.*, 2466, 2468) Thereafter, at or about January 20, 2010, she entered, voluntarily and as placed by the Office

of Mental Health (“OMH”), into a second facility, the Hillside Children’s Center, Hillside Family of Agencies (“Hillside”). (T 08/28/13: 7114-15; D63) She attended Hillside for approximately two marking periods during her senior year. When MZ was placed at Hillside, Jordan-Elbridge and Hillside counselors consulted and collaborated in developing her curriculum needs while she studied at Hillside. (T 08/28/13: 7106; R67) Jordan-Elbridge supplied Hillside with MZ’s curriculum, and the counselors kept in touch with Hillside throughout MZ’s placement there. Also, Jordan-Elbridge provided certain of the textbooks. (T 06/26/12: 1594)

While MZ was at Hillside, the Respondent’s wife, CZ, agreed to be the parental contact with Jordan-Elbridge in matters dealing with MZ. (T 10/01/13: 7671; R202; R203) At or about April 20, 2010, CZ communicated with Ms. Dominick expressing concerns about MZ placement status, and about CZ’s fears regarding MZ’s requirements for graduation. Further, CZ was concerned that MZ, who was an eighteen-year-old,³⁵ might sign herself out of Hillside and return to Jordan-Elbridge. (R203) One week before her communication with Ms. Dominick, CZ contacted Ms. Russ with numerous requests for documents and information regarding MZ. (R202)

In early May 2010, MZ decided to return to Jordan-Elbridge. On May 7, 2010, a Friday, the Respondent received a call from Hillside telling him that MZ was being discharged that afternoon. The Respondent testified that, upon

³⁵ The letter was written on the day of MZ’s eighteenth birthday. (T 10/01/13: 7676)

hearing about MZ's impending release, he notified Ms. Susino, MZ's guidance counselor, that MZ would be returning to Jordan-Elbridge the following Monday. (T 10/01/13: 7691-92) The Respondent testified that he had no contact with Ms. Susino on May 10, and he had no more immediate involvement. (T 10/02/13: 7946) As far as he was concerned, CZ was the parent contact for MZ, and he knew that subsequently, CZ and Ms. Russ had a phone conference to establish a new IEP for MZ, and the IEP was in place on May 12, 2010, two days after MZ's return. (T10/02/13: 7942-43, 7944-45)

By this charge, the Respondent did nothing contradictory to Ms. Dominick's April 1, 2010 directive. MZ was not enrolled into Jordan-Elbridge on May 7, 2010, as the charge mistakenly states, nor did the Respondent have anything to do with her enrollment after that. CZ was the parent contact, and she dealt with Ms. Russ to establish MZ's placement. However, the record indicates background chatter and concerns about MZ just appearing at school and expecting to resume her classes. For example, Ms. Susino said that she did not know MZ was going to classes until she heard it from the teachers. She testified that she "felt like an idiot." (T 06/24/12: 2472-74) However, she acknowledges that DZ told her "in passing" the previous Friday that MZ would be returning on Monday. (*id.* 2475) In fact, on May 7, Ms. Susino sent a memo to the guidance secretaries stating that the Respondent had "asked" her to have

MZ “reenrolled” on Monday. (R74) ³⁶ As another example, Ms. Russ, the Director of Special Education, was upset because she did not know MZ was returning. (D65; D66; D67; D68; D69) ³⁷ Ms. Susino never informed Ms. Russ that MZ was returning after hearing this from the Respondent. (T 06/26/12: 1641-42; D68)

Before MZ’s return, there was confusion among Ms. Dominick, Ms. Susino, and Ms. Russ concerning how to credit MZ’s work at Hillside when she did return to Jordan-Elbridge. (D62) Moreover there were serious disputes over MZ’s enrollment status at Jordan-Elbridge while she was at Hillside and what to do with her upon her return. That is, when Ms. Russ dropped MZ from the Jordan-Elbridge rolls, was that a proper action, and, when she returned, was it necessary to reenroll her? (T 08/29/13: 7550; R108; R110; R140; R173; R202; R203; D104; D105; D133; D134; D135) ³⁸ Relating to the charge, whatever MZ’s proper placement status was while placed at Hillside, the evidence does not indicate that on May 7, 2010, the Respondent enrolled MZ at Jordan-Elbridge.

Furthermore, the District fails in its attempt to expand these charges to include the Respondent’s acts subsequent to May 7, 2010, when he signed

³⁶ The Respondent, in a memo to Ms. Gorton, said that he “reactivated” MZ’s schedule. (D105) However, Ms. Susino’s testimony makes it clear that the direction was more in passing and that, in any event, the scheduling task was in her hands.

³⁷ Ms. Russ, who may have been a key witness regarding the re-enrollment process, was not called to testify.

³⁸ Rather than the confused testimony by District witnesses, who attempted to paraphrase “expert” advisors from various levels in the SED bureaucracy, the District may well have called an appropriate SED witness.

“Grade Change Request Form”(s) (D70; D81) for MZ after she returned from Hillside. Even if allowed to expand the charge, the evidence indicates that Ms. Dominick, not the Respondent, oversaw the details involved in transferring MZ’s grades from Hillside to Jordan-Elbridge. She, not he, made the decisions regarding the transfer of MZ’s grades. Moreover, Ms. Dominick further cleansed the process by seeking advice and guidance from a curriculum expert from outside Jordan-Elbridge before giving final approvals. (T 08/29/13: 7387; T 10/02/13: 7936, R111; R112) Although the Respondent signed the two forms in question, they were not grade change request forms, *per se*, but merely the vehicle used by the District to register the grades at Jordan-Elbridge that MZ achieved at Hillside and were approved by Ms. Dominick. Furthermore, other grades were transferred directly to MZ’s Jordan-Elbridge report card without utilizing such forms.³⁹ In this respect, the District's attempt to expand the charge fails on the evidence even if the charge were expanded. As the charge is written, I will not allow the District to so amend the charge to include any action subsequent to May 7, 2010.

For the foregoing reasons, I conclude that the evidence does not indicate that the Respondent enrolled MZ at Jordan Elbridge on May 7, 2010, and the Respondent is not guilty of insubordination. Therefore, I hereby dismiss in their entirety the charges contained in **HO1, 2.1.2 through 2.1.5.**

Respondent’s Failure to Follow the Law

³⁹ See D63, showing all other Hillside grades, none of which were rejected by Jordan-Elbridge.

The charges read:

- 2.2.1 That the Respondent as Principal of the Jordan-Elbridge High School presented to the Board President Alley on or about June 20, 2010 the Diploma for Student it "A". ("TL")
- 2.2.2 That Respondent as the High School Principal knew or should have known the graduation requirements in New York State and that a New York State Diploma could not be issued without compliance with same.
- 2.2.3 That the Respondent knew or should have known that Student n A" did not meet the course requirements to receive a New York State High School Diploma.
- 2.2.4 That Board President Alley signed a Diploma for Student "A" as presented to her by the Respondent.
- 2.2.5 That Board President Alley informed Superintendent Dominick that Student" A" was not to receive the Diploma she signed unless the student met the graduation requirements.
- 22.6 That Student "A" began participating in the District's computerized credit recovery system, NovaNet during the 2009-2010 School Year.
- 2.2.7 That Student "A" continued to work via NovaNet on course work after the District's June 26, 2010 graduation date in an attempt to complete the course requirements to receive a New York State High School Diploma.
- 2.2.8 That on August 4, 2010 Respondent was present when Associate Principal Madonna presented to the Board of Education a plan in which Respondent helped prepare for students using NovaNet to receive the requisite course credit on NovaNet that required the signature of the Principal, Guidance Counselor and teacher prior to participating and receiving course credit and a New York State High School Diploma.
- 2.2.9 That Respondent, on August 13, 2010, unilaterally presented Student "A" with the June Diploma signed by Board President Alley, without the three necessary signatures, on the NovaNet documents.

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- 2.2.10 That Respondent, on August 13, 2010 told Associate Principal Madonna that he gave Student "A" the June diploma because Board President Alley will not sign a new diploma without proof that Student "A" completed all of the requisite course work.
- 2.2.11 That Respondent subsequently told Superintendent Dominick when questioned the matter, in words or substance that he had to do it for the student.
- 2.2.12 That Respondent, despite: a) the Board President's directive; b) representations to the Board when Respondent was present as to the required signatures for Student "A" to receive the course credit via NovaNet, and; c) the legally mandated requirement to receive a New York State High School Diploma, provided Student "A" with the June 2010 Diploma and otherwise engaged in conduct that amounts to insubordination for which the Respondent should be removed from the employment of the Jordan-Elbridge Central School District.

As written, these charges are so similar to the charges contained in HO1, 1.1.1 - 1.1.16 that they are duplicative and redundant, except that the charge is insubordination instead of conduct demonstrating immoral character.

For the same reasons discussed herein in charges 1.1.1 through 1.1.16, I conclude that the Respondent is not guilty of insubordination. Therefore, I hereby dismiss in their entirety the charges contained in **HO1, 2.2.1 through 2.2.12.**

Respondent's Failure To Submit Annual Goals

The charges read:

- 2.3.1 That Respondent as the High School Principal for the Jordan-Elbridge Central School District knew or should have known of the importance in submitting annual goals in a timely fashion.

- 2.3.2 That Respondent as the High School Principal knew or should have known that his annual goals were to be submitted in the proper format.
- 2.3.3 That Respondent on July 20, 2009 after submitting his annual goals met with Superintendent Dominick to discuss same.
- 2.3.4 That at the July 20, 2009 meeting, Respondent was required by Superintendent Dominick to submit annual goals in the proper form.
- 2.3.5 That Respondent did not comply with Superintendent Dominick's requirement during the entire months of August and September.
- 2.3.6 That Respondent had to be again required by Superintendent Dominick to submit his annual goals.
- 2.3.7 That despite clearly set forth requirements from Superintendent Dominick requiring the Respondent to properly submit his annual goals, Respondent continually refused to do so and thus engaged in conduct that amounted to insubordination for which the Respondent should be dismissed from employment of the Jordan-Elbridge Central School District.

During a July 6 and 7, 2009 “administrative retreat,” Ms. Dominick instructed the administrators to submit their annual goals in a “Strategic and Specific, Measurable, Attainable, Results Oriented / Relevant / Rigorous, and Time Bound (“SMART”) format as follows: “Well written, specific and measurable goals are to be submitted to me by August 15 and must include the four areas we identified as a team and the items below.”⁴⁰ (D171; T 08/29/13: 7544-45) The Respondent submitted his goals by August 15, but the format did not meet with Ms. Dominick’s satisfaction. (*id.* 7599; T 09/30/13 :7429, 7433) She then asked him to “take another try at writing your goals,” and, to assist

⁴⁰ “Below” included goals specific to the Respondent, which are not at issue herein.

him, sent him documents, including a document about SMART goals. (T 08/29/13: 7547-48; R115) As of October 1, 2009, the Respondent had not yet resubmitted his goals, at which point Ms. Dominick sent him a memorandum expressing her “frustration.” She further instructed him, using the term, “expect and require,” to have the goals resubmitted in the SMART format by October 6. (T 08/29/13: 7548-49; D93) The Respondent, with some assistance from Ms. Schue, then resubmitted the goals in the proper format, meeting Ms. Dominick’s imposed deadline. (T 09/30/13: 7437; T 02/05/13: 4787-88)

The evidence does not support the charge of insubordination. The Respondent submitted goals by August 15. The fact that they were not in proper form only indicates that he had difficulty with the format, not with providing his goals as instructed. Ms. Dominick testified that other administrators had difficulties with the SMART format and that other administrators also had trouble meeting the original timelines in submitting their goals. Moreover, the Respondent testified that he had time issues during the late summer and early fall of 2009. He had a time-consuming family illness to attend to, plus the usual busy matters to attend to during the beginning of the school year, and he was without an associate principal through at least the last two weeks in September. (D93; T 09/30/13: 7438) The delay in submitting his goals does not rise to insubordination as commonly understood, that is, willful disobedience or unreasonable delay in carrying out an order. The Respondent submitted his goals on time. Ms. Dominick’s “frustration” with the time it took the

Respondent to resubmit the goals in her preferred format does not rise to insubordination. There were numerous reasonable and common causes for the delay,⁴¹ and when Ms. Dominick delivered a clear and final directive to the Respondent on October 1, 2009, he complied.

For the foregoing reasons, I conclude that the Respondent is not guilty of insubordination. Therefore, I hereby dismiss in their entirety the charges contained in **HO1, 2.3.1 through 2.3.7.**

Respondent's Misuse Of Signature Stamp

The charges read:

- 2.4.1 The Respondent was in possession of a signature stamp which permitted his signature to be affixed to various documents of legal significance.
- 2.4.2 The signature stamp of the Respondent is required to remain in custody at all times in a secured place.
- 2.4.3 In an internal audit, August 20, 2009, the auditor issued a warning to the Respondent that the signature stamp was not secure and was in a position to possibly be abused.
- 2.4.4 The Respondent's misuse of the signature stamp was again the subject of an audit, on September 3, 2010, when the report indicated that the signature stamp was still not secure and was in a position where it could be abused.
- 2.4.5 After repeated verbal and written admonitions to the Respondent, the Respondent failed to properly secure the signature stamp.

At least from April 2009 onward, (D53) the Respondent used a signature stamp that he authorized his secretary, Tamar Adolf, to use for his signature on

⁴¹ Neither the originally submitted goals or the resubmitted goals were offered into evidence by the District. Nor was any evidence submitted by the District regarding how other administrators were treated for their delays and failures to submit the goals in the SMART format. Ms. Dominick did testify that other administrators had problems with timely submission and format, but no other administrators were disciplined. (T 08/29/13: 7599)

certain “routine” documents. (T 10/01/13: 7471, *et sqq.*; T 05/29/12: 2063-64, 2080) On August 20, 2009, the District’s internal auditor, Ms. Mattie, issued a “Treasury Audit” in which she took issue with the use of the Respondent’s signature stamp for “daily transactions.” Ms. Mattie also concluded that the signature stamp “should remain in his [the Respondent’s] custody at all times in a secured space.” (D127 at Bates 002204). Ms. Mattie also concluded that the secretary’s use of the stamp “defeats the purpose of the approval process that has been designated to the Principal, as his staff is now authorizing transactions.” (*id.*)

The audit report was not transmitted or copied by Ms. Mattie to the Respondent and, according to his testimony, he did not see the report until the discovery process in these proceedings. (T 10/01/13: 7470) Nevertheless, following Ms. Mattie’s issuance of the report, Bill Hamilton, the District’s then business manager, sent a memorandum to all administrators instructing as follows: “Signature stamps are not allowed for the purpose of signing business documents (e.g., claim forms, time sheets, etc.). Original signature by the supervisor is required on all such documents. Please be advised.” (D92) The memorandum did not address the location or storage of signature stamps.

Upon receiving Mr. Hamilton’s memorandum, the Respondent phoned Mr. Hamilton to seek clarification of the protocol, and to plead his case to continue using the stamp. (T 10/01/13: 7481) When Mr. Hamilton reiterated his instruction contained in the memorandum, the Respondent then instructed Ms.

Adolf to cease using the stamp for business documents. (*id.* 7483) After that, the stamp was not so used.⁴²

Notwithstanding the contents of the audit reports, there was no evidence presented that, “After repeated verbal and written admonitions to the Respondent, the Respondent failed to properly secure the signature stamp.” The only admonition was Ms. Mattie’s audit report of August 2009, which the Respondent was not copied, nor did he see. Even if he had, an audit report is not an “admonition.” Ms. Mattie was, after all, an independent contractor with the District, (T 10/22/12: 3720) not a person in the supervisory chain of command. Mr. Hamilton’s memorandum was the only written instruction following the first audit report. Upon its receipt and the subsequent conversation between the Respondent and Mr. Hamilton, the Respondent instructed Ms. Adolf to cease its use for business documents. Moreover, although Ms. Mattie took issue with the signature stamp’s location, apparently no one in the administration chain of command took her concern seriously, because no one in the administration ever issued a directive or “admonition” concerning the stamp’s location. It was not until Ms. Mattie issued her “Internal Audit” on September 3, 2010, in which she again took issue with the signature stamp’s location, that the administration secured and “disposed of” the stamp. (D128 at “High School Building” No. 3)

⁴² Exhibit D53 indicates that Ms. Adolf used the stamp on a single “Timesheet for Substitute Employment” form on October 6, 2009, about a month after the Respondent instructed her to no longer use the stamp on such documents. The Respondent was not aware on October 6, that the stamp had been used for that purpose. (T 01/01/13: 7480)

For the foregoing reasons, I conclude that the Respondent is not guilty of insubordination. Therefore, I hereby dismiss in their entirety the charges contained in **HO1, 2.4.1 through 2.4.5.**

The charges contained in **HO1, Charge 3**, allege, "The Respondent is Guilty of Conduct Unbecoming an Administrator," because of his "Inappropriate Taunting of a Student," his "Inappropriate Name Calling of a Student," because he "Released Student Information to Another Student, and he "Has engaged in a pattern of Inappropriate Comments During School."

Respondent's Inappropriate Taunting Of A Student

The Charges read:

- 3.1.2 That Respondent knew or should have known that as a High School Principal to act in a professional manner that is in accordance with his position.
- 3.1.3 That Respondent knew or should have known that taunting a student only serves to escalate a situation and cause a disruptive educational environment that is detrimental to learning.
- 3.1.4 That Respondent on January 14, 2010 confronted Student "C" in a classroom with other students and a District teacher while they were eating lunch and began questioning Student "C" about a repeated offense on Student "C" 's part.
- 3.1.5 That Respondent's comments caused Student "C" to become upset and angry by Respondent's embarrassing comments.
- 3.1.6 That Respondent in talking with the classroom teacher after the incident was informed that Respondent had upset the Student causing him to leave the education classroom.
- 3.1.7 That Respondent on January 21, 2010 met with Superintendent Dominick to discuss his conduct concerning Student "C".

- 3.1.8 That during the conversation between Superintendent Dominick and Respondent, Respondent admitted to Superintendent Dominick that he confronted Student "C" in the classroom, in front of his peers and teacher, embarrassed Student "C" and made him angry.
- 3.1.9 That Respondent knew or should have known that his embarrassing and upsetting comments to Student "C" were unprofessional and conduct unbecoming a High School Principal and that Respondent should be dismissed from his employment with the Jordan-Elbridge Central School District.

At about January 14, 2010, (T 09/30/13: 7395) the Respondent entered a classroom where a group of students was having a conversation with a social studies teacher, Jason Kufs, during the lunch period. (T 08/26/13; 6701, 6731) There were a number of students in the room, perhaps eight to twelve, including student CH. (*id.* 6732) According to the Respondent, he entered to room looking for CH. When he entered the room, he addressed CH, saying, "we need to talk." (T 09/30/13: 7395) The student then "stormed out of the room." (*id.* 7395-96) According to the Respondent, there were several students in the room, including at least one child of a Board member. As the Respondent was leaving the room, CH was coming back to the room, and when the Respondent asked CH to accompany him to the office to talk, CH went back into the room, slamming the door in the Respondent's face, then held the door from the inside to prevent the Respondent from entering again. Then, through the efforts and persuasion of the Respondent and Mr. Kufs, the student opened the door. Then, when the Respondent asked CH again to accompany him to the office, CH responded, "Fuck you, Mr. Zehner, and then he marched away." (*id.* 7397-98)

Mr. Kufs's account is substantially similar to the Respondent's. As the only other witness to the event called to testify, Mr. Kufs testified that the Respondent entered the room and said to CH, "I need to speak with you." (T 08/26/13: 6733). Mr. Kufs could see that CH was angry. Then, CH left the room, the Respondent followed. (*id.*) When CH returned, the Respondent was just behind him, then CH slammed the door in the Respondent's face and said, "Fuck you, Mr. Zehner." (*id.* 6734-35) According to Mr. Kufs, there were children of two different Board members in the room at the time. Mr. Kufs testified that he met routinely with students during lunch periods, that regularly he left the door open, and that frequently the Respondent walked in and out of the room at such times. (*id.* 6731, 6768)

The Respondent further testified that, after the incident, he went to the cafeteria, then returned to his office. When he got there, CH was at the office. (T 09/30/13: 7399) CH and the Respondent had a discussion, during which they came to an agreement regarding future tardiness consequences for CH, and they parted on good terms. (*id.* 7400-010)

Ms. Dominick became involved upon information passed on to her from the Board President, Ms. Alley. (T 08/29/13: 7593) Ms. Dominick summoned the Respondent to a meeting, then issued a memorandum that she represented as a summary of the meeting. (*id.* 7509; D95) Ms. Dominick testified that the Respondent "admitted" that he admonished CH about his tardiness issues in

front of the other students. However, she did not say that in her memorandum.

(*id.*) The Respondent replied to the memorandum. (D96)

Although the Respondent went to Mr. Kufs's room to summon CH to the office to discuss his repeated tardiness, the evidence is not conclusive that he confronted CH about tardiness in front of the other students. Rather, the evidence leans in the opposite direction. Mr. Kufs, who was never interviewed or questioned about the encounter before Ms. Dominick issued her memorandum (D95) or, more importantly, before the District prepared and filed the charges,⁴³ testified that he did not hear the Respondent mention any particular issue involving CH. (T 08/26/13: 6733, 6734, 6756, 6765, 6769) Further, Ms. Dominick's memorandum (D95) stated that the Respondent admitted that he "went to a classroom where a teacher and several students were eating lunch to talk with one of the students about a repeated offense on his part." However, the memorandum did not state that the Respondent spoke out loud about a particular topic with CH in front of the others. Ms. Dominick stated only that the Respondent, "confronted the student in front of the others."

A principal's summoning a student to the office in front of his peers may well embarrass some students, but such action does not rise to conduct unbecoming an administrator. Furthermore, it is rather unusual that Ms. Dominick became involved in what was a relatively minor incident that was fully resolved between the Respondent and CH very shortly after the incident.

⁴³ Mr. Kufs testified that he was surprised when he was told about the particulars of this charge, because he was never questioned "as an adult that was in the room...." (T 08/26/13: 6736, 6740)

Moreover, no report or complaint was ever filed by CH, by the teacher, or by any other eyewitness to the event. It seems Ms. Dominick became involved solely by the information she received from Ms. Alley, who apparently received the information from yet another source or sources, because neither was Ms. Alley there. By the evidence presented, there is no plausible basis for a charge of conduct unbecoming to an administrator.

For the foregoing reasons, I conclude that the Respondent is not guilty of conduct unbecoming an administrator. Therefore, I hereby dismiss in their entirety the charges contained in **HO1, 3.1.2 through 3.1.9**.

Respondent's Inappropriate Name Calling Of A Student

The charges read:

- 3.2.1 That Respondent knew or should have known that as a High School Principal has the responsibility to act in a professional manner.
- 32.2 That on March 23, 2010 Respondent approached Students "D" ("KIS") and "E" ("BB") in the High School and discussed with them a severe accident that Student D's sister had the prior weekend.
- 3.2.3 That during said conversation Respondent learned that Student D's sister had part of her finger severed in the accident the prior weekend to which Respondent stated, "Is it too early to call her stubby," ("Stubby Statement").⁴⁴
- 3.2.4 That on March 29, 2010 Superintendent Dominick met with Respondent to discuss his remarks to Students "D" and "E" at which time Respondent admitted that he made the Stubby Statement to Students "D" and "E".

⁴⁴ Parenthetical ("Stubby Statement") is in original charge.

- 3.2.5 That Respondent was again counseled by Superintendent Dominick about the use of inappropriate language to students in the District.
- 3.2.6 That Respondent in a letter to the Parents of Student "D" admitted that his comments as "a Principal of the Jordan-Elbridge High School were inappropriate and in bad taste".
- 3.2.7 That Respondent knew or should have known that as a High School Principal his comments were insensitive and unbecoming of a Principal and therefore Respondent should be dismissed from his employment in the Jordan-Elbridge Central School District.

According to the Respondent, while walking about the school on the morning of March 23, 2010 he encountered KIS and BB in the hallway. Having previously heard that KIS's sister, KCS, was involved in an accident over the weekend, he asked after her and her family's welfare. (T 09/30/13: 7373-74) KIS responded that they were not doing well. Then, either she or BB asked the Respondent if he wanted to see pictures. The Respondent replied, in words or substance, "well not really," but KIS or BB showed the Respondent a picture or pictures taken by KIS's father while KCS was at the hospital, showing "pretty bloody and gory" images of KCS's hand, which had suffered two partially severed fingers in the accident. (*id.* 7375) The Respondent testified, "I wasn't sure what to say and I misspoke and said is it too early to call her stubby, to which BB responded, that's wrong, Mr. Zehner. And I said, yeah, you're right that's wrong. I'm sorry." (*id.*) After a continued short conversation, the Respondent continued his "rounds around the building," then went to the office, called Ms. Dominick, "to let her know that I had really screwed up this

time.” (*id.*) Ms. Dominick was not in her office, whereupon the Respondent continued walking around the school, and when he returned to his office, Ms. Schue was there. Shortly afterward, KIS’s and KCS’s father, GS, arrived. (*id.* 7376-77)

KIS testified that when the Respondent made the “stubby” remark, she was upset, wanted to cry, and then called her father and told him what the Respondent had said. She also told her father that she wanted to leave school and go home, but her father told her to stay there, that he would be there shortly. After speaking to her father, KIS eventually went to the office. (T 09/06/12: 2469) The Respondent was there, “and another woman,” and her father was there. Her father called KIS to the office door and had her repeat what the Respondent said in the hallway earlier that morning. When she did as asked, her father sent her out, at which point a “loud” discussion ensued for a half-hour to forty-five minutes. (*id.* 2472-73, 2492-95)

During the encounter with GS, Ms. Schue was also in the office. According to the Respondent, GS was in the office for ten or fifteen minutes and was quite upset. (T 09/30/13: 7379-80) According to Ms. Schue, GS was “very angry,” “red in the face,” “yelling.” He “repeated himself,” “made gestures,” and “used profanity.” The Respondent remained seated during the entire encounter. (T 020413: 4760; T 020513: 4958) Ms. Schue testified that the Respondent apologized to GS and told him that he “was willing to apologize when people thought that was appropriate.” (T 02/04/13: 4760-61; T 02/05/13:

4959) As GS left the office, he told the Respondent that he would complain to Ms. Dominick and contact the State Education Department. (T 02/04/13: 4761)

GS testified that when he heard about the Respondent's remark from KIS, he was "floored," "outraged," and "disgusted." (T 09/06/12: 2514) He said that the injury had an effect on the whole family and that he thought that the Respondent's remark humiliated KIS. (*id.* 2511) GS further testified that when he arrived at the school, the Respondent was there, but that KIS was not yet at the office. (*id.* 2516-17) GS testified that when he confronted the Respondent in his office, the Respondent had his legs and arms crossed and that he had a "smug look on his face." (*id.* 7517) GS testified, "there was a heck of a lot of swearing. Me calling him a scumbag, a dirt bag. Told him that if he wasn't on school property that I probably would have ripped his head off. And if I ever caught him off of school property that I probably do the same." (*id.* 2521) GS also shook his fist at and pointed at the Respondent, but he made no movement toward him. (*id.* 2551)⁴⁵ According to GS, the Respondent never apologized to him that morning, (*id.* 2523-25) and that he received an apology letter two weeks after the encounter. (*id.* 2526) He also claimed that the injured daughter, KCS, never received an apology from the Respondent. (*id.* 2533, 2544)

The Respondent testified that he composed letters of apology to GS, KIS and BB that same day. Furthermore, at Ms. Dominick's suggestion, he composed one to KCS as well. (T 09/30/13: 7378-79; T 082913: 7517-18;

⁴⁵ GS is a large, muscular and powerful looking man. By his account, he is five feet-eleven inches tall, and weighs 350 pounds. (T 09/06/02: 2549)

D166; D88) After he had written the letters, he sent the drafts to Ms. Schue for editing, then sent them to the addressees and, attached to an email on that same day, to Ms. Dominick. (*id.* 7379; T 08/29/13: 7530-31; D176) In the letters, the Respondent said he made “no excuses” for his remarks, expressed remorse, and asked “in time for [their] forgiveness.” (D176)

Following the meeting with GS, the Respondent sent a brief email memorandum to Ms. Dominick summarizing the relevant events to that time. (D165) That day, the Respondent and his union representative, Brad Hamer, met with Ms. Dominick. At that meeting, Ms. Dominick ordered the Respondent to work from home “for a few days.” (T 09/30/13: 7384-85; T 08/29/13: 7522-23, 7528-30) She then summarized the meeting in a memorandum dated March 29, 2010, in which she promised a “full investigation,” and cautioned about his “failure to consider your words before you speak....” (T 08/29/13: 7353, 7519 *et seqq.*; D167) Included in the memorandum were instructions to “minimize [his] interaction with students.” He was also required to attend “sensitivity training,” and to “cease and desist trying to be humorous with students.” Finally, Ms. Dominick required that he “continue to keep a journal, including a detailed account of all conversations with students that are outside the realm of keeping order.” (D167) The Respondent testified that he spent two weeks at home, then he “eased back” for another two weeks, spending more time in his office than usual. (T 09/30/13: 7388-91) The Respondent testified that he continued to attend counseling for his

“lack of sensitivity,” and, to the time he testified in these proceedings, was still seeing a counselor. (*id.* 7391-92)

In analyzing this charge, it is appropriate to analyze the Respondent’s known and admitted behavior vis a vis the charge, which is “conduct unbecoming an administrator.” The Respondent’s remark was a mistake, at once spontaneous and provoked by an awkward and uncomfortable situation that the Respondent attempted to ameliorate with humor, albeit injudicious humor. According to his testimony, when the Respondent encountered KIS and BB in the hallway early that morning, he was motivated by concern for KIS, her sister, and her family. He had earlier become aware of the accident, which occurred the previous weekend. When either KIS or BB showed him the “bloody and gory” images of the injury, he reacted with an attempt at humor. The Respondent testified that, in awkward or uncomfortable situations, he has “a tendency to try to use humor...when situations are really tense.” He called this tendency a “fault.” (T 09/30/13: 7381)

Almost immediately upon making the remark, the Respondent knew he had made a mistake, and he apologized to KIS and BB. (*id.* 7375) He contacted Ms. Dominick, who was not yet in her office. He then continued walking through the school, then went to his office where he had the meeting with GS. At that meeting, he apologized to GS while absorbing a loud, profanity-laden, and threatening harangue, during which he (wisely) kept his seat and his composure and restrained his tongue. Thereafter, he was ordered to work from

home for two weeks, and attended (and was still attending at the time of his testimony herein) sensitivity training to address his tendency to use the type of humor that provoked the incident in the first place, among other issues.

The behavior described in the charge and admitted to by the Respondent received the appropriate treatment for the type of behavior acknowledged. His insensitive remark on March 23, 2010 does not, however, rise to conduct unbecoming an administrator. He was guilty of making a careless, even foolish remark or “joke” in what was an awkward situation. However, he did not do so with intent to harm, or out of malevolence or hostility toward KCS’s family. “Conduct unbecoming” is a charge reserved for more serious actions, such as lewdness, or inappropriate touching, or improper liaison with students, or violence, or theft, or using one’s public position for personal gain, or some serious breach of ethics, or moral turpitude.

Under the circumstances, Ms. Dominick’s immediate reaction was even-handed and measured, in accordance with the well established principle of balancing appropriate punitive action with corrective and rehabilitative remedies. In this instance, the evidence indicates that the Respondent learned a lesson and continues to do so in ongoing counseling.

For the foregoing reasons, I conclude that the Respondent is not guilty of conduct unbecoming an administrator. Therefore, I hereby dismiss in their entirety the charges contained in **HO1, 3.2.1 through 3.2.7**.

Respondent Released Student Information To Another Student

- 3.3.1 That Respondent knew or should have known that as a Principal he has the responsibility to act in a professional Manner.
- 3.3.2 That Respondent as a Principal should have known the laws, regulations and policies protecting the privacy rights of students.
- 3.3.3 That on or about April 5, 2010 Respondent did at an after school event make negative comments about male Student "F" ("RB") to a female student from a neighboring school district.
- 3.3.4 That on April 6, 2010, Superintendent Dominick met with the Respondent to investigate his comments to Student "F".
- 3.3.5 That Respondent during the April 6, 2010 meeting admitted that he warned the female student from the neighboring school district of Student "F" and listed several character flaws of Student "F".
- 3.3.6 That Superintendent Dominick spoke with Respondent on prior occasions and as recently as March 2010 concerning his use of inappropriate comments, both inside and outside of school.
- 3.3.7 That Respondent therefore knew or should have known, certainly after counseled, that his derogatory comments about Student "F" to another student were unbecoming of a High School Principal and that Respondent should be dismissed from his employment with the JordanElbridge Central School District.

This charge alleges that the Respondent violated a student's privacy. The student, RB, had past disciplinary issues involving his relationship with two female students. One relationship ended in a violent encounter between RB and the female student and included accusations that RB had shared around the school naked images of a former girlfriend.⁴⁶ Purportedly, RB also publicly

⁴⁶ The respondent testified that he had learned this from his daughter, HZ. (T 10/02/13: 7985)

called both ex-girlfriends “sluts” and “whores.” (T 09/30/13: 7411-12, 7987; D98)

According to the Respondent, at or about April 5, 2010, while attending a track meet at the Weedsport School District, a neighboring district, at which one of his daughters, HZ, was a competitor, the Respondent had a conversation with his daughter and another member of her team, EM. Both HZ and EM attended Weedsport at the time and were members of the Weedsport team. (T 09/30/13: 7414) The Respondent testified that during the conversation, EM revealed that she was dating RB and asked the Respondent if he knew RB and what did the Respondent think of him. The Respondent testified that he told her that RB “had potential,” but that he was a “bad breaker upper.” (*id.* 7409, 7983; D98) The Respondent claims that he used the phrase, “bad breaker upper,” from his memory of a line from the television comedy series, “Seinfeld.” (T 09/30/13: 7411) According to the Respondent, his daughter then joined the conversation and “berated RB up and down.” (*id.* 7410) The Respondent testified that he then disengaged from the conversation and turned to watch the track meet.

EM testified that she was a student at Weedsport and had started dating RB in early 2010,⁴⁷ and was dating him for a “few months” when she met the Respondent at the track meet in April 2010. (T 10/15/12: 2900-02) She testified that after yet another student asked whether RB was coming to the track meet, that she, the Respondent, and HZ “all ended up on the topic” of RB. (*id.* 2904)

⁴⁷ According to RB, EM and he started dating February 28, 2010 (T 07/18/12: 2163)

She testified that the Respondent said the RB was “a bad breaker upper.” (*id.* 2905) She also said that the Respondent told her that RB had bad grades, was a bad student, that his ex-girlfriend punched him in the face because he cheated on her and told EM, in referring to RB, “once a cheater always a cheater.” (*id.* 2906-08) EM further testified that, “even if the facts are right about him,” she did not want to hear these things about her boyfriend, and that the conversation upset her. (*id.* 2912) Shortly after the conversation, EM sent a text message RB, then told him “all the details when [she] got to his house that night.” (*id.*)

The next day, RB went to the high school and reported the incident as told to him by EM to Ms. Thomas-Madonna. (T 07/18/12: 2161) He was “mad and upset” when EM reported the incident to him the night before. (*id.* 2166) According to RB, Ms. Thomas-Madonna informed him of the “privacy law,” and told him that the Respondent had broken the “privacy laws.” (*id.* 2162, 2167-68, 2189) RB further testified that Ms. Thomas-Madonna instructed him to write a statement, that she “sat me down and told me to write down everything,” and that “she was going to take care of it, take it to the superintendent, and she had me write a statement and sign it.” (*id.* 2167-72; D78)

Ms. Thomas-Madonna testified that RB came to her with prior knowledge of the “privacy law” because she had explained it to him during a previous encounter involving the violent incident with an ex-girlfriend

mentioned above. (T 07/17/12: 2036-37) ⁴⁸ She testified that when RB came to her on April 6, he was upset, “red faced,” “agitated,” “angry,” (*id.* 2038) and that his privacy rights had been violated. She testified that, before having RB write his statement, she had consulted with Ms. Dominick, who had asked for the statement. (*id.* 2040-41) According to the Respondent, when Ms. Thomas-Madonna showed him RB’s written statement, he told her to send it to Ms. Dominick. Ms. Thomas-Madonna and the Respondent did not speak about the conversation at Weedsport before she secured RB’s statement. (T 09/30/13: 7415-16)

The evidence presented in this matter does not convince. The Respondent testified that when he had the conversation with EM at Weedsport, it was in response to her inquiry. EM testified that she knew the Respondent was the principal at Jordan-Elbridge and also knew him as her friend’s and teammate’s father. (T 10/15/12: 2902) When asked about RB, the Respondent gave a careful and circumspect answer, that is, that RB had potential and that he was a bad breaker upper. In her testimony, EM used the same term, “bad breaker upper,” but then went on to describe the other comments she attributed to the Respondent. However, she also testified that there was a fourth party involved in the conversation and that when RB’s name came up, they “all ended up on the topic.” (*id.* 2904) Also, she testified that she was “pretty sure” that it was the

⁴⁸ RB’s and Ms. Thomas-Madonna’s testimonies differ on this matter. If RB is to be believed, Ms. Thomas-Madonna told RB on April 6, that the Respondent violated the “privacy laws.”

Respondent who told her about RB's violent break-up with a previous girlfriend, then went on to say that HZ spoke and filled her in on the details. (*id.* 2935) ⁴⁹

Ms. Adolf, the Respondent's secretary, testified that she took a phone call from RB's mother, who was upset that the Respondent had talked about her son. When Ms. Adolf asked the Respondent what had happened, he told her, "all [I] said was [RB] was a bad breaker upper." Moreover, in taking issue with Ms. Dominick's summary of her conversation with the Respondent on April 6, (D97) the Respondent insisted, "I told you that I said to the young lady that [RB] was a 'bad breaker upper' and that he had potential." (D98) The Respondent insisted that he described for Ms. Dominick during their conversation the details as to why RB was a bad choice for EM but did not admit that he said these things to EM the night before. (T 09/30/13: 7417-18) The Respondent insisted further that he did not reveal knowledge that he possessed exclusively as a principal. (T 10/02/13: 7986)

Even assuming, *arguendo*, that the Respondent revealed more to EM than his comment that RB was a "bad breaker upper," the District did not produce any student record for examination to determine if the student's confidential record had indeed been revealed or if what may have been revealed was nothing

⁴⁹ I do not presume that any information HZ possessed about RB and his actions were passed on to her by the Respondent. Certainly, there is no such proof, nor has any been offered. I take judicial notice that the two school districts are approximately ten-minutes apart, and that there is intermingling between the student bodies. After all, RB, a Jordan-Elbridge student, was dating EM, a Weedsport student.

more than common knowledge apart from the student record. I cannot convict based on the presumed student record. Nonetheless, I am not convinced that the Respondent said anything more revealing to EM than what he testified. He was concerned for EM as a father of daughters might be, but, as he credibly insisted from the beginning to Ms. Dominick, and as he told Ms. Adolf, he did not reveal anything of a confidential nature. Telling EM that RB was a “bad breaker upper” was hardly equivalent to a derogatory comment, nor does it constitute a comment for which one should be disciplined.

For the foregoing, I conclude that the Respondent is not guilty of conduct unbecoming an administrator. Therefore, I hereby dismiss in their entirety the charges contained in **HO1, 3.3.1 through 3.3.7.**

Respondent Has Engaged In A Pattern Of Inappropriate Comments During School

The charges read:

- 3.4.1 That Respondent has engaged in a pattern of conduct through comments made to staff concerning his personal life that have detracted from the educational process.
- 3.4.2 That on or about July 9, 2010 Respondent engaged Associate Principal Madonna in a conversation concerning his family member's inappropriate conduct.
- 3.4.3 That Associate Principal Madonna felt extremely uncomfortable learning of the intimate details of Respondent's family member's life.
- 3.4.4 That as a result, on July 9, 2010 Respondent was counseled by his Supervisor, Assistant Superintendent for Instruction, Susan Gorton ("Assistant

Superintendent Gorton") against Respondent's engaging faculty and staff members in conversations about his personal life.

- 3.4.5 That Respondent, again on September 20, 2010 told Associate Principal Madonna that he was going to be suspended from employment at 1:00 p.m. during a meeting with Superintendent Dominick.
- 3.4.6 That again Associate Principal Madonna was made extremely uncomfortable by Respondent's announcement to her of his assertions.
- 3.4.7 That Respondent should have known, certainly after being counseled on same, that his comments of a personal nature were unprofessional and constituted conduct unbecoming of an administrator and thus Respondent should be dismissed from his position in the Jordan-Elbridge Central School District.
- 3.4.8 Respondent recently had a motivational speaker present at the High School to give a presentation. The Motivational Speaker was severely handicapped and disabled, with no arms or legs.
- 3.4.9 The Respondent referred to the motivational speaker as "Bob", when his name was really "John".
- 3.4.10 When questioned by a staff member why he continued to refer to the motivational speaker as "Bob", he responded as follows: "How does a handicapped person swim? He bobs."
- 3.4.11 The Respondent repeated this same remark and these similar comments to various staff and personnel in the District.

These charges stem from three separate complaints lodged against the Respondent by his associate principal, Ms. Thomas-Madonna.

First, according to Ms. Thomas-Madonna, in early July 2010 the Respondent, during a conversation about which she was unable to supply a context, told her about an incident involving a female relative of his, an adopted

daughter and a minor, who had a sexual encounter on a school bus with an eighteen-year-old boy. He told her that he had to discipline his own relative in his capacity as an administrator and that he pressed charges against the boy. According to Ms. Thomas-Madonna, the Respondent used explicit language describing the school bus encounter, namely, “hand-job” and “blow-job.” (T 07/17/12: 2046-48) She testified that she was “uncomfortable with the whole conversation,” was “shocked,” “mortified,” and “offended as a woman.” (id. 2046-50) However, when asked the context of the conversation, she testified that she was so “shocked by the discussion” that she could not recall the context. (T 07/18/12: 2285) She testified that she told the Respondent that she had no need to know such information and that she was offended. (T 07/17/12: 2049; T 07/18/12: 2286) She further testified that “at some point,” but not immediately, she reported the conversation to Ms. Gorton. (T 07/17/12: 2050; T 07/18/12: 2287) According to Ms. Thomas-Madonna, Ms. Gorton had the same reaction as she did when she reported the conversation.

On July 9, 2010, Ms. Gorton sent a memorandum to the Respondent taking him to task for “engaging faculty and staff members in conversations about your personal life during the work day.” She recommended that the Respondent, “Keep your personal life issues to yourself. Stop engaging faculty and staff in conversations that have nothing to do with their work or yours.” (D110) The Respondent replied to Ms. Gorton’s memorandum, stating

that he was “unable to provide a response,” because the memorandum was “devoid of any specific facts.” (D111)

The Respondent testified that he shared with Ms. Thomas-Madonna an incident in which he had to suspend his fourteen-year-old daughter who admitted that she “was touching [the boy’s] penis on the bus.” (T 09/30/13: 7422) The Respondent said that he told Ms. Thomas-Madonna that he involved Mr. Shafer, the middle school principal, in the matter because it involved his daughter and that there was a superintendent’s hearing on the matter. He also told Ms. Thomas-Madonna that he pressed charges against the boy because he was an eighteen-year-old. (*id.* 7420-23) He testified that he was telling Ms. Thomas-Madonna how things work when dealing with a family member, that they were “just sharing different stories,” and “she had shared stories about stuff that happened when she was at C.N.S.” The Respondent testified that he did not “really recall [Ms. Thomas-Madonna] having much of a reaction at all, because it was...we were discussing stuff that happens in school all the time and how you—the choices that you make in disciplining kids.” He received no oral and saw no physical reaction from Ms. Thomas-Madonna. (*id.* 7423-24, 7449-50)

The second of these charges involved the Respondent telling Ms. Thomas-Madonna on September 20, 2010, that he would be suspended from his employment on that afternoon. The Respondent admits to telling this to Ms. Thomas-Madonna. He testified that he had heard from several people at a

community function the previous weekend that he would be suspended, and they wished him luck. (*id.* 7425) The Respondent further testified that he told Ms. Thomas-Madonna on the same morning, with Mr. Hamer present, that he was going to be suspended that afternoon, “and she should be prepared.” (*id.* 7424-25)

The third matter rises from a complaint lodged by Ms. Thomas-Madonna concerning a comment made by the Respondent in reference to a motivational speaker slated to speak at a high school assembly program.⁵⁰ According to the Respondent, Wendy Pidkaminy, the high school social worker, after reading a book by the engaged speaker, was so impressed that she asked the Respondent to bring the author to the high school to speak. He agreed.⁵¹ (T 09/30/13: 7426; T 10/03/13: 8200, *et sqq.*) The speaker was a multiple amputee. Ms. Pidkaminy and the Respondent were in Ms. Pidkaminy’s office, and, during a conversation, the Respondent “shared a Bob joke, and how I learned these series of jokes.”⁵² (T 10/03/13: 8200-01) According to the Respondent, while a teenager, he was employed as a counselor at a summer camp for severely handicapped children, his brother being one of them. One of the campers, who had no arms or legs, told the same joke about himself. (*id.* 8203) According to the Respondent, after

⁵⁰ The times of these exchanges are indefinite in the record.

⁵¹ According to Ms. Thomas-Madonna, the Author was John Winters, the book, *Get Off Your Knees*. (T 07/18/12: 2258)

⁵² The “Bob joke” is in reference to how a person with no arms or legs swims. The punch line is, in words or substance, he doesn’t swim, he bobs.

telling the story to Ms. Pidkaminy, when conversing about the speaker, she and the Respondent privately referred to him as “Bob.” (*id.* 8200-8201; T 09/30/13: 7426-27)

On or near the day the speaker was due at Jordan-Elbridge, Ms. Thomas-Madonna, Ms. Pidkaminy and the Respondent were discussing the final arrangements for the speaker’s special needs. Ms. Thomas-Madonna heard the Respondent refer to the speaker to Ms. Pidkaminy as “Bob.” When she asked why they were calling the speaker, whose name was John, Bob, the Respondent explained to her the origin of the reference, that is, he told her the “joke.” (T 07/17/12: 2053-54; T 09/30/13: 7427) According to the Respondent, there was no immediate reaction from Ms. Thomas-Madonna. However, when asked on direct examination, “And what was your reaction to these remarks?” Ms. Thomas-Madonna answered, “I thought it was unbelievably offensive considering that we have handicapped and special ed students in our building, that a principal would say something like this and find it humorous.” (T 07/17/12: 2053) However, she did not testify that she told the Respondent this or that she admonished or challenged the Respondent about the “joke” at the time she heard it. She did testify that she reported the remark to Ms. Gorton, but put nothing in writing. (T 07/18/12: 2298)

No one else was brought to testify about hearing the Respondent tell the “joke,” although Ms. Thomas-Madonna insisted that she heard the Respondent

tell it several times in front of other people, including Ms. Adolf. (T 07/17/12: 2052-53)

The three isolated matters referenced in these charges do not constitute “a pattern of conduct,” nor has it been shown that the behavior described “detracted from the educational process.” On that basis alone, the charges are worthy of summary discharge. However, I shall provide some brief reasoning.

The first incident references a discussion shared by the Ms. Thomas-Madonna and the Respondent during a discussion in which Ms. Thomas-Madonna could not recall the context. The Respondent credibly testified that the context of the conversation was that Ms. Thomas-Madonna and he were exchanging stories about student discipline experiences. He shared the matter about disciplining his child and how he had to involve another administrator because it involved his child. Ms. Thomas-Madonna claimed that the Respondent, when describing the encounter between his daughter and the male student on the school bus, used the terms “hand-job” and “blow-job;” while the Respondent testified that he told her only that his daughter touched the boy’s penis. I credit the Respondent’s testimony over Ms. Thomas-Madonna’s for good reasons, not the least of which is Ms. Thomas-Madonna’s obvious hostility toward the Respondent throughout her lengthy testimony in these proceedings, and that she had and still has much to gain as the Respondent’s replacement. Furthermore, I find it difficult to believe that, if Ms. Gorton heard what Ms. Thomas-Madonna claimed she reported to her, and that if Ms. Gorton

found it so objectionable as to make it “uncomfortable” to repeat in her testimony what Ms. Thomas-Madonna purportedly reported to her, she did not include clearer references in her memorandum; a memorandum so vague as to make it impossible for the Respondent to defend himself in his response.

(D110; D111) Ms. Thomas-Madonna and the Respondent were sharing administrator war stories, one of which happened to involve a family member of the Respondent’s. What the Respondent shared hardly seems inappropriate given the topics being discussed and the context in which the Respondent told of the event.

The second incident, the so-called “Bob joke,” does not rise to an act worthy of discipline. I believe the Respondent’s telling of how he first heard the so-called joke, and, for good or bad, accept it at face value. The joke was an in-joke between the Respondent and Ms. Pidkaminy. It was shared with Ms. Thomas-Madonna only when she asked after hearing Ms. Pidkaminy and the Respondent talking about “Bob.” The Respondent did not offer the joke unsolicited, nor is there evidence that he broadcast the joke or used it at all outside the context of Ms. Pidkaminy’s and his conversations. As tasteless as the joke is in certain contexts, it is not always so, evidenced by how the Respondent heard it in the first place as a teenager at a camp for the severely handicapped by one suffering the same handicap as the invited speaker. How one reacts is a matter of preference, sensitivity, and taste. Ms. Pidkaminy, a school social worker, was not offended, and even participated in the reference

between her and the Respondent. Simply because Ms. Thomas-Madonna was offended, does not mean that the Respondent is guilty of conduct unbecoming an administrator.

I don't understand the rationale for the third charge, except that the District attempts to connect it to Ms. Gorton's memorandum (D110) to show a "pattern of conduct." As the Respondent testified, the weekend before his suspension, the word of his impending suspension was known in the community, as people who knew about it approached him at a community function. Moreover, Mr. Hamer referenced, "Many people know about it...", in his short memorandum on September 20, the day the Respondent was suspended. (D177) The Respondent's simple statement to Ms. Thomas-Madonna, his apparent replacement, that he was about to be suspended and that she should prepare herself, hardly rises to be worthy of mention, much less discipline.

For the foregoing reasons, I conclude that the Respondent is not guilty of conduct unbecoming an administrator. Therefore, I hereby dismiss in their entirety the charges contained in **HO1, 3.4.1 through 3.4.11**.

The charges contained in **HO1, Charge 4**, allege, "The Respondent is Guilty of Incompetence," because of his "Improper Issuance Of A High School Diploma to Student A Student, (sic) "Release of Confidential Employee Codes," and he misused the NoveNet system."

Respondent's Improper Issuance Of A High School Diploma To A Student

- 4.1.2 That as the High School Principal, Respondent should and is required to know the requirements for receipt of a New York State diploma by a student.
- 4.1.3 That as the High School Principal, Respondent should and is required to have knowledge of the requirements that are necessary for a student to obtain course credit through the use of NovaNet.
- 4.1.4 That Respondent knew or should have known that it was not proper to award Student "A" ("TL") a June 2010 diploma for course work taken after June 2010 without proper documentation and signatures.
- 4.1.5 That an awareness as to the proper awarding of a High School Diploma, the relevant laws and regulations as well as an awareness of the proper policies and practices, is so fundamental to the appropriate operation of a High School that the Respondent is guilty of incompetence if he is not aware of same.
- 4.1.6 That if, in fact, the Respondent did not know the proper rules, laws and/or procedures regarding the awarding of a New York State High School Diploma then the Respondent is incompetent in the performance of his duties and as such should be dismissed.

As written, these charges are so similar to the charges contained in 1.1.1 - 1.1.16 and 2.2.1 through 2.2.12 that they are duplicative and redundant, except that the charge is incompetence instead of insubordination and conduct demonstrating immoral character.

For the same reasons discussed herein above in charges 1.1.1 through 1.1.16, and 2.2.1 through 2.2.12, I conclude that the Respondent is not guilty of incompetence. Therefore, I hereby dismiss in their entirety the charges contained in HO1, 4.1.2 through 4.1.6.

Respondent's Release Of Confidential Employee Codes

- 4.2.1 That as a High School Principal, Respondent should and is required to know the Jordan-Elbridge Central School District photocopying procedures.
- 4.2.2 That as the High School Principal, Respondent knew or should have known that individually assigned photocopier codes are confidential and are not to be posted.
- 4.2.3 That on May 19, 2010, Respondent received the confidential photocopier codes and then posted all of the confidential codes for the entire High School Staff above the photocopier located at the High School for all to see and use.
- 4.2.4 That on May 19, 2010, Respondent admitted to Associate Superintendent Gorton and Director of Operations, Paula VanMinos ("Director of Operations VanMinos") that he had posted the confidential codes.
- 4.2.5 That Respondent knew or should have known of the excessive use of the photocopier at the High School, the cost of public funds associated with the uncontrolled and unaccounted use thereof, the District procedures for photocopying and that the individually assigned employee use codes were confidential.
- 4.2.6 That if, in fact, the Respondent did not know the Jordan-Elbridge Central School District's photocopy procedures, and the confidential nature of individual codes to each High School staff, then the Respondent is incompetent in the performance of his duties and as such should be dismissed from employment with the Jordan- Elbridge Central School District.

On May 3, 2010 an email memorandum from "Support" (at the end of the email identified as the "JE Technology Department.") (T 09/30/13; 7313) was circulated to "Staff" regarding "New Copiers." The memorandum announced, "Each school has a new copy machine in both the main office and the teacher workroom areas." It instructed that the staff would be "required to input a 5

digit account number to make copies or scan documents, you can get this account number from either your main office secretary, the technology department at extension 522, or schooldude.” (R87) The memorandum followed with instructions on how to enter the account number, which included first entering an “Account Name.” (*id.*)

According to the Respondent, teachers frequently forgot their numbers (in each case consisting of five digits), and would, therefore, ask Ms. Adolf, who would then look-up the numbers from the list she had in her possession. (T 09/30/13: 7307-10) The Respondent testified that Ms. Adolf was frequently interrupted during the day to tell the teachers their account numbers, so he instructed her to post the numbers (D57) inside the cabinet door above the copier located in the main office. (*id.* 7311) Ms. Adolf testified that the Respondent instruct her to post the numbers “so the teachers wouldn’t bug” her. (T 05/29/12: 2161) Also, Ms. Adolf testified that Kevin Solon, from the technology department, emailed the list to her. According to Ms. Adolf, she did not receive any word from anyone that the account numbers were confidential, and that she did not consider them so. (*id.* 2434-35)⁵³ The Respondent testified that he did not interpret the May 3 memorandum to mean that the numbers were confidential. (T 09/30/13: 7313)

⁵³ The email transmitting the codes was not offered by the District. The District assumed that the May 3 email from “Support” was the transmittal email for the list of numbers. (D57) However, that is not clear from the record. Attachments referenced in D103 were not identified. (T 09/06/12: 2707, *et sqq.*)

In an odd exchange of memoranda between Ms. Dominick and the Respondent,⁵⁴ Ms. Dominick took issue with the Respondent's posting of what she called "confidential codes," and chided him for his attitude toward Paula VanMinos, the District's Operations Officer, and Ms. Gorton during a phone conversation he had with them regarding the account numbers in particular and the District's copier policy in general. Previously, the Respondent was aware that the District was intent upon gaining control over the elevated use of copiers at the schools, and understood the account numbers to be a means of tracking individual use. (T 10/03/13: 8106; D185) However, up to the point of Ms. Dominick's memorandum, the account numbers were identified as just that, account numbers, and there was nothing in writing that indicated that the account numbers had become "confidential codes." Furthermore, the incident of excessive use at the high school discussed in an exchange of emails on May 12 among Ms. VanMinos, Ms. Gorton and the Respondent, and referenced in Ms. Dominick's chiding memorandum to the Respondent on May 20, concerned an overuse of the copier located in the teacher workroom, where the codes were *not* posted, not the main office where the codes were posted behind the cabinet door, indicating that, at that point, the posting should not and would not have been an issue in the Respondent's mind.

⁵⁴Odd, because Ms. Dominick's memorandum to the Respondent is dated May 20, 2010, but it is signed by her on June 3, 2010, yet, the Respondent's memorandum is dated May 26, 2010, one week before Ms. Dominick signed her memorandum.

According to Ms. Thomas-Madonna, although she could not recall if if she received anything in writing, she recalled that Ms. VanMinos instructed at an Administration Leadership Team (“ALT”) meeting held sometime before the distribution of the account numbers, that the “codes” were to be “confidential.” (T 07/18/12: 2263-65) However, no other ALT member was called to so testify, nor was Ms. VanMinos. Ms. Thomas-Madonna was the only witness called to testify by the District with such a recollection. I do not credit her testimony.

Ms. Thomas-Madonna also testified that the numbers were posted on the outside of the cabinet door, thereby conflicting with what I consider to be the more credible testimony of Ms. Adolf and the Respondent.

The account numbers were removed from above the main office copier after the Respondent received Ms. Dominick’s memorandum. (T 09/06/12: 2695; T 02/05/13:4806; T 05/29/12: 2162)

By the evidence, there is no foundation to prove incompetence. The original memorandum from the technical department identified the list as account numbers. The list was distributed to secretaries who became one of the sources from which the teachers were able to retrieve their numbers. At some point, the brand was changed, and the account numbers became “confidential codes.” However, no one identified them as such until the Respondent’s discussions with Ms. VanMinos and Mr. Solon, followed by Ms. Dominick’s

chiding memorandum. Immediately after the Respondent received the memorandum, the numbers came down.

The District's makes its case on the presumption of facts not in evidence and of information and instructions not ever distributed by the technical department or any administrator. Furthermore, there was no proof offered that posting the numbers in the main office in any way compromised the tracking of copier use, only the assumption that that such posting, *ipso facto*, did so. Further, it is presumed that the teachers would use their colleagues' account numbers in place of their own, assuming, of course, that they would also know their colleagues' other user identifications. Finally, and paradoxically, the only proof offered that demonstrated copier overuse involved the copier located in the teacher work room, not in the main office where the numbers were posted.

For the foregoing reasons, I conclude that the Respondent is not guilty of incompetence. Therefore, I hereby dismiss in their entirety the charges contained in **HO1, 4.2.1 through 4.2.6**.

Respondent's Improper Enrollment

The charges read:

- 4.3.1 That as a High School Principal, Respondent should and is required to know the requirements and procedures for enrolling a student.
- 4.3.2 That on May 7, 2010, Student "B", ("MZ") a special education student with an Individual Education Plan ("I.E.P. ") was enrolled in the High School by the Respondent.

- 4.3.3 That Respondent allowed Student "B" to enroll in the High School and continue therein for three (3) days without any notice to the District's Special Education Department or plan in place for the Student to accommodate her special needs and establish programming and services.
- 4.3.4 That if, in fact, the Respondent did not know the procedures, laws and regulations for the enrollment of students with an I.E.P., then the Respondent is incompetent in the performance of his duties and should be dismissed from the employment in the Jordan-Elbridge Central School District.

In deciding the charges in specifications 2.1.2 through 2.1.5 above, I concluded that the Respondent did not enroll MZ into Jordan-Elbridge on May 7, 2010. For essentially the same reasons, I will dismiss these charges. The Respondent notified Ms. Susino that MS was returning to school on the following Monday. The Respondent was not routinely involved with enrolling students, and the fact that MZ was his daughter and a special education student with an IEP did not obligate him or, *ipso facto*, connect him any further. As discussed above, MZ was an adult student who left Hillside and returned to Jordan-Elbridge on her own. When Hillside notified the Respondent, he told Ms. Susino, MZ's guidance counselor. He took no active part in her enrollment or her immediate reintroduction into Jordan-Elbridge. The parent contact for MZ was the Respondent's wife and MZ's mother, CZ, who, accordingly, completed the requirements for MZ's IEP with Ms. Russ.

For substantially the same reasons discussed herein above in charges 2.1.2 through 2.1.5, I conclude that the Respondent is not guilty of incompetence. Therefore, I hereby dismiss in their entirety the charges contained in HO1, 4.3.1 through 4.3.4.

Respondent has misused the NovaNet system.

The charges read:

- 4.4.1 The District has in place a NovaNet system which is used by students who have failed or not completed various courses in order to assist them in graduating.
- 4.4.2 The NovaNet credit recovery software has certain rules for its use which must be complied with in order to ensure the integrity of the process.
- 4.4.3 On at least five (5) occasions, the Respondent permitted the use of the NovaNet credit recovery software in place of the student taking and attending the ordinary class, which is a violation of the requirements for the use of the NovaNet recovery software. The effect of allowing these students to take the NovaNet credit recovery system was that these students were permitted to gain credit for courses not properly taken.
- 4.4.4 The Respondent permitted the use of the NovaNet credit recovery software, to be utilized, by students and staff, without having adequate controls in place and without adequate supervision, thereby resulting in students receiving credits for courses not properly and credit not properly earned.

These charges assert that the Respondent committed a “violation of the requirements of the NovaNET recovery software,” when he allowed five students to be assigned NovaNET course work for accrual rather than recovery from courses already failed. The evidence for this charge was gathered by Ms. Mattie during her audit dated May 12, 2010. (R32) Ms. Mattie uncovered five instances of such use between the school years as follows: (T 10/16/12: 3239; D130) JBB, a BOCES student, took health between September 24, 2009 and March 16, 2010; ACA, another BOCES student, was assigned Earth Science, but never took the course on NovaNET; NDK, another BOCES student, took a mathematics course between October 9, 2010 and March 25, 2010; WHT took a

health course between September 17, 2009 and January 4, 2010; and MZ took a math course between September 9, 2009 and January 24, 2010. These courses were all apparently assigned at or near the beginning of the 2009-2010 school year, and the record indicates that, except for the student who was assigned but never took the course, all successfully completed the courses. Two of the students completed their courses in January 2010 and two completed their courses in March 2010, all well before Ms. Mattie's final audit on May 12, 2010.

Notwithstanding how or why the students came to be assigned these courses on NovaNET, the gravamen of this matter is that there were no such restrictions, rules, or regulations imposed on the NovaNET program when these students were assigned these courses in the fall of 2009. The first written restriction on NovaNET were contained in the agreement between the Respondent and JETA, an agreement reached during discussions that occurred from November 2009 and into March 2010, after the above five students began to take accrual courses. In their written understanding, the Respondent and JETA contemplated a more restricted accrual use. (R194; R195) However, when the understanding was reached, there was no proviso involving students already taking accrual work on NovaNET.

As noted above in the discussion of the charges contained in specifications 1.1.1 through 1.1.16, the doubts about NovaNET expressed by the Board in August 2009 were done in closed executive session, likewise for

the issues raised by what Ms. Fay purportedly told Mr. Mevec in February 2010, and attested to by Ms. Alley.⁵⁵ Throughout the auditing process and after, the Board had established no NovaNET policy, that is, not until October of the 2010-2011 school year, after the Respondent had been suspended and charged. (HO1) Also, as discussed above, Pearson, the creator of NovaNET, promoted the program as a credit accrual *and* credit recovery program. Furthermore, in Ms. Mattie's words, there were "no policies or procedures regarding usage of the software, and no guidelines of how credit is granted...." In fact, Ms. Mattie suggested that the District, "Develop clear policies and procedures that govern the usage and credit granting of the software." (R32 at Bates 000621) In addition, Ms. Dominick's response to the audit began: "Policies and procedures *will* be developed...." (*id.*) (Emphasis added) There is no basis for finding guilt for violation of "requirements" which did not exist.

Further, there is no foundation that NovaNet was allowed by the Respondent to function "without having adequate controls in place and without adequate supervision." NovaNET was established at Jordan-Elbridge with the approval of Ms. Dominick. Ms. Ely was, likewise, appointed with Ms. Dominick's approval. There was no evidence introduced that proved that any of the courses taken on NovaNET by any student in the system for either recovery or accrual, did not conform to the Jordan-Elbridge curriculum, irrespective of

⁵⁵ Ms. Alley's testimony, twice removed, bears weight only to the extent that whatever Mr. Mevec told her caused her to seek an investigation by Ms. Mattie of NovaNet use.

how individualized the courses may have been. As discussed above, even the curriculum for TL in chemistry, which Ms. Estlinbaum did not feel “comfortable” signing-off on, was approved by the science department. Further, Ms. Susino, by consistent practice, assured herself that NovaNET courses conformed to Jordan-Elbridge curriculum requirements before she assigned them. Moreover, there were no supervision issues raised directly by the administration to the Respondent until Ms. Thomas-Madonna, who had worked with TL at the middle school during the summer of 2010, assumed the belief that TL took the opportunity to abuse the system because he was “unsupervised.” If the supervision issue was indeed a genuine one, then the District, including Ms. Dominick, should have paid closer attention to where the Respondent was directed to set-up the system when the high school was torn apart for renovations during the summer of 2010. After all, the Respondent was directed to place the NovaNET computers at the Middle School. As discussed above, the NovaNET computer was set-up in a room at the Middle School main office suite. It was hardly isolated and unsupervised.

Finally, it would have well behooved the District to call Mr. Shafer or other Middle School personnel as witnesses to give weight to its charges that the NovaNET system was continually unsupervised. Failing to do so only infers against the District’s allegations. The two witnesses who had direct knowledge were Mr. Shafer and his secretary. Neither was called to testify. Instead, the District relied on the hearsay testimony of Ms. Thomas-Madonna

For the foregoing reasons, I conclude that the Respondent is not guilty of incompetence. Therefore, I hereby dismiss in their entirety the charges contained in HO1, 4.4.1 through 4.4.4.

Respondent Is Guilty Of Other Just Causes That He Has Engaged In Incompetence And Insubordination

The charges read:

- 5.1.2 That Respondent knew or should have known that as the Principal of the High School he, along with the other administrators, is responsible for preparing the year-end evaluations for the teachers.
- 5.1.3 That Respondent knew or should have known that for the teacher evaluations he is responsible to complete, he is to sign the teacher evaluations that he writes.
- 5.1.4 That Respondent knew or should have known that he was required to have a conversation with the teacher to discuss the teacher's work and the Respondent's recommendations for the teacher.
- 5.1.5 That of the teacher evaluations for the 2009-2010 school year, that Respondent was responsible to prepare, the Respondent did not author several of them.
- 5.1.6 That although Respondent did not write the teacher evaluations and counseling memoranda for the 2009-2010 school year, he did sign the evaluations and memoranda as being his own work.
- 5.1.7 That Respondent's lack of attention to the important work such as teacher evaluations again demonstrates that Respondent should be removed from his position with the Jordan-Elbridge Central School District.

As written, these charges are rather non-specific and difficult to evaluate, except that, by its claim that the charges were written as notice pleading, the District was permitted to offer evidence on what it claimed to be actions or

inactions by the Respondent that constituted acts of incompetence and insubordination. Irrespective of whether or not 3020-a permits notice pleading, I allowed the hearing to go forward and gave the District every opportunity to present its case, reminding the parties that I would “characterize the charges as they are written,” and that it would “be my responsibility to take the charges and determine whether the proof substantiates the charges as written.” (T 02/04/13: 4742)

Characterizing these specifics as written is no simple task. There appears to be one major allegation in these specifications, that is, the Respondent did not author “several” teacher evaluations that he signed, or that he signed something someone else authored “as being his own work.” However, with respect to other specifications, they do not constitute charges. Specification 5.1.2 states that the Respondent “knew or should have known that as the Principal of the High School he, along with the other administrators, is responsible for preparing the year-end evaluations for the teachers.” The statement means nothing unless connected to the one particular charge accusing the Respondent of signing evaluations he did not author. Only as it relates to that allegation, will I consider 5.1.2 to mean anything at all. Specification 5.1.3 states that the Respondent, for the teacher evaluations under his responsibility, “is to sign the teacher evaluations that he writes.” Again, I will consider this specification only in the context of the allegation that the Respondent signed evaluations he did not complete or author. Specification 5.1.4 seems unrelated to the authorship matter,

and there was no testimony offered by any particular teachers that the Respondent did not have conversations with them to discuss their evaluations. Specifications 5.1.5 and 5.1.6 are iterations of the same charge, that is, the Respondent did not author several evaluations and signed those same evaluations as his own.

During the 2009-2010 school year, Ms. Schue was the District's "Special Projects Administrator." As part of her duties, she assisted administrators, including the Respondent, in preparing evaluations and other documents, checking grammar, and rewriting. She once joined the Respondent during a classroom observation and evaluation of a teacher. Ms. Schue also assisted Mr. Shafer and Eric Varney, another administrator, with their evaluations of teachers. She helped by reviewing their work, making revisions and other suggestions, and providing other "feedback."

(T 02/14/13: 4726-28, 4744) Ms. Schue testified that during the 2009-2010 school year, administrators were learning a new format and "folks were struggling." (*id.* 4729) Hence, her heightened involvement. Ms. Dominick testified that such tasks were part of Ms. Schue's job, to help administrators with "the written word, preparing documents." (T 08/29/13: 7412) Even Ms. Dominick used Ms. Schue to assist her in writing the Superintendent's annual goals, to help her put her goals "in a form" that she would be "proud to show to the Board and to the public." (*id.* 7414)

Ms. Schue testified that she and the Respondent jointly observed a particular teacher on February 24, 2010 for an “Annual Professional Performance Review.” (T 02/05/13: 4784) She also testified that she wrote the narrative on the first draft prepared on March 8, 2010 (*id.* 4783-85; D144) and the same narrative survived into the evaluation that was sent to Ms. Gorton. (*id.* 02/04/13: 4730; D99A; D144)

Ms. Shue testified that she and the Respondent reviewed and discussed the evaluation, and where they sometimes disagreed on the ratings to be given in certain categories, the Respondent changed the ratings. Similarly, The Respondent testified that he asked Ms. Schue to assist him with the new evaluation “rubric,” and, with Mr. Sinclair’s permission, they jointly observed him. The Respondent acknowledged that Ms. Schue wrote most of the narrative, but also testified that they jointly observed Mr. Sinclair and that they had discussions regarding the evaluation. (T 10/02/13: 7805-06)

Ms. Schue also testified that she prepared drafts for three or four end-of-year project evaluations for tenured teachers who elected to submit projects in lieu of formal observations. She recalled doing so for three teachers, Jennifer Weaver, Rita Grome, and Steve Miller. (T 02/04/13: 4749) Ms. Schue testified that she compared the projects against “eight competencies” used by the District. She testified that she “would write a summary of what they presented and an indication of how well it demonstrated a satisfactory, satisfactory with recommendations for improvement needed, level of performance, specific to

each of the criteria.” (*id.* 4750-51) She further testified that she and the Respondent met and went over the projects and her recommendations, “discussed them and he determined the ultimate ratings.” (*id.*) Ms. Shue said that when and where there were no differences between them, the evaluation was sent as she prepared it to the teacher. When she and the Respondent differed, the Respondent made changes. Although they discussed the projects, Ms. Shue could not testify that she actually observed the Respondent read a project or even sign the evaluations, but she testified that she and the Respondent “talked about the contents of the project.” She did not recall that she ever “had any question as to whether he had read it or not.” (*id.* 4754-55)

By these proofs, the District has shown only that, on four evaluations, one involving a classroom observation and three involving project evaluations, Ms. Schue and the Respondent engaged in collaborative efforts as evaluators during the introduction of a new evaluation “rubric,” a rubric that Ms. Schue was assisting the Respondent and other administrators to assimilate. Ms. Schue, although the drafter of much of the narrative, did not make any of the final determinations as to ratings or even narrative. The narrative had to be acceptable to the Respondent. The fact that the Respondent accepted certain, or even most, of Ms. Schue’s narrative, is not probative that the Respondent signed something he did not author, because, in the end, although the evaluations were a joint effort, all final decisions were the Respondent’s. When Ms. Schue and

the Respondent differed, the Respondent entered the rating he determined to be appropriate.

The charge ultimately claims that the Respondent was inattentive to his duties. (“Respondent's lack of attention to the important work such as teacher evaluations.”) The evidence presented does not lead to such a conclusion.

For the foregoing reasons, I conclude that the Respondent is not guilty of incompetence and insubordination. Therefore, I hereby dismiss in their entirety the charges contained in **HO1, 5.5.1 through 5.1.7**.

The charges contained in **HO2, Charge 1**, allege, “The Respondent is Guilty of Conduct Unbecoming an Administrator and Insubordination.”

The charges are drawn from alleged Respondent behaviors at certain Board meetings between October 6, 2010 and January 19, 2011, (Specifications 1.1 through 1.31) and certain behaviors subsequent to January 19, 2011 on unspecified dates. I will first consider the specifications for the period between October 6, 2010 and January 19, 2011 for the Board meetings on the dates identified, namely, October 6, 2010 (Specification 1.1 through 1.11), October 20, 2010 (Specifications 1.12 through 1.13), November 17, 2010 (Specifications 1.14 through 1.16), December 22, 2010 (Specifications 1.17 through 1.19), and January 19, 2011 (Specifications 1.20 through 1.31). I will then consider the specifications regarding the alleged behavior post-January 19, 2011

Board Meeting of October 6, 2010

The Charges read:

- 1.1 Commencing on or about October 6, 2010, the Respondent was the subject of certain discipline charges preferred by the Employer against the Respondent.
- 1.2 Beginning on October 6, 2010, the Respondent appeared at a Board of Education meeting of the Jordan-Elbridge Central School District and engaged in highly unprofessional, inappropriate, scandalous, and objectionable conduct.
- 1.3 At the Board meeting of October 6, 2010, the said Respondent took the privilege of the floor in order to publically (sic) address the Board. In doing so, the Respondent was obligated to follow the rules and procedures of the Board of Education. Said policies and procedures mandated the Respondent, along with every other member of the public who was in attendance at the meeting, to adhere to certain appropriate standards of conduct.
- 1.4 Among those standards of expected conduct for the Respondent, was that the Respondent would not disparage persons who worked for the Employer or other persons. The Respondent was expected to obey the requirements for time limitations on the length of his presentation at the Board meeting when given the privilege of the floor.
- 1.5 At the meeting on October 6, 2010, the said Respondent did disparage individuals by name by making personal attacks upon them, attacking their integrity and competence through his remarks.
- 1.6 During said presentation by the Respondent, he raised his voice and shouted at the members of the Board of Education and others in a loud and disrespectful manner.
- 1.7 During said presentation, the Respondent refused to yield the floor, despite repeated requests that he do so. The Respondent exceeded his allotted time to speak and ignored the requests of the moderator to yield the floor.
- 1.8 During said presentation by the Respondent, he made personal and insulting remarks directed at various of the School District administration, as well as members of the Board of Education.
- 1.9 At the time of said presentation, there were not only members of the public

present, but also students of the high school, for whom the Respondent is expected, and indeed required, to be a positive example and role model through his behavior and conduct.

- 1.10 The Respondent's actions incited other members of the public who were present to engage in similar behavior.
- 1.11 The Respondent knew, or should have known, that his actions were likely to have a disruptive effect upon a meeting of the Board of Education and the Respondent knew, or should have known, that his actions were in violation of the Code of Conduct and Board of Education policies regarding appropriate behavior during meetings of the Board of Education.

These specifications, alleging “conduct unbecoming an administrator” and “insubordination,” are premised upon certain alleged speech and actions by the Respondent at a public Board meeting held on October 6, 2010. The conduct is characterized by the charges as “highly unprofessional, inappropriate, scandalous, and objectionable.”

The District offered proofs by the testimony of Ms. Alley, Board President on October 6, 2010, Penny Feeney and Diana Foote, Board members on October 6, 2010. The District also introduced a series of six re-recordings of original *Twitter* video feeds of the October 6, 2010 Board meeting. The video

feeds were originally posted by the *Syracuse Post Standard*. (D148; T 02/07/13: 5326-28) ⁵⁶

The Board held the meeting in the high school auditorium and it was attended by an estimated eight hundred people, presumably citizens, taxpayers, teachers, and students in the Jordan-Elbridge School District. (R144; R89; Ms. Alley T 02/11/13: 5819; Ms. Foote T 02/06/13: 5044; Ms. Thomas-Madonna T 07/18/12: 2318) ⁵⁷ According to a press account and the Board's minutes, thirty people, the Respondent included, addressed the Board during the public comment portion of the meeting, over a period of approximately two hours. (R144) Speaking at a microphone located in an aisle of the auditorium, The Respondent began his remarks reading from a prepared statement. (R204) The Respondent began by criticizing the Board for a number of actions involving his treatment as an employee and the Board's actions involving two other Jordan-Elbridge employees. He also made critical remarks about the Board's fiscal responsibility, the Board's auditor, Ms. Mattie, and the District's Director of Operations, Paula VanMinos. From the outset, the Respondent's remarks

⁵⁶ It is unclear from the disc exhibit (D148) precisely when the six *Twitter* videos were actually posted, but it is acknowledged that they are postings of the Respondent's remarks, or at least portions of his remarks, made at t Board meetings. The exhibit contains six excerpts from October 6, 2010, and two longer and more complete videos taken from the Respondent's *You Tube* postings of the January 19, 2011 meeting. It is also unclear from the exhibit precisely when the Respondent's posting were actually posted. The exhibit reproduces six October 6, 2010 excerpts which are identified herein by the last five digits of each particular excerpt file as shown on the disc exhibit. They are: 03542, 2 minutes 7 seconds; 04326, 1 minute 43 seconds; 85807, 40 seconds; 85916, 1 minute 40 seconds; 90145, 2 minutes 7 seconds; 90448, 1 minute 38 seconds. (Hereafter the excerpts will be referenced as, *i.e.*, D148 excerpt 03542, etc.)

⁵⁷ Ms. Feeney believed the figure of 800 in attendance was "exaggerated." (T 02/07/13: 5304-05) Ms. Schue put the number at approximately 500. (T 02/05/13: 4820)

were assertive, critical, contentious, and, when challenged by the Board's outside moderator⁵⁸ and Ms. Alley, confrontational. (D148) In his opening remarks, the Respondent stated that he would speak for the full five minutes promised him. (D148 - excerpt 85807)⁵⁹ He went on to say that he could not believe he was defending himself against pending 3020-a charges, because the percentage of students being graduated and the number of seniors going on to college had significantly improved since he became principal. (D148 - excerpt 85916) He further claimed that he had asked to Board, as far back as March 2010, to meet with him to talk about issues, but to no avail. He then offered to meet with the Board, either in public or executive session, about any pending action against him. (*id.*) He told the Board that if they had not reviewed the more than 100 pages of documents submitted in his defense before taking action against him, then they had not performed their "due diligence," because they were getting only one side of the story. (D148 - excerpt 90145) He claimed that he was threatened by the Board because he joined a *Facebook* page in support of Ms. Schue whom, he claimed, was sitting in a "rubber room," and

⁵⁸ The Board retained a professor from Syracuse University, Grant Reeher, to moderate the public comment portion of the meeting. (Heard and seen on D148; Ms. Feeney (T 02/07/13: 5302) Mr. Reeher volunteered his services. (Ms. Alley, T 02/11/13: 5739)

⁵⁹ The record is unclear as to the precise time allowed per speaker on October 6, 2010. For example, The minutes state in a boilerplate paragraph, "Speakers are asked to keep their remarks to two (2) minutes." (R144) Minutes of other Board meetings consistently allow five minutes. (R152; R154; R171; D146; D147; D149) Ms. Alley thought the limit was two minutes per speaker. (T 02/11/13 :5741) Ms. Foote and Ms. Feeney thought the limit was one minute per speaker. (T 02/06/13: 5046-47; T 02/07/13: 5303) Ms. Thomas-Madonna, who attended the meeting, testified that she thought the limit was set at five minutes. (T 07/18/12: 2319-20) Ms. Schue remembered that there was a time limit, but did not recall what the limit was. (T 02/05/13: 4821) The Board minutes indicate that thirty people spoke over a stretch of two-hours, which would indicate that the most accurate answer for the time allowed per speaker was closer to or at five minutes.

that the investigation of her conducted by Mr. Mevec had “come up dry.” (*id.*) He also criticized the Board for spending “tens of thousands of dollars” to get rid of Ms. Schue, Mr. Hamilton, Mr. Scro and himself, and that he hoped, as a taxpayer, that, in spending that money, the Board had done its “due diligence.” (*id.*) He further called the Board’s treatment of Mr. Scro, “heartless and dysfunctional,” and warned that Mr. Scro’s discharge would lead to an expensive wrongful termination suit. During these remarks, the Respondent criticized the Board for believing Ms. VanMinoes when considering Mr. Scro’s discharge, and the Respondent claimed that Ms. VanMinoes referred to herself as “the angel of death.” (D148 - excerpt 04326) At about fifty seconds into the excerpt, the Mr. Reeher interrupted the Respondent, telling him his time was up. The audience reacted with loud protest to the moderator’s interrupting the Respondent’s presentation, and numerous audience members were clearly heard offering their time to the Respondent so that he might continue. (*id.*)⁶⁰ The Respondent continued speaking, referring to “item seven on the agenda,” and going on to criticize the Board’s use of Ms. Mattie, not as an auditor, but to find evidence to bring charges against Mr. Hamilton and him. (D148, excerpt 03542) At approximately 1:15 into the excerpt, Ms. Alley interrupted his comments, calling his name several times while the Respondent spoke over her voice. Approximately ten seconds later, Ms. Alley banged what sounded like a gavel,

⁶⁰ Assuming D148, excerpt 85807 (0:40) was the opening of the Respondent’s remarks, excerpt 85916 (1:40) was a continuation from 85807, and excerpt 90145 (2:07) was a continuation of 85807, fifty-seconds into excerpt 04326 would have added to approximately five-minutes into the Respondent’s presentation.

whereupon much of the audience called out in protest to Ms. Alley's action, several of them within range of the microphone offering their time so that the Respondent might continue. (*id.*) It was during this exchange that the Respondent, addressing Ms. Alley and the Board, said into the microphone, "I have no respect for you." (*id.*)

Ms. Alley testified at length about the 'board meeting of October 6, 2010. She testified that, following the public portion of the meeting when the Board was conducting business, the Respondent called her a liar. (T 02/11/13: 5745) She further testified that she interrupted and gaveled the Respondent because he was making defamatory remarks and discussing personnel, particularly Ms. Mattie and Ms. Van Minos. She said she used the gavel only after "numerous" attempt to get the Respondent to yield the microphone. (*id.* 5754-56) She testified that she believed the Respondent to be in violation of Board policy 3320 Public Expression at Meetings, (D145) and the District's Code of Conduct. (D40) She believed the Respondent to be "not orderly," and that he addressed topics and made comments prohibited by the policies. (T 02/11/13: 5766-67) She testified that she was aware that people in the audience wanted to yield time to the Respondent during his comments, but she did not afford him the time, nor did Mr. Reeher. (*id.* 5811-12) Ms. Alley conceded that other speakers drew cheers and standing ovations during the meeting and that at least one other speaker went over his time but was not asked to yield the floor. (*id.*

5841-43) She testified that the Respondent was “shouting,” and that he was “the loudest one speaking in that whole auditorium the whole night.”

Ms. Foote and Ms. Feeney testified to much the same events. Ms. Foote expressed concern that the Respondent spoke about personnel matters during his presentation. She was also concerned that he ran over his allotted time. (T 02/06/13: 5053-54) Ms. Feeney believed that the Respondent “seemed to goad the audience.” (T 02/07/13: 5306) She testified that the Respondent was “not authorized” to speak of personnel matters and that it was a Board “practice” to not allow the discussion of personnel matters at open Board meetings. (*id.* 5330-31)

The Respondent testified that he prepared his remarks before the meeting, (R204) and that he used his prepared statement when addressing the Board (T 10/03/13: 7701-04) until the dialogues ensued between Mr. Reeher and him, and Ms. Alley and him. (*id.* 7705) The Respondent testified that he said, into the microphone, “I have no respect for you,” in response to a Board member, Ms. Drake, who said to him, “Be respectful..., be respectful.” (*id.* 8002, 8005-06) He testified that he addressed the remark to “probably Ms. alley.” (*id.* 8005) He testified that he made the comment because the Board was trying to “besmirch the treasurer and the former business official....” (*id.* 8002-03) The Respondent further admitted that, during the business portion of the Board meeting, he said to a person sitting next to him, “I’m not going to sit here and

listen to them lie.” He also admitted that he said it loud enough “so that people around [him] could hear....” (*id.* 8004)

In reviewing these charges, I cannot agree that the Respondent’s behavior at the meeting amounted to actions that were “highly unprofessional, inappropriate, scandalous, and objectionable conduct.” The Respondent attended the meeting to deliver prepared comments that were critical of the Board for certain of its actions, and to make a plea to the Board to reconsider acting on pending charges against him. (R204) By what I observed of the public’s reaction to his remarks, I must conclude that issues he addressed were of vital importance to the community. Also, much of the Respondent’s criticism was directed at the perceived adverse fiscal impact of the Board’s actions, hence the direct impact upon the tax burden in the community. Community members at the meeting were no doubt highly supportive of the Respondent and interested in what he had to say.

The District argues that the Respondent’s remarks were not in the public interest. However, his remarks concerning the Board’s considering charges against him were preceded by a brief review of significantly improved student achievement since his appointment as principal, clearly a matter of importance to the community. He directed other remarks at the Board’s actions and how those actions impacted or would potentially impact expenditures, and, by correlation, school tax rates in the community. Such matters as whether the

Board was wisely spending District resources are unquestionably matters of public interest.⁶¹

The District further argues that even if the matters raised are of public interest, “the District may discipline the employee for speech that it reasonably *believes* is disruptive, regardless of whether disruption actually occurred.” (Emphasis in original) (Citing *Waters v. Churchill*, 511 U.S. 661 (1994); *Connick v. Myers*, 461 U.S. 138 (1983); *Jeffries v. Harleston*, 52 F.3d (2d Cir. 1995))

In *Waters*, the Court considered the constitutional rights of an at-will employee who brought a Federal action against the employer, a public hospital, for discharging her for comments she made about hospital operations. The Court discussed at length the obligations of the public entity as a sovereign against its rights as an employer, stating, “But where the government is acting as employer, its efficiency concerns should...be assigned a greater value.” The Court goes on, “What is it about the government's role as employer that gives it a freer hand in regulating the speech of its employees than it has in regulating the speech of the public at large?” It then continues, “We have never explicitly answered this question, though we have always assumed that its premise is

⁶¹ The U.S. Supreme Court in *Pickering v. Board of Education* states, “In *Pickering*, the Court held impermissible under the First Amendment the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. Pickering's subject was “a matter of legitimate public concern” upon which “free and open debate is vital to informed decision-making by the electorate.” [391 U.S., at 571-572, 88 S.Ct., at 1736.](#)

correct - that the government as employer indeed has far broader powers than does the government as sovereign. (Cites omitted) This assumption is amply borne out by considering the practical realities of government employment, and the many situations in which, we believe, most observers would agree that the government must be able to restrict its employees' speech." However, the Court makes a distinction between at-will employees and employees protected by some form of due process beyond direct petition on constitutional grounds. "Where an employee has a property interest in her job, the only protection we have found the Constitution gives her is a right to adequate procedure. And an at-will government employee - such as Churchill apparently was, generally has no claim based on the Constitution at all." The Court continues, "Of course, an employee may be able to challenge the substantive accuracy of the employer's factual conclusions under state contract law, or under some state statute or common-law cause of action. In some situations, the employee may even have a federal statutory claim. (Cite omitted) Likewise, the State or Federal Governments may, if they choose, provide similar protection to people fired because of their speech. But this protection is not mandated by the Constitution." In the instant matter, the Respondent has recourse through the process of these proceedings. It is within this venue, under the just case provisions of 3020-a, that I will resolve this charge.

The District also argues that it may discipline the Respondent if his speech "even *threatens* to interfere with government operations (such as, here, a

Board meeting).” (Citing *Jeffries*) However, there is no evidence that the Respondent’s speech threatened to or even disrupted the Board meeting.⁶² Indeed, Exhibit D148, excerpt 03542, indicates that adverse or even angry community reactions occurred only twice: when Mr. Reeher interrupted the Respondent to tell him his time was up, and when Ms. Alley interrupted the Respondent by calling his name and using her gavel to silence him. Furthermore, when Mr. Reeher interrupted, numerous people could be heard offering their time to permit the Respondent to continue his prepared remarks. When Ms. Alley interrupted the Respondent, a spontaneous and loud protest ensued from a large portion of the assemblage. Otherwise, the Respondent’s presentation, as critical and sometimes abrasive as it was, went rather smoothly, except for occasional interruptions by applause and cheering.⁶³

Ms. Alley and other Board witnesses relied upon the District’s Code of Conduct (D40) (“Code”) and Board Policy 3220 Public Expression at Meetings (D145) (“BP 3220”) to justify the charges related to Board meetings. (Ms.

⁶² In whatever manner, the Board anticipated a larger than normal attendance and showing of public interest. It did, after all, make arrangements to hold the Board meeting at the High School auditorium with a capacity in the hundreds. Further, although there is no agenda for the meeting in evidence, I note by the minutes (R144) that numerous items were disposed of, including matters dealing with Ms. Mattie and Mr. Hamilton. I take judicial notice of the fact that the Board, over the months before this meeting, had attempted to dismiss Ms. Schue, had arranged a severance agreement with Ms. Dominick, had fired Mr. Hamilton and Mr. Scro, and was in the process that very evening of bringing charges against the Respondent, who was on paid suspension since the previous September 20.

⁶³ The insufficiency of Exhibit D148, is that it fails to record the entire public portion of the Board meeting. Other speakers were likewise interrupted by applause and cheering. (Ms. Alley, T 02/11/13: 5843; R89) Due to the limitations of Exhibit D148, there is no basis for comparison between the Respondent’s remarks and the other thirty speakers.

Alley, T 02/11/13: 5766-67, 5773, 5793-94, 5836; Ms. Foote, T 02/06/13: 5048-52, 5086-87, 5163-64, 5169; Ms. Feeney, T 02/07/13: 5564) Both Exhibits address behavior on school property, including speech.

The Code (at 23) states, in part, “The restrictions on public conduct on school property and at school functions contained in this code or not intended to limit freedom of speech or peaceful assembly. The district recognizes that free inquiry and free expression are indispensable to the objective of the district. The purpose of this code is to maintain public order and prevent abuse of the rights of others.” It continues, “All persons on school property or attending a school function shall conduct themselves in a respectful and orderly manner.” The Code (at 24) lists “prohibited conduct,” to wit: “3. Disrupt the orderly conduct of classes, school programs or other school activities.”; “14. Willfully incite others to commit any of the acts prohibited by this code.” Even assuming Board meetings are “other school activity,” the meeting was not disrupted until attempts were made to stop the Respondent from speaking. Also, from the videos, I saw no evidence that the Respondent incited anyone to disrupt the meeting. People applauded him, as they did other speakers. People spoke out in loud protest against the Board when the Respondent was interrupted, not before.

BP 3220 more explicitly addresses “public expression at meetings.” It invites public comment, and states, in pertinent part, “All matters that residents wish to bring before the Board of Education will be given careful consideration. The request to consider said matter should be made by writing a letter to the

Superintendent or the President of the Board so that the matter appears on the agenda.” It continues, “In the interest of affording an opportunity for public participation at Board meetings, provision will be made at each meeting during which residents may express their opinions, concerns, or provide information on topics that may be of interest to the Board. Items of concern, not related to the meeting agenda, will be referred to the Superintendent of Schools or President of the Board of Education for review and possible inclusion at a subsequent meeting.” The District argues that the Respondent addressed items not on the agenda and that he did not previously submit the items to the Superintendent. However, there is no evidence that the thirty other speakers did so either. As I noted earlier, the video images in Exhibit D148 are only a partial account, that is, approximately ten minutes of a two-hour (R144) public session. Moreover, because the instant record does not contain the agenda for the meeting, I examined the Respondent’s prepared statement (R204)⁶⁴ and observe that he came prepared to speak about items that were acted upon by the Board at that meeting, namely, consideration of charges against him, matters involving Mr. Hamilton, matters involving Mr. Scro, and matters involving Ms. Mattie. His prepared statement concluded, “All I can say is that each and every Board Member has an independent obligation to the taxpayers of the District to act with due diligence. All I can ask is that you make sure you have done your

⁶⁴ I reference the Respondent’s prepared statement because, as the videos reveal, up to and until he was interrupted by Mr. Reher and Ms. Alley, the Respondent stayed on script. It was not until the interruptions and the exchanges that ensued that the Respondent deviated significantly from the prepared statement.

due diligence for the people of JE before you cast your critical votes this evening.” With respect to this portion of BP 3220, there was no wrongdoing by the Respondent. I would add, his remarks about Ms. Mattie were not so much critical of her, but were critical of the Board’s use of her services. Moreover, he did not call Ms. Van Minos the “angel of death,” but instead said that she referred to herself as such.

BP 3220 continues, “Individuals wishing to be heard will be recognized by the Board President. The President shall be responsible for establishing time limits, if warranted; prohibiting repetitious comments; and any other rules deemed by the President as necessary for the orderly conduct of business.” The video evidence indicates that the Respondent held the floor for approximately ten minutes, including time consumed by the efforts of Mr. Reeher and Ms. Alley to end his presentation, and additional time consumed by the public reactions. Whatever time limits were for each speaker, whether one minute or two minutes or five minutes, it is clear that most, if not all speakers went over the time limit. The average time per speaker was four minutes, assuming thirty speakers over two hours. (R144) I logically conclude that some spoke for fewer than four minutes, and some spoke for longer than four minutes. Therefore, I cannot conclude that the Respondent is guilty of any wrongdoing for speaking over whatever time limit the Board established, because the evidence indicates that other speakers did so as well. Indeed, calculating the average time consumed per speaker, all other speakers did so. Furthermore, when Mr. Reeher

first told the Respondent that his time was up, numerous members of the assemblage offered their time. The record contains no clear explanation as to why the Board refused the extra time or denied the obvious urgings and pleadings of the assemblage to allow the extra time.

BP 3220 concludes, “Defamatory or abusive remarks, personal attacks, charges or complaints against District employees or Board members, will not be permitted during the public comment portion of any meeting.” By the Respondent’s prepared remarks, there are elements that breach the policy. He stated, “I believe that members of this Board and others have perjured themselves in New York State Supreme Court.” This comment was a clear charge against Board members. In referencing the discharge of Mr. Scro, he charged, “Any organization that fires an employee with ‘regrets and best wishes’ is heartless and dysfunctional at best.” Other comments were highly critical but fell short of charging the Board with wrongdoing. For example, the Respondent questioned the efficacy of using Ms. Van Minos and Ms. Mattie in ways that consumed time and resources unwisely, and, in the case of Ms. Mattie, he questioned using her for other than auditing functions. He particularly criticized the Board for using Ms. Mattie to gather evidence against Mr. Hamilton and him.

The Respondent breached BP 3220 when, during the exchanges between the Respondent and Mr. Reeher, then Ms. Alley, he said into the microphone, addressing Ms. Alley, “I have no respect for you.” (T 10/02/13: 8005, T

10/03/13: 8240) Later, during the business portion of the meeting, while at his seat he said, loud enough to be heard in his immediate vicinity, “I’m not going to sit here and let them lie.” (T 10/02/03: 8004)

In examining this charge, I further note that the District overstates several of the allegations. I viewed carefully and several times the video images supplied in Exhibit D148. The Respondent did not shout at the Board. His voice was raised only slightly as he entered into an argumentative exchange with Mr. Reeher over his allotted time. Moreover, the Respondent was speaking into a microphone, and thus amplified his voice further. Similarly, when he told Ms. Alley that he had no respect for her, he was speaking into the microphone. Although his voice raised slightly, he was not shouting. Furthermore, I saw no attempt by the Respondent to incite the assemblage to misbehave, nor is there any evidence that any of the people misbehaved as a result of the Respondent’s activities that evening. Also, although certain of the Respondent’s remarks were critical of the Board, and at times abrasive, they were not, *ipso facto*, insubordinate. However, those remarks that were clearly insubordinate will be addressed by appropriate corrective measures.

The District argues, citing *Matter of Jerry v. City School District of City of Syracuse*, 35 N.Y.2d 534,543-544 (1974), (“Jerry”) that “the inappropriateness of [the Respondent’s] comments, the unprofessional manner in which he delivered them, his disregard to procedural rules the Board had established, and the reactions of the crowd incited by [the Respondent’s]

remarks and the conduct (even approaching the Board members and yelling in their faces) amply supported the Board's conclusion that [the Respondent's] conduct was disruptive." I reiterate, the allegation, as stated, is exaggerated. For example, I did not observe the Respondent "approaching the Board members and yelling in their faces." Also overstated is the allegation that the Respondent disrupted the meeting. The record indicates that other speaker's remarks were interrupted by cheers and standing ovations. Except for the two exchanges between the Respondent and Mr. Reeher and Ms. Alley (that I will address accordingly), the Respondent's remarks were greeted by the assemblage in a similar supportive manner.

Moreover, at the conclusion of the Respondent's remarks, the meeting continued. As the minutes indicate, (R144) immediately following the public portion of the meeting, the Board held a short recess, reconvening at 9:40 p.m. Between 9:40 p.m. and 10:15 p.m. the Board considered and acted upon at least seven action items and made numerous personnel decisions, until it recessed into executive session at 10:15 p.m. The Board then reconvened from executive session at 11:48 p.m. to adjourn at 11:51 p.m. By the intervals recorded, following a two-hour public comment session during which the Respondent spoke for approximately ten minutes, the Board acted upon numerous action and agenda items in the span of just thirty-five minutes. The ten minutes consumed by the Respondent over a two-hour public session during which, as the numbers indicate, most, if not all, speakers spoke over their allotted time,

was hardly disruptive. As for *Jerry*, there is no comparing the activities of the teacher in *Jerry* with the behavior of the Respondent. The Respondent made public comments at a public meeting during a portion in which the Board invited and expected public comments. After all, the Board prepared for an outpouring of attendance by holding the meeting in the high school auditorium. The level of interest in whatever the Board planned on considering that evening was abundantly evident.

The teacher in *Jerry* argued that his private behavior, that is, his staying overnight with a female student who had just recently been graduated from the high school in which he taught, could not be used as grounds for discipline. The court found otherwise, stating, “In our view what might otherwise be considered private conduct beyond the scope of licit concern of school officials ceases to be such in at least either of two circumstances -- if the conduct directly affects the performance of the professional responsibilities of the teacher, or if, without contribution on the part of school officials, the conduct has become the subject of such public notoriety as significantly and reasonably to impair the capability of the particular teacher to discharge the responsibilities of his position.” In the instant matter, the Respondent’s public utterances directed at Ms. Alley and the Board can hardly be compared to the *Jerry* teacher’s inappropriate sexual behavior as the standard that would “significantly and reasonably to impair the capability of the particular teacher to discharge the responsibilities of his position.” Without doubt, as demonstrated by the images

supplied in the District's video exhibit, the Respondent had overwhelming support from the assembled community members. I doubt whether the community would have demonstrated similar support for the teacher accused in *Jerry*.

Nevertheless, the Respondent's overall approach in his prepared remarks raises concerns about his compliance with BP 3220, as overly restrictive and impeding as its standards are. It was possible that the Respondent could have challenged the Board's activities without accusing them of perjury and of being "heartless and dysfunctional." Furthermore, it was not proper for the Respondent to say for all to hear that he had no respect for Ms. Alley., even if, in his reasoning, he had sufficient cause. Finally, it was not proper during the regular business portion of the meeting for the Respondent to say, from his seat for others to hear, "I'm not going to sit here and listen to them lie."

By all standards,⁶⁵ these remarks were sufficient to warrant discipline, because they were, by such standards, insubordinate. However, for reasons I will discuss below at the conclusions herein, I will significantly reduce the penalty.

For the foregoing reasons, I conclude that the Respondent is not guilty of conduct unbecoming an administrator, but is guilty, in part, of insubordination, as indicated in the discussion herein above relative to **HO2**,

⁶⁵ Brand, Norman, Ed., *Discipline and Discharge in Arbitration*, Washington, DC, BNA Books (1998) at 156 *et sqq.*; St.Antoine, Theodore J., Ed., *The Common Law of the Workplace: The Views of Arbitrators*, Washington, DC, BNA Books (1998) at 164 *et sqq.*; Ertel, Karen L., Ed., *Grievance Guide*, 13th ed., Arlington, VA, Bloomberg BNA (2012) at 195 *et sqq.*

1.1 through 1.11. Therefore, I will assess an appropriate penalty as indicated in the penalty portion herein below.

Board Meeting of October 20, 2010

The charges read:

- 1.12 Respondent engaged in similar behavior on October 20, 2010, when he again addressed the Board of Education at the next meeting.
- 1.13 The Respondent behaved in a fashion similar to that described at the October 6, 2010 meeting.

The District relied on the testimony of Ms. Alley and Ms. Foote to prove these allegations. There was no video evidence, nor was there much detail offered by the witnesses. Ms. Alley testified that the Respondent was not yielding the floor, (T 02/11/13: 5775) but was unable to offer any other specific incident to show that the Respondent acted in the same manner as he did during the meeting held on October 6, 2010. She offered, "...unfortunately, a lot of these meetings just run together for me.... It's difficult to single all of them out and...pick out exactly when one particular incident happened according to the date and meeting." (*id.* 5777) Ms. Foote testified that the Respondent addressed the Board at every meeting after October 6. She testified that he spoke about specific employees (T 02/06/13: 5116) and "every time he spoke he brought up issues that were not to be discussed in public sessions." (*id.* 5118) Neither witness was able to offer particular names, specific comments, or any other evidence, other than the claim that the Respondent's behavior was similar. By

this testimony alone, there is not sufficient evidence to sustain these charges. A mere claim without particulars is deficient and disallows an adequate defense.

For the foregoing reasons, I conclude that the Respondent is not guilty of conduct unbecoming an administrator and insubordination. Therefore, I hereby dismiss in their entirety the charges contained in **HO2, 1.12 through 1.13.**

Board Meetings of November 3, 2010 and November 17, 2010

The charges read:

- 1.14 The Respondent again attended a meeting of the Board of Education on November 3, 2010 and again on November 17, 2010. He again had the privilege of addressing the Board of Education in public session at both meetings and again engaged in conduct similar to that described in 1.5 through 1.10 above.
- 1.15 The Respondent was repeatedly asked to comply with the time limits and behavioral requirements while addressing the Board. The Respondent was also repeatedly asked to yield the floor when his time to address the Board had expired. The Respondent refused to comply with either request and persisted in a pattern of inappropriate and highly offensive behavior directed at members of the Board of Education and the administration of the Jordan-Elbridge Central School District.
- 1.16 The actions of the Respondent occurred in the presence of various students for whom the Respondent is expected to be a role model and an educational leader. The Respondent's actions were antithetical to the proper role a high school principal who is expected to be a role model and leader of an educational institution.

The evidence offered to prove these particulars is much the same as offered to prove HO2 1.12 through 1.13. For the same reasons, I find the

evidenced lacking specificity and, accordingly, insufficient to prove the particulars in these charges.

For the same reasons as in the charges HO2, 1.12 through 1.13, I conclude that the Respondent is not guilty of conduct unbecoming an administrator and insubordination. Therefore, I hereby dismiss in their entirety the charges contained in HO2, 1.14 through 1.16.

The Board Meeting of December 22, 2010

The charges read:

- 1.17 On December 22, 2010, the Respondent again appeared at a meeting of the Board of Education. He again had the privilege of the floor and proceeded to address the Board of Education and administration.
- 1.18 Again during this meeting, the Respondent engaged in conduct similar to that described during the October 6, 2010 Board of Education meeting. He once again repeatedly disregarded requests to yield the floor at the conclusion of his allotted time. The Respondent made personal verbal attacks against employees of both the School District and members of the Board of Education, during which he named specific persons and made disparaging remarks regarding the same.
- 1.19 The actions of the Respondent are considered to be retaliatory and were directed at members of the Board of Education and administration of the School District who have assisted in the investigation of the Respondent, and/or assisted in approving and proffering charges against the Respondent.

The evidence offered to prove these particulars is much the same as offered to prove HO2 1.12 through 1.16, other than claims that the Respondent refused to yield the floor. (Ms. Foote, T 02/06/13: 5145) For the same reasons, I find the evidence lacks specificity and, accordingly, is insufficient to prove

these charges.⁶⁶ In addition, no specific threatening remarks and no particular retaliatory actions are identified. Simply stating that he uttered words or performed acts without concrete evidentiary particulars fails to prove the charges.⁶⁷

For the same reasons as in the charges HO2, 1.12 through 1.16, I conclude that the Respondent is not guilty of conduct unbecoming an administrator and insubordination. Therefore, I hereby dismiss in their entirety the charges contained in HO2, 1.17 through 1.19.

The Board Meeting of January 19, 2011

The charges read:

1.20 On January 19. 2011, the Respondent once again appeared at a meeting of the

⁶⁶ There was testimony by Ms. Foote regarding remarks made by another speaker, Dana Athonson, who alluded to a shooting that occurred at a school board meeting in Florida that had previously been widely aired on news programs. (Ms. Foote, T 02/06/13: 5138-39, 5258-59) Ms. Foote claimed to be intimidated by the remarks. However, there is absolutely no evidence of any connection between the Respondent and Mr. Athonson, or that the Respondent had anything to do with Mr. Athonson's remarks. The testimony was more prejudicial than probative of any of the chargers.

⁶⁷ There was testimony regarding a comment the Respondent made to a new Board member, Roger Hill, at a Board meeting on December 1, 2010. Ms. Foote testified that she was sitting next to Mr. Hill at the time, that she felt intimidated and that she reported the remark to the police. (T 02/06/13: 5119-21) Ms Feeney, although she testified that she did not hear the remark, said that several Board members did hear the remark. (T 02/07/13: 5373, 5386-87) She further testified that, at her insistence, the remark was recorded in the Board minutes after the original minutes, which had not contained the remark, had been posted. (*id.* 5373) The remark, which the Respondent testified to making, was addressed in a one-to-one conversation with Mr. Hill. He told Mr. Hill that, as a new Board member he still had time to "get out" because the current events "hadn't tainted him yet." He added "some of these people are going down hard." (T 10/02/13: 8001; T 10/03/13: 8237) According to the Respondent, Mr. Hill "chuckled and nodded his head yes." (T 10/02/13: 8007) The Respondent did not believe other Board members heard the remark. (*id.*) Nonetheless, there are no charges of misbehavior committed on December 1, 2010, nor was Mr. Hill, the person to whom the comment was directed, called to testify. If this matter was of sufficient import to the District, it should have been charged in the original charges. To raise the matter in testimony in the manner in which it was raised, was more prejudicial than probative to any of the particular charges.

Board of Education.

- 1.21 At that time, the Respondent had the privilege of the floor. He was allotted five minutes to speak.
- 1.22 The Respondent had been previously admonished that he was not to discuss personnel matters or to attack individuals personally. The Respondent was admonished that if he had complaints against specific personnel, he was to address those complaints to the Superintendent of Schools at another time.
- 1.23 The Employer had in place a series of policies regarding the conduct of persons who attend meetings of the Board of Education. The Respondent was aware of said policies.
- 1.24 Despite being aware of said policies, the Respondent engaged in highly unprofessional and inappropriate behavior while addressing the Board. He verbally attacked individual employees of the School District by name and engaged in other disrespectful behavior directed at members of the Board of Education.
- 1.25 When the Respondent was asked to yield the floor by the moderator of the meeting, the Respondent refused to do so and his actions incited the members of the public also in attendance to verbally attack the Board members.
- 1.26 At that time, a law enforcement officer, who was a deputy sheriff of the Onondaga County Sheriff's Department, instructed the Respondent to cease and desist. The Respondent did not heed the officer's instructions and continued speaking, and his actions escalated the situation by inciting the crowd even further.
- 1.27 The Respondent's conduct was so disruptive that the members of the Board of Education temporarily adjourned their meeting.
- 1.28 The Respondent was eventually escorted from the premises by the deputy sheriff, who advised the Respondent that he would be arrested if he did not leave the meeting.
- 1.29 At the time of said incident, the Respondent was employed as the high school principal of the Jordan-Elbridge Central School District.

- 1.30 The Respondent was expected to be a role model and instructional leader for the students and personnel employed at the high school.
- 1.31 The Respondent's actions on those occasions fell below the standards of acceptable behavior and the Respondent violated the Code of Conduct, and otherwise behaved in a highly inappropriate and unprofessional manner.

The District's Exhibit 148 contains two partial recordings of the public segment of the January 19, 2011 Board meeting, attended by approximately fifty people and held at the High School Cafeteria. (T 02/06/13: 5146) I have examined both recordings several times, along with the prepared statement from which the Respondent addressed the Board that evening. (R204) ⁶⁸

The Bush video was approximately twenty-six minutes and fifty-one seconds in length. It showed that the meeting was called to order, and after preliminary and routine procedures, the Board adjourned to executive session. When the Board reconvened, the Superintendent, Mr. Zacher, spoke from 1:17

⁶⁸ Both videos were recorded from left side facing the Board. The Board would have viewed the cameras on their right. One was recorded by a Mrs. Bush. I will reference the video as the Bush video. The other was recorded by the Respondent. I will reference the video as the Respondent's video. The Bush video was recorded at the front of the hall, looking across at the opposite side toward a set of double doors. The video also contained an image of the microphone, and a profile image of the speakers, who faced the Board and whose backs were toward the full assemblage in the cafeteria. The Respondent's video was set further up the aisle and contained the image of the Respondent sitting while he awaited his turn to speak. Another video camera could be seen in the Bush video, and the unidentified recorder could be viewed moving the camera several times up and down the opposite side of the cafeteria, then briefly on the same side as the Bush and Respondent's recorders. The third video was not offered into evidence.

to 10:40⁶⁹⁷⁰ explaining the Board's reasoning regarding the hiring of a part-time music teacher and athletic director. At 10:40, Mr. Zacher introduced Greg Hinman, an Assistant Superintended from BOCES, who Mr. Zacher identified as the moderator and timekeeper. Mr. Hinman then asked potential speakers to keep comments limited to agenda matters, and to end their remarks at about five minutes. He also said that he would give the "high sign" when a speaker's time had expired.

The first speaker started at 11:34 and spoke uninterrupted until 18:05, approximately six and one-half minutes. There were no indications from either the Board or Mr. Hinman that the speaker's time had expired. When she completed her remarks, she approached the Board and distributed written material to each Board member.

Speaking next, the Respondent began his remarks at 18:37, reading from his prepared statement and talking rather fast. His opening comments addressed BP 3220, an apparent agenda item.⁷¹ When the Respondent then proposed returning certain personnel, including himself, to their former positions, assigning dollar amount cost savings to each proposal, Ms. Alley interrupted him (at 22:20), telling him that he was talking about personnel. At 23:57, Ms.

⁶⁹ I will reference segments of the videos as the elapsed times were displayed on the video images.

⁷⁰ As seen in the Bush video, the third camera was set up on a tripod on the opposite side of the room to the left of the double doors at 9:07. It was moved to the other side of the doors at 11:20, then back to the right at 11:44. At approximately 22:30 in the Respondent's video, the roving camera could be seen moving along the side where the Respondent's and Bush's recorders were positioned.

⁷¹ No agenda was offered into evidence.

Alley started telling the Respondent that his time was up. As she did so, members of the assemblage could be heard offering to yield their time to allow the Respondent to continue.⁷² At 24:00 Mr. Hinman entered the frame, raising his arm, clearly signaling behind the Respondent and across the room toward the middle to rear of the room. At 24:16, a uniformed police officer entered the frame from across the room from the vicinity where Mr. Hinman signaled.⁷³ Mr. Hinman then moved in front of the Bush video recorder, blocking its view of the microphone and the Respondent. As the police officer entered the frame and approached the Respondent, the assemblage became noisy and called out in protest and anger, “Oh my God,” “shame,” and “disgrace.” The Respondent continued talking loudly over the noise of the assemblage, calling out that the Board could save a million dollars. He also described the use of a policeman to silence him as “abominable.” At about the same time the assemblage started calling out in protest, Board members began to leave the room. In all, six Board members left the room, and three remained at their seats. At that time, people could be heard calling for the Board members to “resign.” The Respondent could be heard calling loudly into the microphone for the Board to step down. At 25:12, the Respondent could be heard asking if people could take the Board member’s places, after which one woman went behind the Board’s table to take

⁷² As I read the prepared statement and comparing it with the point in time the exchange began, the Respondent had but a few lines remaining in his comments.

⁷³ The police officer was not visible in any frame of the Bush video until Mr. Hinman raised his arm in the direction from where the police officer came.

a Board member's seat. However, she was persuaded to return to the assemblage by one of the remaining board members. At 26:00, a member of the assemblage praised the remaining Board members for not exiting the room. At 26:41, the three remaining Board members were applauded by the people in the meeting room.

The Respondent's video was approximately thirty-three minutes and thirteen seconds in length. After the preliminary opening, the Board went into executive session. The recording displayed a print graphic informing that the Board was in executive session for thirty-five minutes. At 3:11 Mr. Zacher started his remarks regarding the part-time music teacher and Athletic Director positions. At 12:13 Mr. Zacher announced that Mr. Hinman would be the moderator. At 13:00, Mr. Hinman explained the five minute time limit and said that he would give a "high sign" when a speaker spoke for five minutes. The first speaker spoke uninterrupted from 13:34 to 19:54, after which she distributed papers to the Board members at their table. At 22:20, Mr. Hinman could be heard calling the Respondent by his first name. At 20:25, the Respondent approached the microphone and began reading at a rapid, steady pace from his prepared statement. At 23:17, when no member of the Board responded to a question the Respondent asked, he commented that they sat there "as blank as the wall behind [them]." Those comments were not from his prepared statement. At 24:43 the Respondent began speaking of ways the Board could make "real" cost savings, and then commented position-by-position,

mentioning the names of people who held those positions and suggesting that calling them back could save the Board one million dollars. At 25:00, Ms. Alley interrupted the Respondent, telling him that he was not allowed to talk about personnel. The Respondent replied that he was not talking about personnel, but about positions. At 25:31, Ms. Alley told the Respondent that his time was up. At 25:50, Ms. Alley made a clear signal toward where the police officer was apparently posted, out of the range of the recorder. As the police officer approached the Respondent, the assemblage reacted as described above, and the Respondent raising his voice over cries of “shame,” “Oh my God,” and “resign,” continued to speak of the “real cost savings” his proposals would yield.

As the police officer forced him from the microphone, he could be heard saying “this is abominable,” and he called on the Board to “step down” as six of the nine Board members filed from the room. At 26:34, the police officer escorted the Respondent back to his seat. In the ensuing conversation, the Respondent told the police officer that he had the right to speak at a public meeting. At 27:05, as the police officer walked to the doors through which the board members left the room, the Respondent could be heard saying, “Can we assume others can take their seats?” One person walked to the Board table, then was almost immediately seen going back to the assemblage. At 28:28, as the Respondent sat quietly at his seat, someone could be heard praising the Board members who remained in the room. A male Board members who remained in

the room told the assemblage to stay calm and to give the other absented Board members a “few minutes” and they would “be back.” At 29:27, Mr. Hinman could be seen leaving the room toward the doors through which the board exited. At 31:36, the police officer returned, and at 32:12, he ordered the Respondent to leave the room or the Respondent would be put under arrest. At 33:08, the Respondent was applauded as the police officer escorted him from the room.

As I reviewed the videos, with respect to the Respondent’s behavior, I noted the contrast between the October 6, 2010 videos and the videos for January 19, 2011. First, regarding the time limit, I find that I cannot sustain such a charge when it was obvious that (1) the previous speaker spoke for nearly six and one-half minutes without interruption, and (2) the first time Ms. Alley informed the Respondent that his time was up, others in the assemblage urged Ms. Alley to allow him to continue and offered to yield their time. I viewed no evidence that the Respondent’s refusal to yield while numerous others offered their time as “incit[ing] the members of the public also in attendance to verbally attack the Board members.” As I viewed the recordings, I noted no oral protests against the Board until the police officer approached the Respondent. The responses I observed from the assemblage were shock, dismay and anger that a policeman was called upon to remove the Respondent from the microphone. Although the Board was free to utilize such a strategy, the Respondent was not responsible for the reaction from the assemblage. Second, regarding the Respondent’s presentation, I do not find that the Respondent “engaged in

highly unprofessional and inappropriate behavior while addressing the Board.” He did not “verbally attack individual employees of the School District by name....” When he named persons, he identified them in the context of restoring them to positions they once held to affect cost savings to the District. As he did so, Ms. Alley admonished him for discussing “personnel,” while the Respondent commented back that he was discussing positions. As the exchange continued, Ms. Alley also clearly beckoned to the police officer to come forward. Within seconds, the police officer entered the frame, walking toward the Respondent. With the police officer at his side, the Respondent continued to talk over the loud assemblage, and as the Board members left the room and, he spoke loudly, asking them to remove themselves from office.

Ms. Alley’s testimony contradicts in several areas the video evidence. She testified that she adjourned the meeting. (T 02/11/13: 5779-80) However, there was no audible motion made or vote on for an adjournment. She also testified that the three Board members who remained did not hear the motion to adjourn and that only the people on her left heard the motion. (*id.* 5783) However, there were, as well, other Board members on her right who left the meeting at the same time. In addition, the Board member seated closest to the three Board members who remained can be seen conversing with the three who remained as the others were filing out of the meeting. To imply that the three who remained in the cafeteria were unaware of an “adjournment” or walk out,

whatever the case may be, defies the clear visual evidence that, during the walk-out, the remaining three conversed with a departing Board member.

Ms. Feeney testified that she was so “uncomfortable” and felt so “threatened,” that she started to leave the room before Ms. Alley adjourned. (T 02/07/13: 5358, 5547) She testified that when Ms. Alley attempt to stop the Respondent from speaking, “he started to yell and speak louder and get irate.” (*id.* 5359-60) She also testified that the meeting “got out of control” and “people were screaming at us.” (*id.* 5361) As I have noted, the Respondent’s voice raised after the assemblage reacted loudly to the police officer’s physical intervention. At that point, the Respondent became loud as well to be heard over the noise. However, there was no such behavior noted by either the Respondent or the assemblage until the police officer entered the scene.

According to Ms. Foote, the Respondent was asked to yield the floor because he was naming specific personnel. Then the assemblage became so loud that Ms. Alley adjourned the meeting, and because of the noise, three of the Board members did not hear Ms. Alley. (T 02/06/13: 5147-49) Ms. Foote also testified that the police officer “walked over to [the Respondent] in order to attempt to restore order....” (*id.* 5127) As the tape indicates, the assemblage was orderly before the police officer approached the Respondent. The Respondent and Ms. Alley were engaged in an orderly, although disputed, exchange regarding the Respondent’s naming the people he suggested that the Board restore to their previously held positions.

If the Respondent were to be faulted for his behavior at the January 19, 2011 Board meeting, it would be for the apparent use of sarcasm when he failed to receive responses from the Board to direct questions. Also, as his session ended, the Respondent resorted to raising his voice over the loud audience as the police officer took control of the microphone and escorted him from the front of the room. However, given the Board's role in creating the atmosphere that developed, I must view the Respondent's last remarks as a product of the atmosphere generated by use of a police officer to silence the Respondent at a public meeting. As within its rights the Board may have been, the Board failed to calculate what the reaction might be from the assemblage.

For the foregoing reasons, I conclude that the Respondent is not guilty of conduct unbecoming an administrator and insubordination. Therefore, I hereby dismiss in their entirety the charges contained in **HO2, 1.20 through 1.31**.

Post January 19, 2011 Behavior

The charges read:

- 1.32 Following the meeting of January 19, 2011, the Respondent was prohibited from entering upon school premises without express permission from the Superintendent of Schools. The Respondent's access to the property of the School District was thereby restricted.
- 1.33 The Respondent has demonstrated conduct unbecoming an administrator of the Jordan-Elbridge Central School District by engaging in highly public retaliation and retribution against those persons whom he perceived to have assisted in the

investigation of the Respondent and those persons who preferred charges against the Respondent.

- 1.34 The Respondent has posted information about members of the Board of Education on various websites and has engaged in other conduct designed to harass, intimidate; and retaliate against members of the Board of Education.
- 1.35 The Respondent has also publicly discussed his personnel charges and his personnel situation with students who attend the Jordan-Elbridge High School and in doing so, the Respondent has engaged in conduct unbecoming an administrator, by involving those students in personnel matters for which they have no role.
- 1.36 The Respondent's actions have caused disruption to the educational process.
- 1.37 The Respondent is guilty of the charges as stated above and should be dismissed from the employment of the Jordan-Elbridge Central School District.

There was no probative evidence brought regarding any of these charges.

For this reason, I conclude that the Respondent is not guilty of conduct unbecoming an administrator and insubordination. Therefore, I hereby dismiss in their entirety the charges contained in **HO2, 1.32 through 1.37**.

The charges contained in **HO2, Charge 2**, allege, “The Respondent Engaged in Insubordination and Conduct Demonstrating an Immoral Character.”

I will first consider specifications 2.1 through 2.7, and then specifications 2.8 through 2.10, and then specifications 2.11 through 2.15.

Specifications 2.1 through 2.7

The charges read:

- 2.1 The Respondent has engaged in conduct that constitutes insubordination and a demonstration of immoral character.
- 2.2 The Respondent, as principal of the Jordan-Elbridge High School, has directed, instructed, encouraged, and incited subordinate teachers or employees of the Jordan-Elbridge Central School District to engage in unauthorized changes of student grades.
- 2.3 During the 2009-2010 school year, the Respondent instructed and directed various teachers employed by the Jordan-Elbridge High School that they must, in fact, change various grades given to students, without a legitimate educational basis to do so.
- 2.4 The effect of the grade changes was to allow those students who had otherwise not successfully completed a course, or passed said course, to be listed as having completed and passed the course, and thereby, allowed to move up to the next grade or to graduate.
- 2.5 The Respondent, without authorization or permission and in violation of standard, accepted educational practice, and in violation of the School District's grading policy and regulations of the State Education Department, did, on other occasions, make unauthorized and unapproved grade changes in various students' grades, without the knowledge, consent, authorization, or permission of the teachers or any other members of the administration.
- 2.6 The purpose of said grade changes was to allow these students to receive credit for completing a course or courses, and thereby either be promoted to the next grade or be permitted to graduate from the high school.
- 2.7 The Respondent knew or should have known that such actions were unlawful, impermissible, and in violation of policy.

Following lengthy discussion on the record regarding the specificity of these charges, (T 06/25/12: 2329-2358) that is, HO2, Charges 2.1 through 2.7, the District ultimately supplied the specificity demanded and required in the

form of a three-page spreadsheet containing the particular grades the Respondent allegedly "...directed, instructed, encouraged and incited subordinate teachers or employees...to engage in unauthorized changes in student grades..." and, or, "...instructed and directed various teachers...that they must, in fact, change various grades given to students, without a legitimate educational basis to do so..." and, or, "...did, on other occasions, make unauthorized and unapproved grade changes in various students' grades, without the knowledge, consent, authorization, or permission of the teachers or any other members of the administration." The spreadsheet was admitted into evidence as HO15 as an amendment by addition for specification to the original charges dated April 12, 2011.⁷⁴

The amendment, as follows, is included here to supplement the specifications, and is incorporated into the charges contained in HO 2, Charge 2, Specifications 2.1 through 2.7:

Student Name	School Year	Subject	Teacher	Original Grade	Final Grade	Individual Who Changed Grade
C H	2005/2006	Eng 10R	Osier	63	65	DZ
C K	2005/2006	Liv Env	Jarvis	67	65	DZ (directing R. McIntyre)
A S	2005/2006	Alg	Stroup	46.5	65	DZ (directing G. Parrott)
M N	2005/2006	Math A	Fisher	43	65	DZ (directing G. Parrott)
T L	2006/2007	Liv Env	Jarvis	61.86	65	D(directing R. McIntyre)

⁷⁴ The original charges are dated April 12, 2011. These specifications were offered on June 25, 2012, more than one year after the charges were filed. I granted the District the latitude it requested if only to assure that the District had every opportunity to prove these charges, while likewise assuring the Respondent that he would have sufficient time as needed to prepare an adequate cross-examination and defense.

P G	2006/2007	Eng 11R	Doughtry	62.14	65	DZ (directing J.Susino)
T H	2006/2007	Math 201	Tyszka	63	65	"
Z F	2006/2007	Eng 9R	Hourigan	52.3	56	DZ (directing unknown
J J	2006/2007	Eng 9R	Hourigan	48.6	56	parties still awaiting
K T	2006/2007	Eng 9R	Hourigan	53.7	56	information)
S H	2007/2008	Health	Still awaiting information	65		DZ (directing J Susino) DZ (directing unknown)
N M	2007/2008	Eng 9	Hourigan	56.5	65	DZ (directing unknown)
Z F	2008/2009	Eng 11	Alexander	60.37	65	DZ and/or Alexander (directing R. McIntyre)
T C	2008/2009	Liv Env	Alexander	38.91	65	DZ and/or Alexander (directing R. McIntyre)
R S	2008/2009	Liv Env	Bondgren	58.95	65	Bondgren
T P	2008/2009	Liv Env	Bondgren	57.89	65	Bondgren
S B	2008/2009	Liv Env	Bondgren	58.75	65	Bondgren
K G	2008/2009	Liv Env	Bondgren	57.28	65	Bondgren
L H	2008/2009	Liv Env	Bondgren	57.59	65	Bondgren
L H	2008/2009	Liv Env	Bondgren	61.02	65	Bondgren
J D	2008/2009	Liv Env	Bondgren	58.24	65	Bondgren
M M	2008/2009	Liv Env	Bondgren	58.43	65	Bondgren
T T	2008/2009	Liv Env	Bondgren	59.58	65	Bondgren
M E	2008/2009	Earth Sci	Cardinale	62.01	65	Cardinale
K T	2008/2009	Earth Sci	Cardinale	62.35	65	Cardinale
P H	2008/2009	Earth Sci	Cardinale	58.13	65	Cardinale
B O'G	2008/2009	Earth Sci	Cardinale	60.26	65	Cardinale
A G	2008/2009	Chem	Estlinbaum	62.9	65	DZ and/or Estlinbaum (directing R.McIntyre)
S H	2008/2009	Eng 9	Hourigan	61.67	65	DZ (directing persons unknown)
K S	2008/2009	Eng 9	Hourigan	63.07	65	Hourigan
M Z	2008/2009	AP AmHi	Kufs	64.9	74.1	DZ (directing persons unknown)
S D	2008/2009	Eng 9	Larham	62.66	65	Larham
A G	2008/2009	Alg Y1	McCandless	62.99	65	McCandless
M N	2008/2009	Alg Y2	McCandless	58.26	65	DZ or McCandless (directing R. McIntyre)
A McP	2008/2009	Alg Y2	McCandless	55.92	65	McCandless
P M	2008/2009	Alg Y2	McCandless	61.2	65	McCandless
L P	2008/2009	Alg Y2	McCandless	49.19	65	DZ or McCandless (directing R. McIntyre)
C L T	2008/2009	Alg Y1	McCandless	59.18	65	"
D N	2008/2009	Alg Int	McClurg	62.99	65	McClurg
B V	2008/2009	Earth Sci	Mead	53.4	65	DZ (directing D. Fay)
M K	2008/2009	Eng 12 SiF	Sipley	61.43	65	DZ or Sipley (directing J. Susino)
S S	2008/2009	Health	Seibert	51.41	65	Seibert

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C D	2008/2009	Health	Terpening	61.6	65	Terpening
J F	2008/2009	Health	Terpening	63.4	65	Terpening
M K-H	2008/2009	Health	Terpening	59.67	65	Terpening
J K	2008/2009	Health	Terpening	61.86	65	Terpening
J K	2008/2009	Intro Ch	Terpening	62.22	65	Terpening
J B	2008/2009	Intro Ch	Terpening	54.5	65	Still awaiting information
T C	2008/2009	Intro Ch	Terpening	54.46	65	Terpening
D J	2008/2009	Liv Env	Thibault	59.56	65	Thibault
J B	2008/2009	Liv Env	Thibault	60.07	65	Thibault
M K-H	2008/2009	Liv Env	Thibault	60.43	65	Thibault
B D	2008/2009	Liv Env	Thibault	62.69	65	Thibault
R S	2008/2009	Liv Env	Thibault	63.12	65	Thibault
M Z	2009/2010	Finance	Dougherty	Blank	94	DZ (directing M. Madonna)
M Z	2009/2010	Pub Speak	Larham	Blank	95	DZ (directing J. Susino)
J W	2009/2010	Eng 9	Hourigan	62.5	65	DZ (directing D. Fay)
G G	2009/2010	Eng 9	Larham	47	65	DZ (directing J. Susino)
N M	2009/2010	Eng 9	Larham	40	65	Larham
S A	2009/2010	Inte Geo	McClurg	54.72	65	Still awaiting information
R R	2009/2010	Inte Geo	McCandless	55.11	65	Still awaiting information
S C	2009/2010	Inte Geo	McCandless 55.71		65	Still awaiting information
J S	2009/2010	Alg 2/Trig	Miller	55	65	DZ (directing D. Fay)
M K-H	2009/2010	Alg Y2	Arnold	58.94	65	DZ (directing D. Fay)
S B	2009/2010	Earth Sci	Mead	60.331	65	DZ (directing D. Fay)
A R	2009/2010	Earth Sci	Mead	61.431	65	DZ (directing D. Fay)
T F	2009/2010	Earth Sci	Mead	62.96	65	DZ (directing D. Fay)
A G	2009/2010	Earth Sci	Mead	62.84	65	DZ (directing D. Fay)
R S	2009/2010	Earth Sci	Mead	62.61	65	Mead
S S	2009/2010	Earth Sci	Mead	63.33	65	Mead
C B	2009/2010	Liv Env	Bondgren	54.45	65	Bondgren
T L	2009/2010	Liv Env	Bondgren	55.88	65	Bondgren
L C	2009/2010	Liv Env	Bondgren	60.79	65	Bondgren
N M	2009/2010	Liv Env	Bondgren	61.27	65	Bondgren
S P	2009/2010	Liv Env	Bondgren	62.03	65	Bondgren
M G	2009/2010	Liv Env	Bondgren	60.36	65	Bondgren
J A	2009/2010	Liv Env	Bondgren	58.11	65	Bondgren
E C	2009/2010	Liv Env	Bondgren	58.3	65	Bondgren
G G	2009/2010	Liv Env	Bondgren	55.65	65	Bondgren
D K	2009/2010	Liv Env	Bondgren	58.54	65	Bondgren
R B	2009/2010	Liv Env	Bondgren	60.48	65	Bondgren
M B	2009/2010	Liv Env	Bondgren	39.25	65	Bondgren
J H	2009/2010	Bio NR	Thibault	55.71	65	DZ (directing R. McIntyre)
T B	2009/2010	Env Sci	Mead	51.05	65	Pam Mead
R K	2009/2010	Health	Terpening	55.5	65	Terpening
S R	2009/2010	Intro Phy	Bondgren	59.12	65	Bondgren
M V	2009/2010	Intro Phy	Bondgren	60.79	65	Bondgren
L A	2009/2010	Dig Photo	Jordan	62.5	65	Jordan

Ms. Mattie testified that she compiled the data from the grade keeping and recording systems then in use at Jordan-Elbridge, that is, My Grade Book. (“MGB”) My Grade Book was the program used by individual teachers to record and weigh grades throughout the school year and during the individual marking periods, and the Student Information System (“SIS”), maintained by BOCES, was the where grades from MGB were uploaded each marking period, then the final grades at the end of the school year. (T 10/17/12: 3410 *et sqq.*)

Ms. Mattie testified that the Board, in executive session in August 2008, directed her to conduct an audit because of concerns brought to the Board by teachers who claimed that failing grades given by teachers were being changed without their knowledge or permission. Ms. Mattie further testified that the Board received the information from reports supplied by Karen Hourigan and Sue Osier, both teachers, and by Debra Fay, the guidance secretary. (*id.*

3422-24) Ms. Mattie testified that she permitted access to all teachers, but spoke only to Ms. Hourigan and Ms. Osier. According to Ms. Mattie, Ms. Osier could not recall any particular student for whom a grade had been changed “off the top of her head,” and Ms. Hourigan identified several students “she felt” the grades she gave were not the grades the students received. (*id.* 3424-27)

According to Ms. Mattie, Ms. Hourigan identified students, KT, NM, ZF, SH, and another student with a last name beginning with the letter M.⁷⁵ (*id.* 3428)

⁷⁵ NM and ZF were withdrawn from HO15 by the District. A student “M” was never entered onto HO15 for Ms. Hourigan, other than NM.

Ms. Mattie testified further that, after speaking to Ms. Hourigan and Ms. Osier, and with the assistance of BOCES, she harvested SIS and MGB data and identified all cases where grades were changed to sixty-five, and identified all of the teachers involved. She found that seventy-four grades were changed “manually” to sixty-five in SIS. (*id.* 3430-33) Ms. Mattie compiled the data from MGB and amassed a large number of pages (*id.* 3438; D136) that revealed to her that numerous grades had been changed at some point in the transition from MGB to SIS, or thereafter.

The District offered that Ms. Mattie compiled HO15 during her audit (T 06/25/12: 2351-52). However, before discussing Ms. Mattie’s testimony and representations regarding HO15, I am compelled to note that Ms. Mattie, when she published her audit, referenced only two of the twenty-six teachers named in HO15, Karen Hourigan and Susan Osier. According to Ms. Mattie’s testimony, those were the only two teachers she interviewed. (T 10/17/12: 3423-28, 3489, 3530, 3534, 3542; T 10/22/12: 3861, 3863-64, 3947; T 10/24/12: 4450, 4481, 4485) I also especially note that the District called only Ms. Hourigan and Ms. Osier, two of the teachers listed at HO15, to testify. Furthermore, I must note that Ms. Mattie did not interview either Mr. McIntyre or Ms. Susino, the guidance counselors identified by Ms. Mattie as being involved in several of the grade changes. (T 06/27/12: 1727-29, 2008) Mr. McIntyre also testified that neither Ms. Mattie nor anyone else from the District ever asked him if the Respondent directed him to change a grade. (*id.* 2008)

Regarding the particulars supplied in HO15, they were modified by the District several times during the proceedings, as the District withdrew particulars as follows:

Student Name	School Year	Subject	Teacher	Date Withdrawn
Z E F	2006/2007	Eng 9R	Hourigan	July 17, 2012
J J J	2006/2007	Eng 9R	Hourigan	July 17, 2012
N M	2007/2008	Eng 9R	Hourigan	July 17, 2012
MZ	2008/2009	AP AmHi	Kufs	August 26, 2013
S M D	2008/2009	Eng 9	Larham	February 6, 2012
B T V	2008/2009	Phy-Eaci	Mead	February 6, 2012
M P K	2008/2009	Eng 12 SiF	Sipley	August 26, 2013
G G	2009/2010	Eng 9	Larham	February 6, 2012
N M	2009/2010	Eng 9	Larham	February 6, 2012
S B	2009/2010	Phy-Eaci	Mead	February 6, 2012
A R	2009/2010	Phy-Eaci	Mead	February 6, 2012
T F	2009/2010	Phy-Eaci	Mead	February 6, 2012
A G	2009/2010	Phy-Eaci	Mead	February 6, 2012
R S	2009/2010	Phy-Eaci	Mead	February 6, 2012
S S	2009/2010	Phy-Eaci	Mead	February 6, 2012
T B	2009/2010	Env Sci	Mead	February 6, 2012

I thereby dismissed the charges as they were withdrawn.

Additionally, I will deny certain of the charges solely upon the credible testimony of the teachers identified in HO15, namely, Benjamin Alexander, Daniel Bondgren, Richard Cardinale, James McCandless, and Maggie Estlinbaum. Each teacher testified directly to the particulars in HO15.⁷⁶

⁷⁶ These witnesses were called by the Respondent, not the District.

Mr. Alexander testified that, regarding the two students named in HO15, he was never questioned by Ms. Mattie or anyone else regarding the grades prior to these hearings, except that he recalls at a department meeting being asked to explain the grades for these two students. (T 08/27/13: 6910, 6967; R158) He also testified that at no time did the Respondent direct him to give a passing grade to any student. (*id.* 6915) Regarding the two students, ZF and TC, Mr. Alexander testified that, according to his routine, they probably completed make-up work, (*id.* 6946-47) because the actual final grades were 64.86 for ZF and 64.57 for TC, hence his explanation on R158 that he rounded up the two grades to 65. (*id.* 6965, 6967-68; R158) He further testified that he often made changes in SIS without changing grades in MGB when students completed make-up work subsequent to his initial grade entries into SIS.

By this testimony, I will dismiss the specification in HO15 for Mr. Alexander's students, ZF in English 11 and TC in Living Environments for the 2008-2009 school year.

Mr. Bondgren testified that the Respondent never directed him to make a grade change. (T 08/26/13: 6621-22, 6647) He further testified to myriad reasons he would increase grades recorded in MGB to a passing grade in SIS, for example, a student might complete make-up work, or re-take a failed test, or receive compassionate grade compensation for having suffered a traumatic family event, to name some. (*id.* 6623-26)

By Mr. Bondgren's testimony, I will dismiss the specification in HO15 for Mr. Bondgren's students, RS, TP, SB, KG, LH, LAH, JD, MD, and TT in Living Environments for the 2009-2009 school year; CB, TL, LC, NM, SP, MG, JA, EC, GG, DK, RB, and MB in Living Environments for the 2009-2010 school year; and SR and MV in Introduction to Physics for the 2009-2010 school year.

Mr. McCandles testified that he made the changes associated with his name at HO15, which the Respondent did not direct him to do so, and that the Respondent did not make any changes without his knowledge. (T 08/27/13: 7001-7002)

By Mr. McCandles's testimony, I will dismiss the specification in HO15 for Mr. McCandles's students AG and CT in Algebra Y1 for the 2008-2009 school year; MN, AM, PM, and LP in Algebra Y2 for the 2008-2009 school year; and RR and SC in Integrated Geometry for the 2009-2010 school year.

Ms. Estlinbaum testified that she changed the grade associated with her name on HO15 for student AG in Chemistry for the 2008-2009 school year. She testified that the Respondent never directed her to do so, and that she felt comfortable making the change. She further testified that at no time did she believe that she was prohibited from failing the student if she wanted to. (T 02/14/13: 4619, 4633, 4657)

By Ms. Estlinbaum's testimony, I will dismiss the specification in HO15 for Ms. Estlinbaum's student, AG, in Chemistry for the 2008-2009 school year.

Mr. Cardinale testified that for the students, ME, KT, PH, and BO, the Respondent did not instruct or direct him to change these grades. (T 08/27/13: 6865) He testified that, for all but one of the students, he passed them because they had passed the Regents examinations (“Regents”). His grading philosophy “for many years” was, if a student sat for all of the laboratory sessions during the year, then passed the Regents, and the grades were close enough, he gave them a passing final grade, because, he reasoned, they met the State requirements for the course. (*id.* 6867) The one exception out of the four was student PH, who failed the Regents. However, Mr. Cardinale passed PH, because he felt that, for the particular student who was a special education student and who completed all of this assignments, the course was “over his head,” and Mr. Cardinale “wasn’t going to punish him for that.” In any event, the decision was Mr. Cardinale’s, not the Respondent’s. (*id.* 6874)

By Mr. Cardinale’s testimony, I will dismiss the specification in HO15 for Mr. Cardinale’s students, MC, KT, PH, and BO’G in Earth Science for the 2008-2009 school year.

With respect to HO15, page 3, the top two listings are for student MZ in Finance with teacher Dougherty, and Public Speaking with teacher Larham, both for the 2009-2010 school year. I note, in the discussion of the charges in HO1, Charge 2, 2.1.2 through 2.1.5, I indicated that these particular grade changes involved transferring grades to Jordan-Elbridge earned by MZ while placed at a treatment facility, and that, “the evidence indicates that the task of

transferring MZ's grades from Hillside to Jordan-Elbridge was overseen by Ms. Dominick, not the Respondent. She, not he, made the decisions regarding the transfer of MZ's grades." By this evidence, I will dismiss the specifications in HO15 for Dougherty's student, MZ in Finance 2009-2010 school year; and for Mr. Larham's student, MZ, in Public Speaking for the 2009-2010 school year.

Removing the dropped and thus far dismissed particulars from HO15, leaves the following:

Student Name	School Year	Subject	Teacher	Original Grade	Final Grade	Individual Who Changed Grade
C H	2005/2006	Eng 10R	Osier	63	65	DZ
C K	2005/2006	Liv Env	Jarvis	67	65	DZ (directing R. McIntyre)
A S	2005/2006	Alg	Stroup	46.5	65	DZ (directing G. Parrott)
M N	2005/2006	Math A	Fisher	43	65	DZ (directing G. Parrott)
T L	2006/2007	Liv Env	Jarvis	61.86	65	DZ(directing R.McIntyre)
P G	2006/2007	Eng 11R	Doughtry	62.14	65	DZ (directing J.Susino)
T H	2006/2007	Math 201	Tyszka	63	65	"
K T	2006/2007	Eng 9R	Hourigan	53.7	56	DZ(directing unknown parties-still awaiting information)
S H	2007/2008	Health	Still awaiting information	65		DZ (directing J. Susino) DZ
S H	2008/2009	Eng 9	Hourigan	61.67	65	DZ (directing persons unknown)
K S	2008/2009	Eng 9	Hourigan	63.07	65	Hourigan
D N	2008/2009	Alg Int	McClurg	62.99	65	McClurg
S S	2008/2009	Health	Seibert	51.41	65	Seibert
C D	2008/2009	Health	Terpening	61.6	65	Terpening
J F	2008/2009	Health	Terpening	63.4	65	Terpening
M K-H	2008/2009	Health	Terpening	59.67	65	Terpening
J K	2008/2009	Health	Terpening	61.86	65	Terpening
J K	2008/2009	Intro Ch	Terpening	62.22	65	Terpening
J B	2008/2009	Intro Ch	Terpening	54.5	65	Still awaiting information
T C	2008/2009	Intro Ch	Terpening	54.46	65	Terpening
D J	2008/2009	Liv Env	Thibault	59.56	65	Thibault
J B	2008/2009	Liv Env	Thibault	60.07	65	Thibault
M K-H	2008/2009	Liv Env	Thibault	60.43	65	Thibault
B D	2008/2009	Liv Env	Thibault	62.69	65	Thibault
R S	2008/2009	Liv Env	Thibault	63.12	65	Thibault
J W	2009/2010	Eng 9	Hourigan	62.5	65	DZ (directing D. Fay)
S A	2009/2010	Inte Geo	McClurg	54.72	65	Still awaiting information
J S	2009/2010	Alg 2/Trig	Miller	55	65	DZ (directing D. Fay)

M K-H	2009/2010	Alg Y2	Arnold	58.94	65	DZ (directing D. Fay)
J H	2009/2010	Bio NR	Thibault	55.71	65	DZ (directing R. McIntyre)
R K	2009/2010	Health	Terpening	55.5	65	Terpening
L A	2009/2010	Dig Photo	Jordan	62.5	65	Jordan

Regarding these remaining particulars, I note that, except for Ms. Osier and Ms. Hourigan, the District failed to call any of the teachers listed to support the charges particularized in HO15. Ms. Mattie's compilation of the raw data listing the grade changes made in the transition from MGB to SIS are simply not sufficient by themselves to prove the charges, especially since the teachers were named and were known to her at the time, and those teachers who did testify at these proceedings all contradicted and disproved Ms. Mattie's assumptions and conclusions. The best evidence to prove that a teacher's grades had been changed against a teacher's will, or without a teacher's knowledge, or under incitement or pressure from the Respondent, or without the consent, authorization, or permission of a teacher, and without a legitimate educational basis to do so, would be the teachers identified by the District as those teachers whose grades had been so changed. Ms. Mattie gathered and arranged all of the data and identified the teachers, yet Ms. Mattie interviewed only two teachers, both of whom were introduced to her by the Board *before* she began amassing her raw data. I further note that Ms. Mattie characterizes the raw data in her "Final" audit report of May 12, 2010 (R32, Bates 000620-621) as "unsubstantiated manual grade changes," yet, incredibly, she failed to interview the twenty-three teachers (save Ms. Hourigan and Ms. Osier) named in HO15 to

determine if the grade changes were, indeed, “unsubstantiated.” Such an omission renders her findings and the conclusions drawn from same by the Board and the District as unreliable and doubtful, at best.

I also note that the burden of proof is the District’s, and the District’s failure to call all but two of the teachers named compels a strong inference against the charges. After all, the Respondent is accused of egregious acts against these teachers and against the very integrity of their grading system. I reasonably and logically conclude that those teachers who were allegedly forced to commit acts against their will or who witnessed the integrity of their grades being undermined without their knowledge or agreement, would have provided a reservoir of ready and willing witnesses for the District.

Furthermore, and most telling, Ms. Dominick testified credibly that she investigated the data amassed by Ms. Mattie when Ms. Dominick, in fact, surveyed the teachers identified by Ms. Mattie and named in HO 15. The survey results convinced Ms. Dominick that the teachers made the grade changes themselves for their myriad and legitimate reasons. (T 08/29/13: 7274-75, 7278) She further testified that she presented said information to the Board in executive session, with Ms. Mattie present, but the Board rejected her findings. Ms. Alley told Ms. Dominick that she believed Ms. Dominick had “coerced teachers” into initialing and signing the survey. (*id.* 7278-83) Ms. Alley testified that the Board had little faith in Ms. Dominick at the time, did not trust her, and did not believe she could be objective. (T 02/11/13:5850, 5928-30, 5933) Ms.

Alley also testified that she was “not into the details.” (*id.* 5936-37) Furthermore, Ms. Alley excluded Ms. Dominick during much of the communication between the Board and Ms. Mattie because she believed that Ms. Mattie was “not part of the chain of command of the school district. She's an independent contractor who worked for the Board of Education.” (T 02/12/13: 6147)

However, the testimony of the teachers in these hearings indicates that Ms. Dominick never directly questioned or coerced any teacher and that Ms. Dominick's survey was conducted not directly by her, but through the various departments at department meetings. (R158; Cardinale, T 08/27/13: 6900-01; Alexander, *id.* 6943-44, 6968; Bondgren, T 08/26/13: 6670-71, 6689-90; the Respondent, T 10/02/13: 7898-99, 7907) Furthermore, Ms. Dominick testified that no teacher ever complained to her that the Respondent had changed a grade against a teacher's will. (T 08/29/13: 7328-29)

Because the Board's relationship with Ms. Dominic had soured by the time Ms. Mattie made her report, does not diminish or alter the certainty that the Superintendent told the Board that Ms. Mattie's conclusions were wrong. She told them that she possessed the teachers' first-hand accountings that the grade changes were made strictly on their own and for legitimate reasons. The Board's rejection of Ms. Dominic's more concrete evidence, as opposed to Ms. Mattie's stand-alone statistics, was certainly the Board's to make. However, my conclusion, driven by the entire evidence, is that the Respondent is not guilty of

this charge. Therefore, and for all the other reasons herein, with the exception of particulars involving the two teachers who testified for the District, I will dismiss all other specifications in HO15. Moreover, I would, as well, dismiss all charges for allegations made for the 2005-2006 and 2006-2007 school years as untimely. Therefore, the remaining particulars are:

Student Name	School Year	Subject	Teacher	Original Grade	Final Grade	Individual Who Changed Grade
C H	2005/2006	Eng 10R	Osier	63	65	DZ
K T	2006/2007	Eng 9R	Hourigan	53.7	56	DZ(directing unknown parties-still awaiting information)
S H	2008/2009	Eng 9	Hourigan	61.67	65	DZ (directing persons unknown)
K S	2008/2009	Eng 9	Hourigan	63.07	65	Hourigan
J W	2009/2010	Eng 9	Hourigan	62.5	65	DZ (directing D. Fay)

The allegation involving Ms. Osier (student CH) rises from an alleged event that occurred during the 2005-2006 school year. Assuming the grade change was posted as late as August 2006, the alleged wrong occurred almost five years prior to the charge being filed, well beyond the three year statute of limitations. (*3020-a (1)*) Likewise, the alleged event involving Ms. Hourigan (Student KT) occurred at the end of the 2006-2007 school year, making the latest possible date of the alleged grade change to be August 2007, almost four years from the day the District filed the charges.⁷⁷ Yet, the District argues that the effect of the Respondent's misconduct was ongoing or "re-uttered" because

⁷⁷ This also would apply to all particulars in HO15 for the school years 2005-2006 and 2006-2007 had they not otherwise been dismissed.

the students whose grade were allegedly changed were promoted to the next level and allowed to continue on through the grades to graduation, hence, with each progression from tenth grade to graduation, the misconduct was repeated. However, the statute is clear: “Except as provided in subdivision eight of section two thousand five hundred seventy-three and subdivision seven of section twenty-five hundred ninety-j of this chapter, no charges under this section shall be brought more than three years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.” The court, in *Clayton v. Board of Education*, 49 A.D.2d (1975) clearly upheld the statute of limitation as applied specifically to 3020-a, in stating, “Considering the penal nature of these proceedings and the statutes which permit the revocation of tenure and discharge of teachers for specified reasons, the limiting language of section 3020-a should be strictly construed. (Citation omitted) Given such a strict construction, a limitation of time as affected by the importation in subdivision 1 of section 3020-a of subdivision 8 of section 2573 is, in fact, three years from the date the alleged incident occurred except when the charge constituted a crime when committed.”⁷⁸

⁷⁸ I might well have summarily dismissed all allegations contained in HO15 predating the three-year limitation. However, the HO15 supplement came into the record long after both Ms. Hourigan and Ms. Osier had testified. I therefore reserved my judgment for my final deliberations, as I did regarding other motions to dismiss the charges. I considered the testimony of Ms. Osier on the matter. Her testimony is discussed elsewhere in this decision.

Notwithstanding the District's argument (based primarily upon two cases citing exceptions to a four-month statute of limitations in certain Article 78 proceedings, one involving property assessments, and another involving land use disputes in an airport development site),⁷⁹ by the clear standard established in 3020-a, I will dismiss the specifications for Ms. Osier's student CH, and Ms. Hourigan's student KT.

Therefore, the remaining particulars are:

S H	2008/2009	Eng 9	Hourigan	61.67	65	DZ (directing persons unknown)
K S	2008/2009	Eng 9	Hourigan	63.07	65	Hourigan
JW	2009/2010	Eng 9	Hourigan	62.5	65	DZ (directing D. Fay)

With respect to the particulars involving Ms. Hourigan in total, she testified regarding certain students' grades. Specifically, she testified regarding student NM that she was not aware that the student's grade had been changed in SIS. (T 05/01/12: 1758; T 05/04/12:1828) However, the NM particular was withdrawn by the District subsequent to her testimony. She also testified that she did not know how or why students JJ's and ZF's grades were changed, and that the changes allowed the students to attend summer school, (*id.* 1830, *et*

⁷⁹ *Matter of Avery v. Aery* 60 A.D.3d 1133, 874 N.Y.S.2d 612NY, 2009. *Sutton v. Yates County* 193 A.D.2d 1126, 598 N.Y.S.2d 646 N.Y.A.D.,1993. In *Avery*, the court seems to agree that the statute of limitation commences at the time the harm is actually done. If, indeed, the Respondent committed the act in the summer of 2006, that is when the grade was changed and the harm was done, irrespective of whether the student progressed through the grades and was graduated. Any harm to his record occurred at the time the grade was changed. Furthermore, while the student was under the District's control, remedial actions were available. In *Sutton* a municipality made a determination on land use pending a SEQRA determination. Therefore, the harm did not occur at the time the vote was taken, because the resolution approved was contingent upon a final finding regarding SEQRA. There is no similarity in the instant matter. If the Respondent changed the grade, there were no contingencies attached. Any contingencies existing are solely those conjured in the Districts argument.

sqq.) but these particulars likewise were withdrawn subsequent to her testimony. She testified further regarding student KT. (*id.* 1837) However, this particular is barred by the statute of limitations.⁸⁰

Of the three remaining particulars, students, SH, KS, and JW, Ms. Hourigan offered no testimony regarding students KS and JW. Given her obvious willingness to testify against the Respondent, I can only infer that there is no substance to the particulars referencing students KS and JW. Ms. Hourigan was present voluntarily as a hostile witness. If there was any substance to the charges involving KS and JW, it was incumbent upon the District to offer such testimony into evidence. Having not done so, I will dismiss the particulars involving students KS and JW. Furthermore, when Ms. Hourigan was asked in direct testimony whether she had “experienced other circumstances where grades that you turned in were changed or altered,” her answer was, “Not that I am aware of.”

Hence, Ms. Hourigan testified regarding only the one remaining student, SH. The particular regarding SH as written in HO15, alleges that the grade was changed by “DZ⁸¹ (directing persons unknown).” Ms. Hourigan’s testimony was similar to her testimony regarding other particular students named in the charges whose names the District subsequently withdrew. However, regarding

⁸⁰ Further, her testimony indicated that KT passed the course by taking it in summer school. Although Ms. Hourigan took issue with whether the student was eligible for summer school, this seemed to be nothing more than a difference of opinion between Ms. Hourigan and the Respondent regarding such eligibility. (See also T 05/04/12: 1928, *et sqq.*)

⁸¹ DZ is the Respondent.

SH, she testified that in the 2008-2009 school year, SH's ninth-year English grade was changed to 65 from 61.7, a grade she insisted she submitted as a failing grade for the year. She testified that during the following fall, she learned from the guidance office that SH's grade had been changed to passing. She also testified that she was not consulted regarding the change. She testified that after learning of the change, she did not speak to anyone else, except the guidance personnel. (*id.* 1838-41) She further testified that the grade was changed even though she submitted a "failure justification form" with the grade. (*id.* 1981-82) However, no such form was introduced through Ms. Hourigan nor was such a form introduced through Ms. Fay, Ms. Susino, or Mr. McIntyre. Further, Ms. Hourigan testified that she never asked the guidance employee who was responsible for making this particular grade change. (*id.* 1991) Neither Mr. McIntyre nor Ms. Susino testified to any involvement in changing SH's grade. Nor did Ms. Fay, the guidance office secretary. The Respondent testified that he never changed a grade for any of Ms. Hourigan's students. (T 10/02/13: 7887-88)

Ms. Hourigan's testimony with respect to SH is unconvincing. There is simply no evidence offered other than the grade was changed in SIS from 62.5 to 65. Ms. Mattie claimed that the Respondent directed "persons unknown" to make the change, yet, many months later, the District failed to identify the "persons unknown." Ms. Hourigan was quite adamant that the grade had been changed against her will and without her knowledge, but she was just as

adamant regarding other students whose names were subsequently withdrawn from the charges. Thus, her testimony regarding those withdrawn particulars is doubtful, as, likewise, is her testimony involving SH. Moreover, Ms. Hourigan claimed that she filed a failure justification form for SH, but offered no such form into evidence. For these reasons, I will dismiss this remaining particular contained in HO15 and, therefore, deny HO15 and the charges contained therein in their entirety.

In further argument, the District asserts that the Respondent, by promulgating a grading policy that allegedly prohibited teachers from giving number grades of 62, 63 or 64 as final grades, was, by itself, an act that “directed, instructed, encouraged, and incited subordinate teachers or employees...to engage in unauthorized changes of student grades...,” and the Respondent thus, “... engaged in conduct that constitutes insubordination and a demonstration of immoral character.”

The Respondent was hired by Jordan-Elbridge effective January 20, 2006, and awarded a three-year probationary appointment as High School Principal. (D153) He had been previously employed as an assistant principal at the Phoenix, New York and North Syracuse, New York School Districts. (T 09/30/13:7557-58) On November 19, 2008, the Board voted to grant the Respondent tenure, effective January 31, 2009. (*id.* 2559-60; D154)

The gravamen of the instant charge, that is, the charges contained in HO2, Charge 2, specifications 2.1 through 2.7, is rooted in a so-called policy

announced by the Respondent at a faculty meeting early in his employment at Jordan-Elbridge. The testimony regarding the grading policy or preference is inconsistent from witness to witness, and, at times, inconsistent within a witness's testimony. However, all agree that at a faculty or at multiple meetings, the Respondent announced that he preferred that teachers not award final grades of 63 or 64 (or, by some witnesses' statements, 62, 63, or 64).

To briefly summarize the testimony:

Ms. Susino, a Guidance Counselor, testified that the Respondent announced at faculty meeting "probably" in April 2008, that he did not want to see final grades of 62, 63, or 64. (T 06/25/12: 2377-78) She also testified that she thought the Respondent made the announcement in April of his first year as principal, (T 6/26/12: 1513-14) which would have dated the announcement April 2006, not 2008. She further testified that she did not question or discuss the rule with the Respondent. (*id.* 2379) Ms. Susino also testified that the Respondent's predecessor, Ron Barry, discouraged final grades of 63 or 64, but that his practice was to contact teachers before making any changes, and that the teachers had the option of either holding to the grade or making or authorizing a change. (*id.* 2379-81) Ms. Susino remembers being present at the faculty meeting when the policy was discussed, but did not participate in the discussion that ensued when the Respondent made the announcement. (*id.* 1516) Ms. Susino recalled that the faculty understood the policy but disagreed. (*id.*) She further testified that nothing was said that obligated or required a teacher to

either change a grade or not. (*id.* 1517) She also agreed that it was the principal's prerogative to make such a policy. (*id.*) Ms. Susino believed that it was immoral to give a student an undeserved grade, (*id.* 1687) but did not believe that the policy was immoral. (*id.* 1518) She was also aware that other school districts operated under similar policies and that she fully understood the Respondent's reason for the policy. (*id.* 1519-20)

Mr. McIntyre, the other Guidance Counselor, recalled that the Respondent made the grading policy announcement at a faculty meeting sometime after his arrival at Jordan-Elbridge. (T 06/27/12: 1730) He testified that the Respondent explained that "sixty-two, sixty-three, sixty-four, those types of grades were very hard to justify to parents and that it's a matter of a few different assignments or various activities that would help that child pass with a sixty-five." (*id.* 1732) He further testified that the policy did not dictate whether a student should pass or fail, but rather suggested that the grade should be either 65 or lower than 62, at the teacher's option. (*id.* 1996)

Ms. Osier testified that she served at Jordan-Elbridge under four principals. (T 04/30/12: 1437) She testified that one of the Respondent's predecessors, Noel Hotchkiss, asked teachers not to give final a grade of 64, to either pass the student with a 65 or fail the student with a lower grade. (*id.* 1439) She also testified that Mr. Barry, Mr. Hotchkiss's successor, had no particular policy, but that she continued the practice encouraged by Mr. Hotchkiss throughout Mr. Barry's tenure. (*id.* 1440-42) Ms. Osier also testified

that she was present at a faculty meeting in the spring or 2007 when the Respondent told the faculty to not give final grades of 62, 63, or 64.⁸² (*id.* 1453-54) She described the Respondent's policy as "more fluid" than Mr. Hotchkiss's, and testified that the Respondent and she had numerous philosophical conversations about the policy in particular and grading in general. Her philosophical difference was with moving the standard from 64, Mr. Hotchkiss's cut-off point, to 63, the Respondent's. (*id.* 1597-98) However, she believed that the dispute was not whether the teacher should pass or fail a student; the issue was which numerical grade should a teacher use. (*id.* 1691) She had conversations with the Respondent in her multiple roles as teacher, Department Chair, and Union President. (T 04/30/12: 1455, *et sqq.*) She testified that she "believed" that the Respondent told the faculty that he would change grades from 62, 63, or 64 to passing. (*id.* 1641-43) She testified that she told the Respondent that she and Ms. Hourigan "wanted students to be accountable and that we weren't doing them any favors by giving them grades they hadn't earned." (*id.* 1464) However, she did not recall the Respondent's response. (*id.*)

Ms. Hourigan testified that, as far as the Respondent's predecessors were concerned, they did not like final grades of 64. (T 05/01/12: 1715) To her knowledge, Mr. Hotchkiss and Mr. Barry never changed a grade without the teacher's knowledge. (*id.* 1716) She testified that the policy changed when the

⁸² Ms. Osier subsequently changed her testimony to say that the Respondent may have said 63 or 64, as per the policy at North Syracuse. (T 05/01/12: 1535-37)

Respondent announced at a faculty meeting in June 2006 that final grades of 62, 63, or 64 had to be changed to 65. She testified that she became “very vocal” and that the meeting became “very loud,” and the Respondent told the faculty, after being asked directly, that if they refused to change a grade from 62, 63, or 64 to passing, he would. (*id.* 1717-24; T 05/04/12: 1976) ⁸³ Ms. Hourigan testified that she believed she held to a higher standard than most. She testified: “I grade students based on what they earn and what they know. I have a high moral code and I want students to know what they are required to know. And I don't pad grades. And I know other teachers do.”

Mr. Cardinale testified that he recalled the faculty meeting His recollection was that the Respondent told the faculty that he did not like to see grades of 63 or 64, and that he preferred that the grade be moved to 62 or up to 65. According to Mr. Cardinale, the Respondent made it clear that the decision was the individual teacher's. (T 08/27/13: 6878) According to Mr. Cardinale, the Respondent never issued a written directive, and the Respondent expressed the matter as a preference, not a mandate. (*id.* 5878-79) Mr. Cardinale further testified that, even before the faculty meeting, he preferred not to give 63 or 64 as a final grade, (*id.* 6890) and after the faculty meeting, he never heard anyone assert to him that the Respondent's preference went as low as 62. According to Mr. Cardinale, 62 came into play as an option for failing a student with a final grade of 63 or 64. (*id.* 6893-94)

⁸³ Ms. Hourigan could not recall the names of any other faculty speakers at the meeting, although she insisted that several had become vocal and that the meeting was noisy. (T 05/01/12:1721)

Mr. Bondgren testified that he recalled the faculty meeting and recalled the Respondent requesting that teachers change final grades of 63 or 64 to either 62 or 65. He also recalled that the Respondent made it clear that the decision was the teacher's to make. (T 08/26/13: 6628) Mr. Bondgren further testified that, ever since Mr. Barry was Principal, his own policy was not to give final grades of 63 or 64. (*id.* 6629) He recalled that, during the faculty meeting with the Respondent, several teachers in his immediate surrounding found the discussion humorous, because the Respondent's grading preference was already their practice. (*id.*) He also testified that the Respondent never put the policy or preference into writing. (*id.* 6330-31) Mr. Bondgren testified that the Respondent's "announced policy" at the faculty meeting had no influence upon how he graded a student. (*id.* 6668). Further, he never heard the Respondent say that he'd change a grade himself. (*id.*)

Mr. Alexander recalled that the faculty meeting occurred during the Respondent's first year as Principal and that there was a "heated discussion" at the meeting between Pam Meade and Mr. Kufs. (T 08/27/13: 6916; 6948) Mr. Alexander remembered the discussion was "between...two specific teachers, a philosophy of grades and do grades matter...." (*id.* 6916-17) His "impression" from the meeting was that a teacher should: "be able to justify your grades. If you are going to give a 63 or 64, be able to support a 63 or 64." (*id.* 6916-17; 6950) In all, Mr. Alexander remembers the faculty meeting and the discussion as being "a good discussion about grades." (*id.* 6970)

Mr. McCandles testified that he recalled the faculty meeting and that he recalled the Respondent telling the faculty that he did not like grades of 63 or 64. Mr. McCandles also understood that the final grade was the teacher's prerogative. (*id.* 7005)

Mr. Larham testified that the entire issue of whether to give a final grade of 63 or 64 was a matter of grading "philosophy." (T 08/26/13: 6794-95) He further testified that he was aware of similar practices before he was employed at Jordan-Elbridge; that such practices were in place at the Solvay School District and the Syracuse City School District when he taught in those districts. (*id.*) Mr. Larham testified that he viewed the practice as "normal behavior" for most teachers, that most teachers agreed with the practice, but that, in the end, the decision was the teacher's to make. (*id.* 6796) He further testified that the Respondent never did or said anything to influence him to give or change a grade. (*id.*)

Mr. Sipley testified that he recalled that the faculty meeting was held at the High School library. He recalled that the Respondent told the faculty that he did not care to explain a final grade of 63 or 64 to a parent. (T 08/26/13: 6532-33; 6594) He did not recall the Respondent saying he did not want to see final grades of 62. (*id.* 6594) He also testified that most of the expressed faculty responses were "negative." (*id.* 6536-37) Mr. Sipley further testified that his immediate reaction was that he did not think it appropriate to either lower or raise an earned final grade. However, he continued that, in principle, he adjusted

to the policy by committing himself to work with students whose final grades were so close to passing “in order to help them pass..., which is ultimately what we all want....” (*id.* 6538)

Ms. Estlinbaum testified that she recalled the faculty meeting at which the Respondent discussed the difficulty of explaining to parents a failing grade of 63 or 64. (02/04/13:4617-18) She further testified that the policy did not influence her in deciding to pass or fail a student, and that she had previously raised close grades to passing. (*id.* 4619; 4657) She testified that the Respondent clearly said that if a teacher wanted to fail a student to give them a 62 or less, but to avoid grades of 63 or 64. (*id.* 4631) Ms. Estlinbaum testified that two teachers stood out to her as being most upset at the faculty meeting, they were, Ms. Hourigan and Ms. Osier. (*id.* 4631)

Karen Lang, who preceded Ms. Thomas-Madonna as Associate Principal, testified that she did not recall the faculty meeting, but did remember discussions regarding final grades of 63 or 64. She recalled that teachers were encouraged to move the grade to 65. She also recalled that the Respondent preference was for the teacher to find a way to pass the student, rather than take point away to lower the grade to 62. However, she testified that it was her understanding that each decision was the teacher’s to make. (T 08/28/13: 7040-41)

Ms. Dominick testified regarding the matter of moving final grades of 63 and 64 to 65. She testified that the practice had been long-standing at Jordan-

Elbridge and predated the Respondent's employment at Jordan-Elbridge. (T 08/29/13: 7270-71) It was acceptable for a teacher to give such a grade, but the teacher needed to be able to explain the grade to the parents. (*id.* 7272) She testified that both of the Respondent's immediate predecessors, Mr. Hotchkiss and Mr. Barry, had similar preferences. (*id.* 7272-73)

Moreover, on May 14, 2008, before he received tenure, the Respondent was evaluated by Ms. Dominick. (T 08/29/13: 7415; R193, Item 7) It is clear that Ms. Dominick and the Board knew of the Respondent's grading preferences prior to his receiving tenure. (T 08/29/13: 7420) The evaluation states: "Teachers are feeling pressured to inflate grades." It also states: "Board members are feeling that you are not telling me the entire story on this." (R193, Item 7) However, Ms. Dominick testified that no teacher ever directly reported to her that he or she was pressured to change grades, but Ms. Alley had reported to Ms. Dominick one incident in particular involving Ms. Osier. It was upon this report that Ms. Dominick included the reference to "teachers" "feeling pressure to inflate grades." (T 08/19/13: 7446 *et sqq.*) Then, On September 25, 2008, the Respondent received a "Tenure Recommendation Evaluation," in which the Ms. Dominick commented on the Respondent's "need for a well articulated plan for final grades in the 62 - 64 range," as follows: "You have worked with your staff to successfully resolve this. You have communicated with the faculty that any decisions made about final grades must be mutually agreed upon between you and the faculty member."

Clearly, the Superintendent, the Board and the High School faculty were aware of the Respondent's preferences regarding final. He was granted tenure with such preferences on full display. Prior thereto, no one attempted to negate or interfere with the Respondent's preference or his promulgation of the practice, except to counsel him not to change any grade without the teacher's knowledge and consent. By the Respondent's account, he acted to change some grades in the summer of 2006, his first year. He noted that "a few students" had final grades of 63 or 64, and, based upon his experience at North Syracuse, he felt it was appropriate to change some of the grades.⁸⁴ (T 10/01/13: 7488-89) Before doing so, he consulted with the Guidance Counselors and discovered that his predecessor disallowed final grades of 64. (*id.* 7470) Further, in making the changes, he consulted with the Counselors on a student-by-student basis after examining the grades recorded in SIS, and neither Counselor expressed to him any concerns about any changes made at that time. (*id.* 7594-96)⁸⁵

⁸⁴ For all the reasons stated above, all charges contained in Specifications found in HO15 are dismissed. This discussion relates to the generic allegation that the grading policy was, *per se*, intimidating, and "directed, instructed, encouraged, and incited subordinate teachers or employees...to engage in unauthorized changes of student grades...", and the Respondent thus, "... engaged in conduct that constitutes insubordination and a demonstration of immoral character."

⁸⁵ Both Counselors testified. Ms. Susino said she believed it was the Principal's prerogative to make such changes, and that she was aware that other school districts engaged in similar practices. (T 06/26/12: 1517-19) There is no testimony from Ms. Susino that she expressed disagreement or misgivings directly with the Respondent. Mr. McIntyre believed that two of the grade changes listed on HO15 were "unauthorized," (T 06/27/12: 1920) but he did not raise the issue with the Respondent. He believed he had no reason to question the Respondent's authority in such matters, (*id.* 1921) and had no reason that the two teachers involved did not understand the policy.

One alleged grade change to which a teacher gave testimony involved one that occurred beyond the statute of limitations. The teacher, Ms. Osier, testified that she had failed a student in tenth-grade English at the end of the 2005-2006 school year with a final grade of 63. (T 04/30/12: 1445-46) She testified that when she returned to school in the fall, the student approached her and thanked her for passing him, whereupon Ms. Osier went to the Guidance office and discovered that the student, CH, was enrolled in eleventh-grade English, even though he had not attended summer school. (*id.* 1447-48)

Ms. Osier testified that when she confronted the Respondent, although she does not remember what he said, she had a “sense” that he believed, as Principal, he had the right to change the grade. (*id.* 1448-49) However, notwithstanding the fact that CH went on to pass eleventh-grade English, including the English Regents examination, Ms. Osier believed “in [her] bones” that CH was not ready for eleventh-grade English. Ms. Osier explained that she was perturbed because the Respondent had not attempted to contact her over the summer about the grade change. (T 05/01/12: 1644) She testified that the prime issue for her was the communication failure, that the Respondent had not attempted to contact her, that if the Respondent and she had “communicated, we might have had a meeting of the minds” over the final grade for CH. (*id.* 1693)

The Respondent testified that CH’s final average was 63.14 and that the only reason CH failed the course was that he failed the final exam.⁸⁶ The

⁸⁶ Without the final exam, CH’s average over 6 marking periods was 64.5. (D47)

Respondent further testified that he had knowledge that CH experienced difficulties sitting for and taking written exams. (T 10/01/13: 7492-74) For this reason, he gave CH the benefit of the doubt and had his grade raised in SIS, thereby passing him on to eleventh-grade English.

Even assuming, *arguendo*, that the particular charge identifying CH was a viable one, there is no evidence whatsoever leading to the conclusion that the Respondent made the decision for any other than a sound educational reason. Even by Ms.Osier's testimony, the uppermost concern to her was the manner in which the change was made, not the change, *per se*, because she believed that the Respondent and she might well have reached a "meeting of the minds" regarding CH's final grade if only the Respondent had contacted her before he made the change. Ms.Osier was obviously and understandably angered that the Respondent failed to contact her regarding CH's grade. Ms. Osier's situation notwithstanding, there was no concrete evidence, other than Ms. Mattie's overvalued statistics, to link the Respondent to other grade changes in the following year or beyond.

James Froio, the Jordan-Elbridge Superintendent at the time of these proceedings, was called by the District to testify as a expert. Mr. Froio said he investigated the matter of the grading policies promulgated by the Respondent, limiting his investigation "mostly to the things I could dig up myself." (T 02/14/13: 6297) Except for Ms. Hourigan and Ms. Osier, Mr. Froio did not speak to any of the teachers identified in Ms. Mattie's audit. (*id.* 6322, 6338)

Mr. Froio believed that he had sufficient evidence against the Respondent regarding the grades changes, because Ms. Hourigan and Ms. Osier told him that the Respondent's expressed preference was delivered at the faculty meeting as a "proclamation." Based upon their characterization, Mr. Froio likewise believed such. (*id.* 6321-22) He believed that, Ms. Osier provided enough proof to sustain all the allegations, testifying: "I think there was a lot of evidence that was - that was shown relative to grade changes that support teacher initiated grade changes. I make a big distinction between that and directed grade changes by [the Respondent]. So once I was able to establish that he had direct responsibility for grade changes, I don't need to find evidence of seventy-two. I only need to find evidence on one. And so the rest of the grade change investigation did not become important to me at that point." (*id.* 6320) Mr. Froio believed that, "...the grade changes relative to sixty-two, sixty-three, sixty-four were a direct result of [the Respondent's] proclamations to the faculty that you were not allowed to give such grades." (*id.* 6321-22)

Furthermore, Mr. Froio testified that Ms. Mattie's audit, (R32) "...speaks to a culture that was created that close enough is good enough based on [the Respondent's] direction that started at that faculty meeting." (*id.* 2339-40) He testified that he believed a grade change was, "any change that takes place, whether it's a teacher initiated or initiated by the principal, other than what the actual average is."

Mr. Froio testified that he did not consult with or question Ms. Dominick in his investigation. He also claimed that he never saw the results of Ms. Dominick's survey that refuted Ms. Mattie's audit findings. (*id.* 6291; R158) Furthermore, he emphasized that there was no Board policy regarding the Respondent's grade change preferences and that his policy should have been approved by the Superintendent and the Board. (*id.* 6272-73)⁸⁷

Mr. Froio's testimony added no probative value to the District's case. His investigation was insufficient. He spoke to only two teachers who were antagonistic toward the Respondent and accepted, at face value, there slanted versions of events, and their interpretations of the Respondent's intentions. Certainly, Mr. Froio was at liberty to draw any conclusions he wished. However, he was not on hand when the events leading to the charges occurred, nor did he have any first-hand knowledge of the events.

It is noteworthy that the charges contained in HO2 were signed by the Superintendent at the time, Dr. Lawrence Zacher. However, Dr. Zacher was not called to testify. Nor was Dr. Zacher the superintendent when the events leading to the charges contained in HO2 allegedly occurred. The superintendent at the time was Ms. Dominick, who was not called to testify for the District, but was,

⁸⁷ As discussed herein above, Ms. Dominick credibly established, as did teacher witnesses other than Ms. Hourigan and Ms. Osier, that grading preferences similar to the Respondent's were advanced by the Respondent's predecessors. Furthermore, the Board was well aware of the Respondent's grading preferences when they granted him tenure.

instead, called by the Respondent.⁸⁸ Since Mr. Zacher and Ms. Dominick were not called by the District to testify, I may reasonably infer against the District on these charges contained in HO2, 2.1 through 2.7. However, because I have found sufficient grounds to dismiss the charges otherwise, I need not invoke the adverse inference, except to the extent that such an inference further supports the dismissal of the charges.

For the foregoing reasons, I conclude that the Respondent is not guilty of insubordination and conduct demonstrating immoral character. Therefore, I hereby dismiss in their entirety the charges contained in **HO2, 2.1 through 2.7**, and, as included, all particulars contained in **HO15**.

Specifications 2.8 through 2.10

The charges read:

- 2.8 In the case of one student, said student received a diploma, which was later challenged by the college to which he was enrolled. Said college thereafter forced the student to withdraw from the college until the student successfully completed his high school work.
- 2.9 The actions of the Respondent, which led to an unauthorized diploma being issued, were the source of great upset to the family of the student involved, as well as the student himself.
- 2.10 The Respondent's actions were unlawful, illegal, in violation of Board policy, and were the source of considerable consternation to the family and the student involved, as well as exposing the School District to possible liability for the issuance of an unauthorized diploma, and the issuance of unauthorized course credit to the student in question (Student A) ("TL").

⁸⁸ As discussed herein above, Ms. Dominick compiled convincing evidence disputing Ms. Mattie's findings with respect to these charges.

As written, these charges are so similar to the charges contained in HO1, 1.1.1 through 1.1.16, 2.2.1 through 2.2.12, and 4.1.2 through 4.1.6 that they are duplicative and redundant; except to add, for the reasons discussed in the charges previously considered herein, neither is the Respondent responsible for whatever action TL's college demanded of Jordan-Elbridge so that TL might continue as a student there. The evidence does not indicate that TL was "forced" to "withdraw" from the school. Instead, the school inquired of Jordan-Elbridge regarding TL's transcript, which Jordan-Elbridge personnel other than the Respondent withheld. Subsequently, Ms. Estlinbaum and Ms. Thomas-Madonna prepared the "practicum" for TL so that those making the decision at Jordan-Elbridge might find a rationale, by whatever novel standard or methodology they fabricated, to release TL's transcript to the college. As I discussed above, on August 13, 2010, TL passed the course on NovaNET by the standards in place when the high school enrolled him in September 2009. Everything that Jordan-Elbridge's personnel did to obstruct TL's progress after August 13, 2010 was done *ex post facto*, and does not fall upon the Respondent.

For the same reasons discussed herein above in charges HO1, 1.1.1 through 1.1.16, charges 2.2.1 through 2.2.12, and charges 4.1.2 through 4.1.6, I conclude that the Respondent is not guilty of insubordination and conduct demonstrating immoral character. Therefore, I hereby dismiss in their entirety the charges contained in HO2, 2.8 through 2.10.

Specifications 2.11 through 2.15

The charges read:

- 2.11 The Respondent has also directed, encouraged, enjoined, and incited subordinate employees of the School District to modify the grades of a certain special education student (Student B).⁸⁹
- 2.12 By the process of modifying, altering, and changing grades for the special education student, the Respondent encouraged, enjoined, cajoled, and incited those teachers to provide credit to the special education student for courses the student did not successfully complete.
- 2.13 The Respondent thereafter issued a high school diploma for said student, despite the fact that the student had not met the requirements of the Jordan-Elbridge Central School District and the State Education Department for graduation. This special education student (Student B) received an unauthorized diploma issued by the Respondent, with the Respondent having full knowledge that the student did not complete the necessary course work nor achieve the necessary grades.
- 2.14 The Respondent knew or should have known that the issuance of the diploma to the special education student under these conditions was an act that was not authorized by law, policy, or regulation.
- 2.15 The Respondent has engaged in immoral and insubordinate conduct constituting behavior unbecoming an administrator of the Jordan-Elbridge Central School District. The services of the Respondent should be terminated forthwith.

It is difficult to determine the exact nature of these allegations. Surely, the District knew when the charges were drawn the exact courses for which the Respondent allegedly “directed, encouraged, enjoined, and incited subordinate employees of the School District to modify” MZ’s grades, and for which courses the Respondent allegedly “encouraged, enjoined, cajoled, and incited those teachers to provide credit” for MZ that she “did not successfully complete.” I have herein ruled on all matters dealing with NovaNET and dismissed all charges related to alleged NovaNET misuse or abuse based upon, in part, the the District’s failure to demonstrate that any NovaNET policy

⁸⁹ Student B is MZ, the Respondent’s daughter.

existed that contradicted any of the Respondent's or his subordinates' decisions involving students' (including MZ's) use of the system. Further, I have ruled on certain transfers of MZ's grades from Hillside, and I dismissed all charges against the Respondent involving the transfer and recording of grades from Hillside to Jordan-Elbridge. I have also dismissed charges against the Respondent relating to MZ's re-enrollment from Hillside to Jordan-Elbridge. Finally, I have dismissed charges regarding MZ's and the Respondent's interface with Jordan-Elbridge's CSE upon re-enrollment.

One final item involving MZ not addressed herein was the matter involving MZ dropping English 11 and taking, instead, two additional 12th Grade English electives. On this matter, certain facts were established.

According to Mr. McIntyre, MZ's 11th Grade Guidance Counselor, MZ withdrew from English 11 shortly after starting the course. (T 06/27/12: 1772) The Respondent testified that MZ's physician recommended that she drop the course because it was "too stressful for her." She was on "strong" medications and was experiencing "severe" episodes (T 10/01/13: 7685-86; T 10/02/13: 7947) Mr. McIntyre testified that after MZ withdrew from the course, he scheduled her into English 11 for the following (2009-2010) school year, because, he reasoned, the course was required of "every student." (T 06/27/12: 1777-78) Subsequent to dropping the course and before the 2009-2010 school year, MZ sat for and passed the State Regents Examination in English ("English Regents") in June 2009.

In mid-June 2009, Mr. McIntyre received in his office a signed handwritten note from MZ stating that she wanted to take additional senior electives in lieu of English 11 during her senior year. (*id.* 1775; 1785-86) The note read, “Instead of english 11R, I Want 2 take Creative Writeing and Public Speaking Since I Pasted the regents.” (*sic*) (D48) Mr. McIntyre testified that, after receiving the note, he met with the Respondent in the Guidance Office to discuss MZ’s request, and was then joined by Ms. Osier, the English Department Chair at the time. (T 06/27/12: 1779) Mr. McIntyre testified that the Respondent told him that he believed MZ would meet the SED requirements for the English sequence without completing English 11, because the requirement was that a student complete four units of English and pass the English Regents or equivalent to satisfy the requirements. (*id.*) Mr. McIntyre told the Respondent that what he was asking was unusual and was never before done during his tenure at Jordan-Elbridge. (*id.* 1780-81) Mr. McIntyre testified that he believed that passing the English Regents was not an automatic pass for English 11. (*id.* 1789-91) Typically, a student took the course before taking the English Regents. (*id.* 1792) Mr. McIntyre testified that Ms. Osier was “angry,” and “irritated” during the meeting, and eventually “stormed out.” (*id.* 1782-84) He further testified that, after the meeting, he checked the SED website and found nothing either confirming or prohibiting MZ’s request. (*id.* 1787-88) He also testified that, during the meeting, Ms. Osier emphasized that the MZ’s request went against past practice at Jordan-Elbridge, but that he was unaware

of any written regulation, rule or policy regarding the specific request. (*id.* 1912-13) In his testimony, Mr. McIntyre ultimately conceded that the issue was a matter of opinion because he could not find anything to indicate that the Respondent's position regarding MZ's request was incorrect. (*id.* 1798-99) Mr. McIntyre granted MZ's request and so stated on the note by writing, "Done 6/19/09." (*id.* 1785-86; D48)

Other witnesses testified for the District regarding this matter:

Ms. Osier testified that she was "told" that MZ withdrew from English 11 and was being prepped for the English Regents. (T 04/30/12: 1472-73) She testified that she asked the Respondent how granting MZ's request was even possible because, as English Department Chair, it was her experience and expectation that every student take and pass English 11. (*id.* 1473-74) She also testified that, nevertheless, the Respondent allowed MZ's request. (*id.*)

Ms. Osier further testified that the Respondent told her that the only SED requirement for high school English was for a student to take and pass four units of English, and that English 11 was not a course specifically identified by the State's regulations. (*id.* 1479-80) She also testified that the Respondent told her that it was his job to "find loopholes when they benefit students." (*id.* 1481) She further testified that she warned the Respondent that what he was doing established a "dangerous precedent." Ms. Osier testified that she believed one course followed the other in sequence from English 9 through English 11, and that she further believed that the three grades of English were required in order

for a student to take the English Regents. (*id.* 1483) She further testified that MZ passed the English Regents, (*id.* 1490) and that there were no irregularities or discrepancies in her doing so. (*id.* 1497) Ms. Osier testified that she did not know of any item in any of MZ's IEPs that would have exempted her from completing English 11. (T 05/01/12: 1666-67; D50; D51)⁹⁰ Ms. Osier also testified that, although her expectation at that time was that MZ would need to be institutionalized after high school, she was now aware that MZ was currently in college and doing well. (*id.* 1613 *et sqq.*)⁹¹

Ms. Schue testified that, since her employment in 2001, she was not aware of any student ever being graduated from Jordan-Elbridge without completing English 11. (T 02/05/13: 4818) She also testified that she was aware that the SED required that a student complete four units of English "commencement level" courses to be eligible for graduation. (*id.* 4889-90) She also believed that, at Jordan-Elbridge, "credit for English 11 is required to graduate," (*id.* 4992) yet she agreed that no regulations defined which English classes constituted the four unit English requirement. (*id.* 4993)

Ms. Susino testified that no student had ever dropped English 11 at Jordan-Elbridge and that she considered English 11 a required course. (T 06/24/122516; T 6/26/12: 1670) She also testified that she and Mr. McIntyre

⁹⁰ The District never called the Chair of the Special Education Department, Beth Russ, to give expert testimony on the content and meaning of MS's IEPs offered into the record.

⁹¹ The Respondent testified that MZ was attending SUNY Potsdam, was carrying a 3.7 GPA, was on the President's List, and, the previous spring, had studied in London, Great Britain.

checked the Jordan-Elbridge website and did not find anything to indicate that a student could be graduated from Jordan-Elbridge without English 11. (*id.* 06/24/12:2518) She also testified that, except for English 11, she believed MZ met all the requirements for graduation. (T 06/26/12: 1543)

Mr. Froio ⁹² testified that he investigated the matter and relied on Ms. Osier for the pertinent history at Jordan-Elbridge. (T 02/14/13: 6349) Although Mr. Froio insisted that students were required to complete English 11 to be graduated from Jordan-Elbridge, neither he nor the District were able to produce a course catalog for the 2008-2009 school year. Nor did he examine a course catalog for the 2008-2009 school year in preparing for his testimony. (*id.* 6353, 6359) Mr. Froio conceded that what he understood to be the English 11 requirement at Jordan-Elbridge was not based on any documentation, rule or regulation of which he was aware. (*id.* 6391)

The Respondent testified that he instructed Mr. McIntyre to grant MZ's request. (T 10/02/13: 7920) He also testified that before he acted, he discussed the matter with Ms. Russ and Martha Passamonte, both from the special education department and that they approved the move. ⁹³ (*id.* 7921, 8220-21)

⁹² Mr. Froio was not the Superintendent when the charges were filed in April 20121. The Charges were signed by Mr. Zacher, who was not called to testify.

⁹³ The District did not call Ms. Russ or Ms. Passamonte to testify. A "draft" IEP created by Ms. Russ in February 2009 referenced MZ's dropping English 11 and Algebra to "alleviate high stress levels." (R172 at 4 of 9) An apparent IEP dated April 2009 makes reference to algebra being dropped "to assist in alleviating high stress levels," but there is no mention of English 11. (D50) However, the evidence indicates that English 11 had already been dropped, and that in January 2009 MZ was already scheduled to take English 11 starting September 2009. It would certainly have been more instructive to the record to have Ms. Russ testify. Nevertheless, the "draft" IEP supports the Respondent's testimony regarding his discussions with Ms. Russ and Ms. Passamonte.

He further testified that the electives taken by MZ were commencement level courses, as were all senior elective courses offered at Jordan-Elbridge. (*id.* 7954-57, 8232)

This charge cannot be sustained as written, because nowhere in the facts discussed within the confines of 2.11-2.15 is there any evidence that the Respondent “directed, encouraged, enjoined, and incited subordinate employees of the School District to modify the grades” of MZ. However, I will discuss the charge in the limited context of whether MZ’s graduation without receiving credit for English 11 constitutes MZ’s receiving diploma “despite the fact that [MZ] had not met the requirements of the Jordan-Elbridge Central School District and the State Education Department for graduation” and that the diploma was issued, “with the Respondent having full knowledge that [MZ] did not complete the necessary course work...,” and that the Respondent “knew or should have known that the issuance of the diploma to the special education student under these conditions was an act that was not authorized by law, policy, or regulation.”

In reviewing 8 CRR-NY 100.5, (R63) (“Regulation”) the English requirements for a diploma are clearly defined. For, “Students first entering grade nine in the 2001–2002 school year, but prior to the 2008–2009 school year, shall have earned at least 22 units of credit including two credits in physical education to receive either a Regents or local high school diploma.” MZ entered grade nine prior to the 2008-2009 school year. (D64) The

Regulation continues, “Such units of credit shall incorporate the commencement level of the State learning standards in: English; social studies; mathematics, science, technology; the arts (including visual arts, music, dance and theater); languages other than English; health, physical education, family and consumer sciences; and career development and occupational studies. Such units of credit shall include: (i) English, four units of commencement level credits...,” The Regulations also require that such students pass “the Regents comprehensive examination in English.”

The Regulations impose upon other academic areas more defined requirements beyond “commencement level courses.” For example: (1) In science, a student must take one “life sciences,” and one in “physical sciences,” plus a third course “in either life sciences or physical sciences.” (2) In mathematics, a student must take three units “at a more advanced level than eighth grade,” and “no more than two to credits shall be earned for any Integrated Algebra, Geometry, or Algebra 2 and Trigonometry commencement level mathematics course.” (3) In social studies, a student must earn four units of credit including “one unit credit in American History,” and “one-half unit of credit in participation in government and one-half unit of credit in economics or their equivalent.”

The Respondent insisted that the Regulation gave him leave to instruct Mr. McIntyre to drop MZ permanently from English 11 and allow her to instead take a full unit of credit in English in the form of electives offered by the

English Department. The Regulation does not define minimum subject requirements for English, as the Regulations do for mathematics, science, and social studies. Therefore, by the Regulation alone, the Respondent is not guilty of allowing MZ to be graduated without completing “the necessary course work....” Further, by the Regulation alone, the Respondent did not commit an act not “authorized by law, policy, or regulation.” The evidence indicates that MZ completed four units of credit in commencement level English courses and passed the Regents comprehensive examination in English, thereby satisfying, insofar as the English mandate, the State’s requirements.

The final question is whether the Respondent violated a school policy or regulation. Although the District offered testimony that allowing MZ to drop English 11 and take instead two half-units of commencement level English classes was, to their knowledge, unprecedented, there was no evidence offered that the unprecedented move violated any rule or regulation. Ms. Osier, as English Department Chair, was perturbed by the move. Others, such as Ms. Susino, Mr. McIntyre, and Ms. Schue were, in the least, resistant and skeptical. However, not one witness was able to support the theory that the Respondent was guilty of an act of defiance of a High School or District policy. The fact that MZ was the Respondent’s family member weighs against the Respondent at some level because even the appearance of impropriety gives cause to scrutinize more closely the act itself. However, any remedy for the act is prospective and within the capacity of the District to remedy simply by writing more defined

course requirements for a local diploma, or, as Ms. Dominic subsequently did on April 1, 2010, impose safeguards against school personnel making decisions regarding family members without the involvement in or review by other personnel. (D79) The act itself violated no State law or District rule or regulation and did not rise to the level of an act worthy of discipline.

For the foregoing reasons, I conclude that the Respondent is not guilty of insubordination and conduct demonstrating immoral character. Therefore, I hereby dismiss in their entirety the charges contained in **HO2, 2.11 through 2.15.**

The charges contained in **HO3, Charge 1**, allege, “The Respondent is Guilty of Insubordination.”

Charges Involving the High School Faculty Handbook

The charges read:

- 1.1 When the Respondent was appointed as the High School Principal of the Jordan-Elbridge Central School District, the Respondent was charged with the responsibility of developing, writing, and maintaining a current and accurate High School Faculty Handbook, which described the expectations and obligations of the teaching faculty in the School District.
- 1.2 That from and after the time the Respondent was appointed High School Principal, the Respondent, from time to time, attempted to update, rewrite, and supplement the Jordan-Elbridge High School Faculty Handbook.
- 1.3 In the 2008-2009 school year, the Respondent prepared a High School Faculty Handbook for the Jordan-Elbridge High School, which was inaccurate, incomplete, and contained erroneous information concerning the obligations of teachers to report cases of suspected child abuse and/or maltreatment.

- 1.4 That beginning in October 2007, the New York State Department of Education had promulgated guidelines for mandated reporting of cases of suspected child abuse and/or maltreatment. Those guidelines required, *inter alia*, that handbooks in each School District be updated and maintained to reflect current changes in the law.
- 1.5 That among those changes in the law was a requirement that the teachers be permitted to directly contact the child abuse hotline as a mandated reporter if they had reasonable grounds to believe that a child was being neglected and/or abused.
- 1.6 That the handbook maintained in place for the Jordan-Elbridge High School for the 2008-2009 school year, did not correctly describe and identify the responsibility of the teachers to make direct reports of suspected child abuse and/or maltreatment.
- 1.7 As a direct result of the inaccurate directives contained in the Jordan-Elbridge High School Faculty Handbook, an instance of suspected child abuse and/or maltreatment went unreported in 2009 to the child abuse hotline, despite the fact the Respondent had specific knowledge of the abuse.
- 1.8 That the Respondent failed to carry out his assigned duties and responsibilities and is guilty of the offense of insubordination for failing to report a suspected case of child abuse and failure to properly maintain an up-to-date and current faculty handbook, beginning in the 2008-2009 school year and up until the time of his suspension in October 2010.

The charges allege that the Respondent was insubordinate when, in preparing the High School Teacher Handbook (“Handbook”) for the 2008-2009 school year,⁹⁴ he failed to include the then latest amendments to the NYS Social Services Law (“SSL”) designating all school staff as mandated reporters of suspected child abuse to Child Protective Services (“CPS”) (D121). The District further charges that, as a result of the failure, an incident of suspected

⁹⁴ The District did not offer the 2008-2009 Handbook into evidence, but offered instead the handbook for the school year 2009-2010, (D72) arguing that the relevant contents of the 2009-2010 Handbook had not differed from the relevant contents of the 2008-2009 Handbook. As used herein, “Handbook” shall mean the 2008-2009 or the 2009-2010 handbooks interchangeably.

child abuse involving a student that came to light in the fall of 2009 went unreported.⁹⁵ ⁹⁶

The SSL was amended in July 2007, effective October 2007. (D121) According to the District, a meeting of Cayuga County Secondary Principals was held in November 2008, at which the changes in the SSL were explained and discussed by the then BOCES attorney Randy Ray. The District called Kimberle Ward, who was the High School Principal at Union Springs School District in the fall of 2008, and who attended the Cayuga County Secondary Principals' meeting on November 19, 2008, also functioning as recording secretary. (T 12/11/13: 8032) According to Ms. Ward, she recorded handwritten minutes, then typed them and transferred them to a disc for storage. She identified the minutes of November 9, 2008, which report the Respondent being in attendance. (*id.* 8033; D186) She also testified that, as the minutes reflect, there was a discussion of mandated reporting of suspected child abuse to CPS under the then new guidelines contained in the SSL. (*id.* 8036)

Karen Lang testified that she was responsible for preparing the Handbook in the summer of 2008. (T 08/28/13: 7034) She recalled attending a "summer retreat" at which Mr. Ray gave a presentation but did not recall any discussion

⁹⁵ Because of the nature of the circumstances surrounding the alleged unreported abuse, I will refrain from even using the student's real initials, and instead refer to the student as ST.

⁹⁶ ST's teacher, Mr. Alexander believed the incident came to light in the fall of 2010. (T 08/27/13: 6933) However, Ms. Susino, in a written account of events, dated the incident as occurring in the fall of 2009, referring to a meeting she attended on Wednesday, October 7, 2009. (T 06/26/12: 1651; R75) The charge alleges that the incident occurred in 2009.

regarding CPS mandates. (*id.* 7036-39, 7057-58) As an Associate Principal, Ms. Lang considered the Respondent to be more a colleague or associate than a supervisor and considered Ms. Gorton to be her direct supervisor at the time. (*id.* 7078) Accordingly, Ms. Lang testified that she assumed responsibility for the Handbook prepared during the Summer of 2008, (*id.* 7032) and did not recall receiving any legal input from any of the attorneys, nor was the Handbook reviewed by counsel for the District or BOCES. (*id.* 7045-76) She further testified that legal information was transmitted ordinarily through the Superintendent's office, and she did not recall any correspondence regarding CPS from that office. (*id.* 7054-55)

The Respondent testified that Ms. Lang routinely prepare the Handbook, then sent it to him electronically with any changes highlighted, and, upon review, if he had any questions the two would meet to resolve them. (T 10/01/13: 7712-13) On any matters of law, the Respondent relied upon Mr. Ray or Mr. Mevec. (*id.*) The Respondent testified that he was not aware of the changes in the CPS requirements when the Handbooks (both 2008-2009 and 2009-2010) were prepared. (*id.* 7713, 8617) He testified that he first became aware of the changes in the SSL in the early fall of 2010-2011 school year when Ms. Pidkaminy, the school social worker, reported the changes at a faculty meeting. (*id.* 8119) The Respondent testified that he accepted the responsibility for the Handbook's contents because he signed the document, and everything "rolls to the principal as being responsible in some way." (*id.* 8114)

With respect to only the Handbook, certain facts became paramount. The charge as written accuses the Respondent of misrepresenting CPS requirements, in that, "In the 2008-2009 school year, the Respondent prepared a High School Faculty Handbook for the Jordan-Elbridge High School, which was inaccurate, incomplete, and contained erroneous information concerning the obligations of teachers to report cases of suspected child abuse and/or maltreatment." As part of its proofs, the District produced a rebuttal witness, Ms. Ward, to prove that the Respondent was instructed on the pertinent information before the 2008-2009 preparation of the Handbook. However, the evidence indicates that Ms. Lang prepared the Handbook in the summer of 2008, and that it was distributed by November 2008, the particular time at which the District claims the Respondent should have first heard of the CPS mandates from Mr. Ray. Therefore, the charge fails on its face, because, if the District uses the November 2008 meeting as the trigger date for which the Respondent should have been responsible for acquisition of the knowledge, the date follows preparation and distribution of the Handbook.

However, in Specification 1.8 of the charge, the District alleges, in pertinent part, "That the Respondent failed to carry out his assigned duties and responsibilities and is guilty of the offense of insubordination for...failure to properly maintain an up-to-date and current faculty handbook, beginning in the 2008-2009 school year and up until the time of his suspension in October 2010." Once again, the District pinpoints the trigger date as being the

2008-2009 Handbook, then moves the charge forward to hold the Respondent responsible for the inaccuracies regarding CPS reporting mandates in the successive handbook, namely 2009-2010. In this respect, the alleged continued failure relies upon the proof supplied for the alleged original failure in the 2008-2009 school year. Assuming that the Respondent was not aware of the change in the SSL before the preparation of the 2008-2009 Handbook, it would follow that, because he purportedly became aware of the change during the Cayuga County secondary principals' meeting in November 2008, the amendments should have been included in the next handbook, that is, the 2009-2010 Handbook. (D72)

Taking into account this extrapolation, I must weigh the testimony of the Respondent and Ms. Lang against that of the District's rebuttal witness, Ms. Ward. Both the Respondent and Ms. Lang had no recollection of the information being dispensed at the November 2008 meeting. In fact, the Respondent insisted he had no knowledge of the change in the SSL until the fall of 2010, when he received the information from Ms. Pidkaminy. Ms. Ward testified that her minutes (D186) accurately reflected the information covered by Mr. Ray during the November 2008 meeting. The minutes read, in pertinent part, "Template for Neglect Policy: Randy [Ray] gave the most updated document. This is a work in progress. He anticipates the final draft to be complete by June 2009. The most significant change is that all staff must be

directed to make the CPS call themselves even when they report and discuss with administrator. You must direct staff to make these calls.” (sic)

When asked about the chain of custody regarding the minutes, Ms. Ward testified that she transferred her typed minutes onto a disc, then stored them on her hard drive, and that the disc followed her when she left for a new position. (T 12/11/13: 8041) However, the minutes she identified were not taken from her disc or her hard copy files, but were supplied to her by the District’s Counsel. Further, she did not compare the minutes supplied to the minutes stored on her disc. (*id.* 8042) Neither was her disc produced or offered into evidence. However she identified the minutes as those she prepared (D186), that they were her minutes, and that she recorded the topics in the order they were covered at the meeting. (*id.* 8033-36) Ms. Ward did not recall the meeting location, nor was it her practice to note the location of the meeting. Ms. Ward further testified that she did not know whether the Respondent was present during the discussion of the SSL topic because she did not record the comings and goings of attendees. Although she listed the Respondent as present, she testified that if he had left the meeting, she would not have made such a notation. (*id.* 8037-38, 8044, 8046) Ms. Ward explained, “My practice was that we were all responsible adults and that they would return, and if not, they would have the information from the minutes...as I captured them.” (*id.* 8045)

Ms. Ward was called to rebut the Respondent’s testimony in which he claimed that he was not aware of the SSL changes until the fall of 2010.

However, Ms. Ward was unable to establish that the Respondent was present when the matter, as outlined in her minutes, was discussed. By her testimony, she could not say if the Respondent was present, as she admitted that she did not record in her minutes when participants left the meeting, or, after having left, if or when they returned. Her testimony draws one to the logical conclusion that the coming and going of participants during the meeting was typical. Furthermore, although she testified that she wrote, typed, then electronically stored the minutes, the minutes produced at the hearing were not supplied by her, but by the District through a person named Luke Carnicelli, who found them in his own records at the Southern Cayuga School District. (See COR 11/06/13 from Miller and Spagnoli to Day, CC: O'Hara, Froio.) Nevertheless, I accept Ms. Ward's representation that the minutes were the minutes she produced five years earlier. However, by Ms. Ward's testimony, the minutes, of themselves, do not establish that the Respondent was present during the discussion, nor do they establish that Respondent "perjured himself" or chose to lie on the stand. (See *id.*)

I note further that, although the minutes reference Mr. Ray as "giving the most updated document...," on the relevant subject, Ms. Ward did not identify the "document." Was it the statute? SED regulations? Some bulletin from CPS? Also, the minutes state, "This is a work in progress..." and that Mr. Ray "anticipates the final draft to be complete by June 2009." Finally, although the minutes state that "ALL staff must be directed to make CPS call (sic)

themselves even when they report and discuss with administrator.” (Capitals in original) There is no direction one way or another about teacher handbooks. Indeed, the Handbook content is an issue particular to these charges. There was no evidence from either party regarding how the CPS mandate was communicated in other school districts or how it was communicated to the other buildings within Jordan-Elbridge, if at all.

I note that Ms. Lang testified that matters of a legal nature were distributed through the Superintendent’s office, but there is no evidence that any notice regarding CPS requirements was uniformly circulated within the District either by the Superintendent or, for that matter, by Mr. Mevec. The Respondent likewise testified that he relied upon either Mr. Mevec or Mr. Ray on legal matters contained in the handbook, but none was forthcoming. (T 10/01/13: 7713)

In considering these charges, I examined Ms. Lang’s, Ms. Ward’s and the Respondent’s testimony. I am drawn to the question: Why would the Respondent, if he had knowledge of the CPS mandate, decide upon a course of insubordination by refusing to note the CPS mandate in the Handbook? Insubordination implies a willful or intentional disregard of a reasonable order. The District has not proven such willful and intentional disregard, nor has it offered any motive for the Respondent to act in such a manner. Furthermore, the District has not proven that the Respondent had the knowledge the District

claimed he had in order to willfully and intentionally disregard any reasonable order in the first place.

For all these reasons, I will dismiss Charges 1.1 through 1.6.

With respect to charges 1.7 and 1.8, I note that the District withdrew the charges contained in 1.9 through 1.12, which allege, in substance, that the Respondent failed to report a case of child abuse despite his knowledge of same. Also, Charge 1.7 alleges that a case of child abuse went unreported as a result of the faulty information contained in the Handbook and “despite the fact the Respondent had specific knowledge of the abuse.” Further, Charge 1.8 alleges that the Respondent is “ guilty of the offense of insubordination for failing to report a suspected case of child abuse and failure to properly maintain an up-to-date and current faculty handbook, beginning in the 2008-2009 school year and up until the time of his suspension in October 2010.”

Again, the charge is insubordination. The District alleges that in the fall of 2009 a case of child abuse became known to the Respondent that went unreported to CPS. The record indicates that in the fall of 2009, Mr. Alexander received an essay from ST, sixteen-year-old female student in his English 11 class, describing life-long pattern of sexual abuse against her by her grandfather. (08/27/13: 6920; D71) The essay starts in the third person, then changes to and ends in the first person. Mr. Alexander was disturbed by the essay, and reported it to Ms. Susino, who told him she would take the matter up with Ms. Pidkaminy, the school social worker. (*id.* 6922-23) Further, Ms.

Susino told Mr. Alexander that Ms. Pidkaminy and she were previously aware of ST's situation. (*id.*) Mr. Alexander also testified that he knew that Ms. Pidkaminy had previously been employed as a case worker at CPS and that she was considered the CPS "guru" at Jordan-Elbridge. (*id.* 6924) Mr. Alexander testified that he did not show or report the essay to the Respondent. (*id.*)

Ms. Susino testified that she received the essay from Mr. Alexander, and she told him that she would take care of it. (T 06/25/12: 2563) Ms. Susino called the matter to Ms. Pidkaminy's attention, and, according to Ms. Susino, Ms. Pidkaminy contacted ST's parents, who told her that ST was no longer in contact with the grandfather and that ST was going to counseling. (*id.* 2564-2565; R75) According to Ms. Susino, Ms. Pidkaminy decided not to report the matter to CPS. (*id.* 2573) Ms. Susino did not report the essay to CPS because she deferred to Ms. Pidkaminy. (*id.* 2578) Ms. Susino further testified that she did not show or report the essay to the Respondent. (*id.* 2565)

The witnesses testified that, as far as they knew in the fall of 2009, cases of suspected child abuse were to be reported to Ms. Pidkaminy, the school social worker, who would then pursue the matter and make any necessary reports to CPS, and that this procedure was at the direction of the Respondent, because Ms. Pidkaminy had been previously employed by CPS. (Ms. Susino, T 06/24/12: 2578, 2585-86; Mr. Alexander, T 08/27/13: 6924; Mr. McIntyre, T 06/27/12: 1793-96, 1917-19, 1936, 1995)

The Respondent testified that he did not know about ST's essay or the circumstances of the matter until he was contacted by Ms. Susino in January or February 2011, who told him that Mr. Speck, the then Superintendent of Schools, questioned her about the matter. (T 10/01/13: 7714; T 10/03/13: 8122) The Respondent testified that neither Mr. Alexander, Ms. Susino nor Ms. Pidkaminy ever told him about ST's essay or any of the other circumstances in the matter. (*id.* 7715) He further testified that the New York State police questioned him at this home around that same date Ms. Susino called him. (*id.* 7714-15)⁹⁷ Moreover, he testified that he never saw the essay (D72) until it was produced in discovery in the instant proceedings. (T 10/03/13: 8121-22)

By the District's own witnesses who had direct knowledge of the essay, and by the Respondent's undisputed testimony, the District failed to prove that "an instance of suspected child abuse and/or maltreatment went unreported in 2009 to the child abuse hotline, despite the fact the Respondent had specific knowledge of the abuse." Therefore, for much the same reasons I am dismissing charges 1.1 through 1.6, I will dismiss those portions of charges 1.8 and 1.9 that duplicate charges 1.1 through 1.6.

⁹⁷ Other witnesses were questioned by the police in the 2010-2011 school year. In the fall of 2010, Ms. Thomas-Madonna reported the essay (D71) to the acting Superintendent, Mr. Speck, and Ms. Pidkaminy's replacement, Ms. Hummel, reported the matter to CPS. (T 07/07/2012: 2115-16) Ms. Thomas-Madonna testified that Ms. Hummel, Mr. Alexander and Ms. Susino were questioned by the New York State Police (T 07/18/2012: 2226-27) and that she and the others were questioned by the Attorney General and the District Attorney, as well as the State Police. (*id.* 2227-28; Also, Mr. Alexander, 08/27/2013: 6954; the Respondent, T 10/01/2013: 7714-15) There is no evidence of any prosecutions for failing to report the essay to CPS in the fall of 2009.

For the foregoing reasons, I conclude that the Respondent is not guilty of insubordination. Therefore, I hereby dismiss in their entirety the charges contained in HO3, 1.1 through 1.8.

SPECIFICATIONS 1.9 THROUGH 1.12 WERE WITHDRAWN BY THE DISTRICT ON JUNE 12, 2013 IN, “CHARGING PARTIES OPPOSITION TO ‘RESPONDENT’S MOTION TO DISMISS UPON THE CLOSE OF THE COMPLAINANTS’ CASE,” at 101.

SPECIFICATIONS 1.13 THROUGH 1.20 WERE DISMISSED BY THE UNDERSIGNED BY ORDER DATED APRIL 18, 2012 (HO8)

Charges Involving the Evaluation of Probationary Teachers

The charges read:

- 1.21 That in the Respondent's position as principal of the Jordan-Elbridge High School, the Respondent was required to perform evaluations and observations of the various probationary teachers employed in the School District.
- 1.22 That in the 2008-2009 school year, the Respondent failed and/or refused to carry out the duties and responsibilities of the position of principal, by performing appropriate observations and evaluations of certain probationary teachers.
- 1.23 The observation and evaluation of probationary teachers is a significant duty, the responsibility for which is essential to the operations of the high school. The Respondent, as principal, was required by policy to carry out said duties.
- 1.24 As a consequence of the failure of the Respondent to carry out these duties and responsibilities, the Respondent has severely injured and/or damaged the Employer, in that the Employer did not have accurate, complete, and specific

evaluations of various probationary teachers, thereby placing the Employer in a position of having to make judgments and decisions about certain probationary teachers without the benefit of honest and thorough evaluations.

The evidence in support of these charges is inconclusive. The District's Counsel prepared a summary purportedly from existing personnel files. (D118) The summary contradicted certain numbers supplied by the Respondent on his written tenure recommendations submitted on April 30, 2010 for four teachers: Leslie Ahern, James Best, Jennifer O'Malley, and Mark Schermerhorn. (D116; D117; D119; D120 respectively) on these forms, the Respondent listed the number of times the teachers had "classroom observances" of the teachers' performances. The Respondent reported six for Ms. Ahern, six for Mr. Best, six for Ms. O'Malley, and four for Mr. Schermerhorn. The Respondent testified that Amy Lewis in the Superintendent's office supplied him with the. The Respondent further testified that non-tenured teachers were evaluated by Ms. Thomas-Madonna, Mr. Hamer, Ms. Gorton, Ms. Schue, and himself. (T 10/02/13: 7797-99) He testified that he was sometimes, but no always, supplied copies of the evaluations done by the other evaluators. (*id.* 7797) Therefore, when he received the information from Ms. Lewis, he accepted it at face value. He did not view the personnel files himself. (*id.* 7804)

The District Counsel's summary listed only three observations for Ms. Ahern, two for Mr. Best, five for Ms. O'Malley, and four for Mr. Schermerhorn. (T 10/02/13: 7796) According to Ms. Gorton, Ms. Lewis was responsible for entering all data into the personnel files, and that the files overseen by Ms.

Lewis were the repositories for all of the District's evaluation information. (T 10/23/12: 4929-31) Ms. Gorton testified that the District's summary (D118) refreshed her recollection and that it was accurate based on her original review of the individual personnel files. Furthermore, Ms. Thomas-Madonna testified that the Respondent was responsible for performing three "formal evaluations" of probationers in person at least once per year. (T 07/17/12: 2098)

In analyzing the evidence for these charges, I am compelled to note that the District did not offer best evidence, namely the teachers' personnel files where the observances were purportedly inserted and recorded by Ms. Lewis. Furthermore, neither was Ms. Lewis called to testify. I cannot convict a tenured principal of such a serious charge based upon the hearsay testimony of Ms. Gorton and Ms. Thomas-Madonna when the best evidence and best witness were available. Furthermore, although Ms. Thomas-Madonna testified with certainty that it was the Respondent's responsibility to perform three formal evaluations for probationary teachers, neither she nor the District offered any written policy saying such. Indeed, the Jordan-Elbridge Annual Professional Performance Review ("APPR") dating to April 2002 states, "All non-tenured teachers will be formally observed no less than two times per academic year. All observations will be preceded by a pre-conference with the administrator. A post conference following the observation will allow for teacher review and reflection: in the administrator may offer recommendations." There is nothing in the statement identifying the administrator responsible, and, as the record

indicates, the Respondent was one of three, and perhaps four, administrators responsible for such observances, namely, the Respondent, Ms. Schue, Ms. Thomas-Madonna, Ms. Gorton (and Ms. Thomas-Madonna's predecessor, Ms. Lang).

For the foregoing reasons, I conclude that the Respondent is not guilty of insubordination. Therefore, I hereby dismiss in their entirety the charges contained in **HO3, 1.21 through 1.24**

SPECIFICATIONS 1.25 THROUGH 1.35 WERE DISMISSED BY THE
UNDERSIGNED BY ORDER DATED APRIL 18, 2012 (HO8)

HO 3, CHARGE NO. 2

THE RESPONDENT HAS DEMONSTRATED IMMORAL CHARACTER AND CONDUCT UNBECOMING AN ADMINISTRATOR.

- 2.1 The Employer repeats and realleges all of the foregoing as if fully set forth herein.
- 2.2 The charging party contends that the acts described above in Charge No. 1 constitute such offenses that they demonstrate the Respondent's immoral character and conduct unbecoming an employee.
- 2.3 That the Respondent is guilty of immoral character and conduct unbecoming an administrator, as above stated, and his services should therefore, be terminated forthwith.

I find this charge to be redundant. Having already dismissed all of the charges except for HO2 Charge 1.1 through 1.11, in part, I will dismiss this charge in its entirety.

For the foregoing reasons, I conclude that the Respondent is not guilty of immoral character and conduct unbecoming an administrator, except as determined in HO 2, Charge 1.1 through 1.11 as discussed *supra*. Therefore, I hereby dismiss in their entirety the charges contained in **HO3, 2.1 through 2.3**

CHARGE NO. 3

THE RESPONDENT IS GUILTY OF INCOMPETENCY.

- 3.1 The Employer repeats and realleges all of the foregoing as if fully set forth herein.
- 3.2 The actions of the Respondent are so neglectful, negligent, and deficient, that they constitute the offence (sic) of incompetency in the performance of the Respondent's duties.
- 3.3 The Respondent is guilty of the offenses above stated and is guilty of incompetence in the performance of his duties, and his services must be terminated forthwith.

I find this charge to be redundant. Having already dismissed all of the charges except for HO2 Charge 1.1 through 1.11, in part, I will dismiss this charge in its entirety.

For the foregoing reasons, I conclude that the Respondent is not guilty of incompetency. Therefore, I hereby dismiss in their entirety the charges contained in **HO3, 3.1 through 3.3**

CHARGE NO.4

THE RESPONDENT IS GUILTY OF NEGLECT OF DUTY.

- 4.1 The Employer repeats and realleges all of the foregoing as if fully set forth herein.
- 4.2 The charges above stated establish that the Respondent has neglected the duties and responsibilities mandated upon him by law, policy, regulation, and practice in the School District.
- 4.3 That the Respondent has failed and/or refused to carry out those duties and responsibilities, despite being properly instructed in the performance of those duties and in knowing that those duties were part of his responsibility.
- 4.4 That the Respondent has neglected his duties, and has caused serious and significant damage and harm to the School District, as well as to various personnel employed therein.
- 4.5 The Respondent is guilty of the offense of neglect of duty and his services should be terminated forthwith.

I find this charge to be redundant. Having dismissed all of charges except for HO2 for Charge 1.1 through 1.11, in part, I will dismiss this charge in its entirety.

For the foregoing reasons, I conclude that the Respondent is not guilty of neglect of duty. Therefore, I hereby dismiss in their entirety the charges contained in **HO3, 4.2 through 4.5**

In considering credibility, I borrow the words of Hearing Officer Thomas Rinaldo,

“There is a host of factors that inform a credibility determination that a finder-of-fact must make. The Hearing Officer believes there is a real danger, when credibility determinations are made, if the finder-of-fact treats any one factor as of supreme importance or reduces the factors, or any one of them, to the status of a “slogan.” It is often said, for example, that an employee testifying in his or her discharge case has such a huge stake in the outcome in the case that, for that reason, the employee’s credibility should be called into question. While there is some logic in this observation, it should not permit a finder-of-fact to discount in advance the testimony of the employee. Indeed, this Hearing Officer has often credited the testimony of employees whose positions have been at stake, because, in the final analysis, their version of what occurred is the most believable version.

The Hearing Officer would finally add, in these general comments about credibility, that perhaps what counts the most when a credibility determination is made is how well the account of a witness squares with the “rule of reason.” By the time an individual reaches the age of being assigned the role of a legal finder-of-fact, and this Hearing Officer has long since passed that point, he or she has had countless experiences in negotiating with a multitude of situations brought into one’s life that require application of the “rule of reason” in order to sort out, if not what is true and what is not true, at least what is more believable and what is less believable.”

(Eden Central School District v. Margaret Everett, SED No. 12,876)

In the instant matter, I find the Respondent to be more credible than the District’s witnesses. On crucial charges where the facts were in dispute, even credible District witnesses were either wrong on the facts or testified to matters outside the statute of limitations.

The Respondent is innocent of all but one of the numerous charges disputed in these proceedings. As the trier of fact, I came to these proceedings as an impartial, with no prior knowledge of the circumstances and no opinions about the Respondent, the District, the Board, or their respective counsel. I presided in the accumulation of a massive record over a long period. I reach my conclusions only after careful, thorough, and exhausting review of the record. As the charges presented and as the many the District witnesses testified, and as I presided over these proceedings and then reviewed the record, I was struck by the level of hyperbolic and the numerous ad hominem comments made by District witnesses as they testified against the Respondent. I was struck by the notable hostility of certain key witnesses. I was further influenced by the various witnesses' activities during the time leading up to and following September 2010, when the District suspended the Respondent. Following are just several examples.

Ms. Thomas-Madonna testified that the Respondent "was difficult to work with in that he used sarcasm quite a bit. And I wouldn't say he was outright hostile to me but would be sarcastic in his comments, which I felt were demeaning and unprofessional at times and...made me uncomfortable.... So it — you know, honestly, it made for a hostile working environment." (T 02/28/12: 686-87) She also testified that during much of the time in the spring and summer of 2010, she and the Respondent were not speaking. (T 02/23/12: 5794-95)

Ms. Thomas-Madonna was either a key force behind or was involved in instigating several of the charges. Also, from her remarks and from her demeanor during her testimony, it was obvious that Ms. Thomas-Madonna endeavored to reveal the Respondent in the worse possible character.

1. She was instrumental in amassing the information for the charges involving NovaNET and TL, relying heavily on innuendo that TL abused the system by using his sister to take the final test for him, or at least to assist him, and relying on the expertise from a teacher, Ms. Estlinbaum, who admitted she had no real knowledge of either NoveNET or the particular curriculum.

2. Ms. Thomas-Madonna was instrumental in the returning of cigarettes matter, where she went over the Respondent's head and reported the matter to the Assistant Superintendent, Ms. Gorton. (T 01/24/12: 254)

3. During her testimony regarding the so-called "stubby" matter, Ms. Thomas-Madonna claimed that she did not know where the Respondent was when KCS's father, GS, arrived at the Respondent's office to confront the Respondent, (T 07/18/12:2232-33) yet all other witnesses, including the GS, testified that he was in his office. When asked if she knew why the Respondent, who had been told by Ms. Dominick to stay home, was not at work on days immediately following the confrontation with the father, Ms. Thomas-Madonna offered, "I don't recall. He missed a lot of work for various reasons. I don't know." There are no charges in these proceedings that the Respondent was absent to excess.

4. Ms. Thomas-Madonna was also instrumental in encouraging the student, RB, (the “bad breaker upper”) to file a complaint with the Superintendent without first discussing the matter with the Respondent, even knowing that she was getting the information from RB at least third-hand. (T 07/17/12: 2038; T 07/18/12: 2256-57)

5. She was behind the charges involving the “Bob joke,” saying that the Respondent “thought he was very clever.” Because she did not like the joke, she reported the Respondent to Ms. Gorton. (T 07/18/12: 2298)

6. She was behind the charge alleging that the Respondent used inappropriate language when reporting a prior school bus incident involving his daughter. Claiming to be “mortified” and “offended as a woman,” she reported her version of the conversation to Ms. Gorton, (T 07/17/12: 2050) but not immediately. (T 07/18/12: 2287)

7. Regarding the matter of posting teacher copier access codes, Ms. Thomas-Madonna insisted that the codes were posted on the outside of the cabinet door for all to see. (*id.* 2268) However, the person who posted the codes, per the Respondent’s instructions, credibly testified that she posted them inside the door. (T 05/29/12: 2161)

8. Although there was no evidence that the Respondent either threatened anyone or made any sexual or lecherous remarks at any time, in her testimony regarding the Respondent’s behavior at the October 6, 2010 Board meeting, Ms. Thomas-Madonna described the Respondent as “threatening,”

(T 07/18/12: 2331) and “lewd.” (*id.* 2332-33)

Ms. Hourigan was a key witness in the charges involving grade changes. She was also one of the only two teacher witnesses to complain about having her grades changed by the Respondent. She insisted in her testimony that the Respondent issued a mandate at a faculty meeting in June 2006 that he would change to sixty-five any final student grade of sixty-two, sixty-three, or sixty-four. (T 05/01/12: 1717-18, 1721) Numerous other witnesses testified that the Respondent announced that he preferred not to see final grades of 63 or 64 without sound justification, but that he did not threaten to change grades himself. Furthermore, the other witnesses testified that the Respondent made it clear that the decision for the final grade was the teacher’s.

There was no doubt that Ms. Hourigan had sharp philosophical differences with the Respondent over his grading preferences. (*id.* 1718, *et sqq.*) Although Ms. Hourigan described the June 2006 faculty meeting as “ver loud” and “noisy,” most other witnesses did not recall the meeting in that way. Witnesses who attended the meeting testified as follows: The Guidance counselors, Ms. Susino and Mr. McIntyre, reported no such observations. Ms. Estlinbaum recalled that Ms. Hourigan and Osier were upset at the meeting but did not testify that the meeting was loud or noisy. (T 02/04/03: 4631) Mr. Sipley testified that he believed that most “feedback” at the meeting was negative, he did not testify that the meeting was loud or noisy. (T 08/26/13: 6536-37) Mr. Larham reported no such observations. Mr. McCandles reported no such

observation. Mr. Alexander reported a “heated” discussion involving “two specific teachers, a philosophy of grades, and do grades matter....” The discussion was between the two teachers, not Ms. Hourigan or Ms. Osier. (T 08/27/13: 6916-17) He also described it as a “good discussion about grades.” (*id.* 6969-70) Mr. Bondgren made no such observation. Mr. Cardinale made no such observation.

Ms. Hourigan also testified that the Respondent “scolded” her because her grades were too low, (*id.* 1736-37) that he wanted her to raise the grades of certain IEP students, (*id.* 1742) that he harassed her for her opposition to his grading preferences, (*id.* 1750-52), and that she was given a heavier and burdensome assignment because of her opposition to his grading policy. (*id.* 1754, *et sqq*; T 05/04/12: 1926) The so-called extra assignment consisted of three students assigned to a module in which all ninth-grade teachers were assigned to work with students. Her extra burden consisted of three special needs students assigned two days per week during that module. (T 05/04/12: 1945-47; R60). Further, the assignment was not made until 2011, five years after Ms. Hourigan became vocal about the Respondent’s grading preferences. It is implausible that, if the Respondent were inclined to retaliate, he would wait five years. Moreover, there were no charges filed related to any of these *ad hominem* allegations. Further, as discussed above, Ms. Hourigan’s testimony regarding particular allegations of the Respondent’s changing grades were either withdrawn, were unsubstantiated or, in one case, was beyond the statute

of limitations. No doubt, Ms. Hourigan's inaccurate recollections and unfounded allegations were influenced by her obvious bias and hostility toward the Respondent.

Finally, a transcript of Ms. Hourigan speaking to Michael Kessler of Kessler during phone exchanges on April 18, 2012 reveals that Ms. Hourigan knew Ms. Alley "very well"⁹⁸ and was close enough to "talk to either Alicia [Ms. Mattie] or Paula [Ms. VanMinos] or Mary [Ms. Alley] in the next few minutes" to verify that Mr. Kessler's was indeed retained by the District to investigate the grades issue. (R181) When she returned the call to Mr. Kessler, she offered, "That was quick." She went on, "I just wanted to verify with Mary that I wasn't divulging something... that [the Respondent] had retained you and that I was divulging to the wrong side." In speaking about the Respondent, she offered, "I don't trust him at all. I think that this is something I learned through the years working for him."

Ms. Mattie testified that she was an independent contractor hired by the Board to provide internal auditing services. (T 10/16/123: 3152) She also testified that her mandate was to be "independent and objective" when conducting audits, mandated by the Government Auditing Standards (*id.* 3162;

⁹⁸ Ms. Hourigan testified that she was a friend of Ms. Alley "most of my life." Ms. Hourigan also testified that she discussed the Respondent with Ms. Alley a number of times at social gatherings and in the community. (T 05/04/12: 1986-87)

R97) ⁹⁹ She testified that she performed “risk assessments” through observation and inquiry, then presented her assessments to the Board audit committee. (*id.* 3207-08)

Ms. Mattie testified about a conversation she had with the Respondent at the high school guidance office in which the Respondent purportedly “leaned into” her, was “irate,” “looked into [her] eyes,” and while “his voice was raised,” and “challenged why [she] was doing this.” (*id.* 3114-16) However, there were no charges that the Respondent attempted to intimidate the District’s internal auditor.

Furthermore, although Ms. Mattie professed to be unbiased and objective, she became more than casually and not unemotionally involved in assisting a private investigative firm, Kessler International, ¹⁰⁰ (“Kessler”) hired by the Board to investigate the allegations and findings of Ms. Mattie. Kessler interviewed teachers named in Ms. Mattie’s audit report to determine whether the Respondent had changed the teachers’ grade without their consent. (R32)

⁹⁹ According to the Government Auditing Standards (R97), the “ethical principles that guide the work of auditors who conduct audits in accordance with [the rules contained in R97]” include, “integrity,” “objectivity,” and “professional behavior.”

¹⁰⁰ The Board hired Kessler to investigate and prepare a “forensic audit” on certain matters, (R157) including the matter of the Respondent’s alleged altering student grades or forcing teachers to alter grades. The Kessler report (R156) was received into evidence over the District’s objections. Kessler interviewed seventeen teachers and staff (*id.* at 7) and reported, “All of the teachers said that it was ultimately their decision to determine if the student should pass or fail the course. Kessler specifically question the teachers regarding student grades that were changed in the S I S system. In each example the teacher indicated that they remembered advising staff to change grades in the S I S system.” Kessler also reported that the only teacher who admitted to having a grade changed without her consent was Ms. Osier. Kessler further reported that Ms. Hourigan, although she insisted grades had been changed, “was unable to provide accurate accounts of the grades being changed.”

It was clear that Kessler was searching for proof that the Respondent altered grades. Ms. Mattie became an active advocate for finding information for the charges filed on HO2, April 12, 2011. Between January 28 and February 5, 2011, Ms. Mattie sent emails to Kessler, either directly or “FYI” to Kessler and Ms. Alley, to pass information on to him, often hearsay and innuendo. For example, on January 28, 2011, she reported that Ms. Fay told Mr. Mevec, Ms. Dominick, Ms. VanMinos, and Ms. Alley that the Respondent threatened to fire her if she did not change grades on his orders. (R100) Ms. Fay, who testified in these proceedings, said that she did not recall the Respondent telling her to change a grade in SIS (T 08/28/13: 7140) and she did not tell Mr. Mevec that the Respondent asked her to change grades. (*id.* 7145-46) Ms. Mattie also told Kessler that Ms. Susino had information about an unauthorized grade change, adding, “Jamie Susino will not speak easy, so you will have to use your best techniques on her.” (*id.*) On February 4, Ms. Mattie reported that she “just found out” about a teacher (Tracey Dougherty) who was “apparently...willing to speak and has said that [the Respondent] communicated to her to change his daughter’s as well as others. Worth a conversation.” (Ms. Dougherty did not testify in these proceedings.) That same day, Ms. Mattie told an Assistant Attorney General that “It was brought to [her] attention that a teacher by the name of Tracey Dougherty has confessed to the Asst Super of curriculum (sic) that she was told by [the Respondent] to change [the Respondent’s] daughter’s grade as well as others.” (R102) On February 5, Ms. Mattie told Kessler that

Ms. Dougherty “no longer works at the district due to layoffs, however you may want to speak to all of those that were laid off or have left for other reasons. If she testifies, doesn’t that count?” Then then added, “*I know that the teachers have all been spoken to by the past superintendent and the past principal...and were told not to say anything.*” (Emphasis added) She added a lengthy paragraph about NovaNET, concluding that her audit revealed abuses of the system. She concluded, “*Some were only on the system for 18 hours and passed a full semester course in chemistry! Can you imagine if we had that when we were in school? Why would anyone sit in a classroom anymore for the entire year when you could sit for 18 hours and pass chemistry!!!!*”¹⁰¹ (Emphasis added) (R103) These communications preceded the Board’s filing charges on the alleged improper grade changes. By these accounts, Ms. Mattie was not operating as an independent auditor under *any* standard rules for auditors. She was not objective or impartial. Instead of gathering information, she was passing along hearsay and innuendo, and drawing conclusions that were not proven by her audit, which she referenced in the last communication. (*id.*)

When asked why she got involved as an advocate in the investigation, Ms. Mattie stated that she was “directed” by the Board to “cooperate” with Kessler and the Attorney General. (T 10/22/12: 3910) She also testified that Mr. Zacher, the then Superintendent, instructed her to communicate with Kessler. (*id.* 3942) By these communications (R100, 101, 102, 103), it is clear that Ms.

¹⁰¹ Nothing in the instant record supported such a claim.

Mattie stepped out of her role as auditor and became an advocate investigator, while still on retainer as an independent auditor. If she surrendered her independence in helping Kessler at the Board's and Superintendent's direction, one might logically call into question whether her grades audit and NovaNET audit were truly objective and independent.

Ms. Feeney testified about her biased feelings toward the Respondent. While giving testimony about October 6, 2010 and January 19, 2011 board meetings, she testified that on January 19, the first speaker went beyond six minutes uninterrupted by the Board or Mr. Hinman. Then, the Respondent spoke. When Ms. Feeney was asked, "Did you feel any fear for your well-being about [the Respondent] that time?" she answered, "I've always...been—despite his demeanor, he makes me uncomfortable." (T 02/07/04: 5408) When Ms. Feeney viewed a portion of the January 19, 2011 video in which the Respondent was speaking, she was asked, "...was there anything disrespectful about what you just heard?" She answered, "I—it's hard for me...to say because I find him offensive."

Ms. Feeney's obvious bias explains, in part, her propensity to exaggerate the events at the two relevant Board meetings when compared to the video evidence. She testified that she felt "dread," "threatened," "scared" (*id.* 5385, 5408-09, 5411, 5547) Yet, there is not visual or audio evidence that anyone actually threatened the physical well being of any Board member. She also testified that she believed the Respondent "seemed to goad the audience," (*id.*

5306) that “he incites them” (*id.* 5366) However, the video evidence showed that the assemblages reacted to Board actions, while only applauding the Respondent’s remarks. She testified that when Ms. Alley first interrupted the Respondent on January 19, “he started to yell, and speak louder and get irate,” (*id.* 5359-60) that he “was losing control of himself and his demeanor... and he was yelling.” (*id.* 5387-88) However, the video evidence shows that the Respondent’s voice was raised at the January 19 meeting only after the microphone was turned off by the police officer.

Finally, when asked whether she believed the Respondent’s was competent, she replied, “I can’t evaluate him and that’s not my position,” (*id.* 5523) yet also testified that she believed he “was not doing his job well enough.” (*id.* 5540)

Ms. Foote testified regarding the October 6, 2010 and January 19, 2011 board meetings. She first testified that no other speaker exceeded time limits at the October 6 meeting. (T 02/06/13: 5102) She also testified that she felt “intimidated,” because the Respondent was “very loud.” (*id.* 5105)

She further testified that when she overheard the Respondent’s remark to Mr. Hill at the December 21 Board meeting, she reported the remark to the police. (*id.* 5121) The police told her that because the remark was directed at Mr. Hill, he would need to file the complaint. (*id.* 5262-63)¹⁰² However, Ms.

¹⁰² As noted in previous discussion, Mr. Hill had a light hearted reaction to the remark. There is no evidence that Mr. Hill went to the police, nor is there evidence that the Respondent meant the comment to imply physical harm to anyone. Of course, Mr. Hill would have been the best witness to report on Mr. Hill’s reaction to the remark.

Foote testified that she felt so intimidated and physically threatened, that she purchased a driveway alarm system. (*id.* 5121-22) Nevertheless, there is no record evidence that the Respondent ever threatened anyone with physical harm. Nor did he ever use threatening words when he addressed the Board.

Ms. Foote also testified that there was “no order in the room whatsoever...,” “...the officer walked over to [the Respondent] in order to restore order,” that the Respondent “appeared to be out of control and non-responsive to...directives from the Board President.” She said that this concerned her, because the meeting was “right after the Panama City schools in Florida. So tensions were high.” (*id.* 5176-77, 5258) She then testified that another attendee at the assemblage, Mr. Anthenson, alluded to the Panama City incident that evening. (*id.* 5258-59)¹⁰³

The evidence indicates that the Respondent never threatened anyone with physical violence, nor did he use physically threatening gestures. However, Ms. Foote reported him to the police and in her testimony, attempted to link his behavior with the events in Panama City, Florida. Moreover, by telling of Mr. Anthenson’s allusion to Panama City, she clearly intended to link the Respondent to Mr. Anthenson. She characterized the Respondent as an out-of-control, loud, intimidating and potentially violent person as if to demonize him. However, as contentious as he was at the Board meetings, his behavior was not as severe as described by Ms. Foote.

¹⁰³ Mr. Anthenson made his remark after the Respondent was ejected from the meeting, because he does not appear on either of the January 19 videos.

Ms. Alley described the Respondent as “The loudest one speaking in that whole auditorium the whole night” of October 6, 2010. She said he was “shouting.” (T 02/11/13: 5881) It is evident from the videos that the Respondent’s voice raised, but only slightly, when he entered into a verbal exchange with Mr. Reeher and when he told Ms. alley that he had no respect for her. Other than that, as I noted above, the Respondent was speaking into a microphone in a crowded auditorium, and nothing in his overall tone was inordinately loud, and certainly he was not shouting.

With respect to the January 19 meeting, Ms. Alley testified that she cut the Respondent off not because his time had elapsed, but because he was naming and defaming individuals. (*id.* 5898) The video evidence showed that, although the Respondent used names, he was not defaming the individuals named. He was suggesting to the Board that the District would save money by returning the individuals named to their positions. Ms. Alley also insisted that it was inappropriate for the Respondent to talk even about positions. (*id.* 5904) However, even the most severe reading of BP3220, which the District applied in these proceedings, does not prohibit talk of positions or the use of persons’ names.

Ms. Alley also testified that one of the reasons the the Board discharged the Respondent was poor student achievement at Jordan-Elbridge. (*id.* 5826) However, throughout these entire proceedings, no such charge was made, nor was any evidence produced to indicate that student achievement at Jordan-

Elbridge was substandard or if it was, that the Respondent was responsible. The very nature of such an innuendo by the witness in these proceedings reveals bias.

Mr. Mevec was the District's counsel when HO1 was filed October 6, 2010. At some time prior, Mr. Mevec represented the Respondent in an adoption matter that ended on an acrimonious note. (T 10/01/13: 7730-31) On April 11, 2010, the Respondent was summoned to a meeting at Mr. Mevec's office. Ms. Alley was present, but neither Ms. Dominick, the Superintendent nor Ms. Gorton, the Assistant Superintendent, were present.¹⁰⁴ Also present were representatives for the Respondent. (T 10/01/13: 7221; T 10/03/13: 8159-61) According to the Respondent, Mr. Mevec started the meeting talking about the grades audit. Mr. Mevec cited the seventy-two cases where the Respondent purportedly changed grades. (T 10/01/13: 7726) He then told the Respondent that they wanted him to end his employment with the District or they would lodge charges against him over the grades changes with the Attorney General's Office. (T 10/03/13: 8161) The Respondent testified that he was "shocked." He felt that they were "out to get [him]," he was "being set up or persecuted," and from that point on in the meeting, he became "defensive." (*id.* 8162-63) The Respondent further testified that Mr. Mevec made his threat in the first few minutes of the meeting, and that Mr. Mevec told him they had already spoken to

¹⁰⁴ On March 31, 2010, Ms. Alley received a "draft" of Ms. Alley's audit, which included a summary of the grades audit. (D138)

the Attorney General, and they would bring the formal charges unless he agreed to terminate his employment. (*id.* 8164)

Ms. Alley recalled the same meeting and said the meeting was called by Mr. Mevec to discuss “primarily the grade changes and NovaNET,” (T 02/11/13: 5714; T 02/12/13: 5951) and “different issues...at the school district at the time.” (T 02/11/13: 5717) She testified that the meeting lasted about one hour during which Mr. Mevec questioned the Respondent about grade changes. (*id.*) In her direct testimony, Ms. Alley said nothing about the Respondent’s demeanor during the meeting, nor did she testify to Mr. Mevec’s threat to file charges with the Attorney General unless the Respondent exited the District.

However, on cross-examination, she testified:

Q: Do you recall Mr. Mevec saying in that meeting...in words or substance that [the Respondent] should resign and if he did not they would go to the attorney general?”

A: Yes, I remember those words. (T 02/12/13: 5951-52)

Ms. Alley also recalled that the Respondent became “very angry at the end of the meeting. He seemed to be out of control.” (*id.* 5954)¹⁰⁵

Mr. Mevec testified for the District as a rebuttal witness. He said that at that meeting he had in his possession the audit done by Ms. Mattie, and that he called the meeting to talk with the Respondent about the grades matter. (T

¹⁰⁵ According to the Respondent, it was at the end of the meeting that he asked Mr. Mevec to return papers to him having to do with his daughter’s adoption. Mr. Mevec denied having them, but returned them at a later date. (T 10/01/13:7730-31) Ms. Alley recalled that the Respondent asked Mr. Mevec to return personal papers, but did not recall the nature of the matter. (T 02/12/13: 5955)

02/11/13: 8051, 8070-71, 8075-77) He testified that when he asked the Respondent to explain the grade changes, the Respondent “started laughing,” and Mr. Mevec told him that this was no “laughing matter,” that these were “serious allegations.”¹⁰⁶ Mr. Mevec testified that the meeting lasted a half-hour or less and that early in the meeting, the Respondent was “yelling and screaming and flailing his hands.” (*id.* 8056) He said that the Respondent was “standing up over Mary Alley....” He testified that one of the Respondent’s representatives, Mr. Haner, had to “physically remove” the Respondent from the room. (*id.*) Mr. Mevec denied asking the Respondent to resign and that he “absolutely” did not threaten to file charges with the district attorney or Attorney General. (*id.* 8057) He further testified that he remembered the Respondent “literally standing over [Ms. Alley] and yelling...and the only thing I can remember about Mrs. Alley was her eyes were like the size of silver dollars, I think in just shock.” (*id.* 8059)

I do not credit Mr. Mevec’s testimony. His recollection of the meeting and his denial that he threatened the Respondent with criminal charges if he didn’t leave his post at Jordan-Elbridge contradicts the District’s own direct case in which the District’s witness, Ms. Alley, admitted on cross-examination that she heard Mr. Mevec threaten the Respondent. It appears that the District called Mr. Mevec to rebut not the Respondent, but their own witness.

¹⁰⁶ The Respondent recalls the opening this way: Mr Mevec said they were there “to talk about how you’re going to be exiting the district.” The Respondent further testified, “and I laughed.” Then Mr. Mevec said, “...you think this is funny, I’ll take this down to the district attorney right now. I’ve got charges prepared to bring against you.” (T 10/01/13: 7723)

Moreover, it is unlikely that, if Ms. Alley had been threatened by the verbal and almost physical barrage by the Respondent as testified to by Mr. Mevec, that she surely would have readily testified to such treatment. The only recollection she reported was that the Respondent was “very angry at the end of the meeting. He seemed to be out of control.” She spoke of no personal verbal attack or physically intimidating gestures toward her person.

Penalty

I have dismissed all but one of the charges. The single charge for which I have found guilt, HO2, 1.1 through 1.11, involved the Respondent’s behavior at a Board meeting on October 6, 2010. When directing a penalty, I must examine the entire record and apply an even hand to avoid exacting a penalty that would shock one’s common sense of fairness.¹⁰⁷ In the instant matter, to sustain the District’s penalty, that is, to discharge the Respondent from his position as Principal of the Jordan-Elbridge Senior High School, would constitute such a shock. To cite *Pell* at length:

“Of course, terminology like ‘shocking to one’s sense of fairness’ reflects a purely subjective response to the situation presented and is hardly satisfactory. Yet its usage has persisted for many years and through many cases. Obviously, such language reflects difficulty in articulating an objective standard. But this is not unusual in the common-law process until, by the impact of sufficient instances, a more analytical and articulated standard evolves. The process must in any event be evolutionary. At this time, it may be ventured that a result is shocking to one’s sense of fairness if the

¹⁰⁷ *Pell v. Board of Education*, 34 N.Y.2d 222; 356 N.Y.S.2d 833 (“*Pell*”)

sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved. Thus, for a single illustrative contrast, habitual lateness or carelessness, resulting in substantial monetary loss, by a lesser employee, will not be as seriously treated as an offense as morally grave as larceny, bribery, sabotage, and the like, although only small sums of money may be involved.

There is no doubt that the reason for the enactment of the statute...was to make it possible, where warranted, to ameliorate harsh impositions of sanctions by administrative agencies. That purpose should be fulfilled by the courts not only as a matter of legislative intention, but also in order to accomplish what a sense of justice would dictate. Consideration of the length of employment of the employee, the probability that a dismissal may leave the employee without any alternative livelihood, his loss of retirement benefits, and the effect upon his innocent family, all play a role, but only in cases where there is absent grave moral turpitude and grave injury to the agency involved or to the public weal. But deliberate, planned, unmitigated larceny, or bribe taking, or demonstrated lack of qualification for the assigned job is not of that kind. Paramount too, in cases of sanctions for agencies like the police, is the principle that it is the agency and not the courts which, before the public, must justify the integrity and efficiency of their operations."

The matters reviewed in *Pell* involved prior adjudications of guilt for infractions ranging from stealing time or money, taking bribes, and discharging a weapon. What the Respondent did does not rise to such a level. The

Respondent is guilty of making remarks that, by their very nature and by common just cause standards, were insubordinate, to wit: (1) He accused Board members of perjuring themselves, (2) He told the Board President that he had no respect for her, (3) He implied that the Board President and other Board members were liars, (4) He called the Board's action regarding Mr. Scro "heartless and dysfunctional." However, I do not find the Respondent's remarks were acts of "grave moral turpitude," nor did they inflict "grave injury to the agency involved or to the public weal."

Although arbitrators, in general, judge the remarks made by the Respondent as insubordinate, especially when spoken in front of others, arbitral history unfurls a range of options available for remediation. In determining appropriate remediation or penalty, I take notice of the standards of just cause and the mandate of Article 61, Section 3020, "No person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause and in accordance with the procedures specified in section three thousand twenty-a of this article...." Notwithstanding and without needing to resort the widely used "seven tests" for just cause,¹⁰⁸ I found in the Respondent's favor on all but one of these charges based on the evidence, the credibility of witnesses, and certain inferences against the District apropos its failure to call the best witness or present the best evidence, or its failure to call certain witnesses at all.

¹⁰⁸ See Brand, *supra*, 31-33.

In assessing the penalty, I place the emphasis upon remediation. As the video evidence of the Board meetings demonstrated, the Respondent's most offensive comments to the Board were said in the heat of the moment amidst what appeared to be a community outcry against whatever the Board proposed to do on the evening of October 6, 2010, including considering pending charges against the Respondent. Indeed, arbitrators are ever mindful that the penalties meted out in any matter under consideration are to be determined based upon the unique circumstances found. The *zeitgeist* at Jordan-Elbridge in the fall of 2010 is something I must consider, because much of the community disorder was brought on by Board's actions that raised numerous and jarring concerns within the community, even if the Board was within its narrow rights to take such actions.¹⁰⁹

My obligation is to determine if the Respondent is fit to return to the school environment and to continue working with students. I must make this determination upon the one charge that has been proven, not on the charges for which the Respondent is innocent, or which were so trivial or minor as to warrant outright dismissal, or which were dealt with by Ms. Dominick promptly at the time of the offense with appropriate action and for which the Respondent showed genuine remorse and sorrow (i.e., the so-called "stubby" matter). As the

¹⁰⁹ There is evidence that the Board stepped beyond its boundaries when it violated the State's Public Officer's Law, Sec. 105, "Open Meetings Law." The violations were found by the Supreme Court, Onondaga County, by SCJ Greenwood upon an Article 78 action brought by the Respondent. *Matter of David Zehner v. Board of Education of the Jordan-Elbridge Central School District*. Index No. 2110-6515, RJI: 33-10-5183 (January 20, 2011) Such a violation occurred at the very evening under consideration herein, that is, October 6, 2010.

courts have noted, “...disciplinary charges against teachers are not criminal proceedings. Indeed, their primary function is not punitive, but rather the determination of the fitness of the teachers against whom they may be brought to continue to carry on their professional responsibilities.” *Matter of Bott v. Board of Education*, 41 N.Y.2d 265, 268 (1977) (Citations omitted) On October 6, 2010, the Respondent did not use profanity, obscenities, lewd words or gestures, threats of physical violence, or physical violence. Nothing he said can match the wrongdoing of the teacher in *Bott*, who “engaged in repeated acts of physical abuse” against pupils. (id.)

Moreover, in assessing penalty, I must consider the lengthy ordeal endured by the Respondent leading up to the initial charges. In April of 2010, five-plus months before charges were brought, the Respondent was called to Mr. Mevec’s office, ostensibly to answer questions stemming from Ms. Mattie’s audit concerning grade changes. He was confronted and given an ultimatum to leave his post or face possible criminal charges. Furthermore, Ms. Mattie began to probe the grade changing allegations persistently pursued by Ms. Hourigan as far back as August 2008, two years before the Respondent was suspended. However, when the Respondent was first charged with 3020-a charges on October 6, 2010, there were no allegations of wrongdoing involving grade changes, because it was evident that the Superintendent, Ms. Dominick, disagreed that charges of that nature were warranted. The grades charges were

filed by the Interim Superintendent, Dr. Zacher, who was not even present when the alleged infractions occurred.

The evidence indicated that Ms. Dominick, by a spreadsheet distributed to and examined by teachers in department meetings, questioned the teachers named by Ms. Mattie (a task that Ms. Mattie omitted while conduction her audit), and found that Ms. Mattie's conclusions were wrong. Ms. Dominick so informed the board. The District then retained Kessler, who also concluded that no teachers, other than Ms. Hourigan, a close "life long" friend of Ms. Alley's, and Ms. Osier, persisted in complaining about the Respondent's purported improper grades behavior. (R156) The matter was also investigated by the Attorney General's Office.¹¹⁰ There is no evidence that the Attorney General, or any other entity or person, other than the Board and Ms. Mattie, encouraged by Ms. Hourigan and Ms. Osier, found any wrongdoing by the Respondent regarding grade changes.

¹¹⁰ Despite Mr. Mevec's adamant and unwavering denial that he and the District asked the Attorney General to investigate possible criminal activity by the Respondent, a number of teachers were questioned by the Attorney General regarding grades: Mr. Sipley, (T 08/26/13: 6517) Mr. Bondgren, (T 08/26/13: 6617) Mr. Kufs, (T 08/26/13: 6702) Mr. Larham, (T 08/26/13: 6784) Mr. Cardinale, (T 08/27/13: 6879) Ms. Thomas-Madonna, (T 02/28/12: 714-15) Ms. Dominick, (T 08/29/13: 7276) and Ms. Hourigan (T 05/04/12: 1872; R181) Also, see Ms. Dominick's journal entry of May 19, 2010, short weeks after the meeting with the Respondent in Mr. Mevec's office. Ms. Dominick attended an executive Board meeting at which Ms. Mattie's audit was discussed. It was at this meeting that the Board rejected Ms. Dominick's evidence, supplied by the teachers, that the Respondent did not change grades without their knowledge or against their will. Ms. Dominick's journal noted, "Mary [Alley], Dan Mevec, and Alicia Mattie...took the matter to the Attorney General and I had no knowledge of that until I brought it up at this meeting." At the regular Board meeting following the executive meeting, the Board accepted Ms. Mattie's audit and rejected Ms. Dominic's evidence. (R188)

Finally, I consider that while certain persons in the District viewed the Respondent as disreputable and attributed to him only the most nefarious motives, others sang his praises:

Ms. Lang, Ms. Thomas-Madonna's predecessor as Associate Principal, said the Respondent was "beneficial for children," was an "out-of-the-box thinker," and was "always looking for ways to have students succeed." (T 08/28/13: 7041-42)

Mr. Sipley said that the Respondent "allowed teachers to do what's best in the classroom," that he "allowed freedom." Mr. Sipley also said that his "dearest friend on the faculty" ¹¹¹ felt "targeted," by the Respondent, but that he "felt comfortable speaking to [the Respondent] about any issue that we had." Mr. Sipley added that the Respondent sought advice and opinions from the faculty, and testified that, although it was not his job to evaluate the principal, he believed the "school was functioning fine under [the Respondent]," and that he never felt pressured to do anything inappropriate. (T 08/26/13: 6566-69)

Mr. Larham testified that the Respondent was a "very competent principal, one of the best I've worked for." He further said that the Respondent was "a leader who supported his teachers." He believed that the Respondent was "undeniably there because he loved the school and he loved the kids." (T 08/26/13: 6797)

¹¹¹ Ms. Hourigan.

Mr. Bondgren said that the Respondent was “the best” he was the for whom had ever worked. He also said, “every decision” the Respondent made “was for the good of the kids.” He testified that, although he did not always agree with the Respondent, he was “my boss,” and “he was a very, very good principal.” (T 08/26/13: 6647-48)

Mr. Cardinale testified that the Respondent was, “if not the best, one of the best principals I’ve ever worked under.” He also said that he never had a student complain to him about the Respondent. (T 08/27/13: 6880)

Ms. Dominick, who signed charges HO1,¹¹² testified:

“...his biggest asset is that he had a heart for kids. He wanted to see kids succeed, and he also wanted to provide his teachers with the resources that they needed to make kids succeed—help kids succeed.” She added, “... he was a man of great vision. When we were beginning the building project he would vision things that we should do at the high school that would make it a better

¹¹² Ms. Dominick was “prepped” by the District’s counsel, (T 08/29/13: 7463-64) but was not called by the District to testify. Although she signed the charges, she testified that they were drawn by Mr. Mevec, and that she did not recommend that the Respondent be terminated. (id. 7543) Nevertheless, she signed the charges, therefore, I assume she went along with Board’s action, although reluctantly. I make these observations: (1) In the spring of 2009, Ms. Dominick was told by the Board that her contract would not be renewed and she spent much of the ensuing year in protracted and stressful negotiations over a severance package. (R188, *et seq.*) (2) I was surprised that the District did not call upon Ms. Dominick to testify, therefore, by correct inference, I give weight to her testimony that she was a reluctant signatory to the charges. (3) Much of the counseling correspondence between Ms. Dominick and the Respondent, and actions taken against the Respondent, were driven by Ms. Alley. (See Ms. Dominick’s journal entries (id.) for 4/16/10, 5/7/10, 5/16/10, 5/18/10, 5/19/10, 8/5/10) (4) On 9/30/10, Ms. Dominick was instructed by Ms. Alley to put the Respondent on paid suspension. She wrote, in pertinent part, “I was shocked that this would come with no warning just before school was to open.... I said I would not do it. Certainly I would have to know the charges, believe that they were valid, and that we would have a chance of winning the case.... My assumption is that the charges they took to the Atty. Gen. without telling me have been found to have no merit. Why else with this happen now? I had already looked into the charges and found no evidence of wrongdoing. [The Respondent] does some objectionable things, but nothing we could win a 3020A on.” (*id.* 9/3/10)

learning environment. Hard worker, and very personable, very positive. Didn't always think before he spoke...but his good qualities far away his negatives."

3020a (4) (a) states:

"In those cases where a penalty is imposed, such penalty may be a written reprimand, a fine, suspension for a fixed time without pay, or dismissal. In addition to or in lieu of the aforementioned penalties, the hearing officer, where he or she deems appropriate, may impose upon the employee remedial action including but not limited to leaves of absence with or without pay, continuing education and/or study, a requirement that the employee seek counseling or medical treatment or that the employee engage in any other remedial or combination of remedial actions."

In considering a lesser penalty in this matter, I have considered whether a penalty less than discharge would be a disservice to the interests of the District. I realize there is a fine balance to be had, and in that balance, the Respondent's actions and words at the Board meeting on October 6, 2010 must be viewed as something that was fermenting in, then erupted from, a maelstrom of frustrations during months of stressful events and relationships when the Respondent's every move was scrutinized under disproportionate magnification by the Board President, Mr. Mevec, a very few faculty members, one of whom had a close relationship with the Board President, his associate principal, a biased auditor, and the Attorney General's Office. Outside his personal professional milieu, the Respondent was working in an environment in which a majority of the Board was arranging for the removal of no less than five top-level administrators: six including the Respondent. Any reasonable person must

account that the environment just described provides for a compelling mitigating element when considering penalty.

Furthermore, these charges included no less than 220 particular paragraphs in eleven charges, a blunderbuss blast that, but for two or three pellets, missed its target. To discharge the Respondent, with all the ensuing hardship “and the effect upon his innocent family” (*Pell*) after he has been exonerated of all but a portion of one charges and has been exonerated of nearly all the particulars, would pervert what we accept as fairness in these proceedings. His words were not so reprehensible, nor did they constitute “grave moral turpitude,” nor did they inflict “grave injury to the agency...or to the public weal,” (*id.*) to warrant the ultimate penalty.

By all the foregoing, I will order restatement of the Respondent to his position forthwith with full restoration of lost accruals and privileges. In the matters for which I have found the Respondent to be guilty and to held accountable, that is, part of HO2, particulars 1.1 through 1.11 as discussed above, I will impose a fine of \$2,000, to be collected over twenty pay periods following his reinstatement. In imposing this fine, I consider that these proceedings have already extracted a heavy price in time and resources from the Respondent and his family. I impose this fine solely to help him realize that, despite the provocations, he must more wisely contemplate and monitor his public statements and change them accordingly in the future.

FRIVOLOUS CHARGES

The Respondent urges me to find that certain of the charges were frivolous pursuant to 3020-a (4) c that authorizes the hearing officer to determine if any of the charges were frivolous, as defined by CPLR Section 8303-a.

8303-a. Costs upon frivolous claims and counterclaims in actions to recover damages for personal injury, injury to property or wrongful death.

(a) If in an action to recover damages for personal injury, injury to property or wrongful death, or an action brought by the individual who committed a crime against the victim of the crime, and such action or claim is commenced or continued by a plaintiff or a counterclaim, defense or cross claim is commenced or continued by a defendant and is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney's fees not exceeding ten thousand dollars.

(b) The costs and fees awarded under subdivision (a) of this section shall be assessed either against the party bringing the action, claim, cross claim, defense or counterclaim or against the attorney for such party, or against both, as may be determined by the court, based upon the circumstances of the case. Such costs and fees shall be in addition to any other judgment awarded to the successful party.

(c) In order to find the action, claim, counterclaim, defense or cross claim to be frivolous under subdivision (a) of this section, the court must find one or more of the following:

(i) the action, claim, counterclaim, defense or cross claim was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another;

(ii) the action, claim, counterclaim, defense or cross claim was commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law. If the action, claim, counterclaim, defense or cross claim was promptly discontinued when the party or the attorney learned or should have learned that the action, claim, counterclaim, defense or cross claim lacked such a reasonable basis, the court may find that the party or the attorney did not act in bad faith.

Although I have dismissed almost all of the charges and have found several of them to be baseless, the statute provides a narrow opening to declare them to be frivolous. In the previous discussions I have called to question many of the District's and Board's decisions, methods, and motives in bringing these charges. To that end, I have dismissed those charges and reinstated the Respondent to his previously held position. As baseless as some of these charges were, and as ill advised was the District in bringing them, I must take into consideration that each charge had an accuser at its base, be it Ms. Hourigan, Ms. Thomas-Madonna, Ms. Mattie's conclusions based upon her audit, a parent, a Board member or a student.

However one charge emerges as appropriate to be called frivolous, that is, HO 2, charges 2.1 through 2.7. The District brought these charges despite its possession of two forms of exculpatory evidence: (1) The departmental surveys reported by Ms. Dominick disclaiming the grade changes discovered by Ms. Mattie's incomplete audit and (2) Kessler's conclusions which contradicted the

charges. Ms. Mattie's audit failed in its evaluation of the raw data, because, except for two teachers, she did not interview the teachers she identified. Her audit was incomplete and flawed. Moreover, the two teachers Ms. Mattie did interview were already known accusers before she started her audit. To that extent, this charge should not have been brought or pursued, and, thereby, fits the criteria defined in 8303-c (ii), in that "the...claim...was commenced or continued in bad faith without any reasonable basis in...fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law." I will order the parties to meet forthwith to determine costs and reasonable attorney's fees to be paid by the District to the Respondent or his attorney, as they arrange, not to exceed the maximum allowed.

ORDER

After careful consideration of the entire record evidence, credibility determinations, appropriate inferences, and arguments, and for all the reasons in the foregoing discussion and opinion, it is ordered as follows:

The Respondent, David Zehner, shall be returned to his position of High School Principal at Jordan-Elbridge Central School District with full restoration of all lost accruals and privileges.

The Respondent, David Zehner, shall pay a fine of two-thousand dollars (\$2,000.00) to the Jordan-Elbridge Central School District, to be collected in equal payments over twenty (20) pay periods.

The charges contained HO 2, sections 2.1 through 2.7 are frivolous. The parties shall meet forthwith to determine costs and reasonable attorney's fees, not to exceed the maximum allowed, to be paid by the District to the Respondent or his attorney, as arranged.

I, Frederick Day, do hereby affirm that I am the individual described in and who executed this instrument, which is my Order pursuant to N.Y. Education Law, Section 3020-a.

Signed _____

Date: February 17, 2015