SUMMARY OF APPLICABLE FRAMEWORK FOR THE DETERMINATION OF EDUCATION LAW § 3020-A CHARGES

I. *Education Law §§ 3020 and 3020-a* and the Just Cause Standard

In pertinent part, E*ducation Law § 3020* provides that "[n]o 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." *See also Matter of Gould v. Board of Educ. of Sewanhaka Central High School District*, 81 N.Y.2d 446, 599 N.Y.S.2d 787 (1993)(stating that tenured teachers have a property interest in their positions and a right to retain their positions subject to being discharged for cause in accordance with the provisions of *Section 3020-a*).

It is well recognized that the "just cause" standard encompasses seven (7) elements, all of which must be proven to justify the imposition of discipline upon a pedagogue. The seven (7) elements are:

> (1) notice (did the employer provide the employee with notice of the rules and procedures with which the employee is expected to comply *and* the possible or probable consequences of the employee's failure to comply with such rules and procedures);
>
> (2) reasonable rules and orders (are the rules, procedures, or orders which the employee is accused of violating reasonable and valid, or are they unreasonable in that they: (a) conflict with a provision of the applicable collective bargaining agreement; (b) conflict with established past practice; (c) do not reasonably relate to legitimate management objectives; (d) are arbitrary, capricious, or discriminatory; or (e) purport to control how an employee lives his private life);
>
> (3) timely and thorough investigation (did the employer promptly inform the employee of the charges against him and provide the employee with the chance to tell his side of the story, before the imposition of disciplinary charges);

(4) fair investigation (did the employer conduct the investigation in a fair and objective manner;

(5) proof (did the employer satisfy its burden of proof by proving the charges preferred against the employee by a preponderance of the evidence);
(6) equal treatment (did the employer apply its rules, procedures, orders, and penalties even-handedly and equally as to all employees); and

(7) penalty (is the degree of discipline which the employer seeks to have imposed reasonably related to the seriousness of the employee's proven offense *and* the record of the employee in his service with the employer).

See Adolph M. Coven, Susan L. Smith, and Donald F. Farwell, *Just Cause: The Seven Tests* (2nd Edition, 1992).

As a tenured teacher, the Respondent possesses a constitutionally protected property interest in her position of employment which may not be diminished in any manner without her being accorded substantive fair hearing and due process rights. *See Cleveland Board of Educ. v. Loudermill,* 470 U.S. 532, 105 S. Ct. 1487 (1985); *Kinsella v. Board of Educ. of Central School District No. 7*, 378 F. Supp. 54 (W.D.N.Y. 1974); *Matter of Elmore v. Plainview-Old Bethpage Central School District, Board of Education,* 273 A.D.2d 307, 708 N.Y.S.2d 713, 714 (2d Dep't 2000)(stating that tenured teacher has protected property interest in his position which raises due process considerations whenever teacher is faced with termination); *Matter of Soucy v. Board of Educ. of North Colonie Central School Dist. No. 5,* 41 A.D.2d 984, 343 N.Y.S.2d 624 (3d Dep't 1973)(stating that right of tenured teacher to fair hearing and due process were substantive rights which could not be denied her);

Various aspects of the fair hearing and due process protections to which the Respondent is entitled include: that she receive notice of the charges against her and the right to respond (*Loudermill,* 470 U.S. at 542, 105 S. Ct. at 1493); that the charges against her be detailed and

specific as to the misconduct charged (*Matter of Soucy,* 41 A.D.2d at 985, 343 N.Y.S.2d at 625-26); and that she not be found guilty of any misconduct with which she has not been charged (*Matter of Soucy,* 41 A.D.2d at 985, 343 N.Y.S.2d at 625-26).

Additionally, charges against a tenured teacher may not, as a matter of law, be sustained where they are "so innocuous and inconsequential and the proof in support of such acts so insubstantial." *Matter of Tessier v. Board of Educ. of U.F.S.D. No. 5,* 24 A.D.2d 484, 260 N.Y.S.2d 789 (2d Dep't 1965)(dissenting opinion), *rev'd,* 19 N.Y.2d 680, 278 N.Y.S.2d 871 (1967)(adopting dissenting opinion of Second Department); *see also Matter of Appeal of Brink,* 7 Ed. Dept. Rep. 9 (1967)(stating that where board of education seeks to remove tenured teacher, charges must be both substantial and substantiated). In this proceeding, the Board of Education bears the burden of proving the charged misconduct by a preponderance of the evidence. *Matter of Martin v. Ambach,* 67 N.Y.2d 975, 502 N.Y.S.2d 991 (1986). Where a preponderance of the evidence standard is used, if the evidence is evenly balanced, there must be a finding against the party that bears the burden of proof. *300 E. 34th Street Co. v. Habeeb,* 248 A.D.2d 50, 685 N.Y.S.2d 175 (1st Dep't 1997).

II. Principles Applicable to the Determination of Incompetency Charges

The seminal case addressing charges of teacher incompetency is *Board of Education City of New York v. Arrak,* 28 Educ. Dept Rep. 302 (1988) (attached hereto as Exhibit "A"). In *Arrak,* the Commissioner of Education stated that "[i]n a classroom situation, incompetence in its simplest terms means that a teacher is unable to provide a valid educational experience for those students assigned to his classroom." The *Arrak* case was initially heard by a three (3) member panel. In dismissing the charges of incompetence against Arrak, the panel found that, although

Arrak was not a "'good' teacher," his performance "did not fall below the minimal level expected of a 'reasonable teacher'" as determined by the following criteria:

– requisite knowledge of subject matter content;

– ability to communicate content facts;

– ability to motivate and interest students;

– ability to maintain a classroom environment reasonably conducive to learning;

– ability to assess and evaluate student performance.

These criteria for determining teacher competency have consistently been followed since the issuance of the *Arrak* decision, by both the Commissioner of Education and hearing officers designated to hear incompetency charges against tenured teachers. The Hearing Officer is respectfully referred to the following decisions issued by the Commissioner of Education: *Matter of Postman,* 34 Educ. Dept. Rep. 88 (1994)(attached hereto as Exhibit "B"); *Matter of Board of Education Pine Bush CSD,* 33 Ed. Dep't Rep. 412 (1994)(attached hereto as Exhibit "C"); and *Matter of BOCES of South Westchester Cty.*, 32. Educ. Dept. Rep. 358 (1992)(attached hereto as Exhibit "D").

Recent decisions issued by hearing officers in which the *Arrak* criteria were adhered to include *Matter of Great Neck U.F.S.D. v. M.H.* (SED # 5,043, July 20, 2008, Hearing Officer Joel M. Douglas)(attached hereto as Exhibit "E")(see page 36) and *Matter of Department of Education of the City School District of the City of New York v. L.R.* (SED #5,381, December 8, 2007, Hearing Officer Andree Y. McKissick)(attached hereto as Exhibit "F")(see pages 44-45). In *Matter of M.H.*, Hearing Officer Douglas stated that:

The record demonstrates that for a teacher to be charged with incompetence, and

> for the Specifications to be sustained, the teacher must fall below the minimum level of the competency expected of a reasonable teacher. . . . That the Respondent did not live up to [her supervisor's] expectations, does not *de facto* establish a degree of incompetency. The record demonstrates that the classroom observation Specifications, for the most part, cite differences between [the respondent's supervisor] and [M.H.] and as noted, do not *de facto* constitute misconduct or incompetency. That [M.H.] could not satisfy [her supervisor] and perform in a manner desired by her, does not in and by itself prove incompetency. [Respondent's supervisor's] assertions and beliefs cannot be construed as the basis and/or support for summary discharge.

Matter of M.H., page 36.

Arrak also established the important principle that a hearing officer is bound to consider whether or not the administrators who evaluated a teacher and found him/her to be lacking in the requisite teaching skills were subjectively predisposed to find fault with the Respondent's performance. In *Matter of M.H.* and *Matter of L.R.*, *supra*, both hearing officers applied the concept of "subjective predisposition to find fault" in determining the incompetency charges before them. In *Matter of M.H.*, Hearing Officer Douglas held that this concept was persuasive as to one of the respondent's supervisors, and, for this reason and others, dismissed many of the specifications against respondent that were based upon that particular supervisor's notes, observation reports, and testimony. *See Matter of M.H.*, page 36. Similarly, in *Matter of L.R.*, Hearing Officer McKissick concluded that, after the respondent received an unsatisfactory rating from one principal in 2003, his successive supervisors "seem to be subjectively predisposed to finding fault with Respondent." *Matter of L.R.*, page 43.

III. Principles Applicable to the Determination of Penalty, if Any, in Incompetency Cases

In the event that the Hearing Officer concludes that the Board of Education has sustained its burden of proof with respect to any of the allegations against the Respondent, in determining

the issue of any penalty to be imposed he must also consider whether or not the Board has made any genuine attempt to remediate the alleged deficiencies in the Respondent's teaching performance. *See Education Law § 3020-a(4). § 3020-a(4)* codifies the concept that the purpose of *§ 3020-a* is to remediate and not to punish. In *Matter of M.H.*, page 36, Hearing Officer Douglas stated that "the § 3020-a statute is not intended to be punitive." He also found that remedial assistance was not provided to the respondent, stating that:

> While there were suggestions offered by Shalom [respondent's supervisor] in her observation reports, they did not meet the standard of remedial assistance. Shalom's observation comments were critical and highlighted perceived deficiencies yet offered little, if any, constructive assistance. That Shalom was concerned over [M.H.] is noted, yet that does not satisfy the remedial assistance obligation.

Matter of M.H., page 35.

In *Matter of L.R.*, Hearing Officer McKissick similarly found that, because the Department of Education failed to create an "individualized plan entailing the precise problems" of the respondent, no viable remediation program had been established. *Matter of L.R.*, pages 42-43.

A penalty of termination is only appropriate in an incompetency case if a school board or district can prove by a preponderance of the credible evidence that the teacher in question "is so incompetent that he is unable to further the educational development of students assigned to his classroom" and that "there is no likelihood that his competence will improve." *Matter of Board of Education of the Dundee CSD, (Phillips)*, 21 Ed. Dep't Rep. 731, 738 (1982); *see also Matter of Board of Education of the City School District, City of New York (Land),* 29 Ed. Dep't Rep. 228, 232 (1990). As Hearing Officer Douglas stated in *Matter of M.H.*, "Hearing Officers have

long held that if there is a chance at redeeming one's career, reason dictates that such an opportunity must be extended." *Matter of M.H.*, page 38. *See also Matter of L.R.* page 45 (finding that respondent had provided valid educational experience for his students and was capable of further improvement).

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Respectfully submitted,

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