STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLIE CRIST, AS COMMISSIONER OF EDUCATION, Petitioner, vs. JACKI MITCHELL, Respondent.	)	Case No. 02-2999PL

RECOMMENDED ORDER

Pursuant to notice, this cause came on for Administrative Hearing before P. Michael Ruff, duly-designated Administrative Law Judge of the Division of Administrative Hearings, in Chipley, Florida, on November 14, 2002. The appearances were as follows:

APPEARANCES

For Petitioner: J. David Holder, Esquire
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Santa Rosa Beach, Florida 32459

For Respondent: Thomas W. Brooks, Esquire
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Post Office Box 1547
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STATEMENT OF THE ISSUES

The issues in this case involve whether the Respondent has engaged in acts of misconduct alleged in the Administrative Complaint, and if so, whether the Respondent's Florida

educator's certificate should be revoked or other disciplinary sanction imposed.

PRELIMINARY STATEMENT

This cause arose upon the filing of an Administrative Complaint by the Commissioner of Education seeking to impose discipline on the Respondent's Florida Educator's Certificate based upon allegations that she, in essence, accessed and loaded pornographic material onto a laptop computer assigned to her by the Washington County School District, her employer. The Petitioner alleges that the conduct was an act of immorality or gross immorality; constituted personal conduct which seriously reduced the Respondent's effectiveness of an employee in the School Board and violated principles of professional conduct by constituting a failure to make reasonable efforts to protect students from conditions harmful to learning and/or to the students mental health, physical health or safety. The Petitioner thus alleges that the conduct described in the complaint amounted to violations of Section 231.2615 (1)(c), (f), (i), Florida Statutes and Rule 6B-1.006(3)(a), Florida Administrative Code.

The Respondent elected to dispute the allegations of the complaint and sought a formal proceeding to contest the matter before the Division of Administrative Hearings. The cause was transferred to the Division of Administrative Hearings and

ultimately assigned to the undersigned administrative law judge for conducting a formal proceeding. The cause came on for hearing in accordance with duly issued notice on November 14, 2002.

The Petitioner presented the testimony of seven witnesses and six exhibits which were admitted into evidence at the hearing.

The Respondent testified on her own behalf and offered nine exhibits which were received into evidence.

Upon concluding the hearing, the parties ordered a transcript and requested a period of time to submit proposed recommended orders after the filing of the transcript. The one-volume transcript was filed on December 4, 2002. Those proposed recommended orders have been considered in the preparation of this recommended order.

FINDINGS OF FACT

1. The Petitioner is an agency of the State of Florida, charged with regulating the standards for entry into practice as a teacher, including licensure and the regulation of practice of teachers once they are licensed. The Respondent is a licensed Florida Educator (teacher) holding certificate 795510, covering the area of mathematics. That license is valid through June 30, 2003.

2. During the 1999-2000 and 2000-2001 school years the Respondent was employed with the Washington County School District as a teacher at Vernon Middle School. From September 1999 through December 2000 the Respondent was assigned to teach low-functioning exceptional student education (ESE) students. ESE students are those who have learning disabilities or physical impairments which adversely affect the ability to learn. In January 2001, the Respondent sought and obtained a transfer from her ESE assignment to a position teaching mathematics classes, which was within the scope of her certificate. She continued to teach mathematics until her suspension with pay in April 2001. During the 1999-2000 and 2000-2001 school years the Respondent also taught adult night school courses.

3. When the Respondent became employed as an ESE teacher the Washington County School District issued her a laptop computer for the purpose of preparing individual education plans (IEP) and other paperwork required in the ESE program. The Vernon Middle School guidance counselor and its other ESE teacher were also issued laptop computers for ESE paperwork purposes. Witness Heather Miller, testifying for the Petitioner, stated that all ESE teachers received a letter limiting the use of the laptop to ESE purposes. The Respondent testified that she did not receive any letter or other

instructions limiting her use of the computer. Ms. Miller admitted on cross-examination that she was not present when any such instructions may have been delivered to the Respondent. Be that as it may, the gravaman of the charges in the administrative complaint do not involve use of the ESE laptop computer for personal purposes versus employment-related purposes. The Respondent may have been instructed not to use the computer for anything other than ESE instructional-related purposes or may not have been given such instructions, or may simply not recall getting such instructions. Whether or not she received such instructions is immaterial to the charges in the administrative complaint, however.

4. The Respondent had the laptop computer in her classroom when it was first issued to her, while she was learning how to use it. Sometime early in her use of it she installed a program called "Clue Finder" which is a software program for children for the third to fifth grade. She allowed the students to use this software in class. The laptop had never been connected to the internet at the time she permitted students to use it in her classroom and her classroom did not have internet access at that time.

5. She ceased permitting students to use the laptop after she had a discussion with the other ESE teacher, Julie Johnson, about her not permitting her students to use her laptop. The

Respondent's students were not permitted to use the laptop from that point forward, which was sometime in the month of February 2000.

6. Each laptop was equipped with a "zip drive" and "zip disc" in order to download the "GibCo Dynamo Program," the program used for ESE paperwork purposes. Therefore, it was unnecessary for ESE employees to access the internet using their school board-issued laptop. ESE employees were permitted to remove and transport their laptops away from school premises so that they could work on IEP and other ESE paperwork at other locations, including their homes.

7. The Respondent took her laptop home sometime during or after February 2000 and began becoming acquainted with the GibCo Dynamo Program, which helps ESE teachers correctly complete IEP's and other paperwork. It was necessary to periodically update the GibCO Program to reflect changes in the ESE forms. The Respondent already had the laptop at home and did her IEP work there because she did not have time to do it in class. Therefore, she asked Brenda Miller, the ESE resource person from the county office, if she could use her laptop to update her GibCo program through her home internet service provider. She received permission and did so in late February or early March 2000.

8. On one occasion prior to the end of the spring 2000 school term, the Respondent permitted one of her adult alternative education students to use her laptop to complete a paper he was writing. She assisted him in using the laptop and was present the entire time he was using it. This incident occurred before she had begun any personal use of the laptop or put any of her programs on it. Therefore, the use occurred before the material contained in Petitioner's Exhibit one was received or stored on the laptop.

9. The Respondent did not teach during the summer of 2000 and spent more time accessing the internet through the school laptop for personal purposes. Although they were still living in the same home, the Respondent and her husband had become estranged and were ultimately divorced. During the summer of 2000 the Respondent used the ICQ program to communicate with and strike-up non-sexual relationships with other people, including males. The ICQ program is a forum or "chat room," with the exchange of ideas and information on virtually any subject. Users fill out a personal profile which informs other users about the person's interests or subjects the person is interested in receiving or sending communications about. The Respondent contends that her ICQ profile only contained her name, age and gender. When such a user starts his or her computer other users are alerted to that user's presence and

availability for communication. The user may send or receive communications to or from others, which communications can contain attachments, such as documents or pictures.

10. During the time she was using the laptop to access the ICQ program, the Respondent's husband, her baby-sitter and her baby-sitter's mother also had access to the laptop at various times in her home. The Respondent's laptop was connected to the internet at her home for approximately three and one-half to four months. Sometime during the summer of 2000 lightening struck her modem and destroyed it. The laptop was never connected to the internet after that event.

11. During the time the laptop was connected to the internet in the Respondent's home the documents contained in Petitioner's exhibit one were received on the laptop and placed on the hard drive in fifty-eight program folders. The Respondent maintains that she did not realize that the materials contained in Petitioner's Exhibit One, which were on her computer, had been recorded on her hard drive. She admits to seeing some of those documents in Petitioner's exhibit one but maintains that she had not seen all of them. She maintains that she did not see many of the items in Petitioner's Exhibit One, especially items which indicate the ICQ identification name "Hotrod," which was that of her husband.

12. The Respondent claimed that she never knowingly or intentionally accessed or "downloaded" any pornographic materials on her school laptop, nor did she solicit such material from anyone else. During the time her laptop was operating on the internet, through the ICQ program, she would sometime receive messages with documents attached. On some occasions she states that she would discover sexually explicit material when she opened the document and that when she did so would immediately close the file and assumed that it had been deleted.

13. She claims that she had no idea the information was being saved on the computer's hard drive. If the Respondent received unsolicited, sexually explicit material from someone she had wanted to chat with she states that she would inform them not to send that type of information if they wanted to continue to communicate with her.

14. During the time period in question the Respondent also received unsolicited e-mail of a sexually explicit nature which indicated that she had subscribed to it, although she states she never had. The fact that an e-mail indicates that the recipient is a subscriber does not mean that the recipient actually solicited or subscribed to the e-mail. Rather, the recipient's name could have been obtained from another source merely upon

the receiver's profile having been provided to a particular site.

15. It is unclear how the material contained in Petitioner's Exhibit One was saved on the hard drive of the Respondent's laptop. It can not be precisely determined who saved a particular file or who if anyone opened and viewed a particular file, primarily because the Respondent did not have sole access to the computer while it was in her home. It is probable that the Respondent did obtain some of the material that was present on her laptop hard drive, as she did acknowledge having seen some of the material in the past, when confronted with the presence of it by her employer. It cannot be determined from a review of the laptop hard drive that the Respondent named or saved any specific file contained in the Petitioner's exhibit one.

16. After the laptop's modem was destroyed by lighting, the Respondent continued to use the laptop for her IEP's until she returned the computer to the school in September 2000, at the request of Ms. Harrell.

17. The Respondent specifically requested permission to lock the computer up and Ms. Harrell told her she could keep it in a locked storage room, which she did. The storage room was in the administration building, which was next to the building in which her classroom was located.

18. The laptop remained in the locked storage room until October 2000, when the Respondent was assigned a new ESE student. She brought the laptop to the classroom for a short time on that one occasion to work on the new student's IEP, but the students never had access to the computer nor were they ever in a position to see what she was doing on the computer.

19. In January 2001, the Respondent was re-assigned, at her request, from the ESE position to the position of math teacher, which was within her area of certification. She had no further use for the laptop and believed she had removed from it all programs, games and other information she had put on the computer as a result of her personnel use.

20. The Respondent removed her internet service program, Digital Express, and the ICQ Program, believing that this action removed anything associated with these programs from the computer. She was unaware that there were separate program files for the ICQ Program saved to the hard drive. If she had known of this she would have deleted them.

21. Gerald Fender, the Washington County School District Computer Technician indeed saw evidence that an attempt had been made to remove information from the Respondent's laptop when he inspected it.

22. The Respondent's laptop was turned over to her successor, Aubrey Herndon, the new ESE teacher, who placed it

into a locked closet in his classroom. The computer remained there until approximately April 10, 2001, when Mr. Herndon removed it to learn how to use it to prepare his IEP.

23. On April 10, 2001, Heather Miller was assisting Mr. Herndon with transferring information from a zip disc to the laptop when she noticed two sites listed on the "favorites" screen, "ALT.Sex Stories" and "Asclepius Himself."

24. Upon seeing these items, Ms. Miller took the laptop and reported what she had found to the principal, Ms. Harrell and the School Resource Officer, Deputy Mark Collins.

25. Ms. Miller and Officer Collins searched the computer for other suspicious files but were unable to locate any.

26. The next day, Gerald Fender, the school board computer technician was called in and asked to search the computer. After an extensive search, Mr. Fender located the ICQ Program in the program files.

27. In the afternoon of April 11, 2001, the Respondent was called to Ms. Harrell's office and confronted with some of the information contained in Petitioner's Exhibit One. The first document the Respondent was shown was page eighteen of Petitioner's Exhibit One from a program called "pal talk" which was supposed to be a program which enables a person to speak to another person over the internet.

28. The Respondent was shocked when she was shown this document because she had thought she had deleted the entire pal talk program and the file containing this document, after she had received the document when she first accessed the pal talk program. She was shocked when this sexually explicit document appeared through a program she had understood to be a voice program and which she thought she had immediately taken off the computer.

29. The Respondent was also shown a copy of page twenty-nine of Petitioner's Exhibit One, which was a sexually explicit picture of a man standing in a shower. She recognized that picture as also coming from her computer. She acknowledged that the two pictures she was shown were from her computer and then she told "them" that they did not have to show her anymore. There was some conflict in the testimony regarding the precise number of pictures from Exhibit One which were shown to the Respondent. It is unnecessary to resolve this discrepancy because all of the testimony of all witnesses present is consistent that the Respondent acknowledged that the pictures were from her laptop computer after being shown a few of them and no more were therefore shown.

30. The Respondent was asked whether the students had ever used the computer and she said that they had, but that the students were allowed to play games on the computer only during

the time before she had taken the computer to her home and before the information contained in Petitioner's Exhibit One had ever been received.

31. The Respondent also stated in that initial meeting on April 11, 2001, that she had thought that she had deleted all the information which she had been shown from the computer.

32. During this meeting the Respondent also made a statement to the effect that she had used the laptop at night to access her ICQ file when she "would get bored" while working on class work. She was referring to working at home and not in the classroom. Also, during this meeting she told Officer Collins that the students had never seen the objectionable information, and he indicated that he would interview her students, which she encouraged him to do. No student interviewed indicated that he or she had seen any of the information contained in the Petitioner's Exhibit One.

33. Officer Collins also consulted with Captain Strickland the Chief of Investigations of the Washington County Sheriff's Department Capt. Strickland advised that there was no basis for any criminal charges.

34. The Respondent met with Superintendent Jerry Tyre in his office on May 3, 2001, and submitted her resignation effective May 14, 2001. The Respondent had already been informed by Ms. Harrell before this incident that she was not

going to be recommended for renewal as an annual contract teacher for the next year. By resigning rather than contesting the superintendent's suspension, the Respondent believed that she could resolve the situation quickly without any further publicity or notoriety.

35. In June 2001, the Respondent applied for employment as a teacher in Bay County, Florida. She submitted written references from three former colleagues, Paul Parker, her supervisor and director of the Washington County Technician Center; Mary Davis, Adult Education Coordinator and Genevelyn Brown, EAS Assistant. Each of the individuals was informed of the circumstances surrounding the Respondent's resignation and each was still willing to give her a positive reference.

36. The Respondent also solicited support from several parents of students she had taught or tutored while employed in Washington County, during the investigation of this matter by the Department of Education. She informed each of these individuals of the nature of the allegations against her and the circumstances surrounding her resignation. Each of these individuals, Rhonda Duren, Julie Bielinski, Brenda Richards and Victor Marshall, submitted written statements supporting her ability and their belief she should continue as a teacher in Washington County or elsewhere.

37. The Respondent obtained employment as a teacher with the School Board of Bay County at Mosely High for the 2001-2002 school year. She was still employed as a teacher in Bay County at the time of this hearing. She has had no disciplinary problems of a similar nature to that to which occurred in Washington County. It is not clear whether the authorities who hired her in Bay County were aware of the circumstances surrounding her resignation from her position in Washington County. Both prior and subsequent to the events at issue in this case, the Respondent has never had any accusations of any similar misconduct and has no disciplinary record.

38. It has not been established that either the intentional or inadvertent accessing of sexually explicit materials in the privacy of the Respondent's home (even though on a school-issued computer), was immoral or grossly immoral. The downloading of the materials and the presence of them on the computer never became accessible to any students and no student was ever aware that such information was on the computer. It has not been established that the Respondent's failure to delete the sexually explicit material from the computer prior to taking it back to her place of employment constitutes immorality or gross immorality. It has not been shown that the conduct involved in this proceeding was a matter of any notoriety so that her position in the education profession could be the

subject of any public disgrace or disrespect or that her service to the community in that profession could be impaired.

39. There is no clear and convincing evidence that the Respondent engaged in personal conduct which is seriously reduced her effectiveness as an employee of the school board. The Petitioner elicited opinion testimony from witnesses which was conclusary and failed to specify precisely how the conduct could seriously reduce her effectiveness as a teacher. The opinion testimony was based on a factual assumption which was not established by the evidence, namely that the Respondent's students used her laptop after the sexually explicit material had been received and thus had reasonable access to the laptop with that material on it. In fact, the evidence of record supports the opposite conclusion; that the students had no such access to the laptop after the sexually explicit material had been received on it, so the opinions to the effect that her effectiveness has been seriously reduced cannot be accepted since they are based upon an invalid assumption.

40. There is no clear and convincing evidence that the Respondent failed to make a reasonable effort to protect students from harmful conditions concerning learning or their mental health or physical safety. The Respondent tried to delete the material from her laptop, albeit unsuccessfully, prior to returning it to school, based upon what she knew at

that time. She returned it to school thinking it was deleted when it was not. Nevertheless, her conduct after the computer was returned to her school prevented the students from gaining access to it since the computer was maintained in a locked storeroom, one building removed from the building where her classroom was located. Thus it was highly unlikely that the students would have access to the sexually explicit material on the computer. There is no evidence in the record that they did.

CONCLUSIONS OF LAW

41. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. Sections 120.57(1) and 120.569, Florida Statutes.

42. The material factual allegations of the Administrative complaint are that the Respondent, sometime prior to April 10, 2001, accessed and loaded on to a computer assigned to her by the school district, pornographic or obscene material. The Petitioner has alleged that that conduct constituted immorality, gross immorality or an act involving moral turpitude in violation of Section 231.2615(1)(c), Florida Statutes (2001), and that the Respondent is guilty of personal conduct which seriously reduces her effectiveness as an employee of the school board in violation of Section 231.2615(1)(f), Florida Statutes (2001), and has also violated Rule 6B.1.006(3)(a), Florida Administrative Code, by failing to make a reasonable effort to

protect her students from conditions harmful to learning and/or to the student's mental health and/or physical safety, also in violation of Section 231.2615(1)(i), Florida Statutes (2001).

43. When the discipline of a teacher's certificate is at issue, the Petitioner bears the burden of proofing the charges alleged in the Administrative Complaint by clear and convincing evidence. Ferris vs. Turlington, 510 So. 2d 292, (1987). In determining whether a Respondent has violated provisions alleged in an administrative complaint, a penal statute such as that at issue must be strictly construed and no conduct is to be regarded as included within it that is not reasonably proscribed by it. If there are any ambiguities included, such must be construed in favor of the licensee. Lester vs. Department of Professional and Occupational Regulation, 348 So. 2d 923, 925 (Fla. 1st DCA. 1977). Additionally, disciplinary action can be based only upon the facts specifically alleged in the administrative complaint. See MacMillan vs. Nassau County School Board, 629 So. 2d 226 (Fla. 1st DCA 1993). Whether a particular action constitutes a deviation from the required standard of conduct for teachers is an ultimate finding of fact which must be made in the context of the alleged violation. Langston vs. Jamerson, 653 So. 2d 489, (Fla. 1st DCA 1995).

44. The facts in this case do not involve, as the Administrative Complaint implies, the intentional downloading of

pornographic material to a computer located in the classroom where it could have been seen by students. Rather, this case involves the receipt of unsolicited, sexually explicit material on a school laptop computer in the privacy of the teacher's home, according to her testimony. There is also the possibility that some of the material could have been downloaded by other members of the household who had access to the computer and, based upon the Respondent's testimony, some of the material was likely downloaded by the Respondent herself. In any event, the Respondent believed that she had removed all such material either immediately upon its receipt as unsolicited sexually explicit material, but in all cases prior to the return of the computer to the custody of the school or school personnel and to the school location. There is no specific allegation or evidence that any student was exposed or was reasonably likely to be exposed to any inappropriate material left on the laptop computer. Under the totality of the circumstances in this case there is no clear and convincing evidence that the Respondent violated the statutory and rule provisions alleged in the Administrative Complaint.

45. There is no clear and convincing evidence that the Respondent is guilty of an act involving moral turpitude or gross immorality. Neither "gross immorality" nor an "act involving moral turpitude" is defined in Section 231.2615(1)(c),

Florida Statues (2001). However, Rule 6B-4.009, Florida Administrative Code, sets forth a definition of "immorality" and an "act involving moral turpitude" which may be used to determine the meaning of these terms as used in Section 231.2615(1)(c), Florida Statutes. Rule 6B-4.009(2), Florida Administrative Code, defines "immorality" as follows:

> immorality is defined as conduct that is inconsistent with standards of public conscience and good morals. It is conduct sufficiently notorious to bring the individual concerned or the education profession into public disgrace or disrespect and impair the individuals service in the community.

In order to find a violation of this rule, it must be concluded that the teacher engaged in conduct inconsistent with standards of public conscience and good morals and that the conduct was sufficiently notorious as to disgrace the teaching profession and to impair the teacher's service in the community. See McNiell vs. Pinellas County School Board, 678 So. 2d 476 477 (Fla. 2nd DCA 1996). Impairment may not be inferred, but must by proved an element of the violation. McMillan vs. Nassau County School Board, supra.

46. "Gross immorality," is therefore, misconduct that is more egregious than mere "immorality," involving "an act or conduct that is serious rather than minor in nature, and which constitutes a flagrant disregard of proper moral standards."

Turlington vs. Knox, 3 FLAR 1373A, 1374A (EPC Final Order 1981). In Walker vs. Highlands County School Board, 752 So. 2d 127 (Fla. 2nd DCA 2000) it was held that impairment may be inferred if immoral conduct occurred in the classroom or in the presence of the students, but not if the misconduct was of a private nature not involving students. Because the conduct in this case was of a private nature and did not occur in the classroom or in the presence of students, impairment may not be inferred even under Walker and subsequent cases employing its rationale.

47. "Moral turpitude" is defined by Rule 6B-4.009(6), Florida Administrative Code, as follows:

> Moral turpitude is a crime that is evidenced by an act of baseness, vileness or depravity in the private and social duties, which, according to the accepted standards of the time a man owes to his or her fellow man or to society in general, and the doing of the act itself and not its prohibition by statutes fixes the moral turpitude.

48. There is no clear and convincing evidence in this case to prove that the Respondent engaged in conduct involving gross immorality or an act of moral turpitude. In this modern era (for good or ill) it simply is not a clear and convincing departure from standards of public conscience and good morals to download pornographic material in the privacy of one's own home when similar material can be lawfully purchased in a publicly-accessible store or newsstand. The fact that this use of the

school-owned computer violated the School Board's policy regarding its personal use is a collateral issue and not the basis itself of a charge in the administrative complaint. The Petitioner's own witnesses on the issue of gross immorality or immorality were in conflict. One stated that merely looking at such material was immoral and the other acknowledged that what the Respondent did in her own home was her business and that it was the potential accessibility of the material to students at school, not the mere act of downloading the material that was the basis for that witnesse's opinion.

49. The Respondent testified that the objectionable material was unsolicited, that she never knowingly saved any of it and attempted to delete it from the computer as soon as she received it. Further, she testified that she attempted to delete everything of a personal nature from the laptop before she turned it over to her successor at the school. That attempt was verified by the examination of the technology specialist, Gerald Fender. Even if one deemed the evidence to support the proposition that the Respondent intentionally downloaded all the pornographic material present in Exhibit One, there is no evidence that any of it was viewed or disseminated outside the privacy of her own home.

50. Even if the Respondent's conduct could be considered immoral, in spite of her first amendment rights regarding what

activities she can engage in in her own home, the Petitioner did not present evidence that this conduct obtained any notoriety in the local community. There was no notoriety which could arguably rise to the level of disgracing the teaching profession and impairing the Respondent's service as a teacher in the community. In fact, the Respondent herself minimized the potential for notoriety by voluntarily resigning her employment, rather than publicly contesting her dismissal on these charges, having already been notified of the non-renewal of her annual contract. Further evidence of the lack of notoriety lies in the fact that this incident did not "follow her" to the neighboring county in which she has successfully worked as a teacher since resigning her employment in Washington County.

51. Having failed to prove an act "immorality," the Petitioner can not therefore meet its burden of proving "gross immorality."

52. There is no clear and convincing evidence that the Respondent engaged in any personal conduct which seriously reduced her effectiveness as an employee of the School Board. Her conduct has three elements: (1) Personal use at home of the school-issued laptop; (2) Receipt on that laptop of some sexually explicit or pornographic material; (3) The failure to remove this material from the hard drive of that computer when it was returned to the school. There is no evidence that these

acts individually or collectively resulted in a serious loss of effectiveness.

53. Although Heather Miller testified that ESE teachers who received laptops were given a letter which instructed them not to make personal use of the computer, the Respondent denied receiving such a letter or other instruction against personal use and testified that she had requested permission to connect the laptop to her home internet service provider prior to doing so. While it is likely that the Respondent received this letter or at least a verbal instruction regarding personal use of the computer, the charges in the complaint do not relate simply to personal use of the computer. The charges rather relate to acts of immorality, gross immorality or the violation of the above cited rule regarding failure to make a reasonable effort to protect students, etc. While she may have violated the School Board policy, there is no clear and convincing evidence that the Respondent's personal use of the laptop, in and of itself, violated the rules or statutes cited in the Administrative Complaint and referenced herein. There is no evidence that her personal use of her computer, primarily during the summer when she was not working, reduced her effectiveness as a teacher.

54. As previously stated, even some of Respondent's the witnesses conceded that what the Respondent accessed on the internet in the privacy of her home is her own business. It is

also clear that, at law, private conduct thought to be immoral by some does not itself constitute evidence of loss of effectiveness. Walker vs. Highlands County School Board, 752 So. 2d 127, (Fla. 2nd DCA 2000); McNiell vs. Pinellas County School Board, 678 So.2d 476 (Fla. 2nd DCA 1996); Sherburne vs. School Board of Suwannee County, 455 So. 2d 1057 (Fla. 1st DCA 1984). The evidence establishes that the Respondent never had the ability to access the internet at school and there is no evidence that she ever accessed any of the objectionable material contained in Exhibit One, or similar to that, at school. Consequently, her private conduct, even if it is immoral, does not provide a basis for an inference of loss of effectiveness, even in those jurisdictions which permit loss of effectiveness to be presumed under some circumstances.

55. Likewise, the fact that she failed to completely delete all of the objectionable material from the computer when she returned it to school does not provide evidence of any loss of effectiveness, much less a serious loss of effectiveness. The Respondent testified without contradiction that she attempted to delete all personal material (pornographic or otherwise) from the laptop prior to turning it over to her successor and thought that she had eliminated all ICQ files by removing that program. She was simply unaware that the ICQ files had been saved to the computer's hard drive so she did not

know how to delete them. This error does not provide any evidence that she was not able to continue to be an effective teacher.

56. The Petitioner presented three witnesses who testified regarding the issue of loss of effectiveness. Their testimony does not provide clear and convincing evidence that she has incurred a serious loss of effectiveness.

57. The first witness to testify was the principal, Ozeal Harrell. She admitted on cross-examination that her opinion regarding loss of effectiveness and violation of the other statutory and rule provisions at issue, was based on the assumption that the Respondent was accessing the objectionable material in the classroom. She also stated that in her opinion it was immoral to even look at sexually explicit material, regardless of where it occurred and that belief formed the basis for her opinion on loss of effectiveness. Most significantly, she admitted that she did not know for a fact whether the Respondent could or could not be an effective teacher if she were to come back to Washington County.

58. The next witness to testifying on loss of effectiveness was Michael Welch. He based his opinion on the assumption that the laptop was in the classroom "this material was on the laptop and the students did have access to that laptop and used it." He further stated that it was the act of

bringing the computer to school with the objectionable information on it which he found to violate the statute, whether or not it was ever seen by any students and no matter how remote the possibility of the students seeing it might be.

59. The third witness testifying on this issue was Superintendent Jerry Tyre. He testified that his opinion was based both on the fact that the Respondent accessed and downloaded material he considered to be pornographic or obscene, and in addition, the fact that the Respondent brought the computer to school with this material on it which was available to and in fact used by students in the classroom.

60. This testimony is not clear and convincing evidence of a serious loss of effectiveness. First, each of these witnesses assumed facts which have not been proven, primarily that students used or had access to the computer after it had the objectionable material on it. That access or use has in fact been disproven. Consequently, this opinion testimony cannot support a finding of a serious loss of effectiveness. Tenbroeck vs. Castor, 640 So. 2d 164, 168 (Fla. 1st DCA 1994); MacMillan vs. Nassau County School Board, supra. Secondly, this testimony is conclusory and based upon the witnesse's personal view of morality. There is no specific evidence that the Respondent would not have been able to continue as an effective teacher despite this incident. Indeed this testimony constitutes

speculation which has been found not to be a basis for disciplinary action against a teacher's license as shown in the opinion the Tenbroeck case, at 640 So.2d 167. It is not logical that even such a flagrant error in judgment and carelessness exhibited by the Respondent necessarily results in a serious loss of effectiveness.

61. There is no evidence that this incident created any notoriety within the local community, which is the most frequent reason cited for loss of effectiveness. Additionally, the Respondent has been able to obtain a teaching job in a neighboring county and teach effectively without this incident "following her." Therefore, there is no significant evidence which tends to show any serious loss of effectiveness.

62. The Respondent was given positive references from her employment with the Bay District School by three of her co-workers after this incident occurred, as shown by the Respondent's Exhibits One, Two, and Three. Each of these persons had knowledge of the events which led to the Respondent's termination and indicated that they would re-employ her in the same position and knew of no reason why the "applicant" [Respondent] should not work with children. Her co-workers, including an administrator, would not be willing to make such statements if the Respondent has suffered a serious loss of effectiveness. The Respondent's Exhibits Six, Seven,

and Eight are letters the from parents of students which she either taught or tutored while employed in Washington County. These letters in support of the Respondent's effectiveness were written by the three parents when they were aware of the allegations against the Respondent. Thus, considering together these exhibits, when weighed against the conclusory testimony of the Petitioner's witnesses, results in the conclusion that the clear and convincing evidence does not establish a serious loss of effectiveness.

63. The clear and convincing evidence does not establish that the Respondent failed to make reasonable efforts to protect student's from the conditions harmful to learning and/or to the students mental health and/or physical safety. The evidence establishes that the Respondent made a reasonable effort and succeeded in preventing the exposure of any students to any harm resulting from her actions. No student ever saw the sexually explicit material she inadvertently left on the computer nor was there any reasonable likelihood that any student would have been exposed to this material, as shown by the above findings of fact, including those to the effect that the computer was kept under lock and key after it was returned to the school site. Thus, no violation of Rule 6B-1.006(3)(a), Florida Administrative Code, can be found. There is no evidence that the students either used the computer after the objectionable

material was saved on it or easily could have been exposed to such material. In fact, the facts established demonstrate to the contrary.

64. The Respondent testified without contradiction that none of her students used the laptop after she connected it to the internet at her home. When she returned it to the school in September of 2000, she placed it in a locked cabinet, in a different building from her classroom, where it remained until she turned it over to her successor, with one exception. In October of 2000, Ms. Mitchell had a new student assigned to her class and she brought the computer in the class to briefly work on the students IEP. At no time when the computer was in the classroom for that limited purpose were any students given access to it nor were they ever in a position to even see what was on the computer screen.

65. This evidence shows that the Respondent took reasonable steps to ensure that any inappropriate material was removed from the computer. When she took it to her successor, she had no reason to believe that there continued to be anything objectionable on it and she had, from her own experience, every reason to believe that the computer would not be accessible to students, whatever was on it. The fact that she had not removed all of the objectionable material is unfortunate and amounts to carelessness on her part, but does not mean she acted

unreasonably with regard to her students, as contemplated by this rule.

66. In addition to the fact she had no reason to believe that students would have access to this computer, it was virtually impossible for any student to have access to this material accidentally. There is no evidence that access to the two sites in the "favorites" menu would have caused any harm to any student who may have accessed it. Rather, the only potential harm was to the ICQ program files which required several adults and the skills of computer technician when they knew that they were looking for something potentially improper. The possibility that a student could have ever accessed any of the objectionable material is so remote that it would be unreasonable and beyond the scope and contemplation of this rule to require the Respondent to have taken any actions other than those which she took.

67. The Respondent's judgmentally weak and unwise use of her laptop for her personal business obviously placed her employment in jeopardy, and probably should have, but it did not present a reasonable possibility of harm to her students. Thus the Petitioner failed to provide clear and convincing evidence that this rule was violated by the Respondent.

68. In summary, the conduct at issue does not establish immorality, moral turpitude or serious loss of effectiveness as a teacher. It does constitute a serious lapse in judgment and while costing the Respondent her job in Washington County, did not subject any student to any harm. Therefore, the conduct does not violate the provisions of Section 231.2615, Florida Statutes, and the above-cited rule.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED:

That a Final Order be entered by the Commissioner of Education dismissing the Administrative Complaint.

DONE AND ENTERED this 14th day of March, 2003, in Tallahassee, Leon County, Florida.

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
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this 14th day of March, 2003.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.