

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL)
BOARD,)
)
Petitioner,)
)
vs.) Case No. 04-1575
)
JOANN D. DETTREY,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Robert E. Meale, Administrative Law Judge of the Division of Administrative Hearings, conducted the final hearing in Miami, Florida, on August 23, 2004.

APPEARANCES

For Petitioner: Madelyn P. Schere
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

For Respondent: Mark Herdman
Herdman & Sakellarides, P.A.
2595 Tampa Road, Suite J
Palm Harbor, Florida 34684

STATEMENT OF THE ISSUE

The issue is whether Petitioner may terminate the professional service contract of Respondent due to a failure to correct performance deficiencies during the 90-calendar-day probationary period.

PRELIMINARY STATEMENT

By Notice of Specific Charges dated April 27, 2004, Petitioner advised Respondent that it was seeking to terminate her professional service contract due to a failure to correct deficiencies within the 90-calendar-day performance probation period that was imposed on November 15, 2003.

The Notice of Specific Charges alleges that, on December 11, 2003, Respondent functioned below standards in components of Enhancing and Enabling Learning. The Notice of Specific Charges alleges that, on February 4, 2004, Respondent functioned below standards in components of Managing the Learning Environment, Teacher/Learner Relationships, Enhancing and Enabling Learning, and Classroom Based Assessments of Learning. The Notice of Specific Charges alleges that, on March 15, 2004, Respondent functioned below standards in Managing the Learning Environment, Enhancing and Enabling Learning, and Enabling Thinking.

On March 19, 2004, Petitioner's Superintendent notified Respondent that he was going to recommend that Petitioner terminate her professional service contract due to her failure to correct the deficiencies during the 90-calendar-day probationary period. On April 14, 2004, Petitioner adopted the Superintendent's recommendation and terminated Respondent's contract.

By letter filed April 21, 2004, Respondent requested a formal hearing.

At the hearing, Petitioner called six witnesses and offered into evidence 24 exhibits: Petitioner Exhibits 1-24.

Respondent called three witnesses and offered into evidence four exhibits: Respondent Exhibits 1-4. All exhibits were admitted except that Respondent Exhibit 4 was not admitted for the truth.

On September 22, 2004, Petitioner filed a Motion for Official Recognition. This motion is granted.

The court reporter filed the transcript on September 13, 2004. The parties filed proposed recommended orders on October 4, 2004.

FINDINGS OF FACT

1. Respondent entered the teaching profession after working 17 years as a bartender. She earned her undergraduate degree in education--specifically, learning disabilities and varying exceptionalities--and obtained her first teaching job at Gulfstream Elementary School in 1995.

2. For her first eight years at Gulfstream, Respondent taught a physically impaired class. These are small classes of less than ten students with health or medical disabilities. Many of the students cannot walk or talk. With a paraprofessional and sometimes a fulltime aid, Respondent taught substantially the same students from year to year. The focus of

much of the instruction was upon daily living skills, such as reading the signs on restrooms and businesses.

3. In 1996, Respondent developed inoperable Stage IV nasopharyngeal carcinoma. Eight months of radiation therapy scarred Respondent's airway. When Respondent returned to school after a five-month leave of absence, she, like many of her students, wore a feeding tube and relied on a vocal amplification device. Respondent made the most of these characteristics that she now shared with some of her students, encouraging them to overcome their disabilities as she was doing.

4. In the physically impaired class, Respondent taught most of the students on a one-on-one basis. Rarely did she have to address the entire class as part of classroom instruction. For this reason, Respondent was little handicapped by her speech difficulties, which arose due to the cancer treatment. Even today, loud speech is nearly impossible for Respondent, who, to generate speech, must press against her throat to produce a gaspy speech that requires close attention to understand.

5. A new principal arrived at Gulfstream for the 2002-03 school year. The new principal, who had previously been an assistant principal for eight years and a teacher for nine years, found Respondent's performance unsatisfactory in several respects. Respondent was often late arriving to school and

failed to perform her duties on the bus ramp. Respondent often left her paraprofessional alone with the physically impaired class. To monitor the behavior of the child, Respondent sometimes brought her high-school aged daughter to school without permission. Overall, the principal found that Respondent seemed unenthusiastic about teaching. Believing that Respondent might have been depressed, the principal referred Respondent to the Employee Assistance Program.

6. Thinking that a change in assignment might rekindle Respondent's enthusiasm for her job, for the 2003-04 school year, the principal switched the assignments of Respondent and another teacher, so that the other teacher would teach Respondent's physically impaired class, and Respondent would teach a varying exceptionalities class. Neither teacher had requested a new assignment.

7. Respondent's varying exceptionalities class began the 2003-04 school year with 14 students. Eventually, the principal reduced the class to nine students. Respondent had the help of only a part-time paraprofessional. The wide range of cognitive abilities of the students meant that some students could only identify their names in print, and some students could read and write. Students in the varying exceptionalities class were in several classifications, such as educably mentally handicapped, traumatic brain injury, and autistic.

8. By sometime in October 2003, the assistant principal had twice observed Respondent teaching her class. The assistant principal had concerns about Respondent's classroom management and recordkeeping.

9. The assessments and evaluations in this case are based on the Petitioner's Professional Assessment and Comprehensive Evaluation System (PACES). In conjunction with the statutory 90-calendar-day probationary period, as discussed in the Conclusions of Law, the PACES assessments follow a format. A PACES-trained evaluator conducts an initial observation not of record. If the teacher fails to meet standards, the evaluator goes over the findings with the teacher, offers a Professional Growth Team to provide assistance in eliminating any deficiencies, and advises that she will conduct another evaluation in a month. If the teacher meets standards on the second evaluation, which is known as the first observation of record, the teacher reverts to the normal evaluation scheme applicable to all teachers, and the first negative observation is essentially discarded.

10. If the teacher fails to meet standards on the first observation of record, she is placed on performance probation for 90 days. The evaluator conducts a Conference for the Record and gives the teacher a Professional Improvement Plan (PIP). During the probationary period, the evaluator conducts other

observations, and, at the end of the period, the evaluator conducts a final observation. If the teacher still fails to meet standards, then the evaluator conducts a confirmatory observation within 14 days after the end of the probationary period. If the teacher still fails to meet standards, the principal may recommend termination to the Superintendent.

11. PACES assessments cover six domains: Planning for Teaching and Learning (Domain I), Managing the Learning Environment (Domain II), Teacher/Learner Relationships (Domain III), Enhancing and Enabling Learning (Domain IV), Enabling Thinking (Domain V), and Classroom-Based Assessments of Learning (Domain VI). Each of these domains comprises three to five components, for which the evaluator determines whether the teacher meets standards. If the evaluator determines that the teacher fails to meet standards as to a component, the evaluator circles a listed indicator, so that the teacher may readily identify authoritative sources of information, such as the PACES binder provided to each teacher or videotapes in the District office, that will assist her in curing a particular deficiency.

12. The assistant principal conducted the initial observation not of record on October 14, 2003. She determined that Respondent failed to meet standards for 18 of the 21 components. Respondent met standards only in Components III.A, IV.C, and VI.A. Respectively, these are Interpersonal

Relations, which is the teacher's respect for the students; Resources for Learning, which is the teacher's use of teaching aids and learning materials; and Monitoring Engagement and/or Involvement in Learning, which is the teacher's monitoring of the student's engagement during learning tasks.

13. Among the more significant deficiencies reflected in the October 14 evaluation are that Respondent lacked lesson plans and failed to manage the learning environment. To help with these and other deficiencies, the assistant principal offered Respondent a Professional Growth Team and referred her to her PACES binder, which would describe each deficient item and suggest strategies to eliminate each deficiency.

14. For her part, Respondent had tried to deal with her new assignment by grouping the children, where appropriate, by cognitive ability. In September or October, she was able to send one student to regular education.

15. On November 5, 2003, the assistant principal returned to perform the first observation of record. She found Respondent reading a Thanksgiving story to the eight students who were present in her class. Respondent would read one sentence and ask a question about it. By using this approach, Respondent took one hour to read a story that should have taken five minutes to read. Each time that she stopped and asked a question about the preceding sentence, Respondent undermined the

continuity of the story. Also, all of her questions tested the students' memory; none of them required higher-order thinking, as would be required by questions asking how or why something happened.

16. Despite these shortcomings in Respondent's teaching, the assistant principal determined that Respondent had met standards in all of Domains I, II, III, and VI. However, Respondent failed to meet standards in all components of Domains IV and V, including the one component in Domain IV for which she had previously met standards. However, Respondent performed considerably better in this observation than in the previous observation--meeting standards in 13 of 21 components as opposed to meeting standards in 3 of 21 components three weeks earlier.

17. In the ensuing Conference for the Record, the assistant principal prepared a PIP for Respondent and again recommended that she take advantage of the Professional Growth Team for assistance in eliminating the deficiencies. Dated November 14, 2003, the PIP is a detailed documentation of each deficiency noted in the November 5 observation. The November 14 PIP describes what Respondent did or did not do, as to each deficiency. The PIP also contains specific recommendations to eliminate each deficiency.

18. The number of deficiencies is misleading, at least as an indicator of the scope of the teaching that was subject to

the evaluation. The Thanksgiving story, described above, spawned all eight of the observed deficiencies. Respondent's reliance exclusively upon simple recall questions yielded five deficiencies. (One of these deficiencies also relies on Respondent's failure to correct a child who replied to the question of what sound that turkeys make, by answering, "quack, quack." Absent more context, it is possible that Respondent's failure to correct this answer was an attempt not to reward attention-getting behavior.) One of the remaining three deficiencies criticizes Respondent for introducing the Thanksgiving story with an open-ended question, "This is November. What do you think happens in November?" Another deficiency, which focuses on the one-sentence, one-question approach of Respondent to the story, faults Respondent for omitting hands-on activities. The last deficiency notes that Respondent held up a small piece of paper showing the months of the year, but she failed to post the paper for the children to see. (This deficiency implies that Respondent's classroom lacks a posted calendar.)

19. The detail of the November 5 PACES evaluation and November 14 PIP are undermined by the oddly narrow factual basis upon which they rest. Intended as a comprehensive statement of the deficiencies of an experienced teacher, these documents reveal that Petitioner has placed Respondent on probation

because of an awkward reading of a Thanksgiving story to eight students over a period of about one hour.

20. On December 11, 2003, the principal performed an observation. The principal found that Respondent met standards in Domains I, II, III, V, and VI, but not in three components of Domain IV: Initial Motivation to Learn, Teaching Methods and Learning Tasks, and Clarification of Content/Learning Tasks. Respectively, these components involve the identification of the learning objective, the use of logically sequenced teaching methods and learning tasks, and the use of different words or examples when clarification is required.

21. The two components within Domain IV for which Respondent met standards are: Resources for Learning and Knowledge of Content and Pedagogy. The former component involves the use of learning materials to accommodate the range of individual differences among learners, and the latter component involves the creation of an opportunity to allow different learners to learn at different cognitive levels.

22. The basis of the deficiencies was in Respondent's presentation of another story, Little Miss Muffet, although, this time, the problems centered more around her lead-in and follow-up activities. The PIP, dated December 17, 2003, which the principal prepared, notes that the pace of a writing activity worksheet was too slow for four of 11 students, who sat

with nothing to do for ten minutes while waiting for their peers to finish; Respondent failed to correct a student who answered the question, "what are you afraid of," with "sock" (perhaps the same child who had said that turkeys quack); Respondent failed to correct a student who said that a paper was missing words when it was missing only letters; and Respondent failed to identify tasks associated with the story that would challenge all of the students, although Respondent used two worksheets-- one with missing words (presumably for the higher-functioning group) and one with missing letters (presumable for the lower-functioning group).

23. On February 4, 2004, the assistant principal performed the next observation. She found that Respondent met standards in Domains I and III. She found that Respondent failed to meet standards in Components II.D, III.A, IV.A, IV.B, and VI.B. Respectively, these are Managing Environment in Learning, Interpersonal Relations, Initial Motivation to Learning, Teaching Methods and Learning Tasks, and Informal Assessment.

24. During this observation, Respondent read a story on how to build a house. The reading level of the story was at least third-grade, but the students were in kindergarten and first grade. For 40 minutes, Respondent used actual house blueprints as a visual aid. As another visual aid, Respondent used blocks to depict a house, but she lacked sufficient blocks

to finish the project. The story took one hour when it should have taken ten minutes. Consequently, students were out of their seats and trying to find something to do.

25. On February 10, the assistant principal prepared a PIP. Although the contents of this PIP were not dissimilar to the contents of the previous PIPs, one new deficiency was Component III.A, Interpersonal Relations. The notes in the February 10 PIP state: "One learner was ridiculed by the teacher making remarks about her behavior to the classroom paraprofessional. Her remarks included, 'She's totally off the wall' and 'She has been horrendous today.' She also said to other learners not paying attention, 'I'm not going to talk to the air' and 'I'm waiting in case you didn't notice.'" The comments to the individual student were sarcastic and derogatory.

26. In general, the principal found Respondent to be more enthusiastic in the 2003-04 school year than she had been in the previous school year. Respondent showed an improved attitude, but her classroom remained disorganized. Respondent had received considerable assistance from her Professional Growth Team, but the principal concluded that Respondent had still failed to meet standards.

27. From Respondent's perspective, she felt that the principal had prejudged her and was running through the

90-calendar-day probationary period as an empty exercise.

Respondent became increasingly nervous, as she repeatedly tried, and failed, to please the principal and assistant principal.

28. At one point during the 90 days, Respondent restated her desire for a transfer, as she had made such a request the prior summer when she had learned of her new assignment, but the principal refused to give the request any consideration or determine if a transfer were feasible. At least once during the 90 days, Respondent's union representative asked the principal to transfer Respondent, but the principal refused, again without giving the request any consideration. In the meantime, Respondent's difficulties in the varying exceptionalities classroom were exacerbated by the removal, by October 2003, of her voice amplification system.

29. On March 2, 2004, the principal, having determined that the 90 calendar days had expired, performed what she believed was the confirmatory observation. She found that Respondent failed to meet standards in eight components in Domains I, II, IV, and VI. Two days later, the principal informed Respondent that she would be recommending that the Superintendent terminate Respondent's professional service contract.

30. Unfortunately, the principal had miscalculated the 90 days. Learning of this error, the principal discarded the

March 2 evaluation and performed a new confirmatory observation on March 14 and again found that Respondent failed to meet standards. Two weeks later, Respondent failed to meet standards in six components in Domains II, IV, and V. Only three of the six deficiencies covered the same components in the March 2 observation: Components II.D, II.E, and IV.D, which are, respectively, Managing Engagement in Learning, Monitoring and Maintaining Learner Behavior, and Knowledge of Content and Pedagogy. In general, these were deficiencies at the start of the 90-day probationary period, but were eliminated during the 90-day probationary period, only to return again at the end.

31. Following the March 14 confirmatory observation, the principal recommended that the Superintendent terminate the professional service contract of Respondent. On March 19, 2004, the Superintendent advised Respondent that he was going to recommend to Petitioner that it terminate her contract, and, on April 14, 2004, Petitioner did so.

32. A recurring issue in this case is what is meant by failing to meet standards and, more importantly, unsatisfactory performance. Based on the testimony of Petitioner's witnesses, Petitioner contends that the failure to meet any single component within any of the domains of PACES is the failure to meet standards, and a failure to meet standards is invariably unsatisfactory performance, sufficient to place a teacher on 90-

calendar-day performance probation or, if already on performance probation, sufficient to terminate a professional service contract. However, the PACES form does not so indicate, nor do Petitioner's online rules, of which the Administrative Law Judge has taken official notice.

33. Petitioner has failed to prove what is an unsatisfactory performance under the PACES evaluation system. Absent the adoption of a rule to this effect, the isolated omission of a teacher, during a single observation, to provide suggestions to improve learning (Component VI.C) or to start a class or lesson precisely on time (Component II.A) would not constitute unsatisfactory performance, at least for the purpose of initiating the 90-calendar-day probationary period or terminating the professional service contract of a teacher already on performance probation. In this case, undermining the observations of the principal and assistant principal, especially where they appear to be based on discrete failures by Respondent, are the facts that neither supervisor has any significant training in exceptional student education, the principal has no experience teaching in exceptional student education, and the assistant principal has limited experience in teaching exceptional student education.

34. By granting Petitioner's Motion for Official Recognition, the Administrative Law Judge acknowledges that, by

letter dated September 24, 2001, the Florida Department of Education has approved PACES. (The identification of PACES is missing from the letter, but the Administrative Law Judge accepts the representation of Petitioner's counsel that PACES was the subject of this letter.) However, this letter approves PACES on its face, not as applied, and may have been based on more than two-page PACES evaluation form. The present record contains only the two-page form and testimony, unsupported by any documentation, that a single deficiency means that a teacher fails to meet standards and may be placed on probation, if the deficiency arises when the teacher is not on probation, or may be terminated, if the deficiency, even if different from the one that initiated probation, is present at the confirmatory observation.

35. The record does not document the extent to which Respondent was in attendance at school during her 90-calendar-day probationary period. By her count, Respondent missed seven or eight workdays due to illness. Petitioner's calculation does not account for these missed days, and, if it had, the second confirmatory observation was premature too.

36. The record contains some evidence of student achievement. As noted above, one student was transferred early in the 2003-04 school year from Respondent's varying exceptionalities class to a regular education classroom, but the

proximity of this event to the start of the school year suggests that the student was probably misclassified at the start of the year.

37. The mother of another student testified that Respondent helped her daughter make considerable academic progress. The student had undergone a tracheotomy and, consequently, speech delay. While in Respondent's class, the student was eager to attend school and learned to write her name for the first time. For the first time in school, the student was progressing. When the mother learned that Respondent was being terminated, she tried to contact the principal, but the principal declined to see her, claiming it was a personnel matter and implying that a parent had no role in such matters.

38. The record contains the individual education plans (IEPs) of nine students. Typically, IEPs are prepared in the spring of each year, and, prior to the preparation of the next year's IEP, the IEP team closes out the preceding IEP by marking the extent to which the student has achieved the goals of his IEP. The IEP team also indicates progress during the year with respect to specific goals. A mark of "1" means mastery of the goal, a "2" means "adequate progress made; anticipate meeting goal by IEP end," a "3" means "some progress made; anticipate meeting goal by IEP end," and a "4" means "insufficient progress made; do not anticipate meeting goal by IEP end."

39. The last relevant marks for some of the IEPs were January 2004, but some of them bore marks for March 2004. For all of the IEPs, exclusive of physical or occupational therapy, with which Respondent was not substantially involved, 11 goals were marked 2, 39 goals were marked 3, and 15 goals were marked 4. Five of the nine students for whom Petitioner produced IEPs received a mark of 4 on at least one goal in his or her IEP. But 11 of the 15 4's went to two students: one had four 4's, one 3, and one 2; and the other had seven 4's, two 3's, and one 2. One student had two 4's, but also six 3's. Another student had one 4 and six 3's, and the fifth student had one 4 and three 3's. Thus, only two of the nine students were not making satisfactory progress while Respondent was teaching the class.

CONCLUSIONS OF LAW

40. The Division of Administrative Hearings has jurisdiction over the subject matter. §§ 120.569, 120.57(1), and 1012.34(3)(d)2.b.(II), Fla. Stat.

41. Describing the requirements of a teacher-assessment program, the 90-calendar-day probationary period, and the procedure to terminate a professional service contract, Section 1012.34(1)-(3), Florida Statutes, provides:

(1) For the purpose of improving the quality of instructional, administrative, and supervisory services in the public schools of the state, the district school superintendent shall establish procedures

for assessing the performance of duties and responsibilities of all instructional, administrative, and supervisory personnel employed by the school district. The Department of Education must approve each district's instructional personnel assessment system.

(2) The following conditions must be considered in the design of the district's instructional personnel assessment system:

(a) The system must be designed to support district and school level improvement plans.

(b) The system must provide appropriate instruments, procedures, and criteria for continuous quality improvement of the professional skills of instructional personnel.

(c) The system must include a mechanism to give parents an opportunity to provide input into employee performance assessments when appropriate.

(d) In addition to addressing generic teaching competencies, districts must determine those teaching fields for which special procedures and criteria will be developed.

(e) Each district school board may establish a peer assistance process. The plan may provide a mechanism for assistance of persons who are placed on performance probation as well as offer assistance to other employees who request it.

(f) The district school board shall provide training programs that are based upon guidelines provided by the Department of Education to ensure that all individuals with evaluation responsibilities understand the proper use of the assessment criteria and procedures.

(3) The assessment procedure for instructional personnel and school administrators must be primarily based on the performance of students assigned to their classrooms or schools, as appropriate.

Pursuant to this section, a school district's performance assessment is not limited to basing unsatisfactory performance of instructional personnel and school administrators upon student performance, but may include other criteria approved to assess instructional personnel and school administrators' performance, or any combination of student performance and other approved criteria. The procedures must comply with, but are not limited to, the following requirements:

(a) An assessment must be conducted for each employee at least once a year. The assessment must be based upon sound educational principles and contemporary research in effective educational practices. The assessment must primarily use data and indicators of improvement in student performance assessed annually as specified in s. 1008.22 and may consider results of peer reviews in evaluating the employee's performance. Student performance must be measured by state assessments required under s. 1008.22 and by local assessments for subjects and grade levels not measured by the state assessment program. The assessment criteria must include, but are not limited to, indicators that relate to the following:

1. Performance of students.
2. Ability to maintain appropriate discipline.
3. Knowledge of subject matter. The district school board shall make special provisions for evaluating teachers who are assigned to teach out-of-field.
4. Ability to plan and deliver instruction, including implementation of the rigorous reading requirement pursuant to s. 1003.415, when applicable, and the use of technology in the classroom.
5. Ability to evaluate instructional needs.
6. Ability to establish and maintain a positive collaborative relationship with

students' families to increase student achievement.

7. Other professional competencies, responsibilities, and requirements as established by rules of the State Board of Education and policies of the district school board.

(b) All personnel must be fully informed of the criteria and procedures associated with the assessment process before the assessment takes place.

(c) The individual responsible for supervising the employee must assess the employee's performance. The evaluator must submit a written report of the assessment to the district school superintendent for the purpose of reviewing the employee's contract. The evaluator must submit the written report to the employee no later than 10 days after the assessment takes place. The evaluator must discuss the written report of assessment with the employee. The employee shall have the right to initiate a written response to the assessment, and the response shall become a permanent attachment to his or her personnel file.

(d) If an employee is not performing his or her duties in a satisfactory manner, the evaluator shall notify the employee in writing of such determination. The notice must describe such unsatisfactory performance and include notice of the following procedural requirements:

1. Upon delivery of a notice of unsatisfactory performance, the evaluator must confer with the employee, make recommendations with respect to specific areas of unsatisfactory performance, and provide assistance in helping to correct deficiencies within a prescribed period of time.

- 2.a. If the employee holds a professional service contract as provided in s. 1012.33, the employee shall be placed on performance probation and governed by the provisions of this section for 90 calendar days following the receipt of the notice of

unsatisfactory performance to demonstrate corrective action. School holidays and school vacation periods are not counted when calculating the 90-calendar-day period. During the 90 calendar days, the employee who holds a professional service contract must be evaluated periodically and apprised of progress achieved and must be provided assistance and inservice training opportunities to help correct the noted performance deficiencies. At any time during the 90 calendar days, the employee who holds a professional service contract may request a transfer to another appropriate position with a different supervising administrator; however, a transfer does not extend the period for correcting performance deficiencies.

b. Within 14 days after the close of the 90 calendar days, the evaluator must assess whether the performance deficiencies have been corrected and forward a recommendation to the district school superintendent. Within 14 days after receiving the evaluator's recommendation, the district school superintendent must notify the employee who holds a professional service contract in writing whether the performance deficiencies have been satisfactorily corrected and whether the district school superintendent will recommend that the district school board continue or terminate his or her employment contract. If the employee wishes to contest the district school superintendent's recommendation, the employee must, within 15 days after receipt of the district school superintendent's recommendation, submit a written request for a hearing. The hearing shall be conducted at the district school board's election in accordance with one of the following procedures:

(I) A direct hearing conducted by the district school board within 60 days after receipt of the written appeal. The hearing shall be conducted in accordance with the provisions of ss. 120.569 and

120.57. A majority vote of the membership of the district school board shall be required to sustain the district school superintendent's recommendation. The determination of the district school board shall be final as to the sufficiency or insufficiency of the grounds for termination of employment; or

(II) A hearing conducted by an administrative law judge assigned by the Division of Administrative Hearings of the Department of Management Services. The hearing shall be conducted within 60 days after receipt of the written appeal in accordance with chapter 120. The recommendation of the administrative law judge shall be made to the district school board. A majority vote of the membership of the district school board shall be required to sustain or change the administrative law judge's recommendation. The determination of the district school board shall be final as to the sufficiency or insufficiency of the grounds for termination of employment.

42. Petitioner has the burden of proving the material allegations by a preponderance of the evidence. See, e.g., Allen v. School Board of Dade County, 571 So. 2d 568 (Fla. 3d DCA 1990).

43. This case is about whether Petitioner has proved that Respondent's teaching performance is not satisfactory. Petitioner has erroneously equated unsatisfactory performance with one or more deficiencies on the PACES evaluation forms. Under this theory, Petitioner could terminate a professional service contract anytime that a teacher scored a single deficiency in each of five or six observations over a three-

month period. The PACES evaluation forms provide a valuable, reasonably calibrated means for assessing a teacher's performance, but they are only part of the comprehensive evaluation necessary to determine whether a teacher's overall performance is satisfactory.

44. Undoubtedly, tardiness, a sarcastic remark uttered from weariness, a failure to exploit all learning media, forgetting to solicit contributions from students throughout the lesson, and failing to maintain proper instructional pacing are deficiencies. A timely observation performs the useful task of reminding a good teacher that there is always room for improvement. Under Petitioner's theory in this case, though, the successful, experienced teacher whose students are flourishing may nonetheless be terminated if she displays each of these deficiencies in five one-hour observations performed over 90 days.

45. Section 1012.34, Florida Statutes, details the minimum requirements of a teacher assessment instrument and requires its approval by the Florida Department of Education. Nowhere does Section 1012.34, Florida Statutes, authorize the inference that the scenario described in the preceding paragraph constitutes unsatisfactory performance in every case, despite the nature of the teacher's deficiencies and strengths, the performance of the

teacher's students, and the informed desires of the parents of the teacher's students.

46. The adoption of PACES did not relieve Petitioner of the burden of providing unsatisfactory performance when it seeks to terminate a professional service contract. Due to its misunderstanding of the role of the PACES evaluation forms in proving unsatisfactory performance, Petitioner introduced little, if any, expert evidence on the overall question of whether Respondent was performing her duties in a satisfactory manner when placed on probation or when recommended for termination.

47. In this case, a finding of unsatisfactory performance is precluded by the discrete nature of Respondent's reported deficiencies and the limited observational basis on which they are predicated; the process by which deficiencies disappeared, new ones arose, then they disappeared, and old deficiencies reappeared--all over a 90-day period--without any evidence establishing that this variability is more indicative of unsatisfactory performance than the vagaries of the evaluations performed by the principal and assistant principal; the generally satisfactory performance of the students, whose amenability to learning may not be readily apparent to the principal, who has no experience teaching exceptional students; and the principal's curious failures to accommodate Respondent's

disability when the principal transferred Respondent to the varying exceptionalities class, which required her to try to vocalize to the entire class, which was ambulatory, as distinguished to the less ambulatory physically impaired class, where she largely taught one-on-one, and when the principal failed to assure the presence of an amplification device for Respondent's use at all times in the varying exceptionalities class.

48. Exacerbating these deficiencies in proof are several other factors. First, the determination of unsatisfactory performance "must be primarily based on the performance of students" Anecdotal evidence suggests that Respondent's students were performing satisfactorily. The IEPs suggest likewise. As Petitioner applied PACES in this case, it has failed to show that the unsatisfactory assessments of Respondent were primarily based on the performance of her students.

49. Second, as Petitioner applied PACES in this case, parents had no meaningful input into the termination decision. Petitioner argues that report cards provide the parents an opportunity for input. Unless the report cards notify the parents that a teacher is on probation--a doubtful prospect--the parents probably will not learn of the impending termination at a convenient point in the report-card cycle. Here, at least one

parent tried to provide timely input, and the principal shunted her aside.

50. Third, as Petitioner applied PACES in this case, Petitioner was denied her right to request a transfer. The statute does not guarantee a right to a transfer, but it confers upon the teacher on probation the right to request a transfer. If this right is to mean anything, it must impose upon the principal the duty of stating an informed, substantial reason for denying the request or trying in good faith to make the transfer. The principal did neither.

51. Fourth, as Petitioner applied PACES in this case, Petitioner was denied her right to 90 calendar days within which to improve her performance adequately. First, the principal prematurely terminated the probationary period. Already nervous about her chances of retaining her job, Respondent was effectively denied the last few days remaining to her to demonstrate the required improvement.

52. Also, Petitioner failed to take into account Respondent's absence from school for seven or eight days. By statute, "school holidays and vacation periods" are excluded from the 90 calendar days. "School holidays" is the same as "school vacation periods," so the latter term must apply to a teacher's personal leave, when such leave does not correspond to school holidays. It is unclear whether all of the seven or

eight days of leave were sick leave or if any were personal leave. But this is another reason militating against concluding that Respondent received the full 90 calendar days to which she is entitled to improve her performance.

RECOMMENDATION

It is

RECOMMENDED that Petitioner enter a final order rejecting the Superintendent's recommendation to terminate Respondent for unsatisfactory performance during the 2003-04 school year.

DONE AND ENTERED this 26th day of October, 2004, in Tallahassee, Leon County, Florida.



ROBERT E. MEALE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 26th day of October, 2004.

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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 must be filed with the agency that will issue the final order in this case.