

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,)
)
 Petitioner,)
)
 vs.) Case No. 05-0942
)
 JOSE L. ROJAS,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, this cause was heard by Linda M. Rigot, the assigned Administrative Law Judge of the Division of Administrative Hearings, on May 20, 2005, by video teleconference between sites in Miami and in Tallahassee, Florida.

APPEARANCES

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

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

STATEMENT OF THE ISSUE

The issue presented is whether Petitioner should terminate Respondent's professional service contract for his failure to

correct his performance deficiencies within his 90-calendar-day probation period.

PRELIMINARY STATEMENT

By correspondence dated March 9, 2005, Petitioner's Superintendent of Schools advised Respondent Jose L. Rojas that he would recommend to The School Board of Miami-Dade County, Florida, that the School Board terminate Respondent's employment contract as a teacher, effective April 13, 2005. Respondent timely requested an administrative hearing regarding that recommendation, and this cause was thereafter transferred to the Division of Administrative Hearings to conduct the evidentiary proceeding.

Petitioner presented the testimony of Ava G. Byrne; Lucy Iturrey; Margaret Fahringer; Craig DePriest; Natalie Roca, Ph.D.; and Janice Farrell. Additionally, Petitioner's Exhibits numbered 1-25 and Respondent's Exhibits numbered 1 and 2 were admitted in evidence. The Respondent did not testify and did not present the testimony of any witnesses.

Both parties submitted proposed recommended orders after the conclusion of the hearing in this cause. Those documents have been considered in the entry of this Recommended Order.

FINDINGS OF FACT

1. At all times material hereto, Respondent, Jose L. Rojas, has been employed by The School Board of Miami-Dade

County, Florida, as a teacher pursuant to a professional service contract. During the 2004-2005 school year, he taught regular sixth-grade math classes at Redland Middle School.

2. Teachers employed by the School Board, including Respondent, are evaluated pursuant to the Professional Assessment and Comprehensive Evaluation System, known as PACES. PACES was collectively bargained with the teachers' union and approved by the Florida Department of Education in 2001 as being in statutory compliance for teacher evaluations in Petitioner's school district.

3. PACES focuses on student learning and teacher professional development, as well as on teaching behaviors. In PACES, there are seven domains: six are to be observed during a classroom observation, and the seventh domain deals with professional responsibilities demonstrated outside the classroom observation. The domains reflect the required statutory competencies of Section 1012.34, Florida Statutes.

4. Each domain has teaching and learning components, and each component has indicators, 44 of which are required to meet standards under PACES. The 44 indicators are fundamental units of observation that are used to make professional judgments about the quality of learning and teaching. They represent the basic level of teaching to be demonstrated by all teachers in Petitioner's school district, i.e., the minimum requirements.

They are the objective standards described in the PACES manual. Teachers have PACES manuals and access to the PACES Internet website. The standards are also repeated in any professional improvement plan, known as a PIP.

5. It takes only one unacceptable indicator for a domain to be rated below performance standards. One below-standard domain indicates a teacher's non-compliance with statutorily-required competencies.

6. The Florida Comprehensive Assessment Test (FCAT) measures student performance on the State's objectives for Florida's required curriculum, the Sunshine State Standards. While Petitioner's school district, as a whole, must utilize the FCAT data and indicators of student performance, there is no similar requirement for evaluating teachers by the results of the performance of their students on the FCAT (or other local assessments for subject matters not covered by the FCAT). Individual evaluations of teachers, however, must address student performance.

7. PACES addresses student performance in every domain. What is assessed is whether the teacher is monitoring and gauging student progress in the classroom, making sure that the students are mastering the required curriculum. Teachers are expected to use their students' FCAT scores from the prior year

for planning, pursuant to PACES domain I, to meet the students' deficiencies. Redland utilizes FCAT results in this manner.

8. Further, a teacher's teaching strategies and activities are required to address FCAT expectations. At the beginning of the school year, teachers at Redland receive copies of the scope and sequence for what the students are to learn during the school year. The teachers develop the curriculum and timelines for meeting benchmarks to be covered during the school year.

9. PACES domain II, as another example, deals with the teacher's management of the learning environment. If time is not managed and is, instead, wasted, the students' achievement of the Sunshine State Standards will be impacted, which will affect FCAT scores.

10. PACES domain IV, as yet another example, requires teachers to informally assess the students' engagement in learning to assess their performance to ascertain whether the students are mastering the Sunshine State Standards.

11. All of the administrators who were PACES observers in this case have had extensive training in the standards to be observed and evaluated in teacher performance and student learning and are, therefore, authorized to perform PACES observations, which are based upon what the observer objectively observes while in the classroom.

12. The performance probation process in Petitioner's school district, like the PACES teacher evaluation process, was collectively bargained with the teachers' union. The process is as follows: if there is an observation conducted by an administrator that indicates a teacher is performing below standards, it becomes the "initial observation not of record." The administrator meets with the teacher, goes over the observation, makes suggestions for improvement, and notifies the teacher that he or she will be observed again in approximately three weeks. The administrator offers the teacher the assistance of a professional growth team (PGT). Use of a PGT is voluntary on the part of the teacher at this point.

13. The PGT is part of the professional development aspect of PACES. PGTs are composed of experienced peer teachers who are extensively trained in PACES and are authorized to give support and assistance to teachers to improve classroom instruction.

14. The same administrator who conducted the "initial observation not of record" must conduct the next observation, the "kick-off observation," which is the first observation of record in that school year. If this observation reveals below-standards performance, a conference-for-the-record (CFR) is held. A PGT and a PIP are provided to the teacher.

15. The performance probation period begins the day after a PIP is given to the teacher. The teachers' union and Petitioner then mutually agree on the calendar for counting the 90 days. There must be two official observations during the performance probation period. The teacher must meet all 44 required indicators in order to meet performance standards during the teacher's performance probation. If any indicators are below performance standards, PIPs are again given. There are four levels of PIP activities, which are progressively more complex.

16. A "confirmatory observation" takes place after the 90th day to determine whether the teacher has corrected his or her deficiencies. The "confirmatory observation" must be completed within 14 days after the conclusion of the performance probation, and the evaluator must forward a recommendation to the Superintendent of Schools. Within 14 days of receiving the evaluator's recommendation, the Superintendent must notify the teacher whether he will recommend to the school board that the teacher's employment be continued or terminated.

17. It is not sufficient for the teacher to improve on only some of the deficient indicators. It has been the custom and practice under the collective bargaining agreement that remediation occurs only when the teacher meets standards in all of the required indicators.

18. Respondent's initial observation was conducted by Assistant Principal Fahringer on September 23, 2004. Respondent was teaching a class of 20-23 students. Respondent told the students to take out their agenda books which contained their homework. As Respondent went around the classroom checking each student's homework, the remainder of the students just sat and talked, waiting for a lesson to begin. They were not working on math. Out of the two-hour block of class time, the class was off-task about 25 percent of the time. Respondent failed to meet performance standards in components and indicators of domain II, managing the learning environment, and domain IV, enhancing and enabling learning. Pursuant to the agreed-upon procedures, the observation became "not of record."

19. Assistant Principal Fahringer met with Respondent September 28, 2004, went over the evaluation, and explained why Respondent had not met performance standards. Fahringer gave Respondent suggestions for improvement and advised him that she would return to do a follow-up observation. She offered Respondent a PGT, which he accepted.

20. On October 19, 2004, Fahringer performed Respondent's first observation of record, the "kick-off observation." Respondent was giving a lesson on fractions, decimals, and percentages to 32 students using cups of M&Ms and a chart. Respondent told the students to divide into groups of four.

There followed much noise and confusion. As Respondent went from group to group, he did not monitor the other seven groups. Students threw M&Ms and paper wads.

21. Respondent did not meet performance standards in components and indicators of domains II and IV. He did not meet standards in domain II because the learning did not begin promptly. After a five-minute delay, another five minutes were wasted while Respondent counted out the M&Ms. Ten minutes wasted at the beginning of the class is a significant amount of time since time spent on-task improves achievement.

22. There were delays in the organizational and teaching/learning activities. When Respondent told the students to divide into groups of four, some students appeared uncertain as to what group they were in and, instead, milled around talking noisily.

23. Some students remained off-task throughout the lesson. Respondent did not address the off-task behavior because he did not appear to even notice it while he focused on one group at a time. Students came to Respondent with their agenda books, "visiting" other students and talking with them on the way. Eight students were distracted, noisy, and off-task, but Respondent failed to redirect them. Respondent's expectations about acceptable behavior had apparently not been made clear to the students. Although he told them to raise their hands and

not to talk, they continued to talk noisily to each other for 50 minutes.

24. Respondent failed to effectively monitor the class throughout the lesson. When he was with one group, he did not use management techniques to diffuse the unacceptable off-task behavior of the other groups. The remaining seven groups did not work (no learning took place) while they waited for Respondent to come to them.

25. Respondent did not meet standards in domain IV because he did not introduce the purpose of the lesson. The students were told how to count the M&Ms and complete a chart, but there was no explanation as to what they were to learn. The students did not understand that they were learning the relationship among fractions, decimals, and percentages.

26. Respondent did not give clear and complete directions. He told the students that they were going to "integrate" decimals, percents, and fractions, a meaningless word choice. The directions did not include any explanation of content or integration of mathematical concepts.

27. Respondent did not demonstrate accurate content knowledge. He gave inaccurate and unclear information to the students. He counted the various colored M&Ms and put the numbers on the chart. On the chart, he explained that the decimals-- $.35$, $.10$, $.25$, $.17$, $.03$, and $.71$ --equal one, when in

fact they equal 1.61. Also on the chart, Respondent explained that the percentages--35%, 10%, 25%, 17%, 3%, and 71%--equal 100%, when in fact they equal 161%. The students accepted the inaccurate information. On the line of the chart indicating the fractions, Respondent reduced some of the fractions leaving different denominators, which made the addition of those fractions difficult.

28. On October 29, 2004, Principal DePriest and Assistant Principal Fahringer held a CFR with Respondent to address Respondent's sub-standard performance, his performance probation, recommendations for improving the specific areas of his unsatisfactory performance, and Respondent's future employment status with Petitioner. Respondent's input was sought, and he was formally assigned a PGT.

29. Respondent was given a copy of the summary of the CFR and a PIP on November 1, 2004. The PIP required him to read and summarize pertinent sections from the PACES manual by November 22, 2004.

30. Respondent's performance probation period began November 2, 2004, the day after he received the PIP. He was provided assistance through his PGT and his PIP to help him correct his deficiencies within the prescribed time. Respondent's PGT provided assistance to him throughout his performance probation.

31. Respondent failed to complete his PIP activities by the November 22 deadline. On December 2 he was given another 24 hours to comply, which he did.

32. On November 24, 2004, Respondent was formally observed in his classroom by Principal DePriest. Respondent was presenting a lesson to 19 students, but the classroom was too chaotic for learning to take place. Respondent again did not meet performance standards in domain II.

33. Learning did not begin promptly. Respondent wasted 12 minutes reprimanding students, taking roll, and answering his personal cell phone while the students were not engaged in learning. There were also inefficient delays in organizational and teaching/learning activities. The students went to the board, one by one, to solve math problems. Respondent spent approximately five minutes with each student at the board while the rest of the class became noisy, walked around, or slept.

34. Respondent failed to monitor off-task behavior or the behavior of the entire class. As Respondent focused on the one student at the board, the other students were off-task for up to five minutes at a time throughout the lesson, talking, putting their heads down, tapping their pencils, and making inappropriate comments such as "Can someone choke me?", "Can someone kill me?", and "Can I die now?". One student simply played with her hair for six minutes. Essentially, everyone was

talking, and no one was listening to Respondent. Yet, Respondent did nothing to redirect the students.

35. He did not appear to have classroom conduct rules in place. Thus, Respondent failed to make his expectations about behavior clear to the students. He instructed them not to talk without raising their hands. Nevertheless, eight of the students talked out-of-turn for 20 minutes without raising their hands.

36. DePriest met with Respondent on December 2, 2004, to review the observation. DePriest provided assistance through a PIP to help Respondent correct his deficiencies. The PIP required Respondent to observe other teachers and to view PACES vignettes on the PACES Internet website. Respondent was to maintain a log and discuss techniques and strategies with DePriest. Respondent's deadline to complete his PIP was January 6, 2005.

37. On January 10, 2005, Respondent was formally observed by Assistant Principal Janice Farrell. Respondent was presenting a lesson on perimeters and surface areas to 22 students. The lesson was disorganized, and there was an "air of confusion" in the class. Many students were being unruly and exhibiting off-task behavior. Therefore, not much learning was taking place.

38. Respondent still did not meet performance standards in domains II and IV that had been previously identified. He also failed to meet performance standards in components and indicators not identified in the kick-off observation of October 19, 2004, and, therefore, not the subject of Respondent's 90-day performance probation or this Recommended Order.

39. Respondent caused inefficient delays in organizational and teaching/learning activities. The learners were instructed to complete a "bellringer" activity, i.e., an activity that is used at the beginning of the class period to engage the students in learning as soon as they enter the room. Although they were instructed to complete it, eight of the 22 students did not receive a bellringer worksheet. Students were asking for materials and attempting the activity unsuccessfully on their own. Respondent appeared unaware of the problem

40. Respondent failed to monitor off-task behavior and disengagement from learning throughout the lesson. One student continuously called out Respondent's name, louder and louder, for five minutes. Students talked and copied each other's answers. While a student walked around stamping the other students' agenda books, they became off-task. A group of three students at a back table remained off-task throughout the lesson, talking, copying each other's answers, and throwing

papers. Respondent did not redirect any of these students until the last five minutes of the class.

41. Respondent failed to monitor the whole class effectively. When he went to the back of the room to address a tardy student without a pass, he turned his back on the other 21 students who changed seats, threw papers at each other, and hit each other with rulers. Respondent did nothing to redirect his students.

42. He failed to make the purpose or importance of the learning tasks clear to the students. He did not give a rationale for the bellringer activity, which consisted of answering questions about perimeters and areas of geometric shapes. He also gave the students inaccurate information. He incorrectly calculated the perimeter of a square as $3+3+3+3=15$.

43. DePriest and Farrell met with Respondent to review the observation. Farrell made recommendations with respect to the specific areas of unsatisfactory performance and provided assistance through a PIP to help Respondent correct his deficiencies. Respondent's PIP required him to complete self-assessment activities through the PACES website. He was to watch vignettes provided by the website in order to understand what the PACES indicators required of him. Respondent's deadline to complete his PIP was February 11, 2005.

44. Because Respondent's second observation within the performance probation period was below performance standards, a confirmatory observation was required after the expiration of the 90 days to determine whether Respondent had corrected his deficiencies. Principal DePriest performed that observation on February 22, 2005. On that day, management of the learning environment and classroom discipline were non-existent.

45. Respondent was presenting a lesson on geometric shapes to 18 students. While he did have instructions written on the board, there were still the same kinds of delays seen previously, and the students were still not engaged in learning. Overall, the class environment was chaotic. One-third to one-half of the class was off-task at any given time. The class was completely disorganized; the students were not engaged; the students did not pay any attention to Respondent, and very little learning took place.

46. Each time supplies were distributed, commotion resulted. When colored paper was distributed so that the students could trace the shapes, they got into arguments over the different colors, negotiated the trading of colors, and asked Respondent for different colors. When rulers were passed out, the students were not instructed to use them to draw the geometric shapes. Some had already drawn the shapes freehand.

Others were dueling with the rulers. Some tore the shapes, rather than waiting until they received scissors.

47. Respondent again did not meet performance standards in domain II as identified in the kick-off observation. Learning did not begin promptly. Respondent spent 10-11 minutes taking roll and reprimanding tardy students. There were inefficient delays in organizational and teaching/learning activities. Respondent allowed students to talk and distract others. Students were not paying attention. Respondent accepted a phone call and made a phone call during the class. He failed to monitor the off-task behavior caused by the manner in which supplies were distributed and failed to redirect the students, including while they argued about paper, scissors, and rulers.

48. DePriest notified Respondent on February 23, 2005, that Respondent had not satisfactorily corrected noted performance deficiencies during his performance probation period and that DePriest would recommend to the Superintendent of Schools that Respondent's employment be terminated. On that same day, DePriest transmitted such a memorandum. On March 9, the Superintendent notified Respondent that the Superintendent would recommend that the School Board terminate Respondent's employment contract for Respondent's failure to correct his noted performance deficiencies during his performance probation.

49. Petitioner has met all procedural requirements and statutory time frames.

50. The FCAT was administered to Florida students in late-February to early-March, 2005. Petitioner received Respondent's students' scores on May 17 and the district-wide FCAT results on May 19, 2005, the day before the final hearing in this cause. The district as a whole showed "tremendous" progress over the prior year. Even though Redland is a "low-performing" school, it likewise showed progress over the prior year in reading and mathematics. Respondent's students, however, failed to follow this trend.

51. Petitioner does not use a teacher's current students' FCAT scores in assessing a teacher's performance because the scores are released too late in the school year. PACES, however, addresses student performance, as statutorily required. Where a teacher's students are observed as being noisy throughout lessons, being confused, not paying attention, and being given erroneous lesson content, there is a clear lack of student performance, and they are not engaged in learning.

CONCLUSIONS OF LAW

52. The Division of Administrative Hearings has jurisdiction over the subject matter hereof and the parties hereto. §§ 120.569 and 120.57(1), Fla. Stat.

53. A proceeding under Chapter 120, Florida Statutes, is a de novo proceeding which is intended to formulate final agency action, not to review action taken earlier and preliminarily. Young v. Dep't of Community Affairs, 625 So. 2d 831 (Fla. 1993). Since Petitioner seeks only to terminate Respondent's employment contract but not to revoke or otherwise discipline his teaching certificate, it need only prove the allegations set forth in the Notice of Specific Charges by a preponderance of the evidence. Allen v. School Board of Dade County, 571 So. 2d 568 (Fla. 3d DCA 1990).

54. Petitioner relies upon Section 1012.34, Florida Statutes, which provides, in part, as follows:

(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.

* * *

(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 [the FCAT statute] 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. . . .
4. Ability to plan and deliver instruction. . . .

* * *

(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 [sic] training opportunities to help correct the noted 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
(Emphasis added)

55. In accordance with subsection (1), the Florida Department of Education is the agency responsible for approving school districts' instructional personnel assessment systems. The Department interpreted Petitioner's incorporation of the

data and indicators of student performance on the FCAT into the PACES domains as being in compliance with Section 1012.34, Florida Statutes, when the Department gave its full approval to the PACES assessment instrument in 2001.

56. If the plain language of a statute is clear and unambiguous, it must be given its plain and ordinary meaning. Fla. Dep't of Education v. Cooper, 858 So. 2d 394 (Fla. 1st DCA 2003). Various provisions of Section 1012.34, Florida Statutes, however, appear somewhat inherently contradictory and, therefore, ambiguous, e.g., "primarily" using student performance "as appropriate," "not [being] limited to . . . student performance" as the sole criterion, using student performance and other approved criteria in "any combination," and "primarily" using "data and indicators of improvement in student performance assessed annually" by the FCAT, when results are not available until the end of the school year.

57. Where statutory language is ambiguous, the interpretation given by the agency charged with its enforcement is "entitled to great deference and should not be overturned unless it is clearly erroneous." If an agency's "interpretation is within the range of possible and reasonable interpretations, it is not clearly erroneous and should be affirmed." A statute, however, should not be interpreted so as to render any of its terms meaningless. Cooper, at 396.

58. The mechanism provided by the Legislature to remove deficient teachers from classrooms is the 90-day performance probation. § 1012.34, Fla. Stat. A school district's attempt to remove a deficient teacher utilizing the 90-day probationary period early in the school year does not allow for a consideration of that teacher's current students' FCAT results which are not available until the end of the school year.

59. The Florida Department of Education approved PACES as being in compliance with a statute that has the legislative intent of improving the quality of public education through the prompt and timely removal of deficient teachers from classrooms. The Department has reconciled the inherently contradictory provisions found in Section 1012.34 to effectuate this legislative intent. Thus, the Department's interpretation of the statute is entitled to great deference, is not clearly erroneous, and should not be overturned.

60. The evidence in this case is not only clear but also unrebutted that Respondent's classes were chaotic and that his students were not engaged in learning. Under Respondent's theory, a patently-deficient teacher such as Respondent would remain in the classroom until the end of the school year when FCAT results are received. Respondent's interpretation would vitiate the 90-day performance probation provided by the Legislature, rendering the 90-day performance probation

meaningless, a prohibited statutory construction. Considering that FCAT results are customarily not available to school districts across the State until the end of each school year, Petitioner utilized the FCAT data and indicators of student performance, in accordance with Section 1012.34, "as appropriate," by incorporating them into its PACES domains.

61. The statute does not require teacher assessments to be limited to student performance alone; rather, it allows for teacher assessments to be based upon other factors, e.g., the teacher's ability to maintain discipline and the teacher's knowledge of the subject matter, inter alia. Otherwise, deficient teachers would be permitted to remain in the classroom through the end of that school year and into the next since the performance probation could not be completed until the following school year, a result contrary to the clear language used in the statute to mandate the 90-day performance probation period.

62. Respondent argues that he was denied due process because an analysis of his students' 2005 FCAT scores provided to him three days before the final hearing in this cause was admitted in evidence. Since the scores did not exist when Petitioner made its decision to terminate Respondent's employment, they cannot be considered now, according to Respondent. Respondent is correct that those scores did not form the basis of Petitioner's decision; rather, Respondent's

failure to correct his deficiencies formed the basis for that decision. The scores are not irrelevant to this proceeding, however, since Section 1012.34 specifically provides that FCAT scores are a criterion in assessing a teacher's performance.

63. As Petitioner based its decision to terminate Respondent's employment contract on his failure to correct his noted performance deficiencies within the 90 days allowed therefor, this Recommended Order is based upon Respondent's failure to correct his noted performance deficiencies within his 90-day probationary period. The FCAT scores simply are consistent with and support the preliminary decision made by Petitioner and support the conclusions contained in this Recommended Order. In this de novo proceeding to formulate final agency action, all relevant evidence is to be considered. §§ 120.569(2)(g) and 120.57(1)(c), Fla. Stat.

64. Moreover, Respondent was given an opportunity after hearing the testimony of Petitioner's witness regarding Respondent's students' 2005 FCAT scores to have the final hearing continued in order that he might prepare to cross-examine that witness before doing so and may further consider his evidence and defense in light of his knowledge as to Petitioner's evidence against him. Not only did Respondent decline the offer of a continuance of the final hearing but he also waived his right to cross-examine that witness.

Accordingly, his denial of due process argument is without merit.

65. Respondent further argues that the School Board is bound by its prior Final Orders criticizing PACES, its own assessment tool approved by the Florida Department of Education and collectively bargained with the teacher's union. However, Respondent and Petitioner each placed into evidence two prior Final Orders concerning PACES entered by the School Board. Each pair of Final Orders is inconsistent with the other.

66. The two Final Orders admitted in evidence on behalf of Petitioner found no fault with PACES and applied the 90-day performance probation portion of the statute. These Final Orders adopted Recommended Orders entered by Administrative Law Judge Arrington in Miami-Dade County Sch. Bd. v. Harrell, DOAH Case No. 02-1447 (Sept. 10, 2002), and by Administrative Law Judge Lerner in Miami-Dade County Sch. Bd. v. Gomez, DOAH Case No. 04-2335 (Oct. 29, 2004).

67. On the other hand, the two Final Orders admitted in evidence on behalf of Respondent adopted two Recommended Orders entered by Administrative Law Judge Van Laningham in Miami-Dade County Sch. Bd. v. Escalona, DOAH Case No. 04-1654 (Nov. 23, 2004) and Miami-Dade County Sch. Bd. v. Mutis, DOAH Case No. 04-1256 (Dec. 15, 2004). These Final Orders criticized PACES and applied the FCAT-scores portion of the statute rather than the

90-day performance probation portion. The adoption of these Recommended Orders suggests that no teacher's contract can be terminated before the end of the school year or, more likely, until the following school year. A reading of the entire statute, however, strongly suggests that the Legislature established more than one method for objectively evaluating a teacher's performance and mandated the use of the 90-day performance probation method for a teacher not performing his or her duties in a satisfactory manner during the school year.

68. Although an agency may depart from the precedent established by its final orders, no evidence was offered that the School Board intended in the Escalona and Mutis Final Orders to depart from the precedent established in the Harrell and Gomez Final Orders. Rather, the evidence in this cause only indicates that the School Board adopted the Recommended Orders in all four cases. It is noteworthy that the Final Order in the Harrell case was affirmed by an appellate court. Harrell v. School Board of Miami-Dade County, 866 So. 2d 704 (Fla. 3d DCA 2003).

69. The evidence in this cause is unrebutted that Respondent's classroom was chaotic every time Respondent's class was observed by the administrators at his school. The evidence is unrebutted that Respondent's students were not learning since they were not even engaged in the learning process. It is

neither logical nor implied in the statutory language that the Legislature intended to render a school district's evaluation instrument meaningless and prohibit a school board from removing from the classroom a teacher who is unable to engage his students in the learning process. Petitioner complied with every required procedural step and rendered the assistance it could to help Respondent overcome his deficiencies, but to no avail.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered finding that Respondent failed to correct his performance deficiencies and terminating Respondent's professional service contract, effective April 13, 2005.

DONE AND ENTERED this 29th day of July, 2005, in Tallahassee, Leon County, Florida.

Linda M. Rigot

LINDA M. RIGOT
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of July, 2005.

COPIES FURNISHED:

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

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

Honorable John L. Winn
Commissioner of Education
Department of Education
Turlington Building, Suite 1514
325 West Gaines Street
Tallahassee, Florida 32399-0400

Rudolph F. Crew, Ed.D, Superintendent
Miami-Dade County School Board
1450 Northeast Second Avenue, Suite 400
Miami, Florida 33132

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.