SCHOOL BOARD OF
INDIAN RIVER COUNTY, FLORIDA

INDIAN RIVER COUNTY
SCHOOL BOARD,

Petitioner,

vs. Case No. 04-14-2009

ANDREW LEWIS,

Respondent.

FINAL ORDER

This matter came before the School Board of Indian River County, Florida on April 14, 2009, was duly noticed and published in the agenda of the School Board meeting, on the recommendation of Dr. Harry La Cava, Superintendent of Schools, for adoption of the Recommended Order of the State of Florida Division of Administrative Hearings dated March 11, 2009 which is attached hereto and incorporated into this Final Order of the School Board.

The Agency must rule on each exception filed by the Respondent pursuant to law. The Respondent filed nine exceptions, each of which is rejected and denied for the following reasons:

1. Exception #1 is rejected and denied because there was competent and substantial evidence to support the Administrative Law Judge's findings of fact in this matter. Additionally, the exception raises a matter that is at most a harmless error because the totality of the evidence and the application of appropriate law would support the recommendation of the Administrative Law Judge.

2. Exception #2 is rejected and denied because there was competent and substantial evidence to support the Administrative Law Judge's findings of fact in this matter. Additionally, the exception raises a matter that is at most a harmless error because the totality of the evidence and the application of appropriate law would support the recommendation of the Administrative Law Judge.

3. Exception #3 is rejected and denied because there was competent and substantial evidence to support the Administrative Law Judge's findings of fact in this matter. Additionally, the exception raises a matter that is at most a harmless error because the totality of the evidence and the application of appropriate law would support the recommendation of the Administrative Law Judge.

4. Exception #4 is rejected and denied because there was competent and substantial evidence to support the Administrative Law Judge's findings of fact in this matter. Additionally, the exception raises a matter that is at most a harmless error because the totality of the evidence and the application of appropriate law would support the recommendation of the Administrative Law Judge.

5. Exception #1 is rejected and denied because the Administrative Law Judge has correctly stated the appropriate law governing the case. The reliance on *Purvis v. Marion Co. School Board*, 766 So. 2d 492 (Fla. 5th DCA 2000) is for the purpose of defining the definition of the appropriate legal standard of misconduct. In any event, any error with respect to the reliance on this case would be harmless because the totality of the evidence and the application of appropriate law would support the recommendation of the Administrative Law Judge.

6. Exception #6 is rejected and denied because there was competent and substantial evidence to support the Administrative Law Judge's findings of fact in this matter. Additionally, the exception raises a matter that is at most a harmless error because the totality of the evidence and the application of appropriate law would support the recommendation of the Administrative Law Judge.

7. Exception #7 is rejected and denied because there was competent and substantial evidence to support the Administrative Law Judge's findings of fact in this matter. Additionally, the exception raises a matter that is at most a harmless error because the totality of the evidence and the application of appropriate law would support the recommendation of the Administrative Law Judge.

8. Exception #8 is rejected and denied because there was competent and substantial evidence to support the Administrative Law Judge's findings of fact in this matter. Additionally, the exception raises a matter that is at most a harmless error because the totality of the evidence and the application of appropriate law would support the recommendation of the Administrative Law Judge.

9. Exception #9 is rejected and denied because there was competent and substantial evidence to support the Administrative Law Judge's findings of fact in this matter. Additionally, the exception raises a matter that is at most a harmless error because the totality of the evidence and the application of appropriate law would support the recommendation of the Administrative Law Judge.

After having considered the record and exceptions filed by the Respondent, the Recommended Order of the Division of Administrative Hearings in DOAH Case Number 08-5837 is hereby ADOPTED as the Final Order of the School Board in this matter. The

School Board notes that the Respondent has already served the recommended period of suspension.

The School Board of Indian River County, Florida

Attest:

By: _____
Harry J. La Cava, Superintendent

By: _____
Carol Johnson, Chairman

Date of Rendition of the Final Order: April 22, 2009

NOTICE OF RIGHT OF APPEAL

All parties have the right of judicial review of this Final Order as provided by section 120.68, Florida Statutes. In order to appeal, a party must file a notice of appeal with Dr. Harry J. La Cava, Superintendent of Schools, at 1990 25th Street, Vero Beach, Florida 32960-3395 within thirty (30) days of the rendition of this Final Order and must also file a copy of the notice of appeal, accompanied by the appropriate filing fees, with the Clerk of the Fourth District Court of Appeal, 1525 Palm Beach Lakes Boulevard, West Palm Beach, Florida 33401-2399. Review proceedings shall be conducted in accordance with the Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I hereby certify that a true copy of this Final Order has been mailed to the persons listed below on this 22nd day of April, 2009.

Judy Stang, Executive Assistant

COPIES TO:

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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

INDIAN RIVER COUNTY SCHOOL BOARD Petitioner, vs. ANDREW LEWIS, Respondent.	)	Case No. 08-5837

RECOMMENDED ORDER

Pursuant to notice a formal hearing was held in this case on January 7, 2009, in Vero Beach, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

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For Respondent: Patrick M. Muldowney, Esquire
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STATEMENT OF THE ISSUE

Whether the Respondent, Andrew Lewis (Respondent), committed the violation alleged, and, if so, what penalty should be imposed.

PRELIMINARY STATEMENT

On October 22, 2008, the Petitioner, School District of

Indian River County (School Board or Petitioner) issued a letter that charged the Respondent with acts or omissions that constituted just cause for the Respondent's suspension without pay. More specifically, the allegations contained in the letter are:

> (a) On September 15, 2008, you failed to take reasonable efforts to chaperone and supervise the students on a school bus returning from an athletic event in Okeechobee County. While you are a worthy and respected educator in this District, nonetheless, the efforts that you instituted on the school bus on September 15, 2008, fell below the standard of care that we expect of our professional educations when they are chaperoning students on the bus. Unfortunately, during this bus ride there was a serious assault committed by one or more students against another student.
> (b) This failure to properly supervise the school bus on September 15, 2008 constitutes misconduct in office as defined in Rule 6B-4.009(3), Florida Administrative Code. Misconduct in office is defined in this rule as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, Florida Administrative Code, and the Principles of Professional Conduct for the Education Profession, which is so serious as to impair the effectiveness in the school system. Rule 6B-1.006(3)(a), Florida Administrative Code requires that the teacher has an obligation to the student to make reasonable effort "to protect the student from conditions harmful to . . . the student's mental and/or physical health and/or safety." As you know, the incident has received substantial notoriety throughout the community and tends to hold the education profession in disrepute. Accordingly, I have concluded that the failure to exercise due care in the supervision warrants the suspension without pay that I will be recommending to the School Board.

By letter dated October 28, 2008, the Respondent, through counsel, disputed the allegations and requested a hearing to challenge the two-day suspension imposed by the School Board. The Respondent served the suspension, without pay, prior to the hearing in this cause. He seeks back pay and a clear performance record as his remedy.

The case was forwarded to the Division of Administrative Hearings for formal proceedings on November 21, 2008. In accordance with the Order of Pre-Hearing Instructions, the parties' Joint Pre-Hearing Stipulation was filed on December 31, 2008.

At the hearing, the following witnesses testified: B. E. B., a student who was on a athletic bus trip supervised by the Respondent on September 15, 2008; I. N., a student also on the trip; M. L., a third student on the bus; M, L., a parent; Eileen Shirah, principal at Sebastian River Middle School; Dr. Harry Lacava, superintendent of the Indian River County School District; Graziella Salemi, a bus driver employed by the Indian River County School District; John Kebbel, a teacher at Sebastian River Middle School; William McCarthy, athletic director at Sebastian River Middle School; Julius Butch Teske, assistant superintendent for personnel with the Indian River County School District; and the Respondent, Andrew Lewis. The Petitioner's Exhibits 1-3, 7, 12-14, and 17-19 were admitted into evidence. The Respondent's Exhibit 1 was also received in evidence.

At the conclusion of the hearing, the parties were granted twenty (20) days from the date of the filing of the transcript within which to file their proposed recommended orders. On February 10, 2009, the parties filed a Joint Stipulation and Motion Requesting Extension of Time. By Order entered the same date the parties were granted leave until February 20, 2009, to filed their proposed orders. Both parties timely filed Proposed Recommended Orders that have been fully considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. The Petitioner is a duly constituted entity charged with the responsibility and authority to operate, control, and supervise the public schools within the Indian River County Public School District. As such, it has the authority to regulate all personnel matters for the school district.

2. At all times material to the allegations of this case, the Respondent, Andrew Lewis, was an employee of the School Board and was subject to the disciplinary rules and regulations pertinent to employees of the school district.

3. At all times material to this case, the Respondent was employed by the Petitioner and was assigned to teach and coach at Sebastian River Middle School. He has been employed at the middle school for over seven years. The Respondent has coached

the boys' basketball team since his first year and has coached a co-ed soccer team for the past three seasons.

4. All of the acts or omissions complained of in this matter occurred on September 15, 2008, during an athletic bus trip from the middle school to an athletic event in Okeechobee County. More specifically, the incident occurred during the return trip, a portion of which occurred after dark, when the bus was occupied by approximately 40 students, two adult chaperones, and the bus driver. The Respondent was one of the two coach chaperones. The allegations stemmed from the Respondent's failure to appropriately supervise the students on the bus. During his tenure with the Petitioner the Respondent has participated in dozens of bus trips with teams. This case is the sole allegation of wrong-doing against the Respondent.

5. Prior to the allegations of the instant matter, the Respondent maintained an impeccable record. He is well-respected by his superiors. The Respondent is not charged with committing the assault on the student. The Respondent was unaware that an assault had occurred. The Respondent is charged with failure to supervise the students who committed an assault on another student.

6. The incident occurred at approximately 8:00 p.m. after it was sufficiently dark on the bus to preclude a visual inspection of the rear portion of the bus from the front. The Respondent and another coach on the bus, John Kebbel, sat in the

front of the bus behind the bus driver. The Respondent sat sideways in a seat directly behind the driver. Mr. Kebbel sat across from the Respondent and the two observed the students in the bus from their seats. Although Mr. Kebbel got up and walked back to check on the female students seated in the front portion of the bus on at least three occasions, the Respondent remained seated.

7. Before leaving the Okeechobee site, the students were separated into two groups. The male students sat in the rear portion of the bus with the girls seated more toward the front of the bus. The instructions from the athletic director required that the Respondent and Mr. Kebbel keep the boys and girls separated. Additionally, the coaches were to defer to the bus driver regarding safety and conduct on the bus. Finally, the students were to be counted to assure that the number returning on the trip matched the number that traveled to the event with the team. With a few exceptions not pertinent to this matter, these instructions were followed.

8. Mr. Kebbel got up from his seat and walked back to check on "his girls" to make sure they were not sitting with the males in the rear portion of the bus. He was preoccupied with making sure they did not fraternize during the trip. He was aware that inappropriate contact between the boys and girls might occur.

9. The Respondent did not move to the rear of the bus to check on the males there. The Respondent did not ask that the

lights be turned on in order to spot check what the males were doing.

10. The Respondent did not ask the students to be more quiet. It is undisputed that the students were very loud. Additionally, the windows on the bus were open and presumably there was road noise contributing to the din on the bus. The bus driver did not require that the students be more quiet. Neither the Respondent or Mr. Kebbel asked the students to be quiet.

11. The two teams on the bus, the Respondent's soccer team and Mr. Kebbel's girls' volleyball team, were in good spirits. The Respondent did not believe there was any reason for concern regarding their behavior on the bus.

12. The bus stopped on the return trip at a McDonald's restaurant where the students were permitted to purchase and consume food. The students were instructed not to bring food onto the bus. Rather, all food was to be consumed at the stop with trash being put in its proper place (not brought onto the bus).

13. Nevertheless, at least one student brought a pie box onto the bus. There is no evidence that the Respondent checked the students for food or trash when they re-entered the bus.

14. In fact, two eighth grade males had the pie box in their possession in the rear portion of the bus. As part of some hazing or bullying effort, the two male eighth grade students

held a sixth-grade male student down, pulled down his pants and underwear, and inserted the box between his buttocks.

15. They attempted to pull the pants down on a second sixth grade male student but that individual successfully fought them off. The student and others cried for help during the assaults but no one responded to their cries.

16. During these incidents, the noise on the bus was so loud that the Respondent did not realize something was amiss until the sixth grader on whom the assault was successful started throwing up. The Respondent believed the student to be sick. He did not know what had preceded the vomiting.

17. The Respondent claimed that he continuously looked to the rear portion of the bus and listened for indications of improper activity yet he never asked that the students be more quiet, did not ask that the lights be turned on periodically, did not walk to the rear of the bus, and did not hear the cries for help from the students.

18. The Respondent claimed he chose to sit behind the bus driver so that he could not be the subject of a false accusation of impropriety.

19. There is no evidence that the bus was too full to allow the coaches to sit on a row between the male and female students. Clearly, they enjoyed a row to themselves in the front of the bus.

20. It was too dark on the bus for the Respondent to see the rear portion of the bus clearly after the McDonald's stop.

21. The Respondent and Mr. Kebbel were responsible for the athletic trip and were to assure that the students were properly chaperoned.

22. The failure to appropriately chaperone students constitutes misconduct.

23. The School Board took action to discipline the Respondent for failure to supervise the students on the trip and suspended him for two days without pay. The Respondent served that suspension but claims he did not fail to supervise the students. The Respondent seeks restitution of his pay and a clean performance record.

24. The Respondent claims that the conduct of the eighth-grade students was an unfortunate incident that could not reasonably be expected. He claims that had he thought that such conduct were likely he would have taken immediate steps to intercede on behalf of the sixth graders.

25. The Respondent's vantage point in the front of the bus did not afford him a clear line of sight. He did not see the students crawling over the tops of the seats in the rear of the bus. Further, he did not see students getting out of their seats and moving across the aisle in the rear portion of the bus.

26. The parties stipulated there are no procedural

challenges to the pre-suspension proceedings. See Joint Pre-Hearing Stipulation.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings. §§ 120.569 and 120.57(1), Fla. Stat. (2008).

28. The Petitioner bears the burden of proof in this cause to establish by a preponderance of the evidence that the Respondent committed the violation alleged. See McNeil v. Pinellas County School Board, 678 So. 2d 476 (Fla. 2d DCA 1996).

29. A "preponderance" of the evidence means the greater weight of the evidence. See Fireman's Fund Indemnity Co. v. Perry, 5 So. 2d 862 (Fla. 1942). As reviewed in this matter, the Petitioner has established by a preponderance of the evidence that the Respondent violated the rules and policies of the School Board to support "just cause" for an unpaid two-day suspension. In light of the severity of the matter, a two-day suspension is more than reasonable. If the charges were not sustained, the Respondent would be entitled to have his back salary paid. See § 1012.33(6)(a), Fla. Stat. (2008).

30. Section 1012.33, Florida Statutes (2008), provides, in pertinent part:

> . . . All such contracts, except continuing contracts as specified in subsection (4), shall contain provisions for dismissal during the term of the contract only for just cause. Just cause includes, but is not limited to, the following instances, as defined by rule

> of the State Board of Education: misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude.

31. In this case "just cause" clearly includes those items specifically addressed by the statute but also includes other conduct that may be denoted by the "not limited to" language of the statute. See Dietz v. Lee County School Board, 647 So. 2d 217 (Fla. 2nd DCA 1994). Also, "misconduct in office" in the instant matter must be considered in relation to the failure to appropriately supervise the students on the athletic trip.

32. "Misconduct in office" is defined by Florida Administrative Code Rule 6B-4.009, as:

> . . . a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, FAC,, and the Principals of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, FAC., which is so serious as to impair the individual's effectiveness in the school system.

33. Florida Administrative Code Rule 6B-1.001, provides:

> (1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.
> (2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

(3) Aware of the importance of maintaining the respect and confidence of one's colleagues, of students, of parents, and of other members of the community, the educator strives to achieve and sustain the highest degree of ethical conduct.

34. Florida Administrative Code Rule 6B-1.006 provides in pertinent part:

(1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.
(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.
(3) Obligation to the student requires that the individual:
(a) Shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/ or physical health and/or safety.

35. While it is undisputed the Respondent did not intentionally fail to supervise the students, misconduct may result when the conduct engaged in "speaks for itself" in terms of its seriousness and its adverse impact on the teacher's effectiveness. Proof of the conduct, or, as in this case, the failure to act appropriately, may be considered proof of impaired effectiveness. See Purvis v. Marion County School Board, 766 So. 2d 492 (Fla. 5th DCA 2000).

36. A portion of Petitioner's teacher handbook entitled "Pupil Supervision" (Petitioner's Exhibit 17, paragraph 3.41) provides that:

Proper supervision of a pupil shall be

> provided while he/she is under the immediate control of the school to which he/she is assigned. Supervision of pupils shall be maintained on the school grounds, in classrooms, in pupil occupied areas in buildings, on field trips, during any extra-curricular activity, at school sponsored functions, and at any other school related and sponsored activity. Any member of the administrative, supervisory, or instructional staff who has responsibility for the supervision of pupils who fails to provide such supervision by failing to report to duty or by leaving his post of duty, unless properly relieved, may be deemed guilty of neglect of duty unless absence was due to emergency condition beyond the control of the employee. Any person charged with such neglect of duty shall be subject to suspension from duty and termination of his contract as provided by law. The principal shall develop procedures for carrying out this rule.

37. In this case, the Petitioner charged that the Respondent failed to provide appropriate and adequate supervision of the students on the athletic trip to Okeechobee. Common sense, in addition to the foregoing provisions of law, requires that students be supervised at all times. Teachers and coaches are required to employ appropriate care to prevent harm to students; care that is appropriate in hindsight only is not acceptable. Some forethought must be used to anticipate student conduct. Left to their own choices immature students will engage in inappropriate and, as this case demonstrates, harmful conduct. Using an ounce of prevention can avoid potentially dangerous and hazardous situations. Had the Respondent positioned himself between the groups of students, required the students to maintain

a reasonable sound level, or had he walked to the rear of the bus periodically, the underlying conduct would likely not have been possible. That he never imagined the students would perpetrate such an act does not excuse inadequate care and supervision.

38. To evaluate the Respondent's conduct in this matter, a prior incident, on a prior trip, has been considered. In that instance the Respondent discovered a male and female student sitting together in violation of the bus policy. Only when the lights were turned on did the Respondent make that discovery. In that situation, the Respondent was seated in the front of the bus as he did in this case. From that incident, the Respondent knew or should have known that the students were likely to disobey the rules of bus travel. Nevertheless, the Respondent opted to sit in the front of the bus. Further, the Respondent did not request that the lights be turned on periodically to make visual checks on the students. A simple flashlight might have prevented the incident.

39. The Respondent does not acknowledge that he failed to supervise the students. He maintained he did not have a "cue" that something inappropriate was occurring. The Respondent did not acknowledge that he could have prevented the activity by changing his behavior on the bus.

40. In this case, the Respondent's failure to supervise the students seriously affected his effectiveness and undermined the confidence of the public in the school district. More troubling

to the undersigned, is the Respondent's indifference to the severity of the matter. Going the extra mile to protect students is expected of professional educators. To allow the bus to become so loud that the cries of the sixth graders were unheard is unconscionable. Additionally, to put one's own interest and convenience (to remain seated in the front of the bus) over the safety of the students also gives rise to grave concern.

41. In this state educators are held to a high standard of ethical behavior. It is concluded that the Respondent's behavior violated that standard.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Indian River County School Board enter a Final Order sustaining the imposition of the two-day suspension.

DONE AND ENTERED this 11th day of March, 2009, in Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of March, 2009.

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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.

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