

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JAMES F. NOTTER, AS)
SUPERINTENDENT OF SCHOOLS,)
)
Petitioner,)
) Case No. 10-3399
vs.)
)
SEAN GENTILE,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal administrative hearing was conducted on February 15 and 16, 2011, by video teleconference between Tallahassee and Lauderdale Lakes, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Charles T. Whitelock, Esquire
Whitelock & Associates, P.A.
300 Southeast 13th Street
Fort Lauderdale, Florida 33316

For Respondent: Philip Michael Cullen, Esquire
621 South Federal Highway, Suite 4
Fort Lauderdale, Florida 33301

STATEMENT OF THE ISSUE

Whether the School Board of Broward County, Florida (School Board) has just cause to terminate Respondent's employment based

on the allegations set forth in the Administrative Complaint dated May 13, 2010.

PRELIMINARY STATEMENT

Acting on a recommendation submitted by James F. Notter, as Superintendent of Schools (Petitioner), the School Board, voted on June 15, 2010, to suspend Respondent's employment as a classroom teacher with a professional service contract and to terminate that employment, subject to her due process rights.

The grounds for Petitioner's recommendation were set forth in an Administrative Complaint dated May 13, 2010. The Administrative Complaint contained factual allegations pertaining to Respondent's job performance as a reading teacher at Arthur Robert Ashe, Jr. Middle School (Ashe Middle School) and, based on those factual allegations, alleged that she had failed to correct performance deficiencies (Count I); was incompetent (Count II); was guilty of gross insubordination/willful neglect of duty (Count III); and was guilty of misconduct in office (Count IV).

Respondent timely requested a formal administrative hearing to challenge the Petitioner's proposed action, the matter was referred to DOAH, and this proceeding followed.

Respondent filed an Answer to the Administrative Complaint on June 29, 2010, denying the material allegations in the Administrative Complaint. An Amended Answer to the

Administrative Complaint was filed by Respondent on October 8, 2010. The Amended Answer admitted certain facts alleged in the Administrative Complaint. Those admitted allegations are incorporated as findings of fact to the extent the admitted facts are relevant to the issues of this proceeding.

At the final hearing, Petitioner presented the testimony of Deborah Peeples (principal of Ashe Middle School), Devon O'Neil (former acting sixth grade assistant principal at Ashe Middle School), Lauren Brown (a reading coach at Ashe Middle School), Willie J. Dudley, Jr. (a consultant at Ashe Middle School), Elpidio Muniz (a former assistant principal at Ashe Middle School), Dr. Cathy Kirk (a personnel evaluation coordinator employed by School Board), and Terence X. Hart (a former assistant principal at Ashe Middle School). Petitioner offered the following pre-marked exhibits, each of which was admitted into evidence: 1-16, 18, 21-25, 28, 30, 31, 35, 39-45, 48, 50, and 52.

Respondent testified on her own behalf and offered two sequentially-numbered exhibits, both of which were admitted into evidence.

A Transcript of the proceedings consisting of four volumes (but inexplicably in a total of seven binders) was filed on March 30, 2011.

The parties filed Proposed Recommended Orders, which have been duly considered by the undersigned in the preparation of this Recommended Order.

All statutory references are to Florida Statutes (2010).

FINDINGS OF FACT

1. At all times material hereto, the School Board was the constitutional entity authorized to operate, control, and supervise the public schools in Broward County, Florida.

2. At all times material hereto, the School Board employed Respondent as a classroom teacher pursuant to a professional service contract. At all times relevant to this proceeding, Respondent was assigned to Ashe Middle School where she taught reading and language arts.

3. Respondent holds a Florida educational certificate that has both reading and gifted endorsements.

4. During the time Respondent taught at Ashe Middle School, the school was considered a low performing school. There was a high level of student turnover and a relatively high number of foreign students who did not speak English.

5. Respondent had an advanced reading class that read on grade level. Most of her other students read below grade level.¹

6. Pursuant to a collective bargaining agreement (CBA) with Broward Teachers Union and applicable law, which will be discussed in the Conclusions of Law section of this Recommended

Order, School Board has adopted a system to assess teachers known as Instructional Personnel Assessment System (IPAS).

7. Subsection (F) (1)b of Article 18 of the CBA contains the following guiding principle:

b. The School Board and BTU [Broward Teachers Union] acknowledge that the assessment process should recognize the professional nature of teaching and supervision. Educational research has not identified a single uni-dimensional construct called "effective teaching." Teachers must pursue a variety of models of effective teaching. It is recognized, moreover, that the educational environment is complex and variable and great weight should be placed on teacher judgment to guide the activities of student learning.

8. Subsection F(2) (e) of Article 18 of the CBA requires that the principal, director, or his/her designee evaluate each employee at least once a year utilizing IPAS.

9. Rating criteria are defined on the IPAS form in the following categories:

1. Instructional Planning
2. Lesson Management
3. Lesson Presentation
4. Student Performance Evaluation
5. Communication
6. Classroom Management
7. Behavior Management
8. Records Management
9. Subject Matter Knowledge
10. Other Professional Competencies

10. The evaluator rates the employee as to each criterion and for overall performance. The rating can be "satisfactory", "needs improvement", or "unsatisfactory."

11. Subsection F of Article 18 of the CBA describes IPAS. Pursuant to the CBA, the assessment system requires a teacher, whose performance has been deemed deficient in one or more areas by an appropriate school administrator, to be placed on a Performance Development Plan (PDP). A school administrator develops the plan and monitors the employee's progress in completing the plan.

12. Subsection F(2)(m)2 of Article 18 of the CBA provides as follows as to the use and implementation of a PDP:

Use and implementation of this plan requires

- a. identification of deficiencies,
- b. definition of strategies for improvement,
- c. definition of an assistance timeline,
- d. definition of expected outcomes,
- e. definition of possible consequences for failure to remediate,
- g. completion of assistance activities, and
- h. documentation.

13. Subsection (F)(2)f of Article 18 of the CBA provides as follows:

The following five (5) techniques are used to gather data on employee performance. Assessors use multiple techniques to understand actual performance and develop performance ratings.

1. Informal classroom observations:
Informal observations are made periodically

by the principal or designee. A follow-up conference is not required subsequent to an informal classroom observation if performance is deemed satisfactory.

2. Formal classroom observations: Formal observations are primarily initiated by the principal or designee. Employees may, however, request a formal observation. These are not less than 30 minutes in duration and are conducted by the principal, director or his/her designee. The 30 minute time period may be shortened by mutual agreement between the principal and the affected employee. All observations of employees for the purpose of assessment shall be conducted with the full knowledge of the employee. A conference is conducted after each formal observation. The FPMS [Florida Performance Measurement System] or other educationally sound observation instruments which may be used for formal observation.[sic]

3. Observations in non-classroom situations: Principals use opportunities outside the classroom to observe the performance of employees. A follow-up conference is not required subsequent to this type of observation if performance is deemed satisfactory.

4. Review of records and data: Principals review a variety of work samples prepared by the employee. These may include lesson plans, reports, grade card comments, discipline referral documents, etc. In addition, specific records or plans may be requested for review. A follow-up conference is not required if performance is deemed satisfactory.

5. Review of performance portfolio: The principal or designee and the employee may mutually decide that a performance portfolio is needed to provide additional information for the completion of the assessment

ratings. The design of a portfolio is determined by the principal and employee. A follow-up conference is not required if performance is deemed satisfactory.

14. A teacher placed on a PDP is given 90 calendar days, excluding school holidays and vacations, to correct the identified performance deficiencies. If, at the end of the 90-day probation period, the performance of the employee remains at an unsatisfactory level for one or more of the assessment criteria, a rating of U (for unsatisfactory) is given. At that juncture, the administrator can extend the PDP period, or he/she can refer the matter to the Office of Professional Standards for further proceedings.

15. Mr. Luciani was the principal and Mr. Muniz was an assistant principal at Ashe Middle School during the 2006-07 school year.

16. On December 11, 2006, Mr. Muniz wrote a memo to Respondent. The memo is quoted verbatim because it targeted problems that continued throughout Respondent's tenure at Ashe Middle School. The memo is as follows:

This correspondence is to document the last few week's [sic] events when it was determined that your job performance has been less than satisfactory in the following areas:

- * Behavior Management-managing student behavior
- * Records Management-management of data

- * Communications
- * Instructional Planning

On December 7, while doing a classroom visit that lasted 31 minutes I noticed a lack of classroom management. It took almost seven minutes to get the class under control to start your lesson. While there were only 11 students in your room, yet, only five students were on task. You continued to do your lesson despite the disruptions. I am not sure if you were aware or just ignored the disruptions. In the last few weeks you have banished, kicked out, or attempted to kick out students everyday for almost twelve consecutive days. In the past Mr. Hart, Assistant Principal, and I have mentioned that the students should be accompanied by an escort or if you have a receiving teacher you should wait at the door until the child is situated. In at least five occasions your students have been caught wandering the halls because you have kicked them out. There have been many times while on hall duty that I noticed you kicking students out and the class has not yet started. This is unacceptable. You are responsible for the students in your class. When they are unescorted the possibility of injury exist [sic] due to your negligence. The students have not sat down and you attempt to remove them from class. This is also unacceptable.

Prior to our recent data conference it was 12:15 in the afternoon and you requested to find out what data you needed at the conference. I directed you to Ms. J. Shakir[,] reading coach[,] who assisted you in securing minimal data for the conference. Please note that there had been four data presentations regarding preparation for the data conferences conducted by Mr. Fleisher and Ms. Lumpkin from c-net. Ms. Shakir and Ms. Pickney also conducted data disaggregation workshops in the previous weeks. While at the conference itself you appeared to know very little with regard to

your student data. You were not familiar with your BMA results or the progress your individual students or classes had made. There was no attempt made at providing categorical breakdowns of students which needed prescriptive strategies to address their needs.

The confrontational manner with which you speak to children is a direct factor in the lack of classroom management. Your lack of communication skills has led to referrals on many students which have led to major consequences for students after the referrals led to escalated verbal confrontations.

During various grade level meetings, I have requested that all teachers provide me with emergency lesson plans every two weeks. To date I have not received any of these plans.

Our expectations for each of the above listed concerns are: First and foremost, resolve the discipline problems in compliance with the policies of the school, rules of the District School Board and [sic] the State Board and Florida Statutes. Next, maintain consistency in all application of policy and practice by:

- a) Establishing routines and procedures for the use of materials and the physical movement of students.
- b) Formulating appropriate standards for student behavior.
- c) Identifying inappropriate behavior and employing appropriate techniques for correction.

You must prepare for your students all day every day. Lesson plans must be meaningful and relevant to your content area. Studies show that students who are authentically engaged are less prone to deviant [sic] behavior. You must maintain complete order in your classroom. The Principles of Professional Conduct for the Education

Profession in the State of Florida requires that the educator make reasonable efforts to protect the students from conditions harmful to learning, and/or to the students' mental, and/or physical health and/or safety.

In the next few weeks you will be provided with assistance from behavior specialists, reading/curriculum coach and c-net personnel to assist you in meeting expectations.

17. In February 2007 Respondent was placed on a PDP. Mr. Muniz monitored Respondent's progress and opined that she had not successfully completed the PDP. Mr. Luciani disagreed and instructed Mr. Muniz to give Respondent a satisfactory evaluation, which he did.²

18. Mr. Luciani was the principal and Mr. Hart was an assistant principal at Ashe Middle School during the 2007-08 and 2008-09 school years.

19. Mr. Hart received a written complaint from a student that on October 1, 2008, Respondent told the student that the student's mother was unfit and did not know how to raise the student.

20. In response to that complaint, on October 3, 2008, Mr. Hart issued Respondent a letter addressing the inappropriate manner in which she had addressed students, which included the following:

On numerous occasions you have been counseled regarding your inappropriate comments/behavior towards students. This behavior includes embarrassing, disparaging,

and/or awkward comments and/or actions. It has recently been brought to my attention that, once again, you have exhibited this behavior.

* * *

I am directing you to cease and desist all actions/comments of this nature immediately. You are to speak to students in a respectful, professional manner at all times.

21. Mr. Hart, Respondent, and the student's parent met to discuss the alleged statements made by Respondent to the student. During that conference, Respondent became angry and left the meeting.

22. Later, Mr. Hart met with Respondent to give her a copy of his letter dated October 3. Respondent took the letter and walked out of the meeting without signing the acknowledgment that she had received the letter. Respondent slammed the door as she left Mr. Hart's office.

23. Mr. Hart received numerous complaints from parents and, as a result, transferred several students from Respondent's class to another class.

24. On February 5, 2009, Mr. Hart observed Respondent arguing with a student in her classroom. He admonished her in writing to not be confrontational with students. Respondent's conduct on February 5, 2009, was inconsistent with Mr. Hart's admonishment to her on October 3, 2008.

25. In an undated memorandum subsequent to January 20, 2009, Mr. Hart set forth the following issues that continued to be of concern despite his previous discussions with Respondent:

- * Parent phone calls from her classroom
- * Completing assignments
- * Checking emails
- * Inputting grades into Pinnacle (a computer database)
- * Being prepared for instruction

26. On February 18, 2009, Mr. Hart issued a written reprimand to Respondent for her failure to input student grades into Pinnacle.

27. Respondent was placed on a PDP on February 13, 2009. Noted under the categories "Lesson Management" and "Lesson Presentation" were the failures to meet the following criteria:

- * Orients students to classwork, specifies purposes of activities and relationship to the objectives;
- * Prepares the classroom materials and equipment for the presentation of the lesson;
- * Selects and uses appropriate instructional techniques including available materials and technology which support learning of the specific types of knowledge or skills; and
- * Asks questions which are clear and require students to reflect before responding.

28. During the PDP period that began February 13, 2009, Respondent was offered appropriate services designed to remediate her deficient performance areas.

29. On May 28, 2009, Mr. Hart completed an IPAS evaluation that rated Respondent unsatisfactory overall and as to the

following five categories: "Lesson Management", "Lesson Presentation", "Student Performance Evaluation", "Classroom Management", and "Behavior Management." Mr. Hart rated Respondent satisfactory as to the remaining five categories.

30. Mr. Hart placed Respondent on a second PDP that extended into the 2009-10 school year.

31. At the end of the 2008-09 school year, Mr. Luciani retired. Before the start of the 2009-10 school year, Ms. Peebles became principal of Ashe Middle School.

32. Respondent failed to enter grades and other data for students during the first marking period of the 2009-10 school year. That failure hindered the assessment of each student's needs and made it more difficult to monitor each student's progress.

33. On November 19, 2009, Ms. Peebles conducted an IPAS evaluation for Respondent as to the PDP Mr. Hart had placed her on at the end of the 2008-09 school year. Ms. Peebles found Respondent to be deficient in the same five categories as Mr. Hart's evaluation, and she rated Respondent's overall performance as unsatisfactory.

34. During the PDP period that began May 28, 2009, Respondent was offered appropriate services designed to remediate her deficient performance areas.

35. After her evaluation of November 19, 2009, Ms. Peebles had the options of referring Respondent to the Office of Professional Standards for further proceedings or placing Respondent on another PDP. Ms. Peebles elected to place Respondent on another PDP (the last PDP) because Ms. Peebles was new to the school and she wanted to give Respondent another chance to prove herself.

36. At the conclusion of the last PDP, Ms. Peebles conducted an IPAS evaluation, which was dated April 19, 2010. Respondent remained unsatisfactory in the same five categories as the previous evaluations by Ms. Peebles and Mr. Hart, and her overall evaluation remained unsatisfactory.

37. Throughout her employment at Ashe Middle School, Respondent exhibited a pattern of being absent on Fridays and Mondays. Respondent failed to correct that deficiency after having been counseled by administrators.

38. During the 2009-10 school year, Respondent repeatedly failed to timely provide or leave appropriate lessons after having been counseled by administrators to do so. Respondent was instructed to give her lesson plans to Ms. Brown, the Reading Coach and Reading Department Chairperson, during that school year. Respondent never provided Ms. Brown a complete set of lesson plans the entire year.

39. During the 2009-10 school year, Respondent repeatedly failed to demonstrate that she could control her classroom. She made multiple calls to security on nearly a daily basis and she continued to kick students out of class, which left them in the hallways, unsupervised.

40. The Benchmark Assessment Test (BAT) is a county created test that is administered twice a year in September and again in November. The test is designed to measure the progress, if any, the student has made between the testing dates. The test is also used as a predictor for the Florida Comprehensive Achievement Test (FCAT). The vast majority of Respondent's student's test scores depict either no growth or a regression in all classes.

41. A Mini-BAT is an assessment tool used to develop and provide effective lesson plans as well as student growth. The teacher is responsible for administering the assessment tool to her students and thereafter inputting the results in the computer database. During the 2009-10 school year, approximately half of Respondent's students either were not tested or had no score inputted after being tested.

42. The DAR Assessment is a two-part standardized test designed to measure a student's ability at word recognition and all reading frequency. The test is administered twice a year, once in September and again in January. Ms. Brown administered

the tests at Ashe Middle School during the 2009-10 school year. Ms. Brown scored the tests and gave the score results to Respondent, who was required to input the scores in the computer database. The Florida Department of Education (DOE) requires that 90 percent of the students complete the tests, which gives a 10 percent leeway for students who are absent on test days. Students are placed in reading classes based on their test result. The tests also measure each student's progress, or lack thereof, between the test dates. Forty-five percent of Respondent's students had no scores. Nineteen percent of those with scores had no gain.

43. Mock FCATs are periodically administered to students following Mini-BATs. The Mock FCATs administered to Respondent's students during the 2009-10 school year were created by Ms. Brown. Ms. Brown utilized previous iterations of the FCAT that had been released by DOE in an effort to simulate the actual FCAT process in terms of difficulty and complexity. The tests are graded by computer and the scores are given to the teacher to input into the computer database. The results of the Mock FCATs are used to develop instructional plans for students. Sixty-three of Respondent's 111 students (or 57 percent) had no score inputted in the computer database. Nine students who did receive a score made no progress between the dates of the two tests.

44. School Board entered into a contract with a consulting firm named Evans Newton, Inc. (ENI) to assist schools in need of improvement. In 2009-10 school year, ENI provided an assessment test that teachers were to use to monitor students' progress. Respondent administered the assessment test to her class, gave the results to Ms. Brown to score, and recorded the scores in the computer database after receiving the scored results from Ms. Brown. More than 40 percent of Respondent's students had no score recorded for the assessment test. Ms. Brown testified, credibly, that she returned all scored results to Respondent. The lack of a score for over 40 percent of her class can only be explained by Respondent's failure to do her job. Respondent either did not administer the test to those students, she did not give the test results to Ms. Brown to score, or she did not input the scores in the computer database after receiving the results from Ms. Brown.

45. The FCAT Reading Learning Gain is the document through which DOE reports test score results to school districts. During the 2009-10 school year, DOE required a 60 percent learning gain. Respondent's students did not achieve that goal during that school year. For three of the four years she taught at Ashe Middle School, Respondent's classes failed to achieve their FCAT goals.

46. The administrators at Ashe Middle School followed all applicable procedures in formulating and implementing the PDPs and IPASs at issue in this proceeding.

47. After her IPAS evaluation of April 19, 2010, Ms. Peebles referred Respondent's case to the Office of Professional Standards, which resulted in the termination proceedings at issue.

CONCLUSIONS OF LAW

48. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this case pursuant to sections 120.569 and 120.57(1), Florida Statutes.

49. Because Petitioner seeks to terminate Respondent's employment and this case does not involve the loss of a license or certification, Petitioner has the burden of proving the allegations in its Administrative Complaint by a preponderance of the evidence, as opposed to the more stringent standard of clear and convincing evidence. See McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476 (Fla. 2d DCA 1996); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

50. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," Black's Law Dictionary 1201 (7th ed. 1999), or evidence that "more likely

than not" tends to prove a certain proposition. See Gross v. Lyons, 763 So. 2d 276, 289 n.1 (Fla. 2000) (relying on American Tobacco Co. v. State, 697 So. 2d 1249, 1254 (Fla. 4th DCA 1997) quoting Bourjaily v. United States, 483 U.S. 171, 175 (1987)).

51. Petitioner alleged that Respondent failed to correct performance deficiencies (Count I); was incompetent (Count II); was guilty of gross insubordination/willful neglect of duty (Count III); and was guilty of misconduct in office (Count IV).

52. This is a de novo proceeding designed to formulate agency action as to the matter at issue. See Hamilton Cnty. Comm'rs v. Dep't of Env'tl. Reg., 587 So. 2d 1378, 1387 (Fla. 1st DCA 1991); Young v. Dep't of Cmty. Affairs, 625 So. 2d 831, 833 (Fla. 1993); and McDonald v. Dep't of Banking and Fin., 346 So. 2d 569, 584 (Fla. 1st DCA 1977).

53. Pursuant to section 1012.33(6)(a), Florida Statutes, a teacher on a professional service contract may be suspended during the term of the contract for "just cause" as defined by section 1012.33(1)(a), which provides, in relevant part, as follows:

. . . Just cause includes, but is not limited to, the following instances, as defined by rule of the State Board of Education: immorality, misconduct in office, incompetency, gross insubordination, willful neglect of duty, or being convicted or found guilty of, or entering a plea of guilty to, regardless of adjudication of guilt, any crime involving moral turpitude.

54. By including in the definition of the term "just cause" the phrase "includes, but is not limited to," the Legislature made clear that the items listed in the definition were not intended to be exhaustive and that other wrongdoing may also constitute "just cause" for suspension or dismissal. See Dietz v. Lee Cnty. Sch. Bd., 647 So. 2d 217, 218-19 (Fla. 2d DCA 1994).

55. Florida Administrative Code Rule 6B-4.009, contains the following definitions:

(1) Incompetency is defined as inability or lack of fitness to discharge the required duty as a result of inefficiency or incapacity. Since incompetency is a relative term, an authoritative decision in an individual case may be made on the basis of testimony by members of a panel of expert witnesses appropriately appointed from the teaching profession by the Commissioner of Education. Such judgment shall be based on a preponderance of evidence showing the existence of one (1) or more of the following:

(a) Inefficiency: (1) repeated failure to perform duties prescribed by law; (2) repeated failure on the part of a teacher to communicate with and relate to children in the classroom, to such an extent that pupils are deprived of minimum educational experience; or (3) repeated failure on the part of an administrator or supervisor to communicate with and relate to teachers under his or her supervision to such an extent that the educational program for which he or she is responsible is seriously impaired.

(b) Incapacity: (1) lack of emotional stability; (2) lack of adequate physical ability; (3) lack of general educational background; or (4) lack of adequate command of his or her area of specialization.

* * *

(3) Misconduct in office is defined as a violation of the Code of Ethics of the Education Profession as adopted in Rule 6B-1.001, F.A.C., and the Principles of Professional Conduct for the Education Profession in Florida as adopted in Rule 6B-1.006, F.A.C., which is so serious as to impair the individual's effectiveness in the school system.

(4) Gross insubordination or willful neglect of duties is defined as a constant or continuing intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority.

56. Section 1001.32(2) confers the following authority on district school boards:

(2) DISTRICT SCHOOL BOARD.-In accordance with the provisions of s. 4(b) of the State Constitution, district school boards shall operate, control, and supervise all free public schools in their respective districts and may exercise any power except as expressly prohibited by the State Constitution or general law.

57. Such authority extends to personnel matters and includes the power to suspend and dismiss employees. See §§ 1001.42(5), 1012.22(1)(f), and 1012.33(6).

58. Section 1012.34(3) provides, in relevant part, as follows:

(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 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.

59. The performance of a teacher's students, based on valid data, is the primary consideration in evaluating a teacher. See Sherrod v. Palm Beach Cnty. Sch. Bd., 963 So. 2d 251 (Fla. 4th DCA 2006), and Young v. Palm Beach Cnty. Sch. Bd., 968 So. 2d 38 (Fla. 4th DCA 2006).

60. Petitioner proved by a preponderance of the evidence that Respondent failed to correct performance deficiencies following three back-to-back PDPs. The same five categories were found deficient by two separate administrators. Petitioner established the violation alleged in Count I of the Administrative Complaint.

61. Petitioner proved by a preponderance of the evidence that Respondent repeatedly failed to correct performance deficiencies, repeatedly failed to input student data, and repeatedly failed to prepare lesson plans. The vast majority of Petitioner's classes failed to make academic progress as measured by standardized tests. These failures establish that

she was incompetent as a result of inefficiency within the meaning of Florida Administrative Code Rule 6B-4.009(1).

62. Count III of the Administrative Complaint charged Respondent with gross insubordination or willful neglect of duty. Petitioner proved by a preponderance of the evidence that Respondent repeatedly was instructed to correct her performance deficiencies, to input student data, to prepare lesson plans, to stop being confrontational with students, and to stop kicking students out of class without supervision. Petitioner repeatedly failed to comply with those instructions. Based on those failures, Respondent is guilty of the violation alleged in Count III.

63. Count IV of the Administrative Complaint, alleging misconduct in office, alleged that Respondent's acts violated the Code of Ethics of the Educational Profession as adopted in Florida Administrative Code Rule 6B-1.001 and the Principles of Professional Conduct for the Educational Profession in Florida as adopted by rule 6B-1.006. Count IV also alleged that the acts were so serious so as to impair her effectiveness in the school system.

64. The Code of Ethics of the Education Profession in Florida, found at Florida Administrative Code Rule 6B-1.001, includes the following:

(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.

65. Rule 6B-1.006(3) (a) imposes the following obligation on Respondent and all other teachers:

(3) Obligation to the student requires that the individual:

(a) shall make a responsible effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety.

66. The definition of "misconduct in office" requires a two-pronged analysis. The first prong is whether the educator violated the Code of Ethics of the Education Profession or the Principles of conduct for the Education Profession in Florida. The second prong is whether the breach is so serious as to impair the individual's effectiveness in the school system.

67. Petitioner proved by a preponderance of the evidence that Respondent repeatedly was instructed to correct her performance deficiencies, to input student data, to prepare lesson plans, to stop being confrontational with students, and

to stop kicking students out of class without supervision. Petitioner repeatedly failed to comply with those instructions, thereby failing to adhere to the obligations imposed upon her by rule 6B-1.006(3)(a). Those failures constitute misconduct in office as alleged in Count IV of the Administrative Complaint and within the meaning of rule 6B-4.009(3). In reaching this conclusion, the undersigned has concluded that Respondent's effectiveness in the school system has been impaired.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of Law, it is RECOMMENDED that the School Board of Broward County enter a final order adopting the Findings of Fact and Conclusions of Law contained in this Recommended Order. It is further RECOMMENDED that the final order terminate Respondent's employment.

DONE AND ENTERED this May 23, 2011, in Tallahassee, Leon
County, Florida.



CLAUDE B. ARRINGTON
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of May, 2011.

ENDNOTES

¹ The STAR Reading Test is an assessment device that gives each student three different scores which are then listed in a summary report. The first score compares a student's national percentile ranking. The second score compares the student's grade level equivalency. The third score compares the student's independent reading level. The scores reflect that the vast majority of Respondent's students not in the advanced reading group were below average in all three scores. In making the findings and reaching the conclusions set forth in this Recommended Order, the undersigned has considered that Respondent's teaching assignment was a difficult one.

² A teacher who is on a PDP at the end of a school year cannot be transferred to another school during the summer. Petitioner asserted the argument that Mr. Luciani gave Respondent a satisfactory evaluation so he could transfer her to another school. That argument is rejected as being speculative.

COPIES FURNISHED:

James F. Notter, Superintendent
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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.