

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LAKE COUNTY SCHOOL BOARD,                    )  
                                                          )  
                  Petitioner,                                    )  
                                                          )  
vs.                                                                    )     Case No. 11-0238  
                                                          )  
DEBORAH HARKLEROAD,                                    )  
                                                          )  
                  Respondent.                                    )  
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                                                          )

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on March 7, 2011, in Leesburg, Florida, before Lawrence P. Stevenson, the designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Steven W. Johnson, Esquire  
McLin & Burns  
Post Office Box 491357  
Leesburg, Florida 34749-1357

For Respondent: Joseph C. Shoemaker, Esquire  
Bogin, Munns & Munns  
628 South 14th Street  
Leesburg, Florida 34748

STATEMENT OF THE ISSUE

The issue is whether Petitioner, the Lake County School Board, has just cause to terminate the employment of Respondent, teacher Deborah Harkleroad.

PRELIMINARY STATEMENT

On December 13, 2010, Susan Moxley, Superintendent of Schools for the Lake County School Board (the "School Board") wrote a letter to Respondent Deborah Harkleroad. The letter informed Ms. Harkleroad that, pursuant to section 1012.34, Florida Statutes, she had failed to correct performance deficiencies identified by her principal. Dr. Moxley therefore intended to recommend to the School Board that Ms. Harkleroad's employment be terminated as of January 10, 2011.

On January 7, 2011, Ms. Harkleroad filed with the School Board a letter requesting a due process hearing. On January 13, 2011, the School Board referred the matter to the Division of Administrative Hearings ("DOAH") for the assignment of an Administrative Law Judge and the conduct of a formal hearing.

The matter was scheduled for final hearing on March 7, 2011. At the hearing, the School Board presented the testimony of Rebecca Nelson, supervisor of compensation and employee relations for the School Board; Patricia Nave, an assistant principal at Fruitland Park Elementary School ("Fruitland Park") in Fruitland Park; Melissa DeJarlais, the principal of Fruitland Park; Tanya Rogers, an assistant principal at Beverly Shores Elementary School in Leesburg; and Jeffrey Williams, the principal of Beverly Shores Elementary School. The School Board's Exhibits 1 through 17 and 23 through 25 were admitted

into evidence. Respondent testified on her own behalf and presented the testimony of Norma Jean Miller, her former colleague as a literacy coach at Fruitland Park and currently a curriculum resource teacher at Rimes Elementary School. Respondent's Exhibits 18 through 22 were admitted into evidence.

The two-volume Transcript of the hearing was filed at DOAH on March 22, 2011. On March 29, 2011, the parties filed a stipulated motion for a 10-day extension in the time for filing proposed recommended orders. The motion was granted by order dated March 31, 2011. In accord with the order granting extension, both parties filed their Proposed Recommended Orders on April 11, 2011.

#### FINDINGS OF FACT

1. Respondent Deborah Harkleroad has been employed by the School Board as a teacher for ten years. She is a member of the Lake County Education Association, the collective bargaining unit for teaching personnel. She is covered by the collective bargaining agreement between the School Board and the Lake County Education Association (the "CBA"), and holds a professional service contract with the School Board pursuant to Section 1012.33, Florida Statutes.<sup>1/</sup>

2. During the first two years of her employment, the 2001-2002 and 2002-2003 school years, Ms. Harkleroad was assigned to Tavares Middle School. At the start of her third year in the

fall of 2003, she transferred to Fruitland Park as that school's first elementary literacy coach.

3. During the 2007-2008 school year, Ms. Harkleroad transitioned into teaching a regular third-grade class at Fruitland Park. She remained in that position during the 2009-2010 school year.

4. The School Board employs a performance evaluation methodology called "Instructional Personnel Performance Appraisal System" or "IPPAS." The standards for evaluation, the methodology to be used by evaluators, and the documents used in the evaluation of instructional personnel are set forth in the IPPAS Handbook. Article XI of the CBA acknowledges that the IPPAS is the vehicle for the evaluation and assessment of teachers employed by the School Board.

5. Section 7 of Article XI of the CBA provides that an IPPAS Joint Committee composed of an equal number of representatives of the School Board and the Lake County Education Association will coordinate and monitor the development and implementation of the assessment process.

6. Section 12 of Article XI of the CBA states that any teacher in danger of dismissal because of poor performance will be afforded the procedure set forth in section 1012.34, Florida Statutes. This procedure is given the colloquial acronym "NEAT," which stands for: N-- Notice of alleged deficiencies

which, if not corrected, would lead to dismissal; E-- Explanation to the teacher of alleged deficiencies and suggestions for correction; A-- Assistance rendered by the administration to correct alleged deficiencies; and T-- Time for alleged deficiencies to be corrected.

7. In accordance with the CBA and the IPPAS Handbook, the School Board evaluates teacher performance using an "Observation/Assessment of Professional Performance Standards" form in a procedure called an "Appraisal I." The Appraisal I is the standard evaluation for teachers employed by the School Board.

8. The Observation/Assessment form contains 6 sections and 12 subsections. The subsections are further divided into sub-subsections. The evaluator gives the teacher a score of "acceptable" or "unacceptable" in each sub-subsection. The overall evaluation is graded on a 12-point scale, one point for each of the 12 subsections. If the teacher's performance is graded unacceptable in even one sub-subsection, then the teacher receives an unacceptable score for the overall subsection.

9. The only acceptable overall score on the Observation/Assessment form is a perfect 12. If a teacher does not receive an acceptable score in each of the 12 subsections, then the teacher's overall performance is deemed deficient.

A deficient Appraisal I triggers the NEAT procedure and further evaluations.

10. The IPPAS provides a voluntary alternative evaluation for experienced teachers who have received scores of 12 on the Appraisal I for the two immediately preceding years and have a professional service contract with the School Board. This alternative is called "PG-13," and allows the teacher to select a "professional growth" objective for the school year, work with an administrator in devising a strategy for attaining the objective, and demonstrate the attainment of the objective.

11. Finally, the IPPAS contains an evaluation instrument called a "Professional/Personal Action Report Relating to Work Experience," or "Appraisal II." The Appraisal II is used to document individual instances of deficiency in a teacher's work performance that have been identified outside of the formal evaluation process.

12. In order to become eligible for the voluntary PG-13, a teacher must have received no Appraisal II reports during the two years immediately preceding entry into PG-13. In order to remain eligible for the PG-13, a participating teacher must continue to meet the standard competency level for teaching performance, which includes receiving no Appraisal II reports.

13. Since the 2004-2005 school year, Ms. Harkleroad had participated in the PG-13 evaluation process every year except

2007-2008, when she had back surgery and was unable to complete her PG-13 project. For the 2007-2008 school year, Ms. Harkleroad received an Appraisal I score of 12.

14. On March 19, 2009, Ms. Harkleroad received an Appraisal II report from the principal of Fruitland Park, Melissa DeJarlais. The "Area of Concern" listed on the Appraisal II form was "Personal Characteristics and Professional Responsibilities." Dr. DeJarlais wrote the following explanation of Ms. Harkleroad's deficient performance:

On 3-5-09, teachers required to administer the FCAT assessment were mandated to attend the annual FCAT administration training. Mrs. Harkleroad was observed nodding off and/or sleeping during this training. She later explained that she did not feel well and it was possible that her prescribed medication was causing her to be overly sedated. As a precautionary measure, Mrs. Harkleroad's testing responsibilities were changed to that of a proctor thus requiring us to assign another instructional person to her classroom for the express intention of administering the FCAT. Mrs. Harkleroad did not perform her proctoring duties and instead spent time working on school related activities not germane to FCAT testing. These activities included printing her substitute or lesson plans while students were actively taking the FCAT assessment thus compromising the testing environment.

15. At the time she received the Appraisal II, Ms. Harkleroad wrote the following response:

In response to the Professional/Personal Action Report dated 3-19-09, I was running a

temperature of 102.6 and my blood pressure was dipping dangerously low due to being sick on 3-5-09. I should have taken a sick day on this date, but I didn't due to the diminishing amount of teaching time left before the FCAT.

I did fully perform my duties as a proctor for the math FCAT testing, and I did not at any time perform the activities alleged. During the time when I was printing my students' cloze practice reading assignments, no students were actively taking the test.

16. At the hearing, Dr. DeJarlais offered no first hand testimony regarding the allegation that Ms. Harkleroad did not perform her proctoring duties and printed documents in the classroom while the FCAT was being administered. She testified that she relied on the reports of the test administrator and the testing coordinator in issuing the Appraisal II to Ms. Harkleroad.

17. Ms. Harkleroad testified that, unlike the previous principals she had worked for at Fruitland Park, Dr. DeJarlais had never liked her or appreciated the extra work she did in compiling data that tracked student performance on the FCAT and other standardized tests. Ms. Harkleroad testified that she had always received "rave reviews" for the extra work she did in creating and maintaining the school wide data bank for tracking standardized test scores. She resented the fact that Dr. DeJarlais neglected to rave over the data notebooks when



Ms. Harkleroad presented them to her. Ms. Harkleroad felt personally snubbed and concluded that Dr. DeJarlais did not like her.

18. As to the events of March 5, 2009, Ms. Harkleroad surmised that the test administrator was trying to make "brownie points" with Dr. DeJarlais by maliciously reporting falsehoods about Ms. Harkleroad's actions in the classroom. Ms. Harkleroad asserted that the administrator was a friend of Dr. DeJarlais, and that the principal simply took the administrator's word for what happened without conducting any further investigation.

19. Ms. Harkleroad disputed the incident to Dr. DeJarlais to the point of crying, and she was so upset she had to leave school early that day. She testified that at the time she was unaware that the CBA allowed her to file a union grievance over the Appraisal II.

20. Neither party called the test administrator, Kimberly Belcher, to testify.

21. Based on the testimony, the undersigned is not inclined to second-guess Dr. DeJarlais' decision to take the word of Ms. Belcher as to what occurred in the classroom on March 5, 2009. Ms. Harkleroad offered only speculation as to any motive Ms. Belcher had to concoct a story about Ms. Harkleroad's actions during the FCAT. To accept Ms. Harkleroad's version of events, it is necessary to believe

not only that Dr. DeJarlais was out to get Ms. Harkleroad, but that Dr. DeJarlais' vendetta against Ms. Harkleroad was such common knowledge that Ms. Belcher knew she could win "brownie points" by lying about the teacher to the principal. The evidence does not support such a chain of inferences.

22. Ms. Harkleroad testified that during the meeting about the Appraisal II, Dr. DeJarlais emphasized that she would no longer be eligible for the PG-13 evaluations and would have to revert to the Appraisal I evaluation. Ms. Harkleroad stated, "I knew then, when she told me that, that she was out to destroy my career."

23. This extraordinary statement was premised on Ms. Harkleroad's assertion that she has a severe panic disorder that renders her unable to withstand the situation presented by an Appraisal I, in which she must teach while an evaluator sits in the room and judges her performance. Ms. Harkleroad asserted that Dr. DeJarlais was aware of this condition, and purposely contrived to force Ms. Harkleroad back into the Appraisal I process in order to get rid of her.

24. At this point, it is useful to digress from the main narrative to provide a brief history of Ms. Harkleroad's medical travails. She testified that she has a severe form of stress or panic disorder that makes her paranoid and unable to function in situations in which she thinks people are judging her. Earlier

in her career, she was able to control the panic attacks with a prescribed medication, Xanax (alprazolam), and was able to perform well in Appraisal I situations.

25. At some unspecified time prior to the 2005-2006 school year, Ms. Harkleroad underwent spinal fusion surgery. During the 2005-2006 school year, Ms. Harkleroad was involved in an incident requiring her to restrain a kindergarten student who was throwing wooden chairs in the library. Ms. Harkleroad's back was injured. Ms. Harkleroad alleged that the School Board's contract workers' compensation physician misdiagnosed the injury and sent her back to work. Two years later, another physician examined Ms. Harkleroad's MRI from the incident and determined that her fusion had been shattered.

26. During the 2007-2008 school year, Ms. Harkleroad had major back surgery that kept her away from school for 12 weeks. When she returned to work during the spring semester of 2008, she was in a body cast, followed by approximately five months in a brace.

27. Ms. Harkleroad testified that the damage to her back was so severe that it could not be completely repaired. She was subject to muscle spasms due to pressure on her sciatic nerve. The pain became so severe that in February 2009 she began seeing a physician for pain management. The physician prescribed what

Ms. Harkleroad called "pretty heavy duty" medications such as Oxycontin (oxycodone).

28. Ms. Harkleroad's physicians advised her that Xanax cannot be taken with Oxycontin. Therefore, she was forced to forego her panic disorder medication after February 2009.

29. Dr. DeJarlais came to Fruitland Park at the start of the 2008-2009 school year. Ms. Harkleroad was unsure how much Dr. DeJarlais knew about her medical history, though she specifically recalled telling Dr. DeJarlais that she was the teacher who had back surgery and came back in a body cast. Ms. Harkleroad also recalled that, in her first conversation with the new principal, she told Dr. DeJarlais about her panic disorder.

30. Dr. DeJarlais testified that she was unaware that Ms. Harkleroad claimed any disabilities. She knew that Ms. Harkleroad took pain medications for her back, but knew no specifics about them.

31. Ms. Harkleroad testified that at the time of the FCAT administration meeting on March 5, 2009, she was sick and had just started on the pain management medications. She had taken Nyquil for a cold on top of the Oxycontin, and the combination caused her to fall asleep at the meeting. As noted above, she absolutely denied the other statements in the Appraisal II.

32. Shortly after receiving the Appraisal II, Ms. Harkleroad was involved in an automobile accident that kept her out of work for the remainder of the 2008-2009 school year. She had further surgical procedures on her back and remained on pain medications as the 2009-2010 school year began.

33. Patricia Nave, a veteran administrator, arrived at Fruitland Park as assistant principal at the start of the 2009-2010 school year. Dr. DeJarlais assigned Ms. Nave to conduct the Appraisal I performance evaluations of Ms. Harkleroad. Ms. Nave did not know Ms. Harkleroad before August 2009, and testified she was not aware that Ms. Harkleroad had anxiety issues.

34. On February 18, 2010, from 12:45 p.m. until 1:45 p.m., Ms. Nave observed Ms. Harkleroad and scored her on the Appraisal I form. Ms. Nave gave Ms. Harkleroad a score of 10 on the appraisal, rating her unsatisfactory in two of the 12 subsections. Under the section "Teaching Procedures," Ms. Harkleroad was rated unsatisfactory in the sub-subsection titled "Gives clear and explicit directions" within the subsection titled "Displays skills in making assignments." Under the section "Classroom Management," Ms. Harkleroad was rated unsatisfactory in the sub-subsections titled "Applies the established rules and standards for behaviors consistently and equitably" and "Provides conscious modeling to modify attitudes

and behaviors" within the subsection titled "Creates and maintains positive environments in which students are actively engaged in learning."

35. In the area of Teaching Procedures, Ms. Nave testified that in making an assignment, the teacher is expected to use appropriate vocabulary. The teacher tells the students what the assignment is and when it is due, then checks with the students to ensure they comprehend the assignment before releasing them to do the work. Ms. Harkleroad did not make a comprehension check. She simply told the students what to do.

36. In the area of Classroom Management, Ms. Nave had "many, many concerns" regarding Ms. Harkleroad's "conscious modeling to modify attitudes and behaviors." Ms. Harkleroad made unacceptable comments to students throughout the lesson, such as: "I don't understand what you're not getting, probably because you're not paying attention," "Your rudeness scale is going up," and "You are all just counting, not paying attention to what you are counting."

37. Ms. Nave found that Ms. Harkleroad was not setting a proper example to the students. The teacher is expected to be respectful and to set an example by being fair. Ms. Harkleroad was neither consistent nor fair. At times, she would scold the students for calling out without raising their hands, but at other times she would allow them to call out. Some children

were walking around the room when they should have been sitting down for the lesson. Ms. Harkleroad admonished some of the students for walking around but allowed others to do it. She allowed the students to engage in off-task behavior.

38. Ms. Harkleroad testified that in her experience, evaluations last for about 35 minutes. She testified that she was doing fine for the first 35 minutes of Ms. Nave's evaluation. However, when Ms. Nave stayed beyond the 35-minute mark, Ms. Harkleroad began to panic, believing that Ms. Nave intended to stay until she could find something wrong. Her performance fell apart in the latter part of the hour. Ms. Harkleroad stated that she told Ms. Nave about her panic disorder after the evaluation.

39. Ms. Nave noted no dramatic change in Ms. Harkleroad's performance from the first half to the second half of her one-hour observation. Ms. Nave also had no recollection of Ms. Harkleroad discussing her panic disorder at any time, before or after the evaluation.

40. When a teacher receives a deficient Appraisal I, the NEAT procedures require that the teacher also receive a Prescription/Assistance form to outline areas for improvement, recommendations on how to accomplish those improvements, and a time period for a follow-up observation.

41. Ms. Nave met with Ms. Harkleroad on February 22, 2010 to go over the Prescription/Assistance form. Ms. Nave noted the areas of deficient performance and recommended that Ms. Harkleroad review sections of the IPPAS manual that prescribe methods for the areas in which she had been found deficient and watch certain DVDs on effective teaching methods.

42. Ms. Nave gave Ms. Harkleroad four weeks, rather than the usual three weeks, to correct the deficiencies and undergo another observation. To further lessen the pressure on Ms. Harkleroad, Ms. Nave exercised her prerogative to use the February 18, 2010, Appraisal I as an "observation" rather than a formal appraisal that would be counted against Ms. Harkleroad.

43. School Board records indicated that Ms. Harkleroad checked out the recommended DVDs from the Fruitland Park library. Ms. Harkleroad testified that she watched the DVDs.

44. Ms. Nave performed a second Appraisal I on Ms. Harkleroad on March 26, 2010. This appraisal also resulted in a total score of 10. On this appraisal, deficiencies were found under the sections titled "Classroom Management" and "Presentation and Knowledge of Subject Matter."

45. As to Classroom Management, Ms. Harkleroad was rated unsatisfactory in the same sub-subsections as on the February 18, 2010, appraisal: "Applies the established rules and standards for behaviors consistently and equitably" and



"Provides conscious modeling to modify attitudes and behaviors" within the subsection titled "Creates and maintains positive environments in which students are actively engaged in learning."

46. As to Presentation and Knowledge of Subject Matter, Ms. Harkleroad's performance was found unsatisfactory in the sub-subsection titled "Uses questioning techniques" under the subsection titled "Communicates and presents subject matter in a manner that enables students to learn."

47. Ms. Nave testified that in the area of questioning techniques, the preferred technique is to ask a question, wait for the students to process the question, and then call on one student to answer the question. Ms. Harkleroad was asking "multiple questions," meaning that she would ask a question, then ask another question or ask the same question in a different way, before the students had a chance to respond. Ms. Nave stated that teachers are counseled not to ask multiple questions because it confuses the children.

48. Ms. Nave stated that Ms. Harkleroad failed to exhibit another aspect of proper questioning. A teacher should ask a question, and then call the name of a student to answer the question. Asking the question before calling on a student ensures that the whole class pays attention to the question. If the teacher calls on one student, then asks the question, the

other children are off the hook and feel free to pay less attention. Ms. Harkleroad frequently called on students before asking a question.

49. Ms. Harkleroad agreed that her performance during this evaluation was "awful." Ms. Nave had come in to the classroom a day or two before and stayed for about 25 minutes. According to Ms. Harkleroad, "Everything went great. I thought that was my evaluation. A couple days later, here she comes in again. And immediately that's like, 'Okay, what are they doing? They couldn't find anything wrong that time, so they're coming in to find something wrong this time?'" She had a panic attack, and knew that the evaluation was "horrible."

50. Again, Ms. Nave made no note of the dichotomy claimed by Ms. Harkleroad. Her observations were consistent over time. Ms. Nave saw no "great" lessons taught by Ms. Harkleroad. Nonetheless, Ms. Nave continued to encourage Ms. Harkleroad to improve her performance and genuinely believed that "she could get it together" with hard work and a sincere commitment to the recommendations she was receiving.

51. On March 29, 2010, Ms. Nave completed a Prescription/Assistance form and reviewed it with Ms. Harkleroad. Ms. Nave again stated the areas of deficient performance and listed sections of the IPPAS manual that addressed Ms. Harkleroad's deficiencies. Ms. Nave also obtained

the assignment of Linda Bradley, a School Board employee who works as a mentor to beginning teachers, to visit Ms. Harkleroad's class every week to observe and assist her with her ongoing remediation strategies.

52. The Prescription/Assistance form provided that Ms. Harkleroad would correct her deficiencies by the end of the school year, June 9, 2010. Ms. Harkleroad would then go through a 90-day performance probation period during the upcoming school year.

53. Also on March 29, 2010, Dr. DeJarlais issued a memorandum to Ms. Harkleroad titled "Performance Probation" that read as follows:

Pursuant to the provisions of Florida Statutes 1012.34, I am writing to inform you that you have performance deficiencies in the areas of Classroom Management and Presentation and Knowledge of Subject Matter. Based on the deficiencies, I am placing you on performance probation for 90 calendar days beginning on 8-23-2010. The 90 calendar days will end on November 23, 2010.

54. By letter dated March 31, 2010, Superintendent of Schools Susan Moxley warned Ms. Harkleroad of the consequences of failure to correct her performance deficiencies:

Pursuant to Florida Statutes 1012.33, I am writing to inform you that performance deficiencies have been identified by your principal. I understand that your principal has already met with you and made recommendations for improvement. Your

principal will provide assistance to help you correct the performance deficiencies during the subsequent school year. Please be advised that your contract with the Lake County Schools District may be terminated without correction of these performance deficiencies.

Pursuant to s. 1012.33, you may request to meet with the Superintendent or her designee for an informal review of the determination of unsatisfactory performance. You may also request to be considered for a transfer to another appropriate position under a different supervising administrator for the subsequent school year. Such transfer, however, does not reverse this year's identification of performance deficiencies.

55. Both Ms. Nave and Dr. DeJarlais testified as to other problems with Ms. Harkleroad's performance in the classroom. The parents of two children in Ms. Harkleroad's class complained that their children were receiving too many disciplinary referrals to the office. Upon investigation, the administrators agreed with the parents and Ms. Harkleroad was counseled on the issue.

56. As an alternative to referring minor disciplinary cases to the office, teachers at Fruitland Park are allowed to send students to another teacher's classroom for a time. Placed in a strange class with students who do not know him, the recalcitrant student usually will calm down and quietly do his work. Ms. Harkleroad's grade level peers complained to Ms. Nave that Ms. Harkleroad took excessive advantage of this option,

sending children to their classrooms more frequently than should have been necessary.

57. Ms. Nave's major problem with Ms. Harkleroad was her classroom management, her "with-itness," in Ms. Nave's terminology. Ms. Harkleroad too often appeared unaware of the things she was saying to the children, and unaware of what the children were doing in the classroom. She would not notice that children were up and walking around the classroom during lessons. Ms. Nave stated that during her observations, as many as 12 out of 22 children in Ms. Harkleroad's classroom would not be focused on the lesson, and Ms. Harkleroad did nothing to put them back on task.

58. Dr. DeJarlais noted that some parents had complained about Ms. Harkleroad's odd behavior at a student assembly. Her speech was slurred, she called out the same student's name more than once, and she seemed disoriented. Dr. DeJarlais witnessed the assembly, and agreed with the parents that there was a problem. She spoke to Ms. Harkleroad about maintaining a sense of awareness on stage.<sup>2/</sup>

59. Dr. DeJarlais mentioned several other minor incidents. In the spring of 2010, Ms. Harkleroad did not fill out her report cards correctly. She once walked into the wrong grade level meeting and had to be directed to the right one. There was an incident in which she placed a child on the floor during

a disciplinary timeout, and Dr. DeJarlais counseled her to use a desk. During a walkthrough, Dr. DeJarlais saw Ms. Harkleroad teaching the wrong subject. In each of these instances, Dr. DeJarlais counseled Ms. Harkleroad rather than giving her an official disciplinary or performance write-up.

60. Ms. Harkleroad was convinced that Dr. DeJarlais was intentionally using her panic disorder to get rid of her. This was based partly on a conversation Ms. Harkleroad claimed to have overheard in which Dr. DeJarlais referred to Ms. Harkleroad as a "liability" because of her use of pain medications.

61. Ms. Harkleroad believed that Dr. DeJarlais thought of her as a drug addict. She testified that Dr. DeJarlais made frequent comments that insinuated that she was an addict, asking whether she had a "problem" or needed "counseling." Ms. Harkleroad believed these insinuations were intended to add to the pressure she felt at school and therefore increase the anxiety and panic she would feel during her evaluations.

62. Dr. DeJarlais denied ever calling Ms. Harkleroad an addict or even suggesting such a thing. She did recall that she and Ms. Nave had conversations with Ms. Harkleroad about her nodding off in front of the class, and that Ms. Harkleroad mentioned that she might need to adjust her medications.

63. Dr. DeJarlais did not pry into the kinds of medications Ms. Harkleroad was taking. Ms. Harkleroad spoke to

her several times in general terms about seeking help for medical conditions such as back pain. Dr. DeJarlais' only suggestion regarding counseling came when Ms. Harkleroad told her that she feared she was having a nervous breakdown. Dr. DeJarlais credibly denied doing anything to intimidate or humiliate Ms. Harkleroad.

64. Ms. Nave confirmed that she had seen Ms. Harkleroad appear to be sleeping or nodding off while standing in front of the class. At the time, Ms. Nave was unaware that Ms. Harkleroad took prescribed pain medications. Ms. Nave stated that Ms. Harkleroad was unaware that she was nodding off and denied it until Dr. DeJarlais confirmed that two other persons had reported seeing Ms. Harkleroad nod off. At that point, Ms. Harkleroad stated she would go see a physician.

65. Ms. Harkleroad testified that her physician assured her that she could not have been falling asleep on her feet. The physician stated that one of her medications may have been causing mini seizures that resembled nodding off. Ms. Harkleroad testified that she passed this information on to both Dr. DeJarlais and Ms. Nave, though neither of the administrators recalled such a conversation.

66. Given her feelings about Dr. DeJarlais, it was not surprising that Ms. Harkleroad chose the option of transferring to another school for the 2010-2011 school year. Ms. Harkleroad

testified that she chose a transfer only after Dr. DeJarlais made it clear that she would prefer for Ms. Harkleroad to move on to another school.

67. Dr. DeJarlais denied expressing such a preference. Ms. Nave recalled that she and Dr. DeJarlais met with Ms. Harkleroad to discuss her options for the 2010-2011 school year, which included transferring to another school or trying to work through the probationary process at Fruitland Park. Ms. Nave testified that when the discussion turned to the 90-day probationary period, Ms. Harkleroad mentioned that she might be having a nervous breakdown. This conversation occurred near the end of the school year, and was the first mention of any mental problems that Ms. Nave could recall.

68. Ms. Harkleroad testified that the "nervous breakdown" conversation was more complicated than Dr. DeJarlais and Ms. Nave indicated. Ms. Harkleroad stated that she told the administrators that she was having multiple anxiety attacks, one after the other, and that she would have a nervous breakdown "if they kept on pushing me and pushing me."

69. Though she had requested assignment to a middle school, Ms. Harkleroad was transferred to Beverly Shores Elementary School ("Beverly Shores") for the 2010-2011 school year and assigned to a third-grade classroom.



70. At the end of the 2009-2010 school year, the School Board notified Jeffrey Williams, the principal at Beverly Shores, that Ms. Harkleroad would be joining his staff in August 2010. The notice informed Mr. Williams that Ms. Harkleroad was on performance probation, and that her issues were classroom management and presentation of subject matter. Mr. Williams also received a phone call from Dr. DeJarlais to discuss the transfer. Dr. DeJarlais did not go into the details surrounding Ms. Harkleroad's probation aside from stating that she believed the move would be good for Ms. Harkleroad.

71. Mr. Williams contacted Ms. Harkleroad and suggested they meet to discuss her transition to Beverly Shores. Ms. Harkleroad met with Mr. Williams at his office. Ms. Harkleroad told Mr. Williams that she had received a deficiency in her IPPAS evaluation and had requested a transfer, though Beverly Shores was not really where she wanted to be. Ms. Harkleroad mentioned that she had a back problem. Mr. Williams did not recall anything in the conversation concerning panic attacks, an anxiety disorder, or any other condition that would hinder Ms. Harkleroad's ability to pass an Appraisal I evaluation.

72. Ms. Harkleroad denied telling Mr. Williams that she did not want to be at Beverly Shores, though she conceded that she told him she would rather be in a middle school because her

back problems made it difficult to keep up with younger children. Ms. Harkleroad testified that she told Mr. Williams about her panic disorder, and further told him that she could not take medication for it because of the medication she took for her back pain. She requested that Mr. Williams use the PG-13 evaluation tool, or record her class, anything other than having people come into her classroom to judge her. She said that Mr. Williams replied that the rules required the use of the Appraisal I.

73. Mr. Williams did not see Ms. Harkleroad again until school started in August 2010. He assigned assistant principal Tanya Rogers to be the supervising administrator handling all issues related to Ms. Harkleroad's job performance. During the first 90 days of the 2010-2011 school year, Mr. Williams limited his involvement to walkthroughs of Ms. Harkleroad's classroom.

74. Ms. Rogers is an experienced assistant principal who has performed many teacher evaluations under the provisions of the IPPAS and the CBA. Ms. Rogers knew that Ms. Harkleroad was on performance probation, and saw to it that her Prescription/Assistance form from Fruitland Park was implemented at Beverly Shores. Linda Bradley was retained as Ms. Harkleroad's instructional coach, and Ms. Harkleroad was offered classes through the school's learning resource center. Ms. Rogers conducted frequent classroom walkthroughs and met

with Ms. Harkleroad to assist her in preparing for her evaluation.

75. Upon her arrival at Beverly Shores in August, Ms. Harkleroad discovered that her classroom was "filthy. There were mouse droppings all over. It took four of us six hours to get the room just clean enough that I'd bring my stuff in there. No air conditioning. . . It was almost six weeks before that air conditioning was fixed."

76. Mr. Williams testified that the classroom was clean when Ms. Harkleroad arrived at the school in August 2010.

77. Ms. Harkleroad estimated that the air conditioning was not repaired until September 27, and testified that the temperature reached 100 degrees in the afternoons. She had complained to Ms. Rogers but nothing was done until the date of the second observation by Ms. Rogers, when Ms. Harkleroad repeatedly noted how hot it was in the classroom and how difficult for the students to concentrate on their lessons.

78. Ms. Harkleroad also testified that there was a "horrible" burning smell in the classroom. She complained to Mr. Williams about it. Eventually, on December 9, 2010, the Lake County Health Department came to the school to investigate the source of the smell. Ms. Harkleroad denied having called the Health Department.

79. Ms. Rogers agreed that Ms. Harkleroad complained about the air conditioning in September. However, Ms. Rogers testified that she entered a work order and that the air conditioning was repaired on September 7. Ms. Rogers recalled no complaints about a smell in the classroom, though she did acknowledge that the Health Department was at the school on December 9, and that it found everything in Ms. Harkleroad's classroom to be in satisfactory condition.

80. Mr. Williams recalled that Ms. Harkleroad complained about an odor in her classroom. Mr. Williams was convinced that Ms. Harkleroad had called the Health Department for the simple reason that the inspectors went straight to her classroom when they arrived at the school. However, Mr. Williams had no firm evidence that Ms. Harkleroad made the call and no way of knowing whether a concerned parent had made the call. In the absence of any stronger evidence, Ms. Harkleroad's denial is credited.

81. There was no indication that either Ms. Rogers or Mr. Williams took retaliatory action against Ms. Harkleroad for her various complaints about conditions in her classroom, or that the performance appraisals Ms. Harkleroad received at Beverly Shores were based on anything other than her performance in the classroom.

82. As part of her efforts to help Ms. Harkleroad prepare for her Appraisal I, Ms. Rogers conducted two classroom

observations using the "Screening/Summative Observation Instrument" of the Florida Performance Measurement System ("FPMS"). This form was developed by the Florida Department of Education to enable an observer to calculate the frequency of effective and ineffective teaching techniques.

83. In the first observation, conducted on September 7, 2010, Ms. Rogers found performance deficiencies in the areas of classroom management and presentation and knowledge of subject matter. In the second observation, conducted on September 27, 2010, Ms. Rogers found performance deficiencies in the same two areas, particularly in the area of managing student conduct.

84. Ms. Rogers testified that she saw a great deal of choral reading and review of prior knowledge taking place in the classroom but observed no teaching of new content. She also noted that Ms. Harkleroad had a punitive approach to classroom management, and took a sarcastic tone with the children that tended to escalate discipline problems rather than calm them.

85. Based on her observations, Ms. Rogers wrote a Prescription/Assistance form on September 29, 2010, and met with Ms. Harkleroad to go over the needed improvements. Ms. Rogers recommended weekly visits by Ms. Bradley, who would conduct FPMS observations in the problem areas and provide specific feedback to Ms. Harkleroad. Ms. Rogers also recommended specific classes offered at the School Board's staff development training

facility: "Increasing Student Engagement," "Motivating Students," and "Classroom Management for Elementary Teachers." Ms. Rogers wrote that Ms. Harkleroad "will correct these behaviors by October 25, 2010, two weeks after staff development opportunity."

86. Ms. Harkleroad testified that she attended one of the recommended classes, but found that it was unrelated to anything occurring in her classroom. She declined to attend the other classes.

87. As the end Ms. Harkleroad's 90-day performance probation approached, Ms. Rogers notified Ms. Harkleroad of her intent to perform the Appraisal I. Ms. Harkleroad requested a conference with Ms. Rogers prior to the evaluation. At the conference, Ms. Harkleroad requested that Mr. Williams perform the Appraisal I evaluation.

88. Ms. Rogers testified that Ms. Harkleroad told her that she found it difficult to respect women in positions of authority. Ms. Harkleroad believed that women should be at home taking care of their children, and that society's problems could be traced to women working outside the home.

89. Ms. Rogers found this logic confusing because Ms. Harkleroad was herself a woman working outside the home. When Ms. Rogers pointed this out, Ms. Harkleroad responded that she did not have children. Ms. Rogers responded that her own

children were grown and not living with her. Ms. Harkleroad asked Ms. Rogers whether her daughter stayed home with her children. Ms. Rogers replied that her daughter worked. Ms. Harkleroad said, "See, that's what I'm talking about. That's what's wrong with society."

90. At the hearing, Ms. Harkleroad testified that her request had nothing to do with any general complaint about women in the workplace.<sup>3/</sup> Her problem was with Ms. Rogers, whom she found to be unreasonably critical. Ms. Rogers conducted her first observation before Ms. Harkleroad even had a chance to learn the names of the children in her classroom, then told Ms. Harkleroad that she was an incompetent teacher, which caused Ms. Harkleroad to lose all respect for her. Thus, she told Ms. Rogers that she preferred to have Mr. Williams perform her Appraisal I.

91. Ms. Rogers' version of the conference with Ms. Harkleroad is credited.

92. Mr. Williams testified that Ms. Rogers came to him and told him that Ms. Harkleroad did not respect women in authority. Ms. Harkleroad did not think she could get a fair evaluation from Ms. Rogers and requested that Mr. Williams perform the appraisal. Without delving too deeply into the reasons for Ms. Harkleroad's request, Mr. Williams agreed to perform the Appraisal I.

93. Ms. Rogers and Mr. Williams agreed that he declined to take the file that Ms. Rogers had developed on Ms. Harkleroad. He wanted a clean slate, and did not want to be influenced by the prior observations of Ms. Rogers. He wanted to evaluate what was happening in the classroom without preconceptions.

94. Mr. Williams intended to evaluate Ms. Harkleroad as he would any other teacher. He entered Ms. Harkleroad's classroom several times during the week before the evaluation and performed a lengthy walkthrough to assess the overall learning environment.

95. Mr. Williams conducted the Appraisal I on or about November 22, 2010.<sup>4/</sup> He gave Ms. Harkleroad a score of 11. Mr. Williams found a deficiency in the section titled "Presentation and Knowledge of Subject Matter." Ms. Harkleroad was rated unsatisfactory in the subsection titled, "Communicates and presents subject matter in a manner that enables students to learn." This subsection contains seven sub-subsections, and Mr. Williams graded Ms. Harkleroad unsatisfactory in six of them: "Treats concepts/cause and effect/or states and applies rules;" "Teacher directed/guided practice is provided;" "Uses questioning techniques;" "Directs lesson;" "Provides periodic review;" and "Poses problems, dilemmas, and questions to promote critical thinking."



96. Mr. Williams found these deficiencies because there was no direct instruction taking place in the classroom that would satisfy those areas of observation. Shortly after the evaluation, Ms. Harkleroad told him that she "just didn't have it today" and that she knew her performance had not been good.

97. Ms. Harkleroad testified as to her problems with Mr. Williams' evaluation. These problems were related to her panic disorder and to an illness she claimed she had on the day of the evaluation.

98. When Mr. Williams did his preparatory walkthrough of her classroom on the Friday before the evaluation, Ms. Harkleroad mistakenly believed that he was conducting the Appraisal I. As she had with Ms. Nave's earlier pre-evaluation classroom visit, Ms. Harkleroad claimed that the lesson went very well. She was jubilant that she had passed the evaluation.

99. Mr. Williams noted no variance between what he observed on his walkthroughs of Ms. Harkleroad's classroom and what he observed during the November 22, 2010, Appraisal I.

100. On the following Monday morning, Ms. Harkleroad was at an IEP meeting when she started pouring sweat and finding it difficult to breathe. The problem became worse as the day went by. She told Mr. Williams how sick she felt and that she might have to go home. Less than 30 minutes later, Mr. Williams appeared in her classroom to conduct the Appraisal I.

Ms. Harkleroad stated that Mr. Williams' arrival "just blew it." She knew then that "all they wanted to do was fire me. They didn't care how they did it."

101. After the evaluation, Ms. Harkleroad's husband picked her up from school because she was too ill to drive.

Ms. Harkleroad testified that she was diagnosed with bacterial pneumonia. She did not return to school until the Monday after Thanksgiving, November 29, at which time Mr. Williams met with her to review her evaluation.

102. Mr. Williams testified that Ms. Harkleroad said nothing to him about being sick and that he would have rescheduled the evaluation had he known. Before and during the evaluation, she showed no signs of illness. It was only after the evaluation, when they were discussing her poor performance, that Ms. Harkleroad appeared to become ill. Mr. Williams called the school nurse and Ms. Harkleroad's husband. Ms. Harkleroad later told him she had been hospitalized, but Mr. Williams had no firsthand knowledge of her medical treatment.

103. On November 29, 2010, Mr. Williams conducted a post-evaluation conference with Ms. Harkleroad. He presented her options, which at that point were limited to resigning her position or facing formal termination procedures by the School Board. To Mr. Williams' surprise, Ms. Harkleroad chose termination. He was surprised because termination would likely

end Ms. Harkleroad's teaching career. When Mr. Williams inquired further, Ms. Harkleroad told him that she chose termination in order to preserve her unemployment benefits.

104. At the hearing, Ms. Harkleroad testified that she chose termination because resigning would have constituted an admission she had done something wrong.

105. As to aspects of Ms. Harkleroad's performance outside the formal evaluation, Mr. Williams stated that there had been a couple of parent complaints. One child was moved out of her classroom due to what the parent termed "poor communication" with Ms. Harkleroad. Mr. Williams had to tell Ms. Harkleroad to stop asking the child why he had moved from her class.

106. In a memorandum to Dr. Moxley dated December 9, 2010, and titled "Recommendation of Termination," Mr. Williams wrote as follows, in relevant part:

Pursuant to Florida Statutes 1012.34, I am writing to inform you that Mrs. Deborah Harkleroad has completed his/her 90-calendar day performance probation and has failed to correct his/her performance deficiencies. I do not believe that Mrs. Harkleroad can correct said deficiencies and his/her employment should be terminated. I have complied with all applicable provisions of Florida Statutes 1012.34....

107. On the morning of December 13, 2010, Ms. Harkleroad wrote the following email to Dr. Moxley:

Before a final decision is made on my employment status, I would like the

opportunity to meet with you in order to discuss my current situation. It is my contention that I was performing my duties as a teacher in a manner that supported Literacy First guidelines on the date and time my evaluation was conducted. If I had been doing any type of activity other than something similar to what I was doing, I would not have been in compliance with established guidelines.

108. Literacy First is a research-based, data-driven, comprehensive program designed to accelerate reading achievement. Beverly Shores implements the Literacy First program,<sup>5/</sup> which includes explicit directives as to what should take place in whole group and small group instruction.

109. Ms. Harkleroad did not raise Literacy First concerns with Mr. Williams at the time of the evaluation or even at the November 29 conference. After the fact, however, she contended that during the hour in which Mr. Williams conducted the evaluation, the Literacy First schedule called for her to perform whole group activities, which do not include "instruction." The children were building fluency by engaging in group reading practice. Had Mr. Williams stayed through the next hour, he would have seen explicit instruction when the class was broken into small groups.

110. Ms. Harkleroad's argument that Literacy First mandated that she not teach the class is not credited. As early as her first observation on September 2, 2010, Ms. Rogers had

noted that Ms. Harkleroad's whole group method appeared limited to "echo reading" rather than any of the other various strategies called for by the Literacy First program. Ms. Rogers did not formalize this observation in writing because echo reading is a legitimate Literacy First strategy, and she wanted to give Ms. Harkleroad the benefit of the doubt.

111. Mr. Williams understood Ms. Harkleroad's class schedule, and as principal of Beverly Shores he understood the Literacy First guidelines. When he conducted his evaluation, he knew that Ms. Harkleroad's class was involved in whole group reading. It was in this context, with a full understanding of what should have been happening under Literacy First, that Mr. Williams concluded that no instruction took place during his observation. Ms. Harkleroad was not leading the class.

112. Dr. Moxley did not meet with Ms. Harkleroad. By letter dated December 13, 2010, Dr. Moxley informed Ms. Harkleroad that, pursuant to section 1012.34, Florida Statutes, Ms. Harkleroad had failed to correct performance deficiencies identified by her principal and Dr. Moxley intended to recommend to the School Board that Ms. Harkleroad's employment be terminated as of January 10, 2011.

113. At the hearing, Ms. Harkleroad contended that she had placed the School Board on notice of her panic disorder before the 2009-2010 school year, and that she specifically requested

that school administrators use the PG-13 evaluation process as an accommodation to her disability.

114. Ms. Nave recalled Ms. Harkleroad requesting that she be allowed to use the PG-13 evaluation. Ms. Nave stated that Ms. Harkleroad gave no reason for the request, other than an assertion that she had earned the right not to go through the Appraisal I process.

115. Ms. Harkleroad testified that she also pleaded with Mr. Williams to allow her to use the PG-13 evaluation because of her panic disorder. Mr. Williams flatly and credibly denied that any such conversation occurred.<sup>6</sup>

116. Dr. DeJarlais had no recollection of Ms. Harkleroad asking for the PG-13 evaluation. She testified that Ms. Harkleroad made no complaints about the Appraisal I procedure until after the evaluation had been completed.

117. The testimony of the four administrators permits the inference that, far from being open with her superiors about her mental and physical problems, Ms. Harkleroad tended to downplay them because of the intense scrutiny she felt she was receiving regarding her job performance. On several occasions, Ms. DeJarlais and Ms. Nave made tentative inquiries into Ms. Harkleroad's emotional well being only to have Ms. Harkleroad sidestep their questions with vague assurances that she was seeing a doctor.<sup>7/</sup> Out of respect for her privacy,

the administrators left it at that and focused on her classroom performance.

118. The first duty of the school administrators is to ensure that the children in their charge receive adequate instruction from a qualified, competent teacher. If Ms. Harkleroad's panic disorder required an accommodation, it was her responsibility to come forward and request it. The evidence established that she did not do so. It was not the duty of her superiors to tease the information out of her.

119. As Mr. Williams pointed out, he is responsible for 55 teachers at Beverly Shores. He does not have the time to delve into all their personal lives and medical conditions, and tries to respect their privacy. Under all the circumstances, his focus was properly on the classroom.

120. Aside from alleging a conspiracy of sorts to get rid of her,<sup>8/</sup> Ms. Harkleroad could not explain why four experienced school administrators would lie about having no recollection of talking with her about her panic disorder, though they all testified that they knew about her back problems and had at least some knowledge that she took pain medications. Ms. Harkleroad testified that two previous principals at Fruitland Park, Joan Denson and Charles McDaniel, had been aware of and made accommodations for her panic disorder. She called neither

of these former principals as witnesses to corroborate her version of events.

121. The failure to corroborate her testimony was a theme of Ms. Harkleroad's overall presentation. She offered no documentary evidence regarding her medical condition. None of her physicians were called to testify. No fellow employees, friends or neighbors were called to testify that Ms. Harkleroad had discussed her panic disorder with them. Ms. Harkleroad testified that her students and their parents loved her as a teacher, but she called none of them to testify. Ms. Harkleroad's only supportive witness, teacher Norma Jean Miller, had not worked with Ms. Harkleroad for several years and only knew her as a literacy coach, not a classroom teacher. Ms. Miller knew of Ms. Harkleroad's back problems, but said nothing about a panic disorder.

122. In the absence of corroborating evidence, it strains credulity beyond all reason to accept the sole word of Ms. Harkleroad that Dr. DeJarlais decided to get rid of her because of her drug use, realized that Ms. Harkleroad's panic disorder was a means to insure that she failed her evaluations, then apparently recruited the administration of another school to complete the process.<sup>9/</sup>

123. Because there is no evidence beyond Ms. Harkleroad's less than credible testimony to establish that the evaluation



process was conducted in bad faith, it is found that the administrators at Fruitland Park and Beverly Shore judged Ms. Harkleroad on the merits of her teaching performance and graded that performance accordingly.

124. Ms. Harkleroad complains that the criteria used in the evaluations were vague to the point of opacity, and did not take into account that different teachers may have different approaches to their work. She believes that some of the standard rules for classroom instruction are "ridiculous." When Ms. Rogers told her that she should make the children raise their hands and be called on before speaking in class, she airily dismissed the criticism as a "philosophical difference." Though the specific problems with Ms. Harkleroad's classroom performance were eminently correctible, her obstinacy and/or obtuseness in rejecting pointed advice from her superiors made it clear that she was highly unlikely ever to correct her performance deficiencies.

125. The evidence established that the process followed by School Board personnel in evaluating Ms. Harkleroad's performance before and during her probationary period followed the letter of the IPPAS and the CBA, including the NEAT procedure set forth in Section 12 of Article XI of the CBA. The criteria and forms used to evaluate her performance were taken directly from the IPPAS Handbook.

126. However, even though all procedures were correctly followed in the evaluation process, the School Board failed to establish grounds for terminating Ms. Harkleroad's employment pursuant to Section 1012.34(3), Florida Statutes, because it failed to offer evidence, apart from the anecdotal reports of the evaluators, that Ms. Harkleroad's teaching performance adversely affected the academic performance of the students assigned to her classroom.<sup>10/</sup> The assessment procedure is to be "primarily based on the performance of students," and the absence of data such as FCAT scores or other objective comparators renders the School Board's case insufficient under section 1012.34, Florida Statutes.<sup>11/</sup>

127. The issue then becomes whether the School Board has established sufficient grounds for "just cause" termination pursuant to section 1012.33(1), Florida Statutes. On the sole statutory ground available under the evidence of this case, incompetency, the School Board has met its burden and justified its decision to terminate Respondent's employment.

128. The evidence produced at the hearing demonstrated that the School Board had just cause to terminate the employment of Ms. Harkleroad for incompetency.

CONCLUSIONS OF LAW

129. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to section 120.569 and subsections 120.57(1) and 1012.34(3)(d), Florida Statutes.

130. Respondent is an employee of the School Board, and holds a professional service contract pursuant to section 1012.33(3)(a).

131. The School Board has the burden to establish by a preponderance of the evidence the grounds for disciplining Respondent. See, e.g., McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Sublett v. Sumter Cnty. Sch. Bd., 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995); Allen v. Sch. Bd. of Dade Cnty., 571 So. 2d 568, 569 (Fla. 3d DCA 1990); Dileo v. School Board of Dade County, 569 So. 2d 883, 884 (Fla. 3d DCA 1990).

132. There are two statutory mechanisms by which a school board may terminate the employment of an employee working under a professional service contract: termination for cause pursuant to Section 1012.33, Florida Statutes, and termination for failure to correct performance deficiencies within the 90-day probation period pursuant to Section 1012.34, Florida Statutes.

133. Subsection 1012.33(1)(a), Florida Statutes, provides that a teacher's contract must contain provisions for dismissal

during the term of the contract for "just cause," which includes "misconduct in office, incompetency, gross insubordination, willful neglect of duty, or conviction of a crime involving moral turpitude," as those terms are defined by rule of the State Board of Education. The School Board in this case has argued that Respondent's incompetency provides just cause for the termination of her employment contract.

134. Florida Administrative Code Rule 6B-4.009(1) defines "incompetency" as follows:

(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 (Section 231.09, Florida Statutes)<sup>12/</sup>; (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.

135. Section 1012.34(3), Florida Statutes, authorizes the termination of contracts for the failure to correct performance deficiencies. Section 1012.34(1) and (2) requires each school district to develop assessment instruments for all teachers and administrators and establish procedures for school districts to follow in identifying a teacher's performance deficiencies and giving the teacher a chance to correct them. Section 1012.34(3) provides, in relevant part:

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.

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

(c) The individual responsible for supervising the employee must assess the employee's performance. The evaluator must submit a written report of the assessment to the district school superintendent for the

purpose of reviewing the employee's contract. The evaluator must submit the written report to the employee no later than 10 days after the assessment takes place. The evaluator must discuss the written report of assessment with the employee. The employee shall have the right to initiate a written response to the assessment, and the response shall become a permanent attachment to his or her personnel file.

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

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

2. a. If the employee holds a professional service contract as provided in s. 1012.33, the employee shall be placed on performance probation and governed by the provisions of this section for 90 calendar days following the receipt of the notice of unsatisfactory performance to demonstrate corrective action. School holidays and school vacation periods are not counted when calculating the 90-calendar-day period. During the 90 calendar days, the employee who holds a professional service contract must be evaluated periodically and apprised of progress achieved and must be provided assistance and inservice training opportunities to help correct the noted performance deficiencies. At any time during the 90 calendar days, the employee who holds a professional service contract

may request a transfer to another appropriate position with a different supervising administrator; however, a

transfer does not extend the period for correcting performance deficiencies.

b. Within 14 days after the close of the 90 calendar days, the evaluator must assess whether the performance deficiencies have been corrected and forward a recommendation to the district school superintendent. Within 14 days after receiving the evaluator's recommendation, the district school superintendent must notify the employee who holds a professional service contract in writing whether the performance deficiencies have been satisfactorily corrected and whether the district school superintendent will recommend that the district school board continue or terminate his or her employment contract....

136. The evidence established that the School Board followed the procedures set forth in section 1012.34(3) in relation to Ms. Harkleroad throughout the sequence of events set forth in the above Findings of Fact.

137. In Pinellas Cnty. Sch. Bd. v. Ferrier, Case No. 10-1152 (DOAH July 29, 2010), Administrative Law Judge Robert Meale set forth the following persuasive analysis of section 1012.34(3), herein adopted:

57. Much of the focus of the hearing was on whether Petitioner proved an uncorrected performance deficiency, within the meaning of Section 1012.34. This statute assigns a prominent role, in establishing a performance deficiency, to student achievement. The first sentence of Section 1012.34(3) states that the assessment



instrument must be based "primarily" on student performance. The second sentence of this subsection acknowledges that the assessment instrument is not required to be limited to student performance, but may include other criteria. Leaving no doubt, though, Section 1012.34(3)(a) states that the assessment instrument "must primarily" use student data. These provisions require no elaboration and are entirely consistent with each other: for the purpose of establishing an uncorrected performance deficiency as the basis for terminating a teacher, a school district must assess the teacher based primarily, but not exclusively, on student performance, which is measured by state tests and, where not available, local tests.

138. As in Ferrier, the School Board's effort in the instant case to terminate a teacher under section 1012.34, Florida Statutes, fails due to the absence of objective data regarding the performance of students in her class.

139. However, the assessment criteria set forth in Section 1012.34(3)(a)1.-7. "enumerate important skills for a teacher to possess," and proof of deficiency in those skills over time constitutes just cause for termination of a teacher's professional service contract under section 1012.33. See Ferrier, Conclusion of Law 69.

140. Ms. Harkleroad was repeatedly counseled about the same aspects of her job performance. She was given concrete recommendations that she chose not to implement. Both Ms. Nave and Ms. Rogers attempted to assist her in proper questioning

technique, but she resisted. Her willingness to cooperate with her superiors was fatally compromised by her groundless belief that she was the object of a conspiracy to fire her.

141. Ms. Nave and Mr. Williams, the administrators who conducted separate Appraisal I evaluations of Ms. Harkleroad over the course of several months, independently noted the same phenomenon, in virtually the same words: no instruction was taking place in Ms. Harkleroad's classroom. Ms. Rogers noted the same thing in her observations.

142. Ms. Harkleroad failed to maintain proper discipline in her classroom. She failed to employ adequate techniques of instruction in her classroom. She failed to create a classroom environment conducive to learning. She failed to correct her performance deficiencies despite being given multiple opportunities to do so, and despite receiving explicit recommendations on how to improve her performance in the classroom.

143. The evidence presented at the hearing demonstrated by a preponderance of the evidence a "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."<sup>13/</sup> The demonstration of this aspect of incompetency is sufficient to establish just cause to terminate Ms. Harkleroad's professional service contract.

RECOMMENDATION

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

RECOMMENDED that the School Board enter a final order terminating Respondent's professional service contract and dismissing Respondent on the ground of incompetency.

DONE AND ENTERED this 24th day of June, 2011, in Tallahassee, Leon County, Florida.

*Lawrence P. Stevenson*

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Filed with the Clerk of the  
Division of Administrative Hearings  
this 24th day of June, 2011.

ENDNOTES

<sup>1/</sup> Unless otherwise indicated, references to the Florida Statutes are to the 2010 edition.

<sup>2/</sup> Ms. Harkleroad did not recall this incident. She stated that the slurred speech might have been caused by a panic attack.

<sup>3/</sup> In her deposition, however, Ms. Harkleroad testified that female administrators are "petty, and I don't trust them."

4/ There was some uncertainty as to the exact date of the evaluation because Mr. Williams completed the Appraisal I form at his meeting with Ms. Harkleroad on November 29, 2010, though Ms. Harkleroad was certain that the actual observation and evaluation took place on the Monday before Thanksgiving, November 22.

5/ Fruitland Park does not implement the Literacy First program.

6/ Mr. Williams recalled receiving an email from Ms. Harkleroad in October 2010 requesting a transfer to a reading intervention instructor position, in which Ms. Harkleroad noted that the reduced physical demands would better accommodate her "disability." Mr. Williams testified that the requested position was not available, and that he did not know specifically what Ms. Harkleroad meant by her "disability" unless it was to do with her back problems.

7/ Ms. Harkleroad interpreted these inquiries as further efforts to brand her a drug addict.

8/ Even if one were inclined to accept Ms. Harkleroad's assertion that Dr. DeJarlais thought her a drug addict and a liability, and that Ms. Nave was dutifully following Dr. DeJarlais' orders in finding Ms. Harkleroad's classroom performance deficient, there was still no explanation as to how or why this vendetta carried over to Beverly Shores. In any event, Dr. DeJarlais' denial of any ill will toward Ms. Harkleroad is credited.

9/ It should be noted that Ms. Harkleroad testified as to a personality conflict with Dr. DeJarlais and a professional dislike of Ms. Rogers, but testified that she liked Mr. Williams and had no personal issues with Ms. Nave beyond the fact that she worked for Dr. DeJarlais. Mr. Williams and Ms. Nave are the School Board employees who actually performed the evaluations of Ms. Harkleroad.

10/ Ms. Nave testified that Ms. Harkleroad's students had made "average" scores on tests. She had no recollection that they had performed poorly on the FCAT.

11/ The classroom evaluators did their job in assessing Ms. Harkleroad's performance in accordance with the IPPAS and the CBA. The failure of proof lies with the School Board, which

presumably had at hand the test scores to prove this element of its case.

<sup>12/</sup> Prior to the repeal of Chapter 231, Florida Statutes, by section 1058, chapter 2002-387, Laws of Florida, Section 231.09, Florida Statutes (2001) set forth the duties of instructional personnel as follows:

(1) The primary duty of instructional personnel is to work diligently and faithfully to help students meet or exceed annual learning goals, to meet state and local achievement requirements, and to master the skills required to graduate from high school prepared for postsecondary education and work. This duty applies to instructional personnel whether they teach or function in a support role.

(2) Members of the instructional staff of the public schools shall perform duties prescribed by rules of the district school board. The rules shall include, but are not limited to, rules relating to a teacher's duty to help students master challenging standards and meet all state and local requirements for achievement; teaching efficiently and faithfully, using prescribed materials and methods, including technology-based instruction; recordkeeping; and fulfilling the terms of any contract, unless released from the contract by the district school board.

Florida Administrative Code Rule 6B-4.009 has not been updated to reflect the change in the statutes. The continuing validity of the rule has not been questioned in this proceeding.

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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.