STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DR. ALBERTO T. FERNANDEZ, HENNY CRISTOBOL, AND PATRICIA E. RAMIREZ,

Petitioners,

vs. Case No. 13-1492

MIAMI-DADE COUNTY SCHOOL BOARD,

Respondent.
_____/

RECOMMENDED ORDER

Administrative Law Judge Edward T. Bauer held a final hearing in this case in Miami, Florida, on January 27 through 31, 2014, and by video teleconference between sites in Miami, Tallahassee, and Lakeland, Florida, on February 14, 2014.

APPEARANCES

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For Respondent: Luis M. Garcia, Esquire
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STATEMENT OF THE ISSUES

Whether Respondent committed one or more acts of unlawful reprisal against Petitioners, contrary to section 1002.33(4)(a), Florida Statutes, and, if so, what relief should be granted.

PRELIMINARY STATEMENT

Beginning in May 2012 and over the course of the next few months, Dr. Alberto T. Fernandez, Henny Cristobol, and Patricia E. Ramirez (the Petitioners in this proceeding, all of whom are educators employed by the Miami-Dade County School Board) filed a series of formal complaints with the Florida Department of Education ("DOE") pursuant to section 1002.33(4)(a), Florida Statutes. The gravamen of the complaints was that Respondent Miami-Dade County School Board ("Respondent" or "MDCPS") committed acts of reprisal against Petitioners because of their involvement in the attempted conversion of Neva King Cooper Educational Center to a public charter school.

In response, DOE conducted an investigation into the allegations, which culminated in the issuance of a "Final Investigative Report" on November 16, 2012. DOE thereafter attempted, unsuccessfully, to conciliate Petitioners' complaints. Ultimately, on April 12, 2013, Dr. Tony Bennett, DOE's commissioner at that time, notified the parties that the investigation had been terminated; that, with respect to each Petitioner, DOE had "made a finding that reasonable grounds

exist to believe that an unlawful reprisal has occurred, is occurring, or is to be taken"; and that DOE had contracted with the Division of Administrative Hearings ("DOAH") to conduct a formal hearing.

Subsequently, on April 23, 2013, DOE forwarded Petitioners' complaints to DOAH for further proceedings. In an Order dated July 3, 2013, the undersigned granted Petitioners' unopposed requests to amend their complaints. Consistent with the relief requested, the Order of July 3 provided that this cause would proceed on Petitioner Alberto Fernandez' "Petition for Formal Hearing," filed May 7, 2013; Petitioner Henny Cristobol's "Petition for Formal Hearing," likewise filed May 7; and Petitioner Patricia Ramirez' "Petition for Formal Hearing," filed June 6, 2013.

As noted above, the final hearing was conducted on January 27 through 31 and February 14, 2014, during which Petitioners testified on their own behalf, presented the testimony of five other witnesses (William Detzner, Richard Massa, Ondina Rodriguez, Tebelio Diaz, and Tony Peterle), and introduced 42 exhibits into evidence, numbered 2 through 6; 7A; 7B; 8 through 31; and supplemental exhibits 1 through 11.[1/] Respondent called four witnesses (Ava Goldman, Judith Marte, Ana Rasco, and Terry Chester) and introduced 26 exhibits, numbered 2 through 13; 16 through 22; 23A; 23B; and 24 through 28.

The final hearing Transcript was filed on April 14, 2014. At MDCPS' request, the deadline for the submission of proposed recommended orders was extended to May 30, 2014. Both parties timely filed proposed recommended orders, which the undersigned has considered.

Unless otherwise indicated, all rule and statutory references are to the 2012 versions.

FINDINGS OF FACT

I. Introduction

1. The instant proceeding implicates section 1002.33(4), Florida Statutes, which prohibits district school boards from taking certain acts of reprisal——disciplinary or corrective action, unfavorable transfers, and the like——against a school district employee because of his or her involvement with an application to establish a charter school. Petitioners contend that MDCPS violated this statutory proscription in multiple respects, most notably by transferring them to undesirable alternate assignments. Before delving into the particulars, however, a few words about Florida charter schools.

2. Through its enactment of section 1002.33, the Legislature made pellucid that charter schools "are public schools" that "shall be part of the state's program of public education." § 1002.33(1), Fla. Stat. Charter schools, which are intended to improve academic achievement and increase

learning opportunities for all students, take two forms: a "new" (i.e., a start-from-scratch) charter school; and, of particular relevance here, a "conversion charter school." § 1002.33(3)(a) & (b), Fla. Stat.

3. As a prerequisite to the conversion of an existing public school to a public charter school, an application must be presented to the district school board for its approval. See § 1002.33(3)(b), Fla. Stat. However, before such an application can be submitted, it must be demonstrated through a balloting process that the conversion is supported by "at least 50 percent of the teachers employed at the school and 50 percent of the parents voting whose children are enrolled at the school." Id.

4. Significantly, upon the initiation of the balloting process, which occurs at the written request of the principal, parents, teachers, the school advisory council, or the district school board, considerable responsibility is vested exclusively with the prospective conversion school and its principal——as opposed to the district school board. For instance, the principal is tasked with initiating the balloting within 60 days of the receipt of the written request, as well as ensuring that the process is completed at least 30 days before the charter application deadline, which falls on August 1 of each year. Fla. Admin. Code R. 6A-6.0787(1). Moreover, the school principal (or his or her designee) is charged with ensuring that

only eligible persons vote and that no individual votes more than once. Fla. Admin. Code R. 6A-6.0787(2)(g). In addition, and as mandated by Florida Administrative Code Rule 6A-6.0787(2)(e), the ballots are to be "created and distributed by the school." Finally, the principal is responsible for selecting, in conjunction with the applicant, an independent arbitrator to tally the teacher and parent ballots. Fla. Admin. Code R. 6A-6.0787(3)(a) & (b).

II. The Events

5. Against this backdrop, the undersigned turns to the event that, according to Petitioners, resulted in a series of unlawful acts of reprisal: the attempted conversion of Neva King Cooper Education Center ("NKCEC"), a public school operated by MDCPS.

6. In or around the summer of 2011, Petitioner Henny Cristobol ("Mr. Cristobol"), NKCEC's assistant principal at that time, was asked by an acquaintance if he would be interested in serving on the board of a Broward County charter school. During a subsequent conversation with the same individual, Mr. Cristobol learned, much to his surprise, that an existing public school could be converted into a public charter school.

7. His curiosity piqued, Mr. Cristobol investigated the pros and cons of charter schools and eventually concluded that, in light of NKCEC's unique characteristics, its students would

benefit by a conversion. As explained during the final hearing, NKCEC is unusual in that it serves a small population of students (approximately 120) ranging in ages from three through twenty-two, all of whom receive special education services by virtue of profound intellectual disabilities——that is, each student's IQ is less than 25.

8. During the fall of 2011, Mr. Cristobol introduced the idea of a conversion to NKCEC's principal, Petitioner Dr. Alberto Fernandez ("Dr. Fernandez"). As a 30-year veteran of MDCPS who appreciated the gravity of such a proposal, Dr. Fernandez concluded that additional research was necessary before the idea could be presented to NKCEC's Educational Excellence School Advisory Committee ("EESAC"). To that end, Dr. Fernandez requested and received assistance from three NKCEC employees: Petitioner Patricia Ramirez ("Ms. Ramirez"), a placement specialist who had been employed with MDCPS since 1998; Ondina Rodriguez, a program specialist; and Mr. Cristobol.

9. As 2011 wound to a close, Dr. Fernandez ultimately determined, based upon a review of the information gathered, that a conversion, although not without some risks, would be beneficial to NKCEC's students and faculty. However, Dr. Fernandez and Mr. Cristobol feared (presciently, as it turns out) that the prospective conversion would be met with strong resistance from MDCPS. Owing to this concern, Dr. Fernandez and

Mr. Cristobol decided that the conversion effort should not be revealed to MDCPS unless and until NKCEC's EESAC called for a parent and faculty vote. Dr. Fernandez also thought it prudent to retain an attorney with charter school conversion experience——Mr. Robin Gibson, who represents each Petitioner in this proceeding——to ensure that, if initiated, the ballot and application process proceeded lawfully.

10. Thereafter, on February 2, 2012, Dr. Fernandez and Mr. Cristobol presented the conversion idea to NKCEC's EESAC. At the conclusion of the meeting, the EESAC, which comprised members of the faculty, parents, and other members of the community, voted unanimously to initiate the ballot process. The EESAC memorialized its decision in a letter to Dr. Fernandez, which he received on the same date.

11. Immediately following the EESAC vote, Dr. Fernandez telephoned his supervisor, Mr. Will Gordillo (at that time, MDCPS' district director for the department of special education), to inform him of the prospective conversion. Concerned by the news, Mr. Gordillo warned Dr. Fernandez, quite ominously, that "repercussions" would follow.[2/]

12. The same afternoon, Dr. Fernandez convened a faculty meeting, during which the attendees were: informed of the EESAC vote; presented with objective information about charter schools and the conversion process; advised that a conversion would

carry certain risks; and encouraged to respect the opinions[3/] of others regarding the conversion's merits. Not surprisingly, a number of the faculty had questions, which were answered by Dr. Fernandez, Mr. Cristobol, and Mr. Gibson. Notably, Mr. Gibson's attendance at the behest of Dr. Fernandez was entirely consistent with MDCPS' school visitor policy:

> 9150 - School Visitors
>
> Parents, other adult residents of the community, and interested educators are encouraged to visit schools.
>
> * * *
>
> Visitors Invited by Other Administrators
>
> Supervisory or administrative staff who have invited professional visitors may elect to receive the visitors whom they have invited, as well as other visitors who may have a mutual interest or area of competency.[4/]

13. To ensure that any questions regarding the conversion were thoroughly addressed, Dr. Fernandez reconvened the faculty meeting early the following morning (February 3, 2012, a teacher planning day).[5/] At approximately 9:30 a.m., prior to the meeting's conclusion, Dr. Fernandez learned that a "district" visitor was waiting in the front office. As Dr. Fernandez and Mr. Cristobol soon discovered, the visitor in question was Barbara Mendizabal, an MDCPS district regional director.

14. During the conversation that ensued, Ms. Mendizabal inquired as to why MDCPS had not learned of the prospective

conversion earlier. In addition, Ms. Mendizabal repeatedly "reminded" Dr. Fernandez and Mr. Cristobol that they "were still school board employees"——a comment they construed, quite reasonably, as an oblique warning to stay in line.

15. As it happens, Ms. Mendizabal was not the only district-level employee to appear at NKCEC on February 3, 2012. Indeed, Dr. Fernandez also received visits from Milagros Fornell (the associate superintendent for curriculum, and a member of the superintendent's cabinet) and Valtena Brown (a region superintendent), neither of whom, to the best of Mr. Cristobol's knowledge, had ever before visited[6/] NKCEC. Ms. Brown's conversation with Dr. Fernandez was unremarkable in that she simply directed him to convene a meeting with the parents to discuss the conversion process.

16. However, Ms. Fornell's exchange with Dr. Fernandez was considerably more eventful. In particular, Ms. Fornell informed Dr. Fernandez that she was not happy about the prospective conversion; "reminded" him that he was still an MDCPS employee; ordered him to schedule a faculty meeting for a later date; and advised him that, beginning immediately and pending the outcome of the ballot process, several district-level employees would be housed at NKCEC on a full-time basis, ostensibly to field questions from the faculty about the conversion. As detailed below, however, the presence of the district-level employees,

which continued long after the conversion vote was ultimately aborted, served a far less benevolent purpose.

17. Beginning on or about February 4, 2012, and continuing over the next three months, at least one district-level employee was present on NKCEC's campus——on most days, Ms. Ava Goldman, the administrative director of MDCPS' office of special education and educational services, and the person to whom Dr. Fernandez' supervisor, Mr. Gordillo, reported. Although Mr. Gordillo occasionally filled in for Ms. Goldman, the evidence demonstrates that one or both were present[7/] for the entirety of each workday, and that Dr. Fernandez was under an ongoing obligation to provide them with all documents and communications relating to the conversion.[8/]

18. Suffice it to say that, prior to February of 2012, Ms. Goldman and Mr. Gordillo's appearances on NKCEC's campus were rare; indeed, by Dr. Fernandez' reckoning, Mr. Gordillo generally visited an average of two or three times per year, while Ms. Goldman had only been to NKCEC on two occasions over the preceding two years.[9/] It is hardly surprising, then, that a number of NKCEC's faculty were intimidated by Ms. Goldman and Mr. Gordillo's presence,[10/] unease that was exacerbated by the fact that the pair behaved more like sentries than members of high-level management whose purpose was to field inquiries. Indeed, the credible evidence demonstrates that, in lieu of

answering questions[11/] about the conversion, Ms. Goldman and Mr. Gordillo spent their days continually roaming the school's hallways, offices, and classrooms, all the while watching NKCEC's faculty.

19. If the ominous presence of Ms. Goldman and Mr. Gordillo failed to communicate the desired message——i.e., MDCPS' staunch opposition to the prospective conversion——any lingering doubts on that point were extinguished during the faculty meeting of February 7, 2012. The meeting was atypical, first, in that it was controlled by Ms. Fornell (as opposed to Dr. Fernandez), who announced to the faulty that a conversion was "not a good idea."[12/] The meeting was also unusual in that it was attended by 12 to 15 district administrators, the majority of whom had never before visited NKCEC. Although MDCPS claims that the presence of each administrator was necessary to address the variety of issues at hand (retirement, health insurance, budget concerns, and so forth), the credible evidence demonstrates that not all of these individuals actually spoke.[13/]

20. Tellingly, the administrators who did speak at the meeting offered a thoroughly one-sided and sometimes misleading assessment of the prospective conversion. Specifically, the faculty was told that, of the roughly 100 charter schools in Miami-Dade County, only one participated in the Florida Retirement System ("FRS"). MDCPS failed to mention, however,

that all of Miami-Dade's existing charter schools are "start-up" charter schools (a very different animal than conversion schools, which comprise, at least initially, a number of existing FRS members), nor did it point out, until an NKCEC employee pressed the issue at the very end of the meeting, that section 1002.33(12)(i) expressly authorizes charter school participation in FRS.[14/] Further, NKCEC's faculty members were advised that a conversion would necessarily result in the loss of their health insurance and other benefits.[15/] Once again, however, MDCPS neglected to disclose that, even if converted, NKCEC could continue to offer such benefits to its employees.

21. As for the economic feasibility of the prospective conversion, MDCPS' chief budget officer, Ms. Judith Marte, informed the faculty that NKCEC would face an annual budget shortfall in excess of approximately $1.25 million, a figure MDCPS now admits was inflated. Although Petitioners and MDCPS quarrel about the extent to which the deficit was overstated (approximately $100,000 versus upwards of $1 million), the undersigned need not resolve this question, for the evidence demonstrates that Ms. Marte's presentation, albeit flawed, reflected an honest attempt on her part to furnish accurate budget information.

22. Ms. Marte's honesty notwithstanding, the faculty meeting of February 7, 2012, was plainly intended to convey

MDCPS' stern disapproval of the prospective conversion. On this point, the undersigned is persuaded by the final hearing testimony of Mr. Richard Massa, a teacher with more than 30 years of experience, who credibly and aptly summed up the meeting as a "Pearl-Harbor like" bombardment of the negatives:

> A. No. What I disapproved of was 15 – I don't know the exact number, you know, maybe a dozen, maybe 18, but approximately 15 people coming in, never before coming around the school. . . . It's all like, if you do this, it's like – it's the wors[t] thing you could ever do to your life and the students. That's what I recall.
>
> So, you know, if you're asking me again, I'll stick to the two words I said; it was like Pearl Harbor. It was a blitzkrieg. I don't know how else to put it.
>
> Q. So they were just coming in like kamikazes at the meeting?
>
> A. You think it's funny? I don't. They were.[16/]

23. A parent information session was held some nine days later, a proceeding that was dominated, once again, by MDCPS administrators. Similar to the faculty meeting of February 7, 2012, the session's overall theme was clear: the conversion of NKCEC was a foolhardy and doomed endeavor. As a flourish to MDCPS' presentation, the parents were addressed by the former operator of a now-defunct charter school, who proceeded to describe his experiences relating to the institution's closing.[17/] Apparently frustrated with the one-sided nature of

the session, one parent eventually rose from her seat and implored the MDCPS administrators to permit Dr. Fernandez to speak.[18/] Only at that point, and with Mr. Gordillo's approval, was Dr. Fernandez afforded a brief opportunity to address the parents.

24. Before proceeding further, it is well to note that, during the preceding 14 academic years (i.e., 1998 until the prospective conversion), Dr. Fernandez' supervisors had always assessed his performance as either "distinguished" or "exemplary," the two highest ratings awarded by MDCPS. For this reason, Dr. Fernandez was dismayed to receive, on February 29, 2012, a "memorandum of professional responsibilities" from Mr. Gordillo. In the memorandum, Mr. Gordillo indicated that he had not been provided with advance notice of Dr. Fernandez' absence from NKCEC on February 28, 2012, and "reminded" Dr. Fernandez of his professional obligation to provide such notification.

25. In his written response to Mr. Gordillo, Dr. Fernandez credibly explained that he had, in fact, furnished prior notice of his absence to both him (Mr. Gordillo) and Ms. Goldman. Dr. Fernandez also lamented the unusual and sudden change in their longstanding professional relationship:

> Lastly, you and I have always been able to communicate openly and personally, without the need for a memorandum like the one I

> received. In the past, you have always communicated with me either in person, over the phone, or via email whenever you needed me to do something related to my professional responsibilities. You have been my immediate supervisor for over 14 years cumulative. The above-mentioned memorandum represents the first time you have ever given me a memorandum reminding me of my professional responsibilities.[19/]

26. This letter to Mr. Gordillo was not the only correspondence Dr. Fernandez had occasion to write during the weeks preceding the scheduled conversion vote. Indeed, on March 19, 2012, Dr. Fernandez sent a memorandum to Ms. Marte (as noted previously, MCDPS' chief budget officer) that requested, among other things, additional information concerning the revenues NKCEC generated during the previous school year. The correspondence read, in pertinent part:

> [W]e are in the process of finalizing a charter school conversion budget for our teachers and parents to review. However, we need more information. We would like to know what revenues our school both <u>generated and received during the 2010-2011 school year</u> that were not addressed in [Ms. Marte's memorandum of February 14, 2012] and/or were not discussed in the telephone conference of February 27, 2012 . . . . These revenues may include, but are not limited to, Medicaid reimbursement; Title II; Title III; Food Service funds; and Capital Outlay revenues, including Capital Outlay and Debt Service funds, funds generated by the Local Optional [Millage] tax, and any other maintenance funds to which our school is entitled. We would also like to kindly ask that you provide us with the amount of funds we could receive if our school was able to

> participate in the Performance Pay Plan as a charter school. Additionally, we kindly request that you provide us with any other operational costs that were not discussed in the aforementioned conference call and/or were not mentioned in your memorandum of February 14, 2012.
>
> Our intention for the above-mentioned requests is to make sure that we have all of the revenues and expenses when projecting a budget for [NKCEC's] conversion charter school operation, should the process for conversion charter school status continue . . . . We would like to have this information a reasonable time before the teachers and parents vote for approval to continue with the application for charter school status. This vote will take place the week of April 9, 2012.
>
> Additionally, members of our [EESAC] and other staff have requested information about grant allocations to our school. I am in a position to provide some, but not all, of the information. We have provided the EESAC and staff with the information we know about, but, we need to take you up on your invitation to assist us so we can provide the rest of it.

(emphasis added).

27. More than two weeks later, and a mere four school days before the conversion vote was scheduled to commence, Ms. Marte furnished a written response that addressed some, but not all, of Dr. Fernandez' questions. In particular, Ms. Marte reiterated MDCPS' (likely erroneous[20/]) position that, "[u]nder [the Individuals with Disabilities Education Act], Title II and Title III, as a charter school [NKCEC] would be eligible for

services and would not receive an allocation." Ms. Marte's correspondence further opined that, because MDCPS was not expected to receive Public Education Capital Outlay ("PECO") funds during the next fiscal year, NKCEC "would not be eligible for PECO dollars." Notably, however, Ms. Marte did not detail all of the revenue NKCEC generated for MDCPS, nor did she furnish the requested information concerning performance pay funds, the available grant allocations, or the total amount of Medicaid reimbursement associated with NKCEC for the 2010-2011 school year.

28. On March 28, 2012, one week before he received the response detailed above, Dr. Fernandez concluded that the lack of complete budget information——as well as unanswered questions regarding the alternative arrangements, if any, that would be made for current employees who did not wish to remain at NKCEC, if converted——necessitated a postponement of the conversion vote. In an e-mail to Ms. Goldman sent the same date, Dr. Fernandez explained his concerns and requested a brief delay of the voting, which was scheduled to commence on April 9, 2012. Two days later, on March 30, 2012, Ms. Goldman replied as follows:

> You need to do what you think is the right thing to do and what is in the best interest of the school and the students. Furthermore, the district does not object to

> less than 30 day renoticing of parents and teachers on the new vote date.[21/]

29. Notwithstanding Ms. Goldman's unequivocal representation of no objection (on behalf of "the district") to a brief postponement, Dr. Fernandez thereafter received a memorandum dated April 3, 2012, which directed him to proceed with the vote as originally scheduled. Authored by Ms. Fornell, a member of the superintendent's cabinet, the memorandum was peculiar in that it omitted any mention of Ms. Goldman's earlier agreement to a delay. Also noteworthy was that the memorandum represented a blatant usurpation of Dr. Fernandez' control over the voting, for as discussed earlier, Florida Administrative Code Rule 6A-6.0787(1) instructs that the school principal——and only the school principal——is responsible for the initiation and completion of the ballot process. Ironically, Ms. Fornell's memorandum also implied that the voting process itself, as opposed to the foreboding presence of Ms. Goldman and Mr. Gordillo, was responsible for "disruption" at NKCEC:

> The purpose of this memorandum is to respond to your March 28, 2012, request to postpone the charter school voting process, which was officially noticed to parents and faculty on March 6, 2012. Your request has been reviewed by the appropriate administrators and the Office of the School Board Attorney. In order to prevent further disruption, it has been determined that, in the best interest of [NKCEC] students, parents, and faculty, the voting process begin on April 9, 2012, as originally scheduled.

30. Owing to MDCPS' sudden, inexplicable, and last-minute change in position regarding a postponement, Dr. Fernandez reasonably concluded that insufficient time remained to furnish the parents and faculty with the accurate and objective information they needed to cast informed votes.[22/] As such, Dr. Fernandez conferred with Ms. Getchell, the EESAC chairperson, who rescinded the request for a conversion vote in a letter dated April 4, 2012.[23/]

31. Dissatisfied with the sudden turn of events, Mr. Tony Peterle, the parent of a NKCEC student, thereafter submitted a written request to reinitiate the ballot process. MDCPS' copy of the request, which was e-mailed to Dr. Fernandez and the superintendent on April 17, 2012, included the names and signatures of two other NKCEC parents, both of whom affirmed that they "agree[d] with Mr. Peterle and would like to investigate the options with charter school conversion at NKCEC."[24/]

32. Subsequently, on April 18, 2012, Ms. Goldman notified Dr. Fernandez by e-mail (with a courtesy copy provided to Ms. Fornell) that Mr. Peterle's letter was "insufficient" to initiate the charter school conversion process. The very same day, Ms. Fornell filed complaints against Dr. Fernandez and Mr. Cristobol with MDCPS' Incident Review Team. The complaints,

which were virtually identical, alleged that Dr. Fernandez and Mr. Cristobol:

> [U]sed position of authority to intimidate and coerce staff to support and influence the outcome of the vote for the proposed charter school conversion. Employee[s] inappropriately used time and resources to facilitate the charter school conversion process. Employee[s] arranged for an individual [i.e., Mr. Gibson] not properly authorized to come onto school grounds to address faculty and EESAC in support of charter school conversion.

33. The ensuing investigation and its outcome are detailed shortly; first, though, a brief discussion of MDCPS' Personnel Investigative Model ("PIM") is necessary. Adopted in 2004, the PIM details the procedures by which administrators, worksite supervisors, and principals should address incidents of misconduct. For instance, and of particular importance here, the PIM instructs that, prior to reporting an incident, the "administrator, principal, or worksite supervisor . . . shall make a determination as to whether the incident is one that can and should be competently and comprehensively addressed at the worksite." In making such a determination, the PIM admonishes that "[a]dministrators throughout the district are expected to address issues and/or conflicts at the worksite." According to the PIM, issues that "***SHOULD***" (the italics, bold type, and all caps appear in the original) be addressed at the worksite include, among others, the misuse of district time, technology,

or equipment, as well as minor violations of the Code of Ethics——the very sort of allegations leveled against Dr. Fernandez and Mr. Cristobol. The PIM provides, further, that only when an issue "cannot or should not be addressed at the worksite" should it be "reported to the Incident Review Team" ("IRT").

34. Upon its receipt of a report of misconduct, the IRT must review the allegations to determine if criminal behavior is implicated; if so, the matter is forwarded to MDCPS' General Investigative Unit. If not, the PIM authorizes the IRT to take one of three actions: refer the matter back to the worksite for resolution without an investigation; allow an administrator to conduct an investigation——a procedure known as an "Administrative Review"; or, in cases involving "serious non-criminal incidents of misconduct,"[25/] assign the matter to the Civilian Investigative Unit ("CIU"), which is expected, absent "unusual circumstances," to conduct an investigation and "forward[] a completed investigative report, including a determination of Probable Cause, No Probable Cause, or Unfounded to [the Office of Professional Standards] within thirty (30) business days[] from date of assignment by the IRT." If probable cause is found, the Office of Professional Standards ("OPS") must convene the Disciplinary Review Team, which formulates a proposed disciplinary action. Finally, the PIM

contemplates that the entire process——i.e., from the date of the incident to the imposition of discipline——should be completed within 60 work days.

35. Returning to the facts at hand, Ms. Fornell submitted her complaints concerning Dr. Fernandez and Mr. Cristobol with the IRT on April 18, 2012. Electing to treat the allegations as "serious non-criminal conduct," as opposed to issues that could be resolved at the worksite, the IRT transferred the cases to the CIU on the same date. Mr. Julio Miranda, the head of the CIU, immediately assigned the investigations to Ms. Terry Chester and, two days later, notified Dr. Fernandez and Mr. Cristobol that they had been named as subjects in a personnel matter.

36. Shortly after receiving the investigative assignment, Ms. Chester selected approximately 30 individuals (NKCEC faculty, staff, and a few parents) to interview regarding the allegations. Although Ms. Chester eventually mailed letters to each of the witnesses requesting their cooperation, the first such notice[26/] was sent on April 24, 2012, to NKCEC's custodian, Mr. Leroy Dixon. (An odd place to begin an investigation into allegations of voter intimidation and coercion, as Mr. Dixon, a non-teacher, was ineligible to cast a ballot.) Not surprisingly, Mr. Dixon's interview responses revealed no

evidence of coercion or any other wrongdoing on the part of Dr. Fernandez and Mr. Cristobol.

37. As for the balance of the witnesses, the record reflects that Ms. Chester's letters requesting their cooperation were not mailed until Thursday, April 26, 2012 (or later),[27/] more than a week after she was assigned the investigation, and two days after the solitary letter to Mr. Dixon. In pertinent part, the letters read:

> Please be advised that Terri A. Chester, Investigator, within the [CIU] for [MDCPS] has been assigned the responsibility of investigating the allegation that Mr. Henny Cristobol, Assistant Principal, and Dr. Alberto Fernandez, Principal, [NKCEC] *may* have violated School Board Policy 3210, Standards of Ethical Conduct, School Board Policy 3210.01, Code of Ethics, School Board Policy 7540.04, Staff Network and Internet Acceptable Use and Safety, and School Board Policy 7540.05, Staff Electronic Mail.
>
> You have been identified as a person who may have relevant information that could be used to establish some of the facts of this investigation. With your permission only, CIU is requesting your consent to be interviewed regarding the allegation listed above in order to complete a thorough and fair examination of the facts. It is our hope that you will agree to be interviewed regarding the above referenced matter.
>
> *It should be noted that you have the right to decline this request*. However, please understand that the [CIU] has a duty to continue the investigation and make a fair and objective determination with or without the opportunity to have an interview with you. . . .

> As this is an open investigation, no other information can be provided at this time. It must be noted that you are advised not to contact any subject(s) or witnesses, with the intent to interfere with this investigation.

(emphasis in original).

38. Thereafter, on April 30 or May 1, 2012, just two or three business days, respectively, after the foregoing letters were mailed, the head of the CIU, Mr. Miranda, requested that OPS transfer Dr. Fernandez and Mr. Cristobol to alternative assignments. Ms. Chester's explanation, which the undersigned discredits, is that Mr. Miranda made the request after she informed him that the NKCEC faculty members were not cooperating. By contrast, Mr. Miranda claims,[28/] likewise incredibly, that he requested the transfers because "information regarding the investigation was spreading amongst NKCEC employees"——activity that should hardly have been surprising given the numerous letters his subordinate, Ms. Chester, had disseminated to NKCEC's faculty and staff.

39. Nevertheless, on May 2, 2012, OPS relocated Dr. Fernandez to "Stores and Mail Distribution," where he would remain for more than a year, while Mr. Cristobol was reassigned to MDCPS' "Department of Transportation, Vehicle Maintenance." (Dr. Fernandez and Mr. Cristobol's experiences during their alternate assignments are detailed later in this order.) On the

same date, Ms. Fornell assumed the role as NKCEC's site administrator.

40. In light of MDCPS' concession[29/] that the charges did not involve a threat to the health, safety, or welfare of NKCEC's students or employees, the transfers of Dr. Fernandez and Mr. Cristobol were conspicuously at odds[30/] with its "Alternate Assignments" policy, which reads:

> Alternate assignments are considered exclusively when an allegation made is serious enough in nature to warrant the removal of an employee from the site to an alternate assignment until the resolution of the case (i.e. those that the health, safety, and welfare of students and/or employees may be affected).

41. During the ensuing weeks, Ms. Chester continued with her investigation, questioning a number of witnesses and conducting an examination of Dr. Fernandez and Mr. Cristobol's computer usage and e-mail activity. Ms. Chester discovered that, during the months preceding the aborted vote, Dr. Fernandez and Mr. Cristobol had utilized MDCPS computers and e-mail to conduct research and communicate regarding the prospective conversion. She also learned that Mr. Gibson had been present, with Dr. Fernandez' authorization, during the faculty meetings of February 2 and 3, 2012.

42. Neither of these findings was remarkable or indicative of wrongdoing, for, as discussed previously, school principals

are charged with initiating the ballot process, determining the eligibility of voters, creating and distributing ballots, and providing information to teachers and parents. See Fla. Admin. Code R. 6A-6.0787. As for Mr. Gibson's presence at the meetings, MDCPS policy 9150 expressly authorized Dr. Fernandez to invite and receive professional visitors.

43. More problematic, however, was Ms. Chester's conclusion that Dr. Fernandez and Mr. Cristobol had attempted to coerce NKCEC employees into voting for the conversion. On this issue, Ms. Chester's investigative reports read:

> Randomly selected employees, parents and EESAC members were selected for interviews regarding this allegation. Employees interviewed indicated that they were approached and/or coerced by Dr. Fernandez during school hours to vote to convert the school to a charter conversion. Not all employees felt coerced; however, several did feel coerced and they felt singled out.
>
> * * *
>
> Randomly selected employees, parents and EESAC members were selected for interviews regarding this allegation. Employees interviewed indicated that they were approached, coerced, and asked to trust the administration about this decision by Mr. Cristobol during school hours to vote to convert the school into a charter conversion. Not all employees felt coerced; however, several did feel coerced.

44. Notably, the instant record includes the typed statements of each witness interviewed by Ms. Chester. Having

undertaken a painstaking review of these materials, the undersigned finds no evidence of coercion or intimidation, as those terms are commonly understood.[31/] Perhaps this is because, as revealed during the final hearing, Ms. Chester purports to equate the very distinct concepts of persuasion and coercion:

> ADMINISTRATIVE LAW JUDGE: You say that it was your conclusion that some employees felt they had been coerced. What was – how did it get to the point where it was beyond persuasion? In what way were they coerced?
>
> THE WITNESS: I'm using those two words together.
>
> ADMINISTRATIVE LAW JUDGE: Persuasion -- they're synonymous?
>
> THE WITNESS: Correct.

45. As a result of Ms. Chester's conflation of these terms, the NKCEC parents and staff were never asked about coercion or intimidation——the principal allegations of Ms. Fornell's complaints against Dr. Fernandez and Mr. Cristobol. Instead, Ms. Chester merely inquired of the witnesses as follows:

> Were you <u>persuaded</u> by either Mr. Cristobol or Dr. Fernandez to vote to convert [NKCEC] to a charter school? If so, please explain.
>
> Have you ever been <u>approached</u> by [Dr. Fernandez/Mr. Cristobol] about converting [NKCEC] into a charter school? If yes, please tell me what occurred.
>
> Are you aware of Dr. Fernandez or Mr. Cristobol <u>asking</u> parents or staff members to

> vote a certain way to convert the school to a charter school?

(emphasis added).[32/] Notably, the only person Ms. Chester asked about "intimidation" or "coercion" was Ms. Goldman, whose statement was obtained more than a month after those of the other witnesses.[33/]

46. Having listened to several hours of testimony from Ms. Chester, who presented as an educated and articulate witness, the undersigned is convinced that she was fully aware of the distinction between persuasion and coercion and, moreover, that her conflation of these terms (with each witness save for Ms. Goldman) was consistent with an attempt by MDCPS to create an air of legitimacy for the illegitimate reassignments. Consider the final section of Ms. Chester's investigative report:

> Converting [NKCEC] into a charter conversion school was not a part of [Dr. Fernandez/Mr. Cristobol's] official duties. [Dr. Fernandez/Mr. Cristobol were] expected to ensure that the curriculum was followed, that the school was run in an efficient and safe manner and that the students' needs were met. [Dr. Fernandez/Mr. Cristobol] failed to meet these expectations when the school was rated an "F" by plant operations, the curriculum was not followed, the teachers were not teaching according to the access points outlined by the District, and students had not received grades nor were the teachers using the electronic gradebook.

(emphasis added).

47. To be sure, these are potentially serious issues. As it happens, though, the concerns relating to student grading, curriculum, and the use of the electronic gradebook were completely unfounded, while the plant operations grade was dubious at best. Beginning with the question of student grades, it is true that NKCEC's students were not receiving letter grades and that Ms. Goldman informed Ms. Chester as much. However, the credible evidence demonstrates that NKCEC students had been receiving progress reports in lieu of grades since 1998——some 14 years——with Mr. Gordillo's knowledge and assent.[34/] (The reader is reminded that Mr. Gordillo, Dr. Fernandez' supervisor, reported directly to Ms. Goldman.) For this reason alone, the undersigned rejects Ms. Goldman's assertion that she had no knowledge of NKCEC's use of progress reports.

48. As for Ms. Chester's finding (based on a statement from Ms. Goldman) that NKCEC teachers were not using MDCPS' "electronic gradebook," the credible evidence reveals, once again, that the practice had been occurring with Mr. Gordillo's permission for quite some time. This is reflected in an e-mail from Mr. Gordillo to Dr. Fernandez (and others) dated August 9, 2007, which reads:

> I asked both the principals of Merrick Educational Center and [NKCEC] to provide me feedback on this matter and we all agree that these schools should not be saddled with the constraints of electronic Gradebook

> given their extenuating circumstances. . . . Ms. Wehking clearly articulates some of the difficulties these schools experience if they are required to implement the electronic gradebook. Should you have any questions, please contact this office.[35/]

49. With respect to the question of curriculum, Dr. Fernandez' persuasive testimony demonstrates that, contrary to Ms. Goldman's assertion, NKCEC faculty had been teaching "access points" since 2011:

> There are what we call access points. These access points are watered -- I don't want to say watered down, but they are developed so that students with the most severe disability can access the general education curriculum. My conversation with Mr. Gordillo was, well, our students really – we cannot deny them the opportunity to access the general education curriculum, but this is not appropriate. He felt that we had to do it, and we did it. And I explained it to the staff.[36/]

50. Turning to the issue of NKCEC's cleanliness, the evidence establishes that, on May 2, 2012 (within hours of Dr. Fernandez and Mr. Cristobol's involuntary transfers), members of MDCPS' Department of Plant Operations conducted a "cleaning and sanitation audit." Respondent seeks to buttress the audit's results, which rated 76 percent of NKCEC's facility as "unsatisfactory," with the testimony of Ms. Goldman, who asserts that NKCEC was so filthy that it was necessary to disinfect each classroom with "germicide."[37/] In rejecting this bleak portrait of NKCEC, the undersigned notes, first, that the

76 percent "unsatisfactory" rating clashes sharply with the inspection results that immediately preceded the request for a conversion vote: 94 percent "satisfactory" or "very good" on May 18, 2011; and 90 percent "satisfactory" on January 4, 2010.[38/] Moreover, it is critical to recall that Ms. Goldman was stationed at NKCEC's campus, purportedly to answer questions, on a daily basis from February 2, 2012, until May 2, 2012, the date of the audit. As such, MDCPS' version of events would require the undersigned to believe, incredibly, that Ms. Goldman, who insists that she took no action to prompt an inspection,[39/] stood idly by——for some three months——in the face of unsanitary and hazardous conditions.[40/]

51. The investigation's lack of evenhandedness, although readily apparent at this point, is further exemplified by MDCPS' bizarre assertion that Dr. Fernandez and Mr. Cristobol were ethically barred from utilizing any worksite time or resources vis-à-vis the prospective conversion. Ms. Chester posited as much throughout her investigative report, and again during her final hearing testimony:

> THE WITNESS: During school hours, they were supposed to operate the school. They were supposed to facilitate teaching and learning in that environment, not to be working on charter conversion.
>
> * * *

> I said that their responsibility during the day was to be the principal and assistant principal. And their responsibility during the day was not to work on charter conversion. And that's, in fact, what was occurring.[41/]

This position is plainly at odds with Florida Administrative Code Rule 6A-6.0787, which obligates the principal, as the school administrator, to initiate and complete the ballot process in a timely manner; create and distribute ballots; confirm the eligibility of voters; and select an independent arbitrator to tally the votes——activities no reasonable person would expect (or require) a principal to carry out during evening or weekend hours. Ironically, MDCPS' position is also inconsistent with its own actions: namely, the multiple-month assignments of Ms. Goldman and Mr. Gordillo (neither of whose professional duties related to charter schools) to NKCEC's campus, ostensibly to field questions and educate the faculty about the ramifications of a conversion.

52. The short of it is that MDCPS' investigation[42/] yielded no evidence that would plausibly support Ms. Fornell's charges. Nevertheless, on June 22, 2012, Mr. Miranda notified Dr. Fernandez and Mr. Cristobol that there was probable cause to believe that they had violated "School Board Policy 8210, Standards of Ethical Conduct, School Board Policy 3210.01, Code of Ethics, School Board Policy 7540.04, Staff Network and

Internet Acceptable Use and Safety, and School Board Policy 7540.05, Staff Electronic Mail."

53. The consequences of the probable cause findings are detailed shortly. First, it is necessary to shift the narrative to the third Petitioner, Ms. Ramirez. As noted previously, Ms. Ramirez and a fellow colleague, Ms. Rodriguez, conducted research at Dr. Fernandez' behest regarding charter school conversions. It is undisputed that much or all of Ms. Ramirez and Ms. Rodriguez' research activities, which were comparable[43/] in scope and duration, occurred during school hours and with the use of NKCEC computers. Ms. Ramirez and Ms. Rodriguez were also similarly situated in that the research efforts did not impair their work performance. There was, however, a distinction between the two: Ms. Ramirez' husband, a certified public accountant, agreed to review——at no charge, and at the request of Dr. Fernandez——NKCEC's budget information to determine if a conversion would be economically feasible; Ms. Rodriguez' husband, by contrast, had no involvement with the prospective conversion.

54. Although the record is less than explicit, it appears that Ms. Chester learned of Ms. Ramirez and Ms. Rodriguez' charter research, as well as the informal involvement of Ms. Ramirez' husband, within a day or so of Dr. Fernandez and Mr. Cristobol's reassignments. Immediately thereafter, on

Friday, May 4, 2012, Ms. Fornell filed a complaint asserting that Ms. Ramirez had "used site resources and time to conduct non-school related activities"; significantly, no such allegations were lodged against Ms. Rodriguez. Upon reporting to work the following Monday, Ms. Ramirez was informed by Ms. Goldman that she was being reassigned, effective immediately, to MDCPS' Federal and State Compliance Office. Ms. Goldman then proceeded to escort Ms. Ramirez unceremoniously through NKCEC's back gate.

55. During the final hearing in this cause, Ms. Chester initially denied any knowledge of the reason for Ms. Ramirez' transfer:

> Q. And do you know what the reason was to determine -- I know you don't do it, but was it ever conveyed to you as to why Mrs. Ramirez had to be removed from the school?
>
> A. It was not conveyed to me.[44/]

When recalled to testify some two weeks later, Ms. Chester opined that the reassignment was not prompted by the informal involvement of Ms. Ramirez' spouse in the conversion process but, rather, by "concern" that Ms. Ramirez might relay to Dr. Fernandez and Mr. Cristobol the identities of the witnesses who had been selected for interviews.

56. Ms. Chester's explanation, which the undersigned discredits, is notably inconsistent with certain admissions by

Mr. Miranda to the Florida Department of Education ("DOE") during its independent investigation of Petitioners' reprisal complaints. In pertinent part, DOE's investigative report reads:

> When asked why Patricia Ramirez was included in the investigation when other staff members at NKCEC were also clearly utilizing District resources to research and communicate about the charter conversion process[,] Miranda commented that Ramirez was investigated and reassigned because "she sent hundreds of e-mails from her NKCEC e-mail account, plus her husband, Carlos, a CPA, was consulting for NKCEC regarding the charter conversion."[45/]

57. In any event, MDCPS has conceded that Ms. Ramirez' reassignment, as with the transfers of Dr. Fernandez and Mr. Cristobol, was unrelated to any concern for the health, safety, and welfare of NKCEC's students or faculty. This blatant departure from MDCPS' "Alternate Assignments" policy, buttressed by the events detailed earlier in this order, furnishes strong evidence that Petitioners' involuntary transfers would not have occurred but for their involvement in the conversion process.

58. As will be seen, Petitioners' paths diverged markedly following their transfers to the alternate work locations. The remaining factual findings are therefore organized Petitioner-by-Petitioner, beginning with the events relating to Dr. Fernandez.

III. Alternate Assignments & MDCPS' Disciplinary Dispositions

A. Dr. Fernandez

59. At the time of his reassignment to MDCPS' "Stores and Mail Distribution," Dr. Fernandez had served as NKCEC's principal——a position of immense responsibility——for more than 14 years, all the while earning favorable performance evaluations. Understandably, then, Dr. Fernandez was dispirited by the fact that, for the entirety of his involuntary transfer, which began on May 2, 2012, and continued until June 19, 2013, his new supervisor assigned him no more than an hour or two of duties each day. To make matters worse, Dr. Fernandez' responsibilities consisted exclusively of menial chores unbefitting a professional of his qualifications: sorting and packaging crayons; organizing car keys; packaging small mops; and sorting mail. For all that appears, Dr. Fernandez' weightiest assignment required him to perform an inventory, and even that took no more than a day or so.

60. As it happens, Dr. Fernandez' alternate assignment would have ended in June of 2012 were it not for Mr. Miranda's finding of probable cause. Suffice it to say that Dr. Fernandez did not take this turn of events lying down——on July 12, 2012, he, along with Mr. Cristobol and Ms. Ramirez, filed a complaint with DOE alleging unlawful acts of reprisal by MDCPS.

61. Subsequently, on July 19, 2012, Ms. Ana Rasco, the administrative director of MDCPS' Office of Professional Standards, convened a conference for the record ("CFR") to discuss Ms. Chester's investigative report. During the course of the CFR, Dr. Fernandez denied the allegations against him and voiced his disagreement with the investigative findings. At the CFR's conclusion, Ms. Rasco directed Dr. Fernandez to remain at his alternate placement, refrain from contacting any parties involved in the investigation, and abide by all MDCPS policies. Ms. Rasco further informed Dr. Fernandez that disciplinary measures, including non-reappointment, could follow, and that "[a]ll investigative data [would] be transmitted to Professional Practices Services (PPS), Florida Department of Education [], for review and possible licensure action by the Education Practices Commission (EPC)."[46/]

62. Concerned that his employment was in jeopardy, Dr. Fernandez submitted a letter to Ms. Rasco dated August 8, 2012, requesting that MDCPS withhold any imposition of discipline until DOE concluded its investigation of Petitioners' reprisal complaints. Although DOE did not officially terminate its reprisal inquiry until April 12, 2013, it did furnish a copy of its final investigative report——whose content was largely unfavorable to MDCPS——to the parties in November of 2012.

63. Seemingly undeterred by DOE's report, MDCPS subsequently notified Dr. Fernandez that, by virtue of CIU's findings, his reappointment as an administrator (which MDCPS had provisionally granted some months earlier) would be rescinded effective March 8, 2013. Unwilling to give up without a fight, Dr. Fernandez requested an appeal conference, which was ultimately held on April 2, 2013.

64. As noted above, DOE formally terminated its reprisal investigation on April 12, 2013, at which time its commissioner notified MDCPS' superintendent of schools that, with respect to each Petitioner, "reasonable grounds exist to believe that an unlawful reprisal has occurred, is occurring, or is to be taken." The commissioner further informed MDCPS' superintendent that Petitioners' complaints would be forwarded to DOAH to conduct a formal hearing.

65. Following the issuance of the commissioner's notice, Dr. Fernandez' plight improved dramatically. First, MDCPS determined that neither a written reprimand nor any other formal discipline would be imposed. (Oddly, the same cannot be said for Mr. Cristobol, who received a written reprimand prior to the formal termination of DOE's investigation.) And, on June 19, 2013, MDCPS removed Dr. Fernandez from the alternate assignment and appointed him "ESE Principal of Instruction Systemwide," a title he continues to hold.

66. During the final hearing, Dr. Fernandez expressed his desire to return to NKCEC as its principal, noting the relationships he had forged over the years with its students, faculty, and staff. Dr. Fernandez also lamented that, in contrast to his former principalship, which allowed him to serve as the site administrator for one school, his new position requires him to supervise multiple institutions. Nevertheless, the evidence demonstrates that Dr. Fernandez' current and former positions are comparable in terms of salary, benefits, and levels of responsibility.

67. This is not to say, however, that Dr. Fernandez suffered no loss of remuneration as a result of his ordeal. Specifically, the credible evidence demonstrates that, by virtue of his placement on alternate assignment, Dr. Fernandez was deprived of bonuses totaling at least $10,000 ($5,000 in 2011-2012, as well as an identical bonus the following school year).

B. Mr. Cristobol

68. The undersigned turns now to Mr. Cristobol, who was transferred to MDCPS' "Department of Transportation, Vehicle Maintenance" ("DOT") on May 2, 2012. At that time, Mr. Cristobol held a master's degree in educational leadership, had been employed with MDCPS for 15 years, and had served as NKCEC's assistant principal for six years.

69. Mr. Cristobol would soon discover, however, that his education and experience would be put to little use. Indeed, his first two or three days on alternate assignment were spent scanning a pile of documents. Once this backlog was cleared, Mr. Cristobol was asked, for the next two months, to scan new documents as they were received——a task he completed each morning in an hour or less. With no other assignments to perform, Mr. Cristobol spent the remainder of each workday (approximately seven hours) sitting in a small, sparsely furnished room. After several months of this routine, the DOT supervisor heeded Mr. Cristobol's pleas for additional work, permitting him to conduct inventories of auto parts.

70. The only silver lining for Mr. Cristobol was that, as a ten-month employee, the summer months afforded him a temporary reprieve from the drudgery of the alternate assignment. This would be short lived, however, for Mr. Miranda's finding of probable cause (on June 22, 2012) ensured that Mr. Cristobol would return to DOT at the start of the 2012-2013 school year. Mr. Cristobol's response to this turn of events was twofold: on July 12, 2012, he (and the other Petitioners) filed a complaint with DOE, which alleged that MDCPS had committed unlawful acts of reprisal; and, on August 7, 2012, he formally requested that MDCPS withhold any imposition of discipline until DOE completed its investigation.

71. As discussed previously, DOE forwarded a copy of its investigative report to Petitioners and MDCPS in November of 2012. Several months later, on January 30, 2013, MDCPS transferred Mr. Cristobol from DOT to an alternate assignment at South Dade Senior High School ("South Dade") as a temporary assistant principal.

72. On February 21, 2013, prior to the formal conclusion of DOE's reprisal investigation, MDCPS closed its disciplinary proceeding against Mr. Cristobol with the issuance of a written reprimand, which provided, in relevant part:

> During the 2011-2012 school year, there were several instances where you neglected your duties as Assistant Principal at [NKCEC]. This infraction was found to have Probable Cause by [the] Civilian Investigative Unit . . . . These actions were in violation of School Board Policies 1210, Standards of Ethical Conduct; 1210.01, Code of Ethics; 7540.04, Staff Network and Internet Acceptable Use and Safety; and 7540.05, Staff Electronic Mail.
>
> * * *
>
> Please be advised that any recurrence of the above infraction may lead to further disciplinary action.[47/]

With the disciplinary action concluded, MDCPS promptly removed Mr. Cristobol from alternate assignment status and continued his placement at South Dade as an assistant principal.

73. In June of 2013, several months after DOE's commissioner informed the parties that reasonable grounds

supported Petitioners' charges of reprisal, MDCPS transferred Mr. Cristobol to an assistant principalship at TERRA Environmental Research Institute ("TERRA")——one of MDCPS' premiere high school magnet programs, and an assignment comparable to his former position at NKCEC in terms of responsibility, salary, and benefits. In fact, Mr. Cristobol is now entitled to receive, by virtue of his placement at a high school, an annual supplement that boosts his total compensation by $4,000 annually.[48/] Simply put, there has been no showing that Mr. Cristobol's involuntary transfer to DOT or his subsequent placement at TERRA resulted in any loss of remuneration.[49/]

C. Ms. Ramirez

74. The undersigned turns finally to Ms. Ramirez, whose alternate assignment at MDCPS' "Federal and State Compliance Office" began on May 7, 2012. Although Ms. Ramirez would spend less time at her alternate placement (25 and one-half workdays) than the other Petitioners, her treatment was no less humiliating. Indeed, Ms. Ramirez spent the entirety of her first week removing staples from seemingly endless piles of documents——items she was required to scan during the remainder of her assignment.

75. Not surprisingly, Ms. Ramirez was troubled by the menial nature of these new duties, which were plainly

incompatible with her professional qualifications (a master's degree in early childhood special education) and years of experience. Indeed, Ms. Ramirez was so distraught that she would occasionally retreat from her work area to the restroom, where she would cry in solitude.

76. As a ten-month employee, Ms. Ramirez was not required to report to her alternate assignment during the summer of 2012.[50/] However, on July 13, 2012, Mr. Miranda notified Ms. Ramirez that the CIU had found probable cause to believe that she had "utilized District time and resources to conduct non-school related business."[51/] The supposed "non-school related business," of course, was the charter school research Ms. Ramirez performed at the behest of her supervisor, Dr. Fernandez——who, as NKCEC's administrator, was obligated to create ballots, verify voter eligibility, and carry out the voting process.

77. Ms. Ramirez was afforded a conference for the record on August 2, 2012, during which she voiced her disagreement with MDCPS' untenable position that NKCEC administrators and staff were precluded from utilizing any school time or resources in connection with the prospective conversion. Nevertheless, the district director in attendance, Ms. Anne-Marie DuBoulay, formally directed Ms. Ramirez to adhere to all MDCPS policies, to abide by the terms of her alternate placement, and to "cease

and desist from using District resources inappropriately." Ms. Ramirez was further admonished that non-compliance with these directives would "necessitate review by the Office of Professional Standards for the imposition of disciplinary measures."

78. Thereafter, on the first workday of the 2012-2013 school year, MDCPS removed Ms. Ramirez from her alternate placement, relocated her to one of its regional offices, and restored her to a placement specialist position. By all accounts, this new assignment, which Ms. Ramirez continues to hold (and wishes to retain[52/]), involves responsibilities and duties comparable to those of her former position. It appears, moreover, that Ms. Ramirez' total compensation is equal to or greater than what she received during her final year at NKCEC.[53/]

79. Some months later, on January 8, 2013 (subsequent to DOE's issuance of its investigative report), MDCPS disposed of its disciplinary action against Ms. Ramirez by re-issuing the directives imposed during the August 2012 conference for the record.

CONCLUSIONS OF LAW

I. Jurisdiction and Burden of Proof

80. DOAH has jurisdiction over the subject matter and parties to this case pursuant to sections 120.569, 120.57(1), and 1002.33(4)(a)6., Florida Statutes.

81. As the parties asserting the affirmative of the issue, Petitioners bear the burden of proof in this proceeding. See Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778, 788 (Fla. 1st DCA 1981).

II. Unlawful Reprisal

82. As discussed previously, the Legislature has made clear that charter schools shall be part of Florida's program of public education. § 1002.33(1), Fla. Stat. In furtherance of this objective, section 1002.33(4)(a) provides as follows:

> No district school board, or district school board employee who has control over personnel actions, shall take unlawful reprisal against another district school board employee because that employee is either directly or indirectly involved with an application to establish a charter school. As used in this subsection, the term "unlawful reprisal" means an action taken by a district school board or a school system employee against an employee who is directly or indirectly involved in a lawful application to establish a charter school, which occurs as a direct result of that involvement, and which results in one or more of the following: disciplinary or corrective action; adverse transfer or reassignment, whether temporary or permanent; suspension, demotion, or dismissal; an unfavorable performance evaluation; a reduction in pay, benefits, or rewards; elimination of the employee's position absent of a reduction in workforce as a result of lack of moneys or work; or other adverse significant changes in duties or responsibilities that are inconsistent with the employee's salary or employment classification.

83. Aptly recognizing the parallels between section 1002.33(4)(a) and the Florida Civil Rights Act ("FCRA," a statutory provision modeled after Title VII), the parties agree that the burden-shifting framework particular to retaliation claims should be used to evaluate Petitioners' complaints. Pursuant to that framework, a prima facie case is established upon proof: (1) that the employee engaged in a statutorily protected activity; (2) that he or she suffered an adverse employment action; and (3) that the adverse action was causally related to the protected activity. Blizzard v. Appliance Direct, Inc., 16 So. 3d 922, 926 (Fla. 5th DCA 2009). Where the employee makes a prima facie showing, the burden of production shifts and the employer must articulate a legitimate, nondiscriminatory reason for the adverse action. Id. If the employer is able to do so, the burden shifts back to the employee to demonstrate that the proffered reason is pretext for retaliation and that, more generally, the employee's "protected activity was a but-for cause of the alleged adverse action by the employer." Univ. of Tex. Sw. Med. Ctr. v. Nassar, 133 S. Ct. 2517, 2534 (2013).

84. In an effort to score an early knockout, MDCPS contends that, because an application to convert NKCEC was never filed, Petitioners cannot demonstrate that they engaged in a

protected activity——in this context, the direct or indirect involvement "with an application" to establish a charter school:

> Accordingly, because no application was filed, and thus there exists no protected activity, Petitioners cannot assert that they suffered unlawful reprisal for having engaged in a protected activity.

Resp't PRO at 24.

85. This argument is untenable for several reasons. First, MDCPS' interpretation would require the undersigned to read language into the statute that simply isn't there. For activity to be protected, section 1002.33(4)(a) requires only direct or indirect involvement "with an application"; the statute does not read "with a filed application" or "with a submitted application." Moreover, if the prohibition against unlawful reprisal were triggered only upon the filing of the application, a district hostile to charter schools could freely engage in scorched-earth tactics aimed at dooming an impending conversion vote or, worse yet, bullying its employees into abandoning the effort altogether.

86. Refusing to yield to the force of this reasoning, MDCPS asseverates that, if its interpretation of section 1002.33(4)(a) is rejected, "even the mere mention of the idea of conversion in a favorable light would be sufficient to trigger the protections of the statute." Resp't PRO at 23. After stuffing this straw man, MDCPS proceeds to shred it, contending

that such an expansive reading would render the statute meaningless. This argument, of course, fails to acknowledge that Petitioners did considerably more than "mention" the idea of conversion. Indeed, as detailed previously, the formal ballot process had been initiated (prompted by Petitioners' efforts), meetings with parents and faculty were held, and, as required by rule 6A-6.0787, a vote was scheduled.

87. It is concluded that where, as here, the ballot process was formally and lawfully set in motion, an "application" to convert the school existed whether it was ultimately filed or not. Significantly, this interpretation is consonant with the language of rule 6A-6.0787, which contemplates the existence of an application even absent a submission:

> (2) Ballot process.
>
> (a) Support for a conversion charter school shall be determined by secret ballot.
>
> (b) Teachers and parents shall be offered the opportunity to vote on whether or not to approve the charter school proposal.
>
> * * *
>
> (3) Ballot results.
>
> * * *
>
> (d) If a majority of teachers employed at the school and a majority of voting parents support the charter proposal, the conversion charter application must be submitted by the

> application deadline that follows the ballot. The ballot results may not carry over to another school year or application period.
>
> (e) If a majority of parents and/or teachers do not support the charter proposal, the application may not be submitted to the sponsor.

(emphasis added).

88. Having satisfied the first element of a prima facie case, Petitioners must next demonstrate that they suffered an adverse employment action. As section 1002.33(4)(a) instructs, such actions include, among other things: an adverse transfer or reassignment, whether temporary or permanent; disciplinary or corrective action; or other "adverse significant changes in duties or responsibilities that are inconsistent with the employee's salary or employment classification."

89. In light of the limited remedial authority granted by section 1002.33(4)(a), it is unnecessary to address each of the myriad adverse actions Petitioners have identified. It suffices instead to conclude that Petitioners' transfers from NKCEC to their respective alternate assignments, where they were required to perform menial tasks wholly incompatible with their positions, resulted in adverse significant changes in duties or responsibilities.

90. As for the element of causation, Petitioners have adduced substantial evidence that the adverse transfers would

not have occurred but for their involvement with the prospective conversion. As detailed previously, the initiation of the ballot process was immediately met with Mr. Gordillo's ominous remark to Dr. Fernandez that "repercussions" would ensue. This warning was accompanied by MDCPS' assignment of Ms. Goldman and Mr. Gordillo to NKCEC's campus, an action plainly intended to unsettle the faculty and derail the conversion effort. MDCPS continued its blitzkrieg with the dissemination of incomplete (and sometimes misleading) information to NKCEC's parents and faculty concerning the ramifications of a conversion. This was followed by MDCPS' improper usurpation of Dr. Fernandez' authority over the ballot process——power it wielded by issuing a last-minute directive to hold the vote as originally scheduled, notwithstanding its earlier, unequivocal representation to Dr. Fernandez that the vote could be delayed. Although Dr. Fernandez aborted the ballot process shortly thereafter, Ms. Goldman remained on NKCEC's campus for the next four weeks (a fact belying MDCPS' claim that she was assigned to NKCEC to "answer questions"), at which point Petitioners were transferred, in clear violation of MDCPS policy, to alternate work assignments. See Giacoletto v. Amax Zinc Co., 954 F.2d 424, 427 (7th Cir. 1992)(holding that the employer's deviation from its established procedure furnished circumstantial evidence of unlawful retaliation).

91. The foregoing evidence, formidable in itself, is buttressed by the conspicuous unfairness of the CIU investigations, which MDCPS conducted in a way that guaranteed adverse outcomes for each Petitioner. This was accomplished by MDCPS' adherence to the unreasonable notion that Petitioners were ethically prohibited from using any worksite time or resources in connection with the conversion, and by its deliberate conflation of "coercion" (what was actually alleged) and "persuasion" (what was actually investigated). As further evidence of improper animus, MDCPS capped off its investigations with a variety of spurious findings——for instance, that students were improperly receiving progress reports instead of grades, that an "unauthorized" visitor was permitted on campus, and that NKCEC should have been using MDCPS' electronic gradebook system——designed to paint Dr. Fernandez and Mr. Cristobol as negligent administrators.

92. Concluding that each Petitioner has established a prima facie case of unlawful reprisal, the burden shifts to MDCPS to proffer a nonretaliatory explanation for the adverse transfers. This burden is one of production, not persuasion—— that is, MDCPS need only introduce "evidence which, *taken as true*, would *permit* the conclusion that there was a [nonretaliatory] reason for the adverse action." St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993)(emphasis in

original); Kidd v. Mando Am. Corp., 731 F.3d 1196, 1205 n.14 (11th Cir. 2013)("[T]he employer's burden is not one of persuasion but a burden of production, which itself can involve no credibility assessment")(internal quotation marks omitted). In its Proposed Recommended Order, MDCPS posits, consistent with Ms. Chester's testimony, that Dr. Fernandez and Mr. Cristobol were transferred "to ensure that witnesses would cooperate in the investigation," and that Ms. Ramirez was relocated because the "CIU investigator feared that [her] presence at [NKCEC] could adversely impact the investigation by relaying information to Petitioners Fernandez and Cristobol." Resp't PRO at 14; 18. Taking these explanations as true for the moment, as the foregoing authority requires, MDCPS has sustained its burden of production.

93. With MDCPS' burden of production satisfied, the undersigned turns to the ultimate question: whether Petitioners have demonstrated by a preponderance of the evidence that, but for their involvement with the prospective conversion, the transfers to the alternate assignments would not have occurred. At this stage of the burden-shifting process, it is no longer necessary to accept MDCPS' proffered explanations as true; this is significant, as it is well settled that "a plaintiff's prima facie case, combined with disbelief of the defendant's proffered reasons for the negative employment action, permits a finding of

retaliation by the factfinder." Imwalle v. Reliance Med. Prods., 515 F.3d 531, 545 (6th Cir. 2008); King v. Preferred Tech. Group, 166 F.3d 887, 894 (7th Cir. 1999); see also Palmer v. Bd. of Regents of the Univ. Sys. of Ga., 208 F.3d 969, 974 (11th Cir. 2000)(explaining that the fact finder's "disbelief of the defendant's explanation is enough because the untruthfulness itself can provide the necessary inference of discrimination."). This is such a case, for as detailed earlier in the Findings of Fact, the undersigned has expressly discredited the testimony of MDCPS' witnesses concerning its reasons for the transfers. The disbelief of MDCPS' proffered explanations, in combination with the evidence adduced as part of Petitioners' prima facie cases, is sufficient to support the ultimate finding that MDCPS violated section 1002.33(4)(a).[54/]

III. Remedies

94. Turning finally to the question of remedies, section 1002.33(4)(b) provides, in relevant part:

> (b) In any action brought under this section for which it is determined reasonable grounds exist to believe that an unlawful reprisal has occurred, is occurring, or is to be taken, the relief shall include the following:
>
> 1. Reinstatement of the employee to the same position held before the unlawful reprisal was commenced, or to an equivalent position, or payment of reasonable front pay as alternative relief.

> 2. Reinstatement of the employee's full fringe benefits and seniority rights, as appropriate.
>
> 3. Compensation, if appropriate, for lost wages, benefits, or other lost remuneration caused by the unlawful reprisal.
>
> 4. Payment of reasonable costs, including attorney's fees, to a substantially prevailing employee, or to the prevailing employer if the employee filed a frivolous action in bad faith. . . .

(emphasis added).

95. As reflected by the forgoing language, each Petitioner is entitled, as a substantially prevailing party, to an award of attorney's fees. In addition, MDCPS must compensate Dr. Fernandez for $590 in costs he incurred during the course of the instant litigation.

96. With respect to compensation for "lost wages, benefits, or other lost remuneration caused by the unlawful reprisal," Dr. Fernandez has demonstrated that his placement on alternate assignment deprived him of bonuses totaling $10,000. It is concluded, however, that Petitioners' remaining requests for compensation either fail as a matter of proof or fall outside the ambit of section 1002.33(4)(b)3.

97. Finally, it is necessary to address Dr. Fernandez and Mr. Cristobol's requests for reinstatement to their former positions. In resolving this issue, it is critical to note,

first, that each Petitioner presently occupies an assignment that is equivalent, both in terms of compensation and responsibility, to his previous position at NKCEC. This is significant, for section 1002.33(4)(b)1. does not mandate the restoration of the employee to his or her former assignment; rather, it contemplates reinstatement either to the same position "or to an equivalent position." (Emphasis added). Finally, it is important to acknowledge that, during the two-year period since Dr. Fernandez and Mr. Cristobol's removal from NKCEC, MDCPS assigned two new administrators (neither of whom had any involvement with the reprisal) to fill the vacancies created by the involuntary transfers.

98. Although mindful of Dr. Fernandez and Mr. Cristobol's deep commitment to NKCEC's students and faculty, as well as the substantial grief and heartbreak that accompanied their adverse transfers, the undersigned declines to recommend Petitioners' reinstatement to their former positions——relief that would necessitate the displacement of NKCEC's entire administrative staff and result in further disruption to the institution.

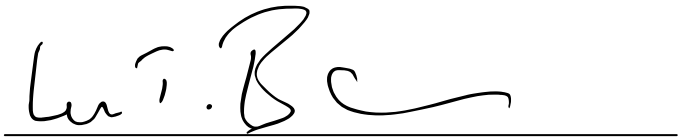
RECOMMENDATION

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

RECOMMENDED that the Florida Department of Education enter a final order: finding that the Miami-Dade County School Board

violated section 1002.33(4)(a) with respect to each Petitioner; awarding attorney's fees to each Petitioner; and ordering that the Miami-Dade County School Board compensate Petitioner Dr. Alberto T. Fernandez in the amount of $10,590.00.

DONE AND ENTERED this 30th day of June, 2014, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
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this 30th day of June, 2014.

ENDNOTES

[1/] Petitioners' Supplemental Exhibits 1 and 2 (respectively, the deposition transcripts of Tracy McCrady and Richard Shine) were received in lieu of the witnesses' live testimony.

[2/] Hr'g Tr. 88:4-9; 89:23-25.

[3/] Hr'g Tr. 1277:11-17.

[4/] Pet'r Ex. 17.

[5/] Mr. Gibson was in attendance, once again, with Dr. Fernandez' authorization.

[6/] Hr'g Tr. 406-407.

[7/] Hr'g Tr. 105:8-11.

[8/] See Petitioner's Exhibit 4, the February 10, 2012, memorandum from Ms. Fornell to Dr. Fernandez.

[9/] Hr'g Tr. 89-90.

[10/] In particular, Ms. Ondina Rodriguez testified credibly that the constant presence of the district-level staff was both intimidating and uncomfortable. Hr'g Tr. at 1354:25-1355:1-7. Similarly, Mr. Tebelio Diaz, an art teacher who has been employed with MDCPS for more than 20 years, persuasively testified that many of NKCEC's faculty were "scared, confused, [and] intimidated" by the presence of Ms. Goldman and Mr. Gordillo. Hr'g Tr. at 1381:12-16. Perhaps the most compelling testimony on this point came from Mr. William Detzner, a member of NKCEC's faculty since 1990, who offered credible testimony that the constant presence engendered an "atmosphere of very deep fear." Hr'g Tr. at 1284:11-14.

[11/] The undersigned rejects Ms. Goldman's testimony that she fielded "a lot" of questions concerning the prospective conversion. Instead, the credible evidence demonstrates that Ms. Goldman and Mr. Gordillo rarely had occasion to field inquiries from NKCEC's faculty. Hr'g Tr. at 411:1-13; 554:6-21.

[12/] Hr'g Tr. 100:20-21.

[13/] Hr'g Tr. 1336:8-10.

[14/] Hr'g Tr. 99:3-12; 264:3-19.

[15/] Hr'g Tr. 99:13-21.

[16/] Hr'g Tr. 1334:13-1335:6.

[17/] Hr'g Tr. 102:5-11.

[18/] Mr. Cristobol credibly described the parent's remarks as follows:

> And then there was another parent, Ms. Bundukamara, who literally stood up and said, "I know Dr. Fernandez real well, and I know he's not crazy. And if he thinks this

is a good idea, I would like to hear what he has to say about it."

Hr'g Tr. 423:13-17.

[19/] Resp't Ex. 6, p. 292.

[20/] See 20 U.S.C. § 7221e(a)("For purposes of the allocation to schools by the States or their agencies of funds under part A of subchapter I of this chapter, and any other Federal funds which the Secretary allocates to the states on a formula basis, the Secretary and each State educational agency shall take such measures as are necessary to ensure that every charter school receives the Federal funding for which the charter school is eligible not later than five months after the charter school first opens . . . .")

[21/] Pet'r Ex. 5; Hr'g Tr. 107:20-23.

[22/] Hr'g Tr. at 108:19-23.

[23/] Dr. Fernandez drafted the letter on Ms. Getchell's behalf.

[24/] Resp't Ex. 6, p. 505.

[25/] The PIM defines the CIU as the "entity assigned to investigate serious non-criminal incidents of misconduct made against MDCPS personnel." Pet'r Ex. 7, p. 8.

[26/] Resp't Ex. 6, p. 158.

[27/] Resp't Ex. 6, pp. 68; 74; 77; 83; 89; 95; 101; 108; 111; 118; 121; 128; 134; 137; 144; 147; 150; 152; 165; 171; 177.

[28/] Mr. Miranda's explanation in this regard, which the undersigned discredits, is documented in DOE's fact-finding report. Resp't Ex. 9, p. 36; Pet'r Ex. 14. The DOE report, admissible pursuant to section 1002.33(4)(a)4., has been used solely to evaluate the consistency of MDCPS' explanations regarding Petitioners' transfers.

[29/] Hr'g Tr. 873:21-874:7.

[30/] MDCPS contends that the policy's reference to "health, safety, and welfare" is illustrative, not exhaustive. This interpretation is patently unreasonable, however, for the policy expressly provides that "[a]lternate assignments are considered

exclusively when an allegation is serious enough in nature to warrant removal . . . (i.e. those that the health, safety, and welfare of students and/or employees may be affected)." (Emphasis added). The short form of the Latin "id est," "i.e." means "that is to say." Black's Law Dictionary 746 (6th ed. 1990). In other words, "i.e." is not the same as "e.g."——the abbreviation for exempli gratia, which means "for the sake of an example." Id. at 515; see also United States v. King, 849 F.2d 1259, 1260 (9th Cir. 1988)(explaining that the "abbreviation i.e. . . . introduces another way . . . of putting what has already been said. It does not introduce an example")(internal quotation makes omitted). Concluding that the language means what it says and that MDCPS understands what it means, the undersigned discredits the testimony that the policy has been routinely applied to employees whose alleged misconduct did not present a danger to the health, safety, and welfare of students or employees.

[31/] Of the litany of NKCEC employees and parents interviewed by Ms. Chester, only two provided information that even remotely warrants discussion. The first, Mary Surca, recounted that, on one occasion, Mr. Cristobol informed her that he could not locate a copy of her lesson plans; later, during the same conversation, Mr. Cristobol "discussed" the prospective conversion. Resp't Ex. 6 at 125. Notably, however, Ms. Surca did not indicate that she felt coerced, intimidated, or otherwise mistreated. Id. at 124-26. The other witness, Melissa Placido, advised that, during one of the faculty meetings convened to discuss the conversion, Dr. Fernandez identified her as the teacher with the least seniority at NKCEC——a fact Dr. Fernandez mentioned while expressing his opinion that a conversion would afford NKCEC employees greater job security. Id. at 161. Once again, though, there is absolutely no suggestion that the witness interpreted these comments as acts of intimidation or coercion. Id. at 160-62.

[32/] Resp't Ex. 6, pp. 64-65; 71-72; 80-81; 86-87; 92-93; 98-99; 104-105; 114-115; 124-125; 131-132; 140-141; 155-156; 161-162; 168-169; 174-175.

[33/] Ms. Goldman's statement reflects that she never personally witnessed any instances of intimidation or coercion on the part of Dr. Fernandez or Mr. Cristobol. Resp't Ex. 6, p. 45. This did not prevent her from alleging, incredibly, that "many teachers and staff"——none of whom she identifies——"came to [her] stating that they were intimidated and felt coerced." Id.

[34/] Hr'g Tr. 234-235; 677:6-16.

[35/] Pet'r Supp'l Ex. 5.

[36/] Hr'g Tr. 671:6-14.

[37/] Hr'g Tr. 712:12-14.

[38/] Pet'r Supp'l Ex. 8.

[39/] Hr'g Tr. 715:4-8; 715:18-21.

[40/] The photographs taken on the date of the inspection (found in Respondent's Exhibit 12) reveal nothing more than cluttered storage rooms, occasional instances of disarray about the outer grounds, and——hardly surprising given MDCPS' $1.8 billion maintenance backlog——a campus in need of repair. Hr'g Tr. 956:15-16. The short of it is that photographs, none of which depicts any area recognizable as a classroom, fail to corroborate Ms. Goldman's claim that the interior of NKCEC posed a sanitation hazard.

[41/] Hr'g Tr. 878:11-15; 879:6-10.

[42/] Ms. Chester's report is also critical of Dr. Fernandez for his occasional use of a school computer in connection with his volunteer work as a youth judo instructor. Notably, however, MDCPS policy expressly provides that "[p]ersonal use of the District's Network, including e-mail and Internet, is permitted as long as it does not interfere with an employee's duties, a student's learning activities and/or system operations . . . ." Resp't Ex. 4.

The CIU investigation also concluded that Dr. Fernandez behaved "unethically" by fielding inquiries from an attorney who had filed a complaint with the United States Department of Education's Office for Civil Rights on behalf of an NKCEC parent. (As best the undersigned can tell, the complaint alleged that MDCPS was discriminating against NKCEC's students, all of whom are disabled, by depriving them of the funding and staffing to which they were entitled.) Although it is possible that the attorney committed misconduct by contacting Dr. Fernandez directly (instead of through MDCPS counsel), it does not follow that Dr. Fernandez was ethically prohibited from communicating with the attorney. In fact, had he so desired, Dr. Fernandez could have personally filed the complaint on behalf of NKCEC's students. See 34 C.F.R. § 100.7(b)("Any

person who believes himself or any specific class of individuals to be subjected to discrimination prohibited by this part may by himself or by a representative file with the responsible Department official . . . a written complaint")(emphasis added).

[43/] Hr'g Tr. 540:23-541:14; 545:8-9.

[44/] Hr'g Tr. 888:25-889:1-4.

[45/] Resp't Ex. 9, p. 36; Pet'r Ex. 14

[46/] On December 13, 2013, DOE's commissioner found no probable cause to pursue disciplinary action against Dr. Fernandez' educator's certificate. Pet'r Ex. 16.

[47/] As a result of this disciplinary action, Ms. Rasco filed an updated report, dated May 1, 2013, with DOE's Office of Professional Practices Services. (Ms. Rasco first reported Mr. Cristobol to DOE on or about July 17, 2012.) DOE's commissioner ultimately determined that there was no probable cause to pursue disciplinary action against Mr. Cristobol's professional license. Pet'r Ex. 24.

[48/] Although Mr. Cristobol concedes that his present compensation (a salary of $80,000 and an annual supplement of $4,000) exceeds what he earned at NKCEC ($76,000), he nevertheless alleges an ongoing financial "loss" of $16,000 per year. Pet Supp'l Ex. 10. In particular, Mr. Cristobol argues that, because of TERRA's expansive activities schedule, he now works ten more hours each week than he did at NKCEC——hours he asserts are tantamount to unpaid overtime. This argument is without merit, however, for it is well established that administrative employees are not entitled to overtime compensation. See 29 U.S.C. § 213(a)(1); Viola v. Comprehensive Health Mgmt., 441 Fed. Appx. 660, 662 (11th Cir. 2011) (explaining that the Fair Labor Standards Act "exempts any employee employed in a bona fide administrative capacity from the general rule that employees are entitled to overtime compensation for time worked over forty hours in a workweek."). In any event, it is clear that the additional work hours are not the product of ongoing reprisal by MDCPS but, rather, flow from the more stringent time demands of the new position.

[49/] The undersigned has not overlooked the argument that Mr. Cristobol's reassignment to DOT deprived him of "Race to the Top" bonuses during the 2011-2012 and 2012-2013 school years. Although Mr. Cristobol undoubtedly missed out on these bonuses,

he has failed to adduce any non-hearsay evidence concerning their value. Indeed, the record contains only one reference to the bonus amounts:

> Q. Had you been [at NKCEC], what funding would you have received because of these Race to the Top funds?
>
> A. I do not know.
>
> Q. So you come up with $1,000. How did you get that?
>
> A. Speaking with colleagues, that's a conservative amount. They're receiving [$]1,500 to $1,750.

Hr'g Tr. 1449:20-1450:1. This testimony, while unobjected to, is insufficient alone to establish the value of the bonuses. See § 120.57(1)(c), Fla. Stat. ("Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions"); Scott v. Dep't of Bus. & Prof'l Reg., 603 So. 2d 519, 520 (Fla. 1st DCA 1992).

[50/] It is undisputed that Ms. Ramirez' placement on alternate assignment disqualified her from seeking employment with MDCPS during the summer of 2012. Pet'r Ex. 28. Although it is certain that Ms. Ramirez, if eligible, would have pursued summer employment, there is a paucity of evidence concerning the availability of such positions. The undersigned therefore declines to compensate Ms. Ramirez for the wages she might have earned during that period.

[51/] By virtue of MDCPS' probable cause determination, Ms. Rasco reported Ms. Ramirez to DOE for possible disciplinary action against her educator's certificate. On December 18, 2013, DOE's commissioner closed the matter with a finding of no probable cause. Pet'r Ex. 31.

[52/] On this point, Ms. Ramirez' testimony was as follows:

> ADMINISTRATIVE LAW JUDGE: Just in terms of the relief that you're requesting here, you don't – If I were to find a violation of the statute . . . and we're trying to formulate

> what to do for you, you are not asking me to move you from where you are; is that correct?
>
> THE WITNESS: That is correct. I want my record cleared.

Hr'g Tr. 665:5-12.

[53/] While it appears that Ms. Ramirez no longer receives one stipend in particular (furnished to educators assigned to institutions, such as NKCEC, which serve severely disabled children), her testimony fails to establish any overall loss of compensation. Indeed, Ms. Ramirez conceded during her cross-examination that she recently received a salary increase, and that she "doesn't know" how her total pay is calculated. Hr'g Tr. 662:11-22.

[54/] In reaching this result, the undersigned has given no weight to DOE's ultimate investigative conclusions, which were conclusory and unsupported by any analysis. See generally Coleman v. Quaker Oats Co., 232 F.3d 1271, 1281 (9th Cir. 2000)("[T]he EEOC probable cause determinations in these cases carry little weight since they are conclusory and completely devoid of analysis."). However, as explained in supra note 28, the witness statements documented in DOE's fact-finding report have been used to evaluate the consistency of MDCPS' explanations regarding Petitioners' transfers.

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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.