

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MIAMI-DADE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 14-3005TTS

ARLEEN GOMEZ,

Respondent.

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RECOMMENDED ORDER

A hearing was conducted in this case pursuant to sections 120.569 and 120.57(1), Florida Statutes (2013),^{1/} before Cathy M. Sellers, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH"), on January 20, 2015, in Miami, Florida, and on February 17, 2015, by webcast at sites in Miami and Tallahassee, Florida.

APPEARANCES

For Petitioner: Sara M. Marken, Esquire
Miami-Dade County School Board
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For Respondent: Branden M. Vicari, Esquire
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STATEMENT OF THE ISSUE

Whether just cause exists for Petitioner to suspend Respondent without pay and terminate her employment as a teacher.

PRELIMINARY STATEMENT

On or about June 18, 2014, Petitioner took action to suspend Respondent without pay and terminate her employment as a teacher. Respondent timely requested an administrative hearing to challenge Petitioner's proposed action, and the matter was forwarded to DOAH for assignment of an ALJ to conduct a hearing pursuant to sections 120.569 and 120.57(1).

On August 26, 2014, Petitioner filed the Notice of Specific Charges in this proceeding, effectively alleging that Respondent had impermissibly assisted her students on a series of reading tests, by helping them answer the test questions or changing the students' wrong answers to right answers. Petitioner charged Respondent with having violated specified Department of Education rules and School Board of Miami-Dade County policies.

The hearing initially was scheduled to be conducted by video teleconference on September 2, 2014; however, pursuant to the parties' joint motion for continuance, the hearing was rescheduled for September 24, 2014. Thereafter, the parties jointly moved the ALJ to conduct an in-person final hearing to enable her to view exhibits consisting of original test papers

containing erasure marks that would not be visible on duplicated copies of the papers. Accordingly, the final hearing was rescheduled for November 6, 2014, in Miami, Florida. However, due to illness of the undersigned, the final hearing was rescheduled for January 20, 2015. The final hearing commenced on January 20, 2015, in Miami, Florida, but did not conclude that day. The continued hearing was conducted by webcast and concluded on February 17, 2015, at sites in Miami and Tallahassee, Florida.

In its case-in-chief, Petitioner presented the testimony of Maria Zabala, Almendra Bodan, Mary Murphy, and Ana Sanchez. Petitioner's Exhibits 1 through 3, 14 through 16, 20 through 22, 24 through 42, 44, 45, 50, 54, 56, 57, and 59 were admitted into evidence without objection, and Petitioner's Exhibits 13, 19, 23, and 46 were admitted into evidence over objection. Respondent testified on her own behalf and presented the testimony of Susan Shugar. Respondent did not proffer any exhibits for admission into evidence. On rebuttal, Petitioner presented the testimony of Maria Zabala.

The two-volume Transcript of the final hearing was filed at DOAH on June 2, 2015, and the parties initially were given until June 12, 2015, to file proposed recommended orders. Pursuant to Petitioner's motion, the time for filing proposed recommended orders was extended to July 1, 2015. Respondent's Proposed

Recommended Order was timely filed on July 1, 2015, and Petitioner's Proposed Recommended Order was filed on July 2, 2015. The undersigned duly considered both proposed recommended orders in preparing this Recommended Order.

FINDINGS OF FACT

I. The Parties

1. Petitioner is a duly-constituted school board charged with operating, controlling, and supervising all free public schools within Miami-Dade County, Florida, pursuant to Article IX, section 4(b), Florida Constitution, and section 1001.32, Florida Statutes.

2. At all times relevant, Respondent was employed with Petitioner pursuant to a professional services contract as a teacher at Fienberg/Fisher K-8 Center ("Fienberg/Fisher"), a public school in Miami-Dade County, Florida.

3. Respondent has been employed with Petitioner as a teacher since 2005. She became employed at Fienberg/Fisher in the 2009-2010 school year, and taught kindergarten for the first three years. She taught third grade in the 2012-2013 and 2013-2014 school years.

4. At all times relevant, Respondent's employment was governed by the collective bargaining agreement between Miami-Dade County Public Schools and the United Teachers of Dade Contract, Petitioner's rules, and Florida law.

II. Evidence Adduced at Hearing

5. During the 2013-2014 school year, Respondent taught third grade. Between 18 and 20 students were assigned to her class, 12 of which were classified as "English for Speakers of Other Languages" ("ESOL") students.^{2/} Respondent had the largest number of ESOL students assigned to her classroom for the entire third grade at Fienberg/Fisher that school year.

A. The Reading Portfolios

6. During the 2013-2014 school year, the Florida Comprehensive Assessment ("FCAT") Test was administered statewide to third-grade students, including the third-grade students at Fienberg/Fisher.

7. Students must pass the FCAT to be promoted to fourth grade. If a student fails to earn the necessary minimum score of 2 (on a scale of 1 to 5, with 5 being the highest score) on the reading portion of the FCAT, the student is mandatorily retained in third grade unless he or she has successfully completed a series of reading passages and related tests called "Reading Portfolios" ("Portfolios").

8. Each Portfolio is an instructional package consisting of a reading passage covering a particular topic, followed by questions—essentially, a test—aimed at measuring the student's reading comprehension for the passage. The tests consist of a series of multiple choice questions, each having four answer

choices. In taking the test, the student is to select the one correct answer for each question.^{3/}

9. The reading passages in the Portfolios are administered as a "cold read," which means that the student sees the passage for the first time when he or she reads it in order to answer the test questions associated with that passage.

10. The Portfolios are administered over a ten-week period starting in January of the school year. Portfolios are administered one day per week, with one Portfolio administered that day, for a total of ten Portfolios that are administered to, and completed by, the students. Students may complete two additional Portfolios if needed.

11. The Portfolio reading passages and questions are keyed to the reading benchmarks that are tested on the FCAT.

12. A student has three opportunities to demonstrate, through completing the Portfolios, that he or she has mastered a particular reading benchmark.

13. The Portfolios help prepare the student to take, and presumably pass, the reading portion of the FCAT. They also enable a student who does not pass the reading portion of the FCAT to nonetheless be promoted to fourth grade, provided he or she is able to demonstrate, through the Portfolio tests, mastery of the reading benchmarks.

14. A student's scores on the Portfolios serve to alert the student, his or her parents, and the teacher as to whether the student is reading at a level sufficient either to pass the reading portion of the FCAT, or to demonstrate that he or she should be promoted to the fourth grade in spite of having failed the reading portion of the FCAT.

15. Therefore, it is vitally important that a student's Portfolio scores accurately reflect the student's actual performance on the Portfolios. To that point, it would be very harmful to a student if he or she received scores on the Portfolios indicating that he or she could read at a level sufficient to either to pass the FCAT or otherwise be promoted, when, in fact, that was not the case.

16. Third grade teachers at Fienberg/Fisher are trained to correctly administer the Portfolios. As part of their training, all teachers sign a security form. In doing so, the teacher acknowledges that the Portfolios are secure tests, that he or she may not share secure information with the students, and that he or she may not take any action that would cause the Portfolio results to be misinterpreted or scored in a way that does not accurately reflect student performance.

17. Respondent attended the training session for the 2013-2014 school year^{4/} and signed the security form acknowledging

that she was informed regarding the secure administration of the 2014 Portfolios.

18. In administering the Portfolios, the teacher distributes the particular Portfolio assigned for that day to the students. The Portfolio is not timed, so the students may take as much time as needed to read the assigned passage and complete the test questions.

19. When the Portfolio is administered, translation dictionaries are distributed to the ESOL students who need them to read the passages and complete the test questions.^{5/}

20. Most of Respondent's students were ESOL and most of them used translation dictionaries when reading the 2014 Portfolio passages and taking the tests associated with those passages.

21. When a student finishes a Portfolio, he or she returns the Portfolio materials, including the completed test questions, to the teacher.

22. The teacher grades the test and records the student's score for the test for that particular Portfolio reading passage on a Score Summary Sheet, which is kept in the individual student's Portfolios folder.^{6/} The Score Summary Sheet identifies the specific benchmarks being tested on each reading passage and test. When a student's response to a question constitutes an "acceptable demonstration" that the student has

met the specific benchmark being tested for that particular Portfolio passage, the teacher checks the Score Summary Sheet indicating that the benchmark has been acceptably demonstrated. As noted above, the student has three opportunities to demonstrate mastery of a particular benchmark and, if necessary, may complete two additional Portfolio passages and tests to demonstrate benchmark mastery.

23. Once the teacher has scored each student's test for a particular Portfolio passage and recorded each student's test score on the student's Score Summary Sheet, the teacher returns the graded test to the student.

24. The teacher then reviews the reading passage and the graded test questions with the class, identifying the correct answer for each question and explaining why that answer is correct and the other choices are incorrect. The review is instructional, so is a crucial component of the correct administration of the Portfolios.

25. Following review of the specific Portfolio reading passage and test with the class, the teacher collects the graded tests, which are securely stored, along with the other Portfolio passages and tests, in the student's Portfolio folder.

26. Respondent stored the students' Portfolios folders in a locked cabinet or closet in her classroom, so they were not readily accessible to others.

27. For the 2013-2014 school year at Fienberg/Fisher, Portfolios were administered on Thursdays starting in January 2014.

28. The third-grade teachers at Fienberg/Fisher decided, as a group, the order in which the specific Portfolios would be administered to the students based on the reading benchmarks being covered at the time. The same Portfolio was administered to all students present in the class on a given day.^{7/}

B. Events Triggering Investigation of Portfolios

29. On March 6, 2014, Respondent notified Maria Zabala, the principal at Fienberg/Fisher, that due to her father's illness, she needed to take personal leave.

30. At the final hearing, Zabala testified, credibly, that when Respondent requested to take leave, she told Zabala that she nonetheless needed to be present on Thursday to administer the Portfolios to her students.

31. Zabala testified that, initially, she did not understand why Respondent insisted that she needed to be present to administer the Portfolios and was under the impression that Respondent simply wanted to be supportive of her students. However, Respondent explained that if she wasn't there, the students would not do well because she needed to help them. At that point, Zabala stopped the conversation and asked Respondent

to report to her office the following morning to continue the discussion.

32. Zabala testified, credibly, that when Respondent came to her office on the morning of March 7, 2014, she recounted to Respondent her understanding of their conversation the previous day, stating "[t]his is what I understood of our conversation yesterday. I understood that you need to be here for Portfolio because the students are helped when they're taking Portfolio." Zabala credibly testified that in response, Respondent "went back and forth a little, but then settled on "[y]es, I'm there and I help them, because if not, they won't do well."

33. At that point, Zabala called Assistant Principal Mary Murphy to her office and asked Respondent to explain to Murphy how she administered the Portfolios. Zabala testified, credibly, that Respondent also told Murphy that she helped her students take the Portfolios.

34. Zabala explained to Respondent that the Portfolios are a secure test and that in order to determine if Respondent's actions breached test security, she was required to report the matter to Petitioner's investigative unit. Zabala testified that at that point, Respondent asked what would happen next.

35. Murphy corroborated Zabala's version of the discussion between Zabala, Respondent, and herself. She testified, credibly, that when Zabala asked Respondent to repeat, in her

(Murphy's) presence, what she previously had relayed to Zabala, Respondent stated that the students could not take the reading Portfolios if she wasn't present because they would not score well, that she needed to be there to ensure they would answer in the correct way, and that that the Portfolios needed to be scored a certain way to ensure the students passed.

36. Murphy reminded Respondent that changing answers or helping the students on the Portfolios would misrepresent student scores and would be very detrimental to the students and the school.

37. Murphy testified, credibly, that Respondent then responded that the reading coach, Danielle Klahr, had told her to help the students take the Portfolios.^{8/}

38. Thereafter, Zabala retrieved the Portfolios from Respondent's classroom and securely stored them in her office.

39. Thereafter, Respondent did not administer the reading Portfolios to her students, but did continue teaching at Fienberg/Fisher for the rest of that school year.

40. Respondent's version of these events differs sharply from Zabala's and Murphy's.

41. Respondent testified that on March 6, 2014, when she notified Zabala that she needed to take one week of leave due to her father's illness, Zabala became upset and tried to dissuade her from taking leave. Respondent characterized Zabala's

response as "like a guilt trip. She basically cried and told me, you know, that she needed me to be there and how my students were going to suffer and how I really didn't care about my students."

42. Respondent testified that at that point, she offered to come in on Thursday and administer the Portfolio to her students. She stated: "I wasn't even thinking about correcting it. I'm talking about administering it because children need consistency and they will not be as nervous as they would be if they had somebody else. So I was doing that as a favor. However, that was extremely misconstrued."

43. According to Respondent, she went to Zabala's office on the morning of March 7, 2014, for the sole and specific purpose of requesting two weeks' leave instead of the one week she originally had requested. She testified: "[t]he only thing—the only conversation that I was thinking on having with Ms. Zabala that morning was the fact that I got the paper signed for me to take the week off."

44. Respondent testified that Zabala refused to approve her request for two weeks' leave and that in the course of their discussion, Zabala questioned the accuracy of her students' Portfolio test scores, which she recently had submitted. According to Respondent, Zabala observed that Respondents' students previously had failed interim reading tests and other

tests but now "mysteriously" were performing relatively well on the Portfolios.

45. Respondent testified that Zabala ordered her to bring the students' Portfolios to her office, and she complied.

46. Respondent testified that in the discussions with Zabala and Murphy, she had explained that she needed to be present to administer the Portfolios because "children need consistency[,] [a]nd them having another teacher in the Portfolio would be devastating for them."

47. Respondent claimed that she had "offered," rather than requested, to be present to administer the Portfolios, and that her offer was "misconstrued."

48. Respondent denied having allowed her students to cheat on the Portfolios, and she denied having told Zabala and Murphy that she allowed her students to cheat on the Portfolios.

49. Respondent did not specifically address or deny Murphy's testimony that she (Respondent) had told Murphy that the reading coach had told her to assist the students in taking the Portfolio tests.

C. Petitioner's Investigation

50. Respondent's students had completed an estimated six Portfolios by the time Zabala retrieved their Portfolios.

51. Zabala reviewed the Portfolios to determine whether Respondent had helped her students cheat on the Portfolios. She

specifically reviewed the students' test papers to determine, from erasure marks on the tests, "did [the students] go too many times from wrong answers to right answers."

52. Zabala testified that on several of the students' Portfolio test papers, there were numerous erasure marks showing that the student had erased the wrong answer, and that the right answer had been circled. Zabala interpreted that as indicating either that Respondent had told the student the right answers and allowed them to change wrong answers to right answers, or that Respondent herself had erased the wrong answers and circled the right answers.

53. Zabala acknowledged that she did not review Respondent's students' test papers to evaluate the frequency with which the students changed answers from right to wrong or from wrong to wrong, and she further acknowledged that she did not review the Portfolio test papers for any of the other third-grade classes.

54. Zabala noted that many of Respondent's students' test papers were graded in pencil, rather than pen and asserted that this was a violation of test protocol because it enabled the students or Respondent to erase "X" marks placed next to the wrong answers and to select the right answers. She testified, based on her review of Respondent's students' papers, that it appeared that this had happened.

55. The evidence showed that in several instances, students' test papers were not graded, but scores for those tests nonetheless were recorded on the Portfolio Score Summary Sheets kept in the students' folders. Zabala explained that it is extremely important that the test papers are graded and returned to the students, because review of the graded tests enables the students to learn from their mistakes and, therefore, be better prepared to take the FCAT.

56. Zabala also testified that in several instances, students who consistently had performed poorly on previously-administered standardized tests, including the Stanford Achievement Test ("SAT") and the second-grade FCAT, had performed comparatively well on the Portfolio tests that Respondent administered. She observed that it is uncommon for a student who previously performed poorly on such tests to perform well on the Portfolios. The clear import of Zabala's testimony was that she believed that the students' improved performance on the Portfolios was due to Respondent having helped the students or having herself changed wrong answers to right answers.

D. Invalidation of Respondent's Students' 2014 Portfolios

57. Following her discussion with Respondent and Murphy on the morning of March 7, 2015, Zabala contacted Petitioner's District office to report the suspected security breach in Respondent's administration of the 2014 Portfolios.

Petitioner's Civilian Investigative Unit conducted an investigation of the matter.

58. Ultimately, as a result of the investigation, the Portfolios that had been completed by Respondents' students to that point in the school year were invalidated.

59. Because their 2014 Portfolios were invalidated, the students were required to complete another set of Portfolios.

60. Invalidating the 2014 Portfolios placed Respondent's students, their parents, and the school in a very difficult position. The students were confused and did not understand why they were being forced to complete another set of Portfolios. Many of them wondered if they had done something wrong and were concerned about being retained in the third grade. The students' parents, understandably, were distraught that their children had to complete another set of the Portfolios. The administration and teaching staff at Fienberg/Fisher were placed in the difficult circumstance of having to administer ten weeks of replacement Portfolios in a compressed timeframe before the FCAT was administered in April 2014.

E. Administration of Replacement Portfolios

61. As replacement for the invalidated 2014 Portfolios, the students completed Portfolios that previously had been given to third-grade students in the 2012-2013 school year ("Replacement Portfolios").

62. Because there were only a few weeks remaining between invalidation of the 2014 Portfolios and administration of the 2014 FCAT, Respondent's students were forced to complete more than one Replacement Portfolio per week.

63. Susan Shugar, a reading specialist who administered the Replacement Portfolios to Respondent's students, testified that in administering the Replacement Portfolios, "I was just there. I did what I was told, and that's it." She testified that she was not told to distribute translation dictionaries to the students in Respondent's class, so she did not do so. Shugar testified: "I think maybe one student had a dictionary and that's it."

64. Many of Respondent's students performed significantly worse on the Replacement Portfolios than they had performed on the 2014 Portfolios. Zabala interpreted this as further evidencing that Respondent had assisted her students in taking the Portfolios, either by giving them the correct answers or changing their incorrect answers.

F. Specific Charges Against Respondent

65. In its Notice of Specific Charges, Petitioner alleges that Respondent engaged in conduct that helped the students in taking the Portfolio tests by allowing them to change their answers from wrong to right—essentially, that she help her students cheat on the tests. Petitioner charges that

Respondent's conduct constitutes misconduct in office under Florida Administrative Code Rule 6A-5.056; violates the Code of Ethics of the Education Profession in Florida, rule 6A-10.080; violates the Principals of Professional Conduct for the Education Profession in Florida, rule 6A-10.081; violates the School Board of Miami-Dade County ("School Board") Standards of Ethical Conduct, Policy 3210; and violates the School Board Code of Ethics, Policy 3210.01.

III. Findings of Ultimate Fact

A. Evidentiary Findings

66. Having fully and carefully considered the evidentiary record, it is determined that Petitioner has shown, by a preponderance of the competent, substantial, and persuasive evidence, that Respondent did, in fact, did help her students cheat on the Portfolio tests, and that this conduct constitutes misconduct under rule 6A-5.056; violates the Code of Ethics of the Education Profession in Florida, rule 6A-10.080; violates the Principles of Professional for the Education Profession in Florida, rule 6A-10.081; and violates School Board Policies 3210 and 3210.10.

67. The undersigned found Zabala and Murphy to be very credible witnesses,^{9/} and found their account of the discussions that took place on March 6 and 7, 2014, to be far more

persuasive and credible than Respondent's account of those discussions.^{10/}

68. As discussed above, the persuasive evidence establishes that when Respondent told Zabala that she needed to be present to administer the Portfolios, Zabala herself initially thought that Respondent merely meant that she needed to be present in order to provide consistency for her students. However, specifically to ensure that she did not misinterpret Respondent's statement, Zabala asked Respondent to clarify, and that based on Respondent's explanation, Zabala concluded that Respondent meant that she needed to be present to help the students get the right answers on the Portfolio tests.

69. Murphy precisely corroborated Zabala's version of the March 7, 2014, discussion with Respondent. Based on Murphy's discussion with Respondent, Murphy also concluded that Respondent did indeed admit that she helped her students get the right answers on the Portfolio tests.

70. Given Zabala's and Murphy's precise testimony on this point, it is difficult to envision that they both "misconstrued" Respondent's statements, made during three separate discussions, such that they both incorrectly concluded that Respondent had effectively admitted that she helped her students get the right answers when they took the Portfolio tests. Accordingly, the undersigned rejects, as incredible and unpersuasive,

Respondent's claim that Zabala and Murphy "misconstrued" her March 6 and March 7, 2014, statements.

71. Murphy's testimony that Respondent told her that the reading coach had directed her (Respondent) to help the students take the Portfolio tests was credible and persuasive.

Respondent's attempt to exculpate herself by blaming the reading coach constitutes a tacit admission that she did, in fact, help her students cheat on the tests.

72. Based on the foregoing, the undersigned finds that Respondent effectively admitted that she helped her students cheat in taking the 2014 Portfolios.

B. Findings Regarding Violation of Rules and Policies

73. Whether Respondent committed the offenses charged in the Notice of Specific Charges is a question of ultimate fact to be determined by the trier of fact in the context of each alleged violation.

a. Misconduct in Office

74. As noted above, Petitioner has charged Respondent with misconduct in office under rule 6A-5.056(2). The rule defines misconduct in office to mean conduct that constitutes one or more of the following: (a) a violation of the Code of Ethics of the Education Profession in Florida as adopted in Florida Administrative Code Rule 6B-1.001^{11/}; (b) a violation of the Principles of Professional Conduct for the Education Profession

in Florida as adopted in rule 6B-1.006^{12/}; (c) a violation of the adopted school board rules; (d) behavior that disrupts the student's learning environment; or (e) behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

75. Respondent's conduct in allowing or enabling her students to cheat on the Portfolio tests violated rule 6B-1.001, the Code of Ethics of the Education Profession in Florida. Her conduct evidences that she does not value the truth and is not devoted to excellence in her teaching. She failed to exercise the best professional judgment and integrity, and her failure to achieve and sustain the highest degree of ethical conduct caused her to lose the respect and confidence of her colleagues at Fienberg/Fisher, and, presumably, the parents of the children who were forced to complete another set of Portfolios due to her conduct. Accordingly, Respondent's conduct constitutes misconduct in office as provided in rule 6A-5.056(2)(a).

76. Respondent also violated rule 6B-1.006, the Principles of Professional Conduct for the Education Profession in Florida. Respondent's conduct in helping her students cheat on the Portfolio tests harmed the students by giving them and their parents the misimpression that they were more proficient in reading than actually was the case. As a result of her actions, her students were denied the benefit of learning from their

mistakes on the Portfolios, so that they could be better prepared to take the FCAT. Respondent failed to maintain honesty in her professional dealings, and she submitted fraudulent information on documents in connection with her professional activities. Accordingly, Respondent's conduct constitutes misconduct in office as provided in rule 6A-5.056(2)(b).

77. Respondent's conduct also violated School Board Policy 3210. She failed to conduct herself in a manner that reflected credit on herself and on the school system, and also failed to teach efficiently and faithfully by employing approved methods of instruction as provided by law and the rules of the Department of Education. As discussed above, her conduct did not protect students from conditions harmful to learning; she failed to maintain honesty in her professional dealings; and she submitted fraudulent information on documents in connection with her professional activities. Accordingly, Respondent's conduct constitutes misconduct in office as provided in rule 6A-5.056(2)(c).

78. Respondent's conduct also violated School Board Policy 3210.01. She failed to create an environment of honesty and integrity and did not aid in providing a high quality education to her students. As discussed above, her conduct evidences that she does not value the truth and that she is not

devoted to excellence in her teaching. She failed to exercise the best professional judgment and integrity, and she did not achieve and sustain the highest degree of ethical conduct. She failed to adhere to the fundamental principles of Petitioner's Code of Ethics because she did not deal truthfully with, or exhibit respect for her students, their parents, and her colleagues at Fienberg/Fisher. Further, when it became apparent that Respondent had helped her students cheat so that she may be subject to discipline, she did not accept responsibility for her actions and instead attempted to blame a colleague. She failed to perform her job as a teacher efficiently and effectively and, as discussed above, failed to protect her students from conditions harmful to learning. Accordingly, Respondent's conduct constitutes misconduct in office as provided in rule 6A-5.056(2)(c).

79. Respondent's conduct disrupted her students' learning environment. As discussed above, her conduct harmed her students by causing or contributing to the misimpression that they were capable of reading at higher levels than actually was the case. Further, as a direct result of her conduct, her students were forced to complete another set of Portfolios under suboptimal conditions, which may have resulted in some of them performing poorly and being retained in the third grade. Thus,

Respondent's conduct constitutes misconduct in office as provided in rule 6A-5.056(2)(d).

80. Respondent's conduct unquestionably reduced her and her colleagues' ability to effectively perform their teaching duties. As a direct result of her conduct in administering the 2014 Portfolios, she was relieved of that duty and her colleagues were forced to assume the responsibility of administering the Replacement Portfolios under a compressed timeframe. Respondent's conduct thus constitutes misconduct in office as provided in rule 6A-5.056(2)(e).

b. Violation of the Code of Ethics

81. Petitioner also has charged Respondent with violating the Code of Ethics of the Education Profession in Florida, rule 6A-10.080.^{13/}

82. As discussed above,^{14/} the evidence establishes that Respondent's conduct violated this rule.

c. Violation of the Principles of Professional Conduct

83. Petitioner also has charged Respondent with violating the Principles of Professional Conduct for the Education Profession in Florida, rule 6A-10.081.^{15/}

84. As discussed above,^{16/} the evidence establishes that Respondent's conduct violated this rule.

d. Violation of School Board Policies

85. Petitioner has charged Respondent with violating School Board Policies 3210 and 3210.10.

86. As discussed above,^{17/} the evidence establishes that Respondent's conduct violated these policies.

C. Weight Assigned to Other Evidence in the Record

87. Petitioner's evidence regarding Respondent's grading of the Portfolio test papers was not persuasive. Although Zabala testified that many of Respondent's students' test papers appeared to have an unusually large number of erasure marks and changes of wrong answers to right answers, she acknowledged that she did not look for or count the number of changes from right answers to wrong answers or wrong answers to wrong answers. Further, she acknowledged that she did not compare any other third-grade students' Portfolio test papers with those of Respondent's students in order to determine whether the number of erasures and answer changes on Respondent's students' papers actually were inordinately high. Without these benchmarks, there is no factual basis on which to conclude that there was an unusually large number of erasure marks on Respondent's students' test papers, and, thus, that Respondent helped her students cheat on the Portfolio tests.

88. The undersigned also found unpersuasive Zabala's testimony that on some of Respondent's students' test papers,

circles around some correct answers were larger than circles around answers on those same papers—evidencing that Respondent herself had circled the correct answers on the test papers. Zabala was not qualified as an expert in handwriting and was not otherwise shown to be competent to testify on this point. See Huff v. State, 437 So. 2d 1087 (Fla. 1983) (the trier of fact is not competent to make a handwriting comparison without the aid of expert testimony); Clark v. State, 114 So. 2d 197 (Fla. 1st DCA 1959) (the comparison of handwriting is an art which can be judicially practiced only by expert or skilled witnesses).^{18/} Accordingly, her testimony on this point is not considered reliable and is given no weight in this proceeding.

89. The undersigned also finds unpersuasive Zabala's testimony to the effect that Respondent graded many of her students' test papers in pencil rather than pen specifically to facilitate cheating. The credible, persuasive evidence establishes that teachers were not required to grade the Portfolio papers in pen; therefore, it is speculative to surmise that Respondent graded the Portfolio tests in pencil specifically to help her students cheat on the Portfolios.

90. The undersigned also finds unpersuasive Petitioner's evidence regarding Respondent's students' poor performance on the Replacement Portfolios as compared to that on the 2014 Portfolios. The credible, persuasive evidence establishes that

Respondent's students took Replacement Portfolios under significantly different conditions than those under which they took the 2014 Portfolios. Specifically, Respondent's ESOL students—which comprised a substantial majority of the class—had used translation dictionaries in taking the 2014 Portfolios but were not able to use them in taking the Replacement Portfolios. Thus, it is entirely reasonable to infer that their significantly poorer performance on the Replacement Portfolios was due to this substantial inconsistency in how the 2014 Portfolios and Replacement Portfolios were administered. In any event, Petitioner did not demonstrate, by credible, persuasive evidence, that the reason Respondent's students performed markedly worse on the Replacement Portfolio tests than they had on the 2014 Portfolios was because Respondent helped them cheat on the 2014 Portfolios.

91. The undersigned also assigns no weight to Zabala's testimony that Respondent's students' markedly better performance on the 2014 Portfolios tests compared to their performance on previously-administered SAT and FCAT exams, and that this indicated that Respondent had helped her students cheat on the Portfolio tests. The interpretation and comparison of different types of standardized and non-standardized educational evaluation instruments, such as the SAT, FCAT, and Portfolio tests, requires special knowledge, skill, experience,

or training in educational measurement or a similar subject area, and, therefore, is appropriately the subject of expert testimony. See, e.g., Hoots v. Pennsylvania, 272 F. Supp. 2d 539 (W.D. Pa. 2003); Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698 (N.D. Cal. 1989). Here, although the evidence showed that Zabala generally is knowledgeable about testing from her many years as an educator, she was not qualified as an expert in educational measurement or in any other discipline, so is not competent to testify on this point. Thus, pursuant to sections 90.701 and 90.702, Florida Statutes, her testimony is not afforded any weight.

92. In sum, for the reasons addressed above, it is determined that Respondent helped her students cheat in taking their Reading Portfolio tests during the 2013-2014 school year, and that her conduct constitutes misconduct in office as defined in rule 6A-5.056, violates rules 6A-10.080 and 6A-10.081, and violates School Board Policies 3210 and 3210.01.

93. Accordingly, just cause exists, pursuant to section 1012.33, Florida Statutes, for Petitioner to suspend Respondent without pay and to terminate her employment as a teacher.

CONCLUSIONS OF LAW

94. DOAH has jurisdiction over the parties to, and subject matter of, this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes.

95. Here, Petitioner alleges that just cause exists to suspend Respondent from her employment without pay and terminate her employment as a teacher, pursuant to section 1012.33, Florida Statutes; rule 6A-5.056; rule 6A-10.080,^{19/} the Code of Ethics of the Education Profession in Florida; rule 6A-10.081,^{20/} the Principles of Professional Conduct for the Education Profession in Florida; and School Board Policies 3210 and 3210.01. These statutes and rules are penal and therefore must be strictly construed, with ambiguities resolved in favor of the person charged with violating them. McCloskey v. Dep't of Fin. Servs., 115 So. 3d 1103 (Fla. 5th DCA 2013); Lester v. Dep't of Prof. & Occupational Reg., 348 So. 2d 923 (Fla. 1st DCA 1977); See also Miami-Dade Cnty. Sch. Bd. v. Fleurantin, Case No. 13-4129 (Fla. DOAH July 29, 2014); Miami-Dade Cnty. Sch. Bd. v. Snow, Case No. 13-1177 (Fla. DOAH Mar. 31, 2014).

96. Respondent is an instructional employee as defined in section 1012.01(2). Petitioner has the authority to suspend and terminate instructional employees pursuant to sections 1012.22(1)(f) and 1012.33(1)(a) and (6)(a).

97. To do so, Petitioner must prove, by a preponderance of the evidence, that Respondent committed the alleged violations and that such violations constitute "just cause" for dismissal. § 1012.33(1)(a), (6), Fla. Stat.; McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Dileo v. Sch. Bd. of Dade Cnty., 569 So. 2d 883 (Fla. 3d DCA 1990).

98. As discussed above, whether Respondent committed the charged offenses is a question of ultimate fact to be determined by the trier of fact in the context of each alleged violation. Holmes v. Turlington, 480 So. 2d 150, 153 (Fla. 1985); McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

99. Pursuant to sections 1012.33(1)(a) and (6), instructional staff may be terminated during the term of their employment contract only for "just cause."

100. Section 1012.33(1)(a) provides, in pertinent part, that "just cause" includes misconduct in office, as defined by rule of the State Board of Education.

101. Pursuant to rule 6A-5.056(2), "misconduct in office" is defined to mean one or more of the following:

(a) A violation of the Code of Ethics of the Education Profession in Florida as adopted in Rule 6A-10.080, F.A.C.;

(b) A violation of the Principles of Professional Conduct for the Education

Profession in Florida as adopted in Rule 6A-10.081, F.A.C.;

(c) A violation of the adopted school board rules;

(d) Behavior that disrupts the student's learning environment; or

(e) Behavior that reduces the teacher's ability or his or her colleagues' ability to effectively perform duties.

102. Rule 6A-10.080, the Code of Ethics of the Education Profession in Florida, states:

(1) The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn and to teach and the guarantee of equal opportunity for all.

(2) The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

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

103. Rule 6A-10.081, the Principles of Professional Conduct for the Education Profession in Florida, states in pertinent part:

(1) The following disciplinary rule shall constitute the Principles of Professional Conduct for the Education Profession in Florida.

(2) Violation of any of these principles shall subject the individual to revocation or suspension of the individual educator's certificate, or the other penalties as provided by law.

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

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

* * *

(5) Obligation to the profession of education requires that the individual:

(a) Shall maintain honesty in all professional dealings.

* * *

(h) Shall not submit fraudulent information on any document in connection with professional activities.

104. School Board Policy 3210, Standards of Ethical Conduct, states in pertinent part:

All employees are representatives of the District and shall conduct themselves, both in their employment and in the community, in a manner that will reflect credit upon themselves and the school system.

A. An instructional staff member shall:

1. teach efficiently and faithfully, using the books and materials required, following

the prescribed courses of study, and employing approved methods of instruction as provided by law and by the rules of the State Department of Education;

* * *

3. make a reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety;

* * *

17. maintain honesty in all professional dealings;

* * *

26. not submit fraudulent information on any document in connection with professional activities[.]

105. School Board Policy 3210.01 states in pertinent part:

All members of the School Board, administrators, teachers and all other employees of the District, regardless of their position, because of their dual roles as public servants and educators are to be bound by the following Code of Ethics. Adherence to the Code of Ethics will create an environment of honesty and integrity and will aid in achieving the common mission of providing a safe and high quality education to all District students.

As stated in the Code of Ethics of the Education Profession in Florida (State Board of Education F.A.C. 6B-1.001):

A. The educator values the worth and dignity of every person, the pursuit of truth, devotion to excellence, acquisition of knowledge, and the nurture of democratic citizenship. Essential to the achievement of these standards are the freedom to learn

and to teach and the guarantee of equal opportunity for all.

B. The educator's primary professional concern will always be for the student and for the development of the student's potential. The educator will therefore strive for professional growth and will seek to exercise the best professional judgment and integrity.

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

* * *

Fundamental Principles

The fundamental principles upon which this Code of Ethics is predicated are as follows:

* * *

D. Honesty—Dealing truthfully with people, being sincere, not deceiving them nor stealing from them, not cheating nor lying.

* * *

H. Respect—Showing regard for the worth and dignity of someone or something, being courteous and polite, and judging all people on their merits. It takes three (3) major forms: respect for oneself, respect for other people, and respect for all forms of life and the environment.

I. Responsibility—Thinking before acting and being accountable for their actions, paying attention to others and responding to their needs. Responsibility emphasizes our positive obligations to care for each other.

Each employee agrees and pledges:

A. To abide by this Code of Ethics, making the well-being of the students and the honest performance of professional duties core guiding principles.

* * *

D. To treat all persons with respect and to strive to be fair in all matters.

E. To take responsibility and be accountable for his/her actions.

* * *

H. To be efficient and effective in the performance of job duties.

* * *

Conduct Regarding Students

Each employee:

A. shall make reasonable effort to protect the student from conditions harmful to learning and/or to the student's mental and/or physical health and/or safety[.]

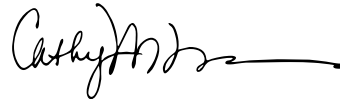
106. For the reasons discussed above, it is concluded that Petitioner has demonstrated, by a preponderance of the competent substantial evidence, that Respondent engaged in misconduct in office as defined in rule 6A-5.056(3); violated the Code of Ethics of the Education Profession in Florida, rule 6A-10.080; violated the Principles of Professional Conduct for the Education Profession in Florida, rule 6A-10.081; and violated School Board Policies 3210 and 3210.01.

107. According, just cause exists, pursuant to section 1012.33, Florida Statutes, for Petitioner to suspend Respondent without pay and terminate her employment as a teacher.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that Petitioner, Miami-Dade County School Board, enter a final order upholding its suspension of Respondent, Arleen Gomez, without pay and terminating her employment as a teacher.

DONE AND ENTERED this 30th day of October, 2015, in Tallahassee, Leon County, Florida.



CATHY M. SELLERS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 30th day of October, 2015.

ENDNOTES

- 1/ All references are to the 2013 codification of Florida Statutes unless otherwise stated.
- 2/ Students whose primary language is not English also are referred to as "English Language Learners" ("ELL"). For brevity, only the acronym "ESOL" is used in this Recommended Order.
- 3/ Here, most, if not all of the students answered the test questions by circling, in pencil, the letter next to the selected answer.
- 4/ Respondent also administered the Portfolios in the 2012-2013 school year.
- 5/ ESOL students are categorized as Level 1 through Level 5, depending on the student's level of proficiency in English, with Level 1 being the least proficient and Level 5 being the most proficient. Students categorized as levels 1 through 4 receive accommodations, such as the use of translation dictionaries in completing class work and testing. Students classified as Level 5 have completed the ESOL program and no longer receive accommodations.
- 6/ Each student has a folder in which all Portfolios, consisting of a specific reading passage and questions testing comprehension of that passage, are kept.
- 7/ For example, if the Portfolio titled "A Trip to the Beach" were administered on a given day, all students present in class that day would complete that specific Portfolio, and were not supposed to complete Portfolios covering other topics. If a student was absent on a given day, he or she would complete that specific Portfolio at a later date.
- 8/ Klahr was not listed as a witness by either party and did not testify at the final hearing.
- 9/ In particular, Zabala calmly comported herself with dignity and professionalism throughout her lengthy testimony in direct examination and cross-examination at the final hearing. The undersigned found incredible and unpersuasive Respondent's testimony that Zabala became upset and cried when she requested to take leave.

10/ Further, there was no persuasive evidence presented showing any possible motive that either Zabala or Murphy may have for lying during the investigation or at the final hearing in this proceeding, in order to cause Respondent to lose her job. There is no evidence showing that Respondent has any previous disciplinary record, and no evidence was presented showing that Respondent had not enjoyed a positive professional relationship with Zabala and Murphy before the events leading to this proceeding occurred.

11/ The current version of rule 6A-5.056 was adopted on July 8, 2012. It was in effect at the time of Respondent's conduct at issue in this proceeding, and, therefore, applies in this proceeding. The rule expressly references and incorporates rule 6B-1.001, the Code of Ethics for the Education Profession in Florida, and rule 6B-1.006, the Principles of Professional Conduct for the Education Profession in Florida, as those rules were numbered on July 8, 2012. On January 1, 2013, rule 6B-1.001 was renumbered as rule 6A-10.080 and rule 6B-1.006 was renumbered as rule 6A-10.081.

12/ See supra note 11.

13/ See supra note 11.

14/ See paragraph 75, supra.

15/ See supra note 11.

16/ See paragraph 76, supra.

17/ See paragraphs 77 and 78, supra.

18/ Further, it is questionable whether, under any circumstances, testimony regarding the difference in the size of circle marks around choices on a test answer sheet could constitute reliable evidence that the circles marks were made by different people. See Fassi v. State, 591 So. 2d 977 (Fla. 5th DCA 1991) (comparison of spray-painted graffiti on a wall to handwriting in a letter is too speculative to be probative regarding the identities of the scribes).

19/ See supra note 11.

20/ See supra note 11.

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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.