STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

BROWARD COUNTY SCHOOL BOARD,

Petitioner,

vs. Case No. 15-3022TTS

ELAINE JAFFE,

Respondent.
_____/

RECOMMENDED ORDER

This case came before Administrative Law Judge John G. Van Laningham for final hearing by video teleconference at sites in Tallahassee and Lauderdale Lakes, Florida, on September 8, 2015; the hearing reconvened on November 16, 2015, and concluded the following day, on November 17th.

APPEARANCES

For Petitioner: Tria Lawton-Russell, Esquire
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For Respondent: Robert F. McKee, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent, a teacher, failed to implement a student's Individual Educational Plan,

made offensive comments to the same student's parent, and/or did not collect data to measure another student's response to interventions for purposes of determining eligibility for Exceptional Student Education services, as Petitioner alleges; and, if so, whether just cause exists to suspend Respondent without pay for five days.

PRELIMINARY STATEMENT

At its regular meeting on May 19, 2015, Petitioner Broward County School Board voted to approve the superintendent's recommendation that Respondent Elaine Jaffe be suspended for five days, without pay, from her job as a teacher. The reasons for this action were spelled out in an Administrative Complaint that had been issued on or around April 23, 2015, in which Ms. Jaffe was accused of having failed to fulfill her obligations towards two of her students, and of having spoken rudely to one of the students' mothers.

Ms. Jaffe timely requested a formal administrative hearing to contest Petitioner's intended action. On May 27, 2015, the matter was referred to the Division of Administrative Hearings ("DOAH") for further proceedings.

At the final hearing, which took place on September 8, November 16, and November 17, 2015, Petitioner called the following witnesses: Mr. M.N., Ms. P.F., Ms. M.P., Colleen Forde, Donna Schwartz, Katelynn Breighner, Michal Waskowiak,

Tameka King, Ronald Adam, Cory Smith, Susan Leon-Leigh, and Susan Cooper. Petitioner's Exhibits 1 through 18 were received in evidence without objection. Ms. Jaffe testified on her own behalf and called Gary Itzkowitz and Jaclyn Merchant as additional witnesses.

The four-volume final hearing transcript was filed on January 11, 2016. Each party timely filed a Proposed Recommended Order on the deadline, which had been extended to February 25, 2016, at Petitioner's request.

Unless otherwise indicated, citations to the official statute law of the state of Florida refer to Florida Statutes 2015, except that all references to statutes or rules defining disciplinable offenses or prescribing penalties for committing such offenses are to the versions that were in effect at the time of the alleged wrongful acts.

FINDINGS OF FACT

1. The Broward County School Board ("School Board"), Petitioner in this case, is the constitutional entity authorized to operate, control, and supervise the Broward County Public School System.

2. At all relevant times, Respondent Elaine Jaffe ("Jaffe") was employed as a reading teacher at Coral Springs High, a public school in Broward County.

3. The events at issue involve two students, C.N. and N.P. Although the School Board alleges, in brief and broadly speaking, that Jaffe failed to fulfill obligations towards each of these students, there is no factual overlap between the situations of C.N. and N.P.——each student is the subject of a separate occurrence or occurrences. Further, the alleged wrongdoing in reference to C.N. took place (if at all) during the 2013-14 school year, while the disputed events concerning N.P. transpired the following year, 2014-15.

4. C.N. was an eleventh grade student in 2013-14 who received Exceptional Student Education ("ESE") services pursuant to an Individual Educational Plan ("IEP"). Jaffe had taught C.N. the previous year (2012-13), when C.N had been in Jaffe's reading class for special education students. For 2013-14, C.N. was placed in a less restrictive, albeit remedial, reading class, which included students from the general population. Unhappy with her assigned teacher, however, C.N. (or her parents) requested that C.N. be transferred to Jaffe's class (Jaffe taught the same course), which was done.

5. The fact that C.N. voluntarily transferred to Jaffe's class is significant for two reasons. First, it gives rise to the reasonable inference——confirmed by Jaffe's credible testimony——that Jaffe was aware, in 2013-14, of the supplementary aids and services ("accommodations") prescribed in

C.N.'s IEP, with which her teachers were to provide her, having afforded the same (or substantially similar) accommodations to C.N. the previous year. Second, from the voluntary transfer the undersigned reasonably infers that neither C.N. nor her parents had concerns about Jaffe's alleged inability, failure, or refusal to implement C.N.'s accommodations; more than that, since they *requested* that C.N. be moved into Jaffe's class, the reasonable inference, hereby drawn, is that C.N. and her parents were satisfied with Jaffe's instructional performance in 2012-13, including the provision of accommodations.

6. In its Administrative Complaint, the School Board alleges that Jaffe failed to provide C.N. the following three accommodations (as described in C.N.'s IEP):

> Flexible Setting-Small group for testing
>
> Flexible Presentation-Oral presentation of test prompts (if allowable)
>
> Flexible Scheduling/Timing-Add'l time for task (Total time = twice the allotted time)

This alleged default, according to the School Board, was "demonstrated by [Jaffe's] failure to send C.N." to the Support Room, i.e., a separate classroom where special education students can take tests or complete other assignments in a small group under the supervision of an ESE teacher who serves as the support coordinator.

7. C.N. did not report to the Support Room from Jaffe's class at any time during the 2013-14 school year. This fact means little, however, in light of other circumstances. C.N. went to the Support Room 13 times in 2013-14 at the instance of a teacher. Ten of those referrals were from C.N.'s American History class, which means that one teacher (Watson) accounted for 77 percent of C.N.'s trips to the Support Room. C.N.'s science teacher (Eyerman) sent her for support twice in November 2013, and a geometry teacher (Myers) sent C.N. to the Support Room once, in March 2014. Like Jaffe, C.N.'s English teacher (Merchant), American Sign Language teacher (Nesser), and another geometry teacher (Barr) did not account for any documented visits by C.N. to the Support Room during the 2013-14 school year.

8. Jaffe's utilization of the Support Room vis-à-vis C.N., in short, was no different, or practically indistinguishable, from that of all the rest of C.N.'s teachers except one (who might have overutilized this resource for all the record shows). That being the case, the undersigned rejects the School Board's contention that Jaffe's "failure" to send C.N. for support constitutes persuasive proof that she failed to implement C.N.'s IEP.

9. There is, moreover, no persuasive evidence in the record to support the charge that Jaffe otherwise ignored C.N.'s

accommodations. On the contrary, Jaffe testified credibly that she read aloud test "prompts" or directions as appropriate, and that she always offered C.N. additional time to complete a task or test, which C.N. regularly declined.

10. Finally, there is no persuasive evidence demonstrating that Jaffe *ever* failed to provide an accommodation to C.N. on a particular occasion when such an accommodation was requested or required under the circumstances.

11. In sum, the School Board presented insufficient evidence in support of its allegations that Jaffe failed to implement C.N.'s IEP.

12. The School Board also alleges that Jaffe made disparaging comments about C.N. to C.N.'s mother (P.F.) during the course of an IEP meeting on April 11, 2014. There is no dispute that Jaffe attended the meeting in question, and that Jaffe was excused from the meeting before it concluded because she needed to get back to her classroom. When Jaffe left, P.F. followed her out of the room, and the two spoke briefly and in private. Each gives a different, and conflicting, account of what was said.

13. Based entirely on P.F.'s version of the event, the School Board alleges that Jaffe told P.F. that C.N. is "not college material" and her plans to attend college "were ridiculous and a complete waste of time." Allegedly, Jaffe

further recommended to P.F. that C.N. concentrate on learning a "skill" for which she might get paid.

14. Jaffe denied having made these remarks. Her testimony in this regard is corroborated by additional persuasive evidence demonstrating that P.F. was not visibly upset when she returned to the meeting following her one-on-one conversation with Jaffe, and that she did not say anything to the other participants about Jaffe's allegedly offensive comments. Indeed, P.F. first complained about the alleged remarks more than a month after the IEP meeting, contacting the assistant principal in late May 2014 to lambaste Jaffe. P.F.'s email to the administrator following their telephone conversation included such intemperate opinions as: "[A] higher level of thinking . . . is beyond [Jaffe's] intellectual capacity."

15. The undersigned discounts the accuracy of P.F.'s recollection of her private conversation with Jaffe——her memory is likely corrupted by personal animus——and finds that Jaffe did not make the alleged remarks attributed to her in the Administrative Complaint. Rather, based on the evidence presented, it is likely that during the IEP meeting Jaffe expressed the view, which she evidently held, that pursuing a college degree might not be in C.N.'s best interests. Expressing such an opinion during an IEP meeting involving a high school student seems neither remarkable nor objectionable,

so long as it is tactfully and respectfully offered. Obviously, the student is free to disagree and pursue whatever course of action or study is both desirable and available to him or her.

16. At bottom, the School Board presented insufficient evidence in support of its allegations that Jaffe made offensive remarks about C.N. to C.N.'s mother.

17. As mentioned above, the other student whom Jaffe allegedly underserved is named N.P. After his sophomore year, N.P.'s mother decided that N.P. would benefit from ESE services, which she resolved to secure. To that end, she brought her son to a private psychologist for an evaluation in the summer of 2014. The report of that study (dated June 9, 2014) was presented to Coral Springs High for consideration at the start of the next school year. Then a junior, N.P. was a student in Jaffe's reading class during 2014-15.

18. The administration referred N.P. to a Child Study Team to evaluate his eligibility for ESE services. On September 2, 2014, the guidance counselor sent an email to N.P.'s teachers asking them to begin providing N.P. with "Tier 1" and "Tier 2" interventions and collecting data from such interventions pursuant to the response to interventions ("RtI") procedure used in determining ESE eligibility.

19. On September 4, 2014, the guidance counselor informed N.P.'s teachers by email that the RtI process was being

accelerated and that, accordingly, they were each immediately to commence a "Tier 3" intervention with the student. Tier 3 interventions are more involved than Tier 2 interventions, which latter are an intermediate step up from the Tier 1 interventions commonly provided to all students. A Tier 3 intervention, therefore, at least generally speaking, requires the teacher to spend more time on, and devote more attention to, the subject student than otherwise would be the case.

20. The guidance counselor gave N.P.'s teachers notice of yet another change of plans regarding the RtI in an email dated September 12, 2014, which stated: "Many of you are expressing that you don't see any issues/concerns with [N.P.] and that's fine. Because of this, Mrs. Forde (the ESE specialist) would like you to now log ONLY Tier 1 interventions" into the electronic database.

21. Nearly three months later, on December 8, the ESE specialist, Coleen Forde, emailed Jaffe to complain that "there is no data [on N.P.] for a Tier 3 intervention" and to assert that "[n]ot having this data will prevent him from being eligible for ESE." Ms. Forde advised Jaffe as follows:

> Being in an intensive class [such as yours] is a Tier 2 intervention and doing smaller groups in class is a Tier 3 intervention. What you do in that small group can be monitored and data can be collected and graphed.

22. Jaffe replied later that day to Ms. Forde's email, writing in relevant part:

> On September 12, [2014,] we received an email that addressed the lack of issues/concerns regarding [N.P.]'s behavior and academic work. We were instructed that since we did not have issues with [N.P.], "Mrs. Forde would like you to now log ONLY Tier 1 interventions on [the database]." I did this.
>
> Your email today is a bit confusing. Tier 3 interventions were written, not inputted into [the computer] due to malfunctions of the [database] program. Both [the guidance counselor] and I have tried to input data into Tier 3 but it did not work, and then we were told to only put in information for Tier 1.
>
> * * *
>
> I believe I have done all that I have been asked to do. Please let me know if you need other information.

Ms. Forde did not reply.

23. Almost two more months passed. Jaffe received an email notifying her that a meeting of the Child Study Team, of which Jaffe was a member, would be held on February 2, 2015, to determine whether N.P. was eligible to receive ESE services. Jaffe was not instructed to bring any materials to this meeting.

24. The meeting was held as scheduled. In its Administrative Complaint the School Board alleges that "because Ms. Jaffe had failed to collect Tier 3 data, the team was unable to find [N.P.] eligible for ESE and had to reschedule."

Allegedly "[a]s a result, N.P.'s ESE eligibility determination had to be postponed for another month."

25. The School Board failed to prove that Jaffe was solely, or even largely, responsible for the ensuing one-month delay in N.P.'s being deemed eligible for ESE services. (He would be approved at a meeting on March 2, 2014, after Jaffe collected Tier 3 data——the only one of N.P.'s teachers to do so.) While it is true that Jaffe did not bring Tier 3 data to the February 2nd meeting, the facts are that no one else did either, and that Jaffe had not been directed to bring such information. Moreover, the evidence fails persuasively to establish that Jaffe was ever clearly directed to resume collecting Tier 3 data after being told unambiguously on September 12, 2014, to "log ONLY Tier 1 interventions." (Ms. Forde's December 8th email contained only an implied (not express) directive to implement Tier 3 interventions——one which conflicted, at that, with the emphatic command of the September 12th email. Ms. Forde's failure to timely contradict Jaffe's assertion——that, as of December 8, 2014, she (Jaffe) had "done all that I have been asked to do"——increased the ambiguity.)

26. In conclusion, the School Board presented insufficient evidence in support of its allegations that Jaffe failed to

carry out her duties respecting the RtI process as it pertained to N.P.

Determinations of Ultimate Fact

27. The greater weight of the evidence fails to establish that Jaffe is guilty of the offense of misconduct in office, which is defined in Florida Administrative Code Rule 6A-5.056(2).[1/]

28. The greater weight of the evidence fails to establish that Jaffe is guilty of incompetency,[2/] which when proved affords just cause for suspension or dismissal from employment.

29. The evidence does not support a determination that Jaffe violated School Board Rule 4008(B), which essentially directs teachers and other employees to obey all applicable statutes, rules, and policies.

30. The greater weight of the evidence fails to establish that Jaffe is guilty of gross insubordination.[3/]

31. The evidence does not support a finding that Jaffe "intentional[ly] or reckless[ly] fail[ed] to carry out required duties," which if proved constitutes a disciplinable offense under rule 6A-5.056(5)(defining "willful neglect of duty").

CONCLUSIONS OF LAW

32. DOAH has personal and subject matter jurisdiction in this proceeding pursuant to sections 1012.33(6)(a)2., 120.569, and 120.57(1), Florida Statutes.

33. A district school board employee against whom a disciplinary proceeding has been initiated must be given written notice of the specific charges prior to the hearing. Although the notice "need not be set forth with the technical nicety or formal exactness required of pleadings in court," it should "specify the [statute,] rule, [regulation, policy, or collective bargaining provision] the [school board] alleges has been violated and the conduct which occasioned [said] violation." Jacker v. Sch. Bd. of Dade Cnty., 426 So. 2d 1149, 1151 (Fla. 3d DCA 1983)(Jorgenson, J. concurring).

34. Once the school board, in its notice of specific charges, has delineated the offenses alleged to justify termination, those are the only grounds upon which dismissal may be predicated. See Lusskin v. Ag. for Health Care Admin., 731 So. 2d 67, 69 (Fla. 4th DCA 1999); Cottrill v. Dep't of Ins., 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996); Klein v. Dep't of Bus. & Prof'l Reg., 625 So. 2d 1237, 1238-39 (Fla. 2d DCA 1993); Delk v. Dep't of Prof'l Reg., 595 So. 2d 966, 967 (Fla. 5th DCA 1992); Willner v. Dep't of Prof'l Reg., Bd. of Med., 563 So. 2d 805, 806 (Fla. 1st DCA 1990), rev. denied, 576 So. 2d 295 (Fla. 1991).

35. In an administrative proceeding to suspend or dismiss a member of the instructional staff, the school board, as the charging party, bears the burden of proving, by a preponderance

of the evidence, each element of the charged offense(s). See McNeill v. Pinellas Cnty. Sch. Bd., 678 So. 2d 476, 477 (Fla. 2d DCA 1996); Sublett v. Sumter Cnty. Sch. Bd., 664 So. 2d 1178, 1179 (Fla. 5th DCA 1995); MacMillan v. Nassau Cnty. Sch. Bd., 629 So. 2d 226 (Fla. 1st DCA 1993).

36. The instructional staff member's guilt or innocence is a question of ultimate fact to be decided in the context of each alleged violation. McKinney v. Castor, 667 So. 2d 387, 389 (Fla. 1st DCA 1995); Langston v. Jamerson, 653 So. 2d 489, 491 (Fla. 1st DCA 1995).

37. In its Administrative Complaint, the School Board advanced five theories for suspending Jaffe: Misconduct in Office (Count 2); Incompetency (Count 3); Violation of School Board Rule 4008(B) (Count 4); Gross Insubordination (Count 5); and Willful Neglect of Duty (Count 6).

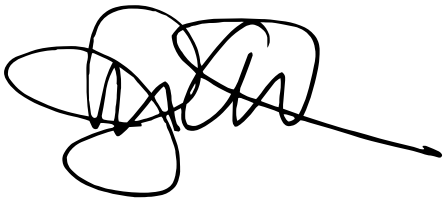
38. Each of the School Board's charges depends upon allegations that Jaffe failed to fulfill her obligations to implement C.N.'s IEP and to participate fully in the RtI process that was initiated to evaluate N.P.'s eligibility for ESE services, and that she spoke rudely to C.N.'s mother. The School Board, however, failed to prove these essential allegations of material fact by a preponderance of the evidence. Thus, all of the charges against Jaffe necessarily fail, as a

matter of fact. Due to this dispositive failure of proof, it is not necessary to render additional conclusions of law.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the School Board enter a final order exonerating Jaffe of all charges brought against her in this proceeding and awarding her back salary (if she has already served the five-day suspension) as required under section 1012.33(6)(a).

DONE AND ENTERED this 11th day of April, 2016, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 11th day of April, 2016.

ENDNOTES

[1/] The rule provides as follows:

> (2) "Misconduct in Office" means 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.

[2/] Rule 6A-5.056(3) defines "incompetency" as "the inability, failure or lack of fitness to discharge the required duty as a result of inefficiency or incapacity."

[3/] Rule 6A-5.056(4) defines "gross insubordination" as "the intentional refusal to obey a direct order, reasonable in nature, and given by and with proper authority; misfeasance, or malfeasance as to involve failure in the performance of the required duties."

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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.