

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ABBIE ANDREWS, EASTER BROWN,
CHERRY DEATON, DONNA FOSTER, AND
DANIELLE PERRICELLI,

Petitioners,

vs.

Case No. 18-2333

CLAY COUNTY SCHOOL BOARD,

Respondent.

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RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on December 14, 2018, in Green Cove Springs, Florida, before Lawrence P. Stevenson, the designated Administrative Law Judge of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioners: H. B. Stivers, Esquire
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245 East Virginia Street
Tallahassee, Florida 32301

For Respondent: Nicole Smith, Esquire
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STATEMENT OF THE ISSUE

The issue is whether Petitioners are entitled to the Best and Brightest Scholarship as established and defined by section 1012.731(3)(c), Florida Statutes (2017).

PRELIMINARY STATEMENT

Petitioners, Abbie Andrews, Easter Brown, Cherry Deaton, Donna Foster, and Danielle Perricelli ("Petitioners"), each timely applied to the Clay County School Board (the "School Board") for a \$1,200 scholarship under the 2017 Florida Best and Brightest Teacher Scholarship Program (the "Best and Brightest Program"). Between October 11, 2017, and November 14, 2017, each Petitioner received an email from School Board Representative Brenda Troutman stating that they were not eligible for the scholarship.

Ms. Troutman's emails did not provide Petitioners with a clear point of entry to challenge the School Board's decision. On April 20, 2018, Petitioners filed a collective Petition for Formal Hearing contesting the determination that they were ineligible for the scholarship. On May 9, 2018, the School Board referred this matter to DOAH for the assignment of an Administrative Law Judge and the conduct of a formal hearing.

On May 31, 2018, the School Board filed a Motion to Dismiss, arguing that the proper responding party in this case should be the Florida Department of Education, because it sets

the standards for and is statutorily mandated to administer the Best and Brightest Program. See § 1012.731(2), Fla. Stat. The Motion to Dismiss was denied by Order dated June 11, 2018.

The case was originally scheduled for final hearing on August 22 and 23, 2018. A joint motion for continuance was granted on August 16, 2018, and the case was rescheduled for October 10, 2018. On October 8, 2018, the parties filed a joint motion again seeking continuance due to the hurricane watch then in effect along the Northeast Florida coast. The continuance was granted and the case was ultimately rescheduled for December 14, 2018, on which date it was convened and completed.

At the outset of the hearing, the parties stipulated to the admission of Joint Exhibits 1 through 18, which included the depositions of each Petitioner and of Ms. Troutman. At the hearing, each of the Petitioners testified on her own behalf. The School Board presented the testimony of Ms. Troutman, who is the School Board's director of Instructional Personnel; Mallory McConnell, the principal of Lakeside Junior High School of Orange Park; and Janice Tucker, assistant principal at Orange Park High School. The School Board's Exhibits 4, 6 through 9, 19, 22, and 23 were admitted into evidence.

The one-volume Transcript of the hearing was filed at DOAH on January 9, 2019. An unopposed extension of the time for filing proposed recommended orders was granted ore tenus on

January 17, 2019. In compliance with the deadline set by the oral extension Order, Petitioners filed their Proposed Recommended Order on January 31, 2019. The School Board filed its Proposed Recommended Order on February 1, 2019, along with an unopposed motion to deem its proposed recommended order timely filed. Given the minimal tardiness of the School Board's filing and the lack of opposition from Petitioners, the School Board's motion is hereby granted. The School Board's Proposed Recommended Order has been duly considered in the writing of this Recommended Order.

FINDINGS OF FACT

1. In 2015, the Legislature enacted, by way of a line item in the annual appropriations bill, the Best and Brightest Program to award cash scholarships to Florida teachers who have been evaluated as "highly effective" by their school districts and who scored at or above the 80th percentile (top 20%) on the SAT or ACT when they took the test. Ch. 2015-232, § 2, line item 99A, Laws of Fla.^{1/}

2. In 2016, the Legislature enacted a stand-alone statute for the Best and Brightest Program, codifying the appropriations bill language and providing that the program is to be administered by the Department of Education (the "Department"). Ch. 2016-62, § 25, Laws of Fla., codified at § 1012.731, Fla. Stat. (2016). Rather than enacting a statutory scholarship

amount, subsection (5) of the 2016 version of section 1012.731 provided that the scholarships would be awarded to every eligible classroom teacher "in the amount provided in the General Appropriations Act."^{2/}

3. The 2016 statute also explained that the Best and Brightest Program was intended to provide "categorical funding for scholarships to be awarded to classroom teachers, as defined in s. 1012.01(2)(a), who have demonstrated a high level of academic achievement." § 1012.731(2), Fla. Stat. (2016).

4. Section 1012.01(2) defines "instructional personnel," including "classroom teachers," as follows:

(2) INSTRUCTIONAL PERSONNEL.—
"Instructional personnel" means any K-12 staff member whose function includes the provision of direct instructional services to students. Instructional personnel also includes K-12 personnel whose functions provide direct support in the learning process of students. Included in the classification of instructional personnel are the following K-12 personnel:

(a) Classroom teachers.--Classroom teachers are staff members assigned the professional activity of instructing students in courses in classroom situations, including basic instruction, exceptional student education, career education, and adult education, including substitute teachers.

(b) Student personnel services.--Student personnel services include staff members responsible for: advising students with regard to their abilities and aptitudes, educational and occupational opportunities, and personal and social adjustments;

providing placement services; performing educational evaluations; and similar functions. Included in this classification are certified school counselors, social workers, career specialists, and school psychologists.

(c) Librarians/media specialists.-- Librarians/media specialists are staff members responsible for providing school library media services. These employees are responsible for evaluating, selecting, organizing, and managing media and technology resources, equipment, and related systems; facilitating access to information resources beyond the school; working with teachers to make resources available in the instructional programs; assisting teachers and students in media productions; and instructing students in the location and use of information resources.

(d) Other instructional staff.--Other instructional staff are staff members who are part of the instructional staff but are not classified in one of the categories specified in paragraphs (a)-(c). Included in this classification are primary specialists, learning resource specialists, instructional trainers, adjunct educators certified pursuant to s. 1012.57, and similar positions.

(e) Education paraprofessionals.--Education paraprofessionals are individuals who are under the direct supervision of an instructional staff member, aiding the instructional process. Included in this classification are classroom paraprofessionals in regular instruction, exceptional education paraprofessionals, career education paraprofessionals, adult education paraprofessionals, library paraprofessionals, physical education and playground paraprofessionals, and other school-level paraprofessionals.

5. In 2017, the Legislature amended section 1012.731(3) to establish that the scholarship award would be \$6,000 for those classroom teachers rated "highly effective" who also had the requisite SAT or ACT scores:

(3) (a) To be eligible for a scholarship in the amount of \$6,000, a classroom teacher must:

1. Have achieved a composite score at or above the 80th percentile on either the SAT or the ACT based on the National Percentile Ranks in effect when the classroom teacher took the assessment and have been evaluated as highly effective pursuant to s. 1012.34 in the school year immediately preceding the year in which the scholarship will be awarded, unless the classroom teacher is newly hired by the district school board and has not been evaluated pursuant to s.1012.34.

* * *

(b) In order to demonstrate eligibility for an award, an eligible classroom teacher must submit to the school district, no later than November 1, an official record of his or her qualifying assessment score and, beginning with the 2020-2021 school year, an official transcript demonstrating that he or she graduated cum laude or higher with a baccalaureate degree, if applicable. Once a classroom teacher is deemed eligible by the school district, the teacher shall remain eligible as long as he or she remains employed by the school district as a classroom teacher at the time of the award and receives an annual performance evaluation rating of highly effective pursuant to s. 1012.34 or is evaluated as highly effective based on a commissioner-approved student learning growth formula

pursuant to s. 1012.34(8) for the 2019-2020 school year or thereafter.

Ch. 2017-116, § 46, Laws of Fla.

The 2017 amendment to section 1012.731 also added a new subsection (3)(c), providing that lesser amounts could be awarded to teachers rated "highly effective" or "effective," even if they could not demonstrate scores at or above the 80th percentile on the SAT or ACT:

(c) Notwithstanding the requirements of this subsection, for the 2017-2018, 2018-2019, and 2019-2020 school years, any classroom teacher who:

1. Was evaluated as highly effective pursuant to s. 1012.34 in the school year immediately preceding the year in which the scholarship will be awarded shall receive a scholarship of \$1,200, including a classroom teacher who received an award pursuant to paragraph (a).

2. Was evaluated as effective pursuant to s. 1012.34 in the school year immediately preceding the year in which the scholarship will be awarded a scholarship of up to \$800. If the number of eligible classroom teachers under this subparagraph exceeds the total allocation, the department shall prorate the per-teacher scholarship amount.

This paragraph expires July 1, 2020.

Id.

6. By December 1 of each year, each school district must submit to the Department the number of eligible classroom teachers who qualify for the scholarship, as well as identifying

information regarding the schools to which the eligible classroom teachers are assigned. § 1012.731(4)(a)-(c), Fla. Stat.

7. For the 2017-2018 school year, the December 1, 2017, submission deadline was extended to January 2, 2018, due to a hurricane. The School Board's deadline for teachers to apply for the scholarship was accordingly extended from November 1, 2017, to December 1, 2017.

8. By February 1 of each year, the Department is required to disburse scholarship funds to each school district for each eligible classroom teacher to receive a scholarship. § 1012.731(5), Fla. Stat. By April 1, each school district is required to award the scholarship to each eligible classroom teacher. § 1012.731(6), Fla. Stat.

9. In 2018, the Legislature amended section 1012.731 to provide that a school district employee who is no longer a classroom teacher may receive the \$6,000 award if the employee was a classroom teacher in the prior school year, was rated highly effective, and met the requirements of this section as a classroom teacher. § 1012.731(3)(b)2., Fla. Stat. (2018). The Legislature did not add a similar provision stating that former classroom teachers who are still school district employees remain eligible for the \$1,200 and \$800 awards. § 1012.731(3)(c)2., Fla. Stat. (2018).

10. The Legislature funds the Best and Brightest Program. The School Board had no role in creating the Best and Brightest Program.

11. The School Board is required to determine the eligibility of classroom teachers who qualify for the Best and Brightest Program pursuant to the requirements of the statute.

12. Petitioners in this case claim entitlement only to the \$1,200 award established by the 2017 version of the statute.

13. Brenda Troutman, director of Instructional Personnel, is the School Board employee in charge of the Best and Brightest Program application and submission process. Ms. Troutman has worked for the School Board for 17 years. She has been a junior high classroom teacher and an assistant principal and vice principal at the high school level. Though no longer teaching in the classroom, Ms. Troutman retains her certifications in math grades 5-9, exceptional student education ("ESE"), educational leadership, and school principal.

14. When working as a high school administrator, Ms. Troutman was the master scheduler for her school, meaning that she built the schedule for every teacher at the school. This task required that she become very familiar with the School Board's course code directory.

15. Ms. Troutman also had to understand the certification system in order to hire and assign teachers. If a teacher asked

to teach a certain course, Ms. Troutman had to know both the course requirements and the teacher's certifications to determine whether the teacher was eligible to teach the course.

16. As part of her current position in the School Board's human resources department, Ms. Troutman is required to know the School Board's various job titles and descriptions. She is responsible for replacing obsolete job descriptions and posting current job descriptions on the School Board's website.

17. Ms. Troutman testified as to how she manages the application and submission process of the Best and Brightest Program. She starts by making herself familiar with any changes the Legislature may have made to the program. She then issues a notice to teachers about the program and the current eligibility requirements. For the 2017-2018 Best and Brightest Program, Ms. Troutman prepared a draft email that Superintendent Addison Davis reviewed and sent to all of the school district's teachers and administrators on September 28, 2017. The email explained that to be eligible for the \$6,000, \$1,200 or \$800 scholarship, an applicant must meet the definition of classroom teacher as set forth in section 1012.01(2)(a).

18. Ms. Troutman developed the School Board's application for the Best and Brightest Program, based upon her understanding of the statutory requirements. All completed applications for the Best and Brightest Program come into Ms. Troutman's office.

Ms. Troutman testified that she received approximately 2,000 applications for the 2017-2018 award.

19. Ms. Troutman, with the aid of her assistant, reviews and verifies the information on the applications. If Ms. Troutman has any questions about an application, she seeks the opinion of her direct supervisor David Broskie, the director of Human Resources. In some cases, they also have discussions with Superintendent Davis and School Board Attorney David D'Agata.

20. The School Board employs two major data programs. FOCUS is the program/database that holds all student information, including attendance, grades, disciplinary actions, test information, and demographics. TERMS is the program/database that houses all employee information. When verifying information on the Best and Brightest Program applications, Ms. Troutman uses both FOCUS and TERMS, and on occasion conducts additional investigation.

21. The School Board's application asks for the teacher's assignment. Because the application was titled "2017-2018 Clay County Application: Florida Best & Brightest Teacher Scholarship," Ms. Troutman believed that the teachers were required to provide their 2017-2018 teacher assignments.

22. As will be discussed in more detail below, the year of the teacher assignment was a major point of disagreement between

Petitioners and the School Board. The application provided a checkmark system for the teacher to indicate which scholarship was being sought. The \$1,200 scholarship line provided as follows:

I am applying for the \$1,200.00 highly effective scholarship.

I have attached a copy of my 2016-2017 highly effective final evaluation (with student performance measures).

23. The application's language led Petitioners to believe that the 2017-2018 scholarship awards would be based on their teacher assignments and evaluations for 2016-2017. Ms. Troutman explained that this belief was incorrect. Eligibility for the 2017-2018 scholarship was based on a teacher's assignment for the 2017-2018 school year. The plain language of the statute requires that one must be a "classroom teacher" in order to be eligible for the scholarship; having been a classroom teacher in a previous year does not suffice. Ms. Troutman stated that she verified with Mr. Broskie, Mr. Davis, and Mr. D'Agata that the School Board should base the award on the teacher's 2017-2018 assignment.

24. Petitioners, on the other hand, argue that the statutory language requires only an evaluation of "highly effective" for the 2016-2017 school year. The statute is silent as to whether a teacher applying for the \$1,200 scholarship must

be teaching in a classroom situation during the 2017-2018 school year. Petitioners argue that the School Board is reading a requirement into the statute that is not evident from the plain language.

25. Ms. Troutman further explained that the applications for the 2017-2018 scholarships were to be submitted prior to the conclusion of the 2017-2018 school year. Therefore, as required by section 1012.731(3)(a)1. and (3)(c), the application requested the evaluation for "the school year immediately preceding the year in which the scholarship will be awarded."

26. Ms. Troutman testified that it is sometimes obvious from the teaching assignment that the teacher qualifies as a "classroom teacher." If an application states that the assignment is "chemistry teacher" or "algebra teacher" or "fifth grade classroom teacher," it is clear that the applicant meets the definition. Aside from verifying the assignment in the TERMS database, Ms. Troutman takes no further action.

27. However, some applications require additional research before Ms. Troutman can conclude that the applicant qualifies as a classroom teacher. For example, Petitioner Abbie Andrews identified her assignment on her application as "classroom teacher." Ms. Troutman went to TERMS and saw that Ms. Andrews was designated as an "ESE Support Facilitator" for the 2017-2018 school year. Ms. Troutman testified that ESE Support

Facilitators are sometimes assigned to teach classes and therefore could be classified as "classroom teachers" for purposes of the Best and Brightest Program. Ms. Troutman examined both the master schedule and the teacher's personal account in FOCUS to determine whether Ms. Andrews was assigned to teach any courses. Ms. Andrews had no teaching assignments for 2017-2018 in FOCUS.

28. Ms. Andrews and fellow Petitioners Cherry Deaton, Donna Foster, and Danielle Perricelli held the position of ESE Support Facilitator during the 2017-2018 school year. The School Board concluded that these Petitioners did not qualify for the \$1,200 scholarship because their schedules did not assign them the professional activity of instructing students in courses in a classroom situation, as required by the statute. It was undisputed that these Petitioners had been rated "highly effective" for the 2016-2017 school year. It was also undisputed that Ms. Andrews, Ms. Deaton, and Ms. Foster met the statutory definition of a classroom teacher for the 2016-2017 school year.

29. The School Board's general job description for an ESE Support Facilitator provides as follows:

The teacher is responsible directly to the Principal. He/she provides for the instruction, supervision, and evaluation of assigned students on an as needed basis. He/she supports both general education and

ESE teachers. He/she serves in a staff relationship with other teachers and supports and promotes ESE inclusion activities. (Emphasis added).

30. The School Board contrasts this job description with that of "Classroom Teacher," which provides: "The teacher is responsible directly to the principal for the instruction, supervision, and evaluation of students." The classroom teacher is fully responsible for the "instruction, supervision, and evaluation" of the students in her classroom, whereas the ESE Support Facilitator performs those activities only "as needed."

31. The School Board also points out that, unlike a classroom teacher, an ESE Support Facilitator is not required to be certified in-field for the position. The ESE Support Facilitator is not the teacher of record for any particular course. Their schedule is fluid. The ESE Support Facilitator comes and goes as needed ("pushes in," to use the teaching vernacular) in the classroom, and is expected to be wherever the ESE student assigned to them needs their services. Sometimes they push into the classroom and sometimes they pull students out of the class to work on a specific concept or skill.

32. An ESE Support Facilitator is assigned "contact students" for whom individualized educational plans ("IEPs") are prepared. The classroom teacher of record is responsible for giving the student course credit or a grade and is responsible

for recording attendance in FOCUS. One-third of the classroom teacher's evaluation is tied to student performance. Only the classroom teacher has default access to FOCUS in order to enter attendance and grade information for the students in the class. An ESE Support Facilitator must seek and be granted access to student's FOCUS information.

33. An ESE Support Facilitator is expected to meet with each contact student at least once a month; in practice, these meetings tend to occur more frequently. The ESE Support Facilitator goes over accommodations the student needs and assignments the student did not understand. The facilitator reteaches the course material if need be and stays in touch with the student's teachers and parents, making sure all stakeholders in the student's success are on the same page.

34. The evidence presented at the hearing indicated that all of the students served by the ESE Support Facilitators in this case attended classes in regular classrooms, not in separate ESE classes. In such "inclusion" classes, the ESE Support Facilitator's role is to push in and assist contact students in the regular classroom, ensuring that their IEP requirements are met and that the students are progressing satisfactorily through the course material.

35. Based on these definitional and operative distinctions, Ms. Troutman considered ESE Support Facilitators

to be "other instructional staff" as defined by section 1012.01(2)(d), rather than "classroom teachers" as defined by section 1012.01(2)(a).

36. Ms. Andrews was employed as an ESE Support Facilitator at Middleburg High School during the 2016-2017 school year. She taught two periods of English and spent the remaining four periods fulfilling her ESE duties. She was evaluated as "highly effective." As noted above, there was no dispute that Ms. Andrews met the definition of a "classroom teacher" for the 2016-2017 school year.

37. During the 2017-2018 school year, Ms. Andrews was a full-time ESE Support Facilitator at Middleburg High School, not assigned to teach any courses. In FOCUS, she was assigned as the "contact teacher" for approximately 60 students, meaning that she was primarily responsible for writing their IEPs and ensuring that they made adequate progress in their classes. She met with all of her contact students on an as needed basis, at least once per month but often as much as twice per week. However, Ms. Andrews was not listed in FOCUS as the teacher of record for any class.

38. Even though she routinely pushed into classes to support her assigned ESE students, Ms. Andrews was not the primary teacher of record. She was there to assist her contact students with whatever they needed to learn the course, but the

course was not assigned to her to teach. Ms. Andrews did not have a traditional classroom. She was not the teacher of record in any course for which students received academic credit, and she did not assign grades to students for the material she was teaching. Ms. Andrews prepared IEPs that were individualized to particular contact students. She did not prepare daily lesson plans in the manner of a classroom teacher.

39. Ms. Andrews described her job as an ESE Support Facilitator as follows:

My job is to teach, mentor, challenge students to make them -- make them ready for graduation, become productive members of society. I believe that's the same thing a classroom teacher does. I am using the Florida standards to prepare lessons for remediation if a student needs it. I am constantly having conversations with not just students, but their parents, keeping them on track or making sure their students are on track because ultimately, a parent wants that student to graduate on time as well.

I believe that the questions that are asked of me as a support facilitator are the same questions that parents would ask of a classroom teacher because they are very concerned. I am not just answering questions based on one classroom. I'm answering questions based on six classes. I'm responsible for that student being successful in six classes.

The IEPs that I write, they're legally binding. I am involved in the academics, behavior, discipline. I deal with discipline problems. All of these things are the same things that a classroom teacher

would deal with. I do not have a schedule in Focus; however, when a need arises, I'm there, I'm in a classroom, I'm helping, and I'm doing what's needed to be done for the kids to be successful.

40. Ms. Deaton was employed as an ESE Support Facilitator at Middleburg High School during the 2016-2017 school year. She taught two periods of English and spent the remaining four periods fulfilling her ESE duties. She was evaluated as "highly effective." As noted above, there was no dispute that Ms. Deaton met the definition of a "classroom teacher" for the 2016-2017 school year.

41. In 2017-2018, Ms. Deaton was a full-time ESE Support Facilitator at Middleburg High School, with approximately 60 contact students assigned to her in FOCUS. She was not assigned to teach any courses. If she pushed into a class to support her assigned ESE students, she was not the primary teacher of record. She was not designated as a co-teacher,^{3/} but she would assist teaching classes on an as-needed basis if she was not busy testing students or preparing IEPs. For those classes, she was provided access to view grades in FOCUS, but she did not have access to give grades. She would meet students as needed in her office, in another teacher's classroom, or in the computer lab. She did not develop lesson plans on her own, but provided suggestions and advice on lesson plans to the primary teacher. As an ESE Support Facilitator, Ms. Deaton did

not have a classroom or teach a classroom full of students. She had no schedule assigned to her in FOCUS, but had contact students assigned to her in FOCUS.

42. Ms. Foster was employed as an English/language arts and ESE Inclusion Teacher during the 2016-2017 school year. She taught four classes as ESE inclusion teacher. The remaining two periods were devoted to her position as ESE department head. Ms. Foster had a schedule in FOCUS. She had her own classroom and students, prepared daily lesson plans, and assigned grades. Students in her classes received academic credit. Ms. Foster was evaluated as "highly effective." As noted above, there was no dispute that Ms. Foster met the definition of a "classroom teacher" for the 2016-2017 school year.

43. Ms. Foster was employed as an ESE Support Facilitator and ESE department head during the 2017-2018 school year. She retired at the end of the school year, effective June 7, 2018. As an ESE Support Facilitator, Ms. Foster did not have a set schedule. Ms. Foster's assigned ESE students did not receive academic credit for the services she provided, but her assistance was integral in helping them pass their courses.

44. Ms. Foster assisted with an American history class during the 2017-2018 school year, but was not assigned as the primary teacher in FOCUS. Ms. Foster testified that she did not

believe she had ever been identified as a co-teacher in FOCUS, though she thought she should have been.

45. Ms. Foster testified that she had IEPs for the American history class that listed both the class setting and the service delivery method as "co-teach." She explained that because the class had both general education and ESE students, the teacher had to be certified in both the subject matter and ESE. Because the primary teacher was certified only in the subject matter, it was necessary for Ms. Foster to co-teach the class. Ms. Foster testified that she split lesson plan preparation with the primary teacher.

46. Ms. Foster believed she was not listed in FOCUS as the co-teacher because the school administration never bothered to remove the name of Kristin Heard, the ESE teacher originally assigned to the class, who was moved to a science class early in the year. Ms. Foster pursued the matter with the assistant principals at Lakeside Junior High, but nothing came of it.

47. Mallory McConnell, the principal at Lakeside Junior High School during the 2017-2018 school year, confirmed that Ms. Foster was not listed as a co-teacher on the master schedule. Ms. McConnell testified that in 2017-2018 there were no "true co-teacher" situations, by which she meant two teachers who equally shared responsibility for the instruction and grading of every student in the class. Ms. McConnell was aware

of situations in which a student's IEP mandates co-teaching in a class, but she testified that she was unaware of any student at Lakeside Junior High School in 2017-2018 whose IEP required a co-teacher.

48. Ms. McConnell conducted infrequent walkthrough observations of the American history class. She testified that she saw Ms. Foster providing support services to the ESE students but never saw Ms. Foster teaching at the front of the class. Ms. McConnell stated that she would not have expected to see Ms. Foster teaching the class or creating lesson plans for the class as a whole because those tasks were not her job responsibility.

49. Ms. McConnell was in no position to state whether Ms. Foster did, in fact, prepare lesson plans and teach the class. Ms. McConnell was able to state that for at least one month during the school year, Ms. Foster administered tests to her ESE students, meaning that she could not have been co-teaching the American history class.

50. Ms. Foster did not tell Ms. Troutman that she had assisted teaching the American history class during the 2017-2018 school year, nor did she include such information on her application for the Best and Brightest Program, because she believed the award was based upon her position in 2016-2017 and because she believed the school administration's failure to

include her as teacher of record in FOCUS was an "in-house" issue.

51. Ms. Perricelli was employed as an ESE Support Facilitator, ESE department head, and MTSS intervention team facilitator at Orange Park Junior High School. "MTSS" is an acronym for Multi-Tiered System of Support, a framework for providing support to students who are struggling academically or have an identified need in a specific area such as speech, language, or behavior. MTSS interventions may be used for regular education or ESE students.

52. Ms. Perricelli testified that she was not the teacher assigned by FOCUS for any class in 2016-2017. In addition to her regular ESE duties, Ms. Perricelli taught "grade recovery" to two students in language arts, science, and math. Grade recovery is a class offered to students who have failed a course and lack the credits to move on to the next grade level. Ms. Perricelli designed lesson plans and curriculum assessments for each subject, graded papers and tests, and reported the students' grades to the school.

53. Ms. Perricelli testified that she was not given the authority to enter the grade recovery students' grades into FOCUS in 2016-2017. She requested a course code but was never provided one.

54. Ms. Perricelli taught grade recovery for two periods, one for each student. For the other four periods of the school day, Ms. Perricelli would push into classrooms and work with ESE students, usually in small groups with students who needed remediation. She had around 40 contact students and developed IEPs for each of them. Most of her contact students were in the classrooms that she was going into, so she would see them throughout the week. She would meet with her other contact students about once a week. Ms. Perricelli would work with the assigned teacher to modify the course material to meet the needs of the ESE students.

55. Ms. Perricelli was evaluated as "highly effective" for the 2016-2017 school year, based on standard classroom teacher criteria. She was observed working with her grade recovery students and in the classrooms in which she pushed in.

56. Ms. Perricelli testified that her assignments were the same for the 2017-2018 school year. She taught one student in a grade recovery course. Due to her persistence, Ms. Perricelli was able to get a course code from Ms. Troutman for the grade recovery course in 2017-2018. The grade recovery course was named "Unique Skills."

57. In 2017-2018, Ms. Perricelli was assigned around 70 contact students for whom she prepared IEPs. As department

head, Ms. Perricelli oversaw 22 ESE instructors. She was the only ESE Support Facilitator at the school.

58. Janice Tucker was vice principal at Orange Park Junior High School in 2017-2018. She testified that early in the school year, the assigned teacher for seventh grade math left for another county. A long-term substitute, Lashonda Campbell, took over as teacher of record.

59. Ms. Perricelli testified that she developed some of the curriculum in Ms. Campbell's math classes, which included ESE and non-ESE students. She stated that she taught the class alone once a week when Ms. Campbell started, then tapered off into pulling out small groups of ESE students who needed remediation. She worked with four periods of seventh grade math classes that year. Ms. Perricelli testified that she gave grades to students in those courses and gave them to Ms. Campbell for entry into FOCUS.

60. Ms. Tucker testified that Ms. Perricelli was not a co-teacher for the math class. Ms. Campbell was the teacher of record. Ms. Tucker testified that when she observed the math class, she saw Ms. Perricelli working with small groups in the back of the class or at a table in the hallway, and Ms. Campbell at the front teaching the class. Ms. Tucker never saw Ms. Perricelli at the front of the class teaching. Ms. Tucker conceded that she had no knowledge whether Ms. Perricelli was

involved in creating lesson plans or assigning grades for the math class.

61. Ms. Perricelli was evaluated by Ms. Tucker for the 2017-2018 school year. Ms. Tucker observed Ms. Perricelli in the seventh grade math class and in the Unique Skills class. Ms. Perricelli was again rated "highly effective."

62. Ms. Perricelli testified that she did not mention teaching the math class on her scholarship application. She stated that she did not tell Ms. Troutman about the math class because at the time, the school was still attempting to get a full-time teacher for the class.

63. Ms. Troutman obviously knew about the "Unique Skills" class, having issued the course code to Ms. Perricelli. Ms. Troutman testified that she consulted with Mr. Broskie and Mr. D'Agata as to whether having one assigned class in FOCUS should qualify Ms. Perricelli for the scholarship. They concluded that teaching one class with one student was insufficient to qualify as a "classroom teacher" for purposes of the Best and Brightest Program.

64. Ms. Troutman testified that this conclusion was consistent with the School Board's historic practice of considering two or more classes as the "cutoff" for a classroom teacher. Ms. Troutman believed that if an ESE Support

Facilitator taught two classes, then she would qualify as a "classroom teacher."

65. Petitioner Easter Brown taught a fourth grade classroom at Grove Park Elementary School during the 2016-2017 school year and was rated "highly effective." It is not disputed that Ms. Brown met the definition of a "classroom teacher" for the 2016-2017 school year.

66. In 2017-2018, Ms. Brown was a full-time SPRINT specialist. "SPRINT" stands for Supervisor of Pre-Interns and New Teachers. SPRINT specialist is a support position for teacher trainees and new teachers, operating under an agreement between the School Board and the University of North Florida ("UNF"), each of which pays half of the SPRINT specialist's salary. Ms. Brown taught field classes at UNF and conducted workshops for clinical educator training and professional development.

67. Ms. Brown kept Grove Park Elementary as her home base and shared a classroom there with two other teachers. She taught UNF students in classes at the university and worked with new teachers at the school. She estimated that she spent half her time at UNF and half at Grove Park Elementary.

68. Ms. Brown had no K-12 courses or K-12 students assigned to her in 2017-2018. She had no courses assigned to her in FOCUS. She gave grades to only UNF students. Ms. Brown

did not create traditional lesson plans but did assist new teachers in writing lesson plans. Ms. Brown testified that she did some teaching in a regular classroom for purposes of modeling teaching techniques for her student teachers.

CONCLUSIONS OF LAW

69. The Division of Administrative Hearings has jurisdiction over the parties to and subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2018).

70. Section 1012.731(4) places upon the School Board the responsibility of determining in the first instance whether a classroom teacher qualifies for a Best and Brightest Program scholarship. Petitioners challenge the School Board's denial of their applications for Best and Brightest Program scholarships. As the parties seeking affirmative relief, Petitioners bear the burden of proving by a preponderance of the evidence that they are entitled to the award. Dep't of Transp. v. J.W.C. Co., 396 So. 2d 778 (Fla. 1st DCA 1981). A preponderance of the evidence is defined as "the greater weight of the evidence," or evidence that "more likely than not" tends to prove a certain proposition. Gross v. Lyons, 763 So. 2d 276, 280 n.1 (Fla. 2000).

71. This case presents two questions. First, does section 1012.731(3)(c)1. require a \$1,200 scholarship recipient to be a

classroom teacher at the time the award is made? Second, if the answer to the first question is affirmative, did any or all of Petitioners meet the definition of "classroom teacher" at the time the scholarships for the 2017-2018 school year were awarded?

72. As to the first question, Petitioners note that to qualify for the \$6,000 scholarship under section 1012.731(3)(a), a classroom teacher must: (1) have achieved a composite score at or above the 80th percentile on either the ACT or SAT based on National Percentile Ranks in effect when the classroom teacher took the exam; and (2) have been evaluated "highly effective" in the school year immediately preceding the year in which the scholarship will be awarded. § 1012.731(3)(a)1., Fla. Stat. Petitioners further note a third requirement for the \$6,000 scholarship: once a classroom teacher has been deemed eligible by the school district, the teacher remains eligible "as long as he or she remains employed by the school district as a classroom teacher at the time of the award," in addition to receiving an annual performance evaluation rating of highly effective. § 1012.713(3)(b), Fla. Stat.

73. Petitioners contrast the criteria for the \$6,000 scholarship with the eligibility statement for the \$1,200 scholarship: any classroom teacher who was evaluated as highly effective in the school year immediately preceding the

year in which the scholarship will be awarded. There is no language about a qualifying ACT or SAT test score and no language requiring the teacher to remain employed by the school district as a classroom teacher at the time of the award.

74. Petitioners argue that the preliminary language of paragraph (3)(c), "Notwithstanding the requirements of this subsection," renders this paragraph a standalone provision. The "notwithstanding" clause evinces a legislative intent that the only qualification for awarding the \$1,200 scholarship is whether the teacher was evaluated as "highly effective" in the school year immediately preceding the year in which the scholarship is awarded. The Legislature manifested its intent not to employ the criteria concerning ACT/SAT scores or continuing employment as a classroom teacher at the time of the award by stating that paragraph (3)(c) applied "notwithstanding" the other requirements of subsection (3).

75. In Cisneros v. Alpine Ridge Group, 508 U.S. 10, 18 (1993), Justice White, writing for a unanimous Court, stated that the use of a "notwithstanding" clause in a statute

clearly signals the drafter's intention that the provisions of the "notwithstanding" section override conflicting provisions of any other section Likewise, the Courts of Appeals generally have "interpreted similar 'notwithstanding' language . . . to supersede all other laws, stating that "[a] clearer statement is difficult to imagine.'" Liberty Maritime

Corp. v. United States, 289 U.S. App. D.C. 1, 4, 928 F.2d 413, 416 (1991) (quoting Crowley Caribbean Transport, Inc. v. United States, 275 U.S. App. D.C. 182, 184, 865 F.2d 1281, 1283 (1989) (in turn quoting Illinois National Guard v. FLRA 272 U.S. App. D.C. 187, 194, 854 F.2d 1396, 1403 (1988)). [Other citations omitted].

76. The quoted language from Cisneros appears generally to support Petitioners' contention that the express use of the term "notwithstanding" excludes the requirements for the \$6,000 scholarship from applying as requirements for the \$1,200 scholarship. Case law makes it clear, however, that a "notwithstanding" clause does not automatically annul the application of other portions of a statute. Cisneros itself limits the effect of the "notwithstanding" clause to an override of conflicting provisions in any other section of the statute. In Consejo de Desarrollo Economico de Mexicali, A.C. v. United States, 482 F.3d 1157, 1168-69 (9th Cir. 2007), the court stated:

The fact that the [Tax Relief and Health Care Act of 2006] used the phrase "notwithstanding any other provision of law" is not dispositive. United States v. Novak, 476 F.3d 1041, 1046-47 (9th Cir. 2007) (en banc). Indeed, "[w]e have repeatedly held that the phrase 'notwithstanding any other provision of law' is not always construed literally." Or. Natural Res. Council v. Thomas, 92 F.3d 792, 796 (9th Cir. 1996). Rather, when the phrase is used, we have determined its reach by "taking into account the whole of the statutory context in which it appears." Novak, 476 F.3d at 1046. In

viewing the statutory context, we attempt "to give effect, if possible, to every clause and word of a statute, rather than to emasculate an entire section," Estate of Reynolds v. Martin, 985 F.2d 470, 473 (9th Cir 1993), mindful that "[t]he cardinal principle of statutory construction is to save and not to destroy." Id.^[4/1]

77. The School Board points out that, even if the "notwithstanding" clause is given the effect urged by Petitioners, subsection (3)(c) still goes on to use the term "classroom teacher." Nothing in the language of subsection (3)(c) indicates that "classroom teacher" should be read as "former classroom teacher" or otherwise in the past tense. The plain language of subsection (3)(c) requires that an applicant for a \$1,200 scholarship be a classroom teacher and have received an evaluation of "highly effective" in the most recent preceding school year.

78. The School Board argues that the "notwithstanding" clause is intended to refer to the ACT/SAT test requirement of subsections (3)(a) and (3)(b). Subsection (3)(c) establishes a "stepdown" scholarship for current classroom teachers who have been evaluated as "highly effective" but lack the college admissions testing scores needed to qualify for the \$6,000 scholarship; it is not intended as a reward to former classroom teachers for a job well done last year.

79. The School Board contends that its interpretation of the "notwithstanding" clause is supported by the 2018 amendment to section 1012.731(3) that added a new subparagraph 2. to subsection (3)(b) governing the \$6,000 award:

2. A school district employee who is no longer a classroom teacher may receive an award if the employee was a classroom teacher in the prior school year, was rated highly effective, and met the requirements of this section as a classroom teacher.

80. Petitioners counter that the 2018 language supports their position, by clarifying that school district employees may qualify for the \$6,000 scholarship even though they are no longer classroom teachers. Petitioners argue that no such amendment was necessary for the \$1,200 or \$800 scholarships because they were already available to former classroom teachers.

81. The undersigned concludes that the School Board has the better argument as to the interpretation of subsection (3)(c), though Petitioners' position is quite defensible. The statute is no model of clarity. Keeping in mind the principle that the preferred reading is one that gives effect, if possible, to every clause and word of the statute, it seems clear enough that the "notwithstanding" clause is not meant to eliminate the requirement that a scholarship awardee must be a classroom teacher at the time of the award.

82. The 2018 amendment introduced a new term into subsection (3)(b): "school district employee who is no longer a classroom teacher." No such term is present in subsection

(3)(c). Also, section 1012.731(4) provides:

(4) Annually, by December 1, each school district shall submit to the department:

(a) The number of eligible classroom teachers who qualify for the scholarship.

(b) The name and master school identification number (MSID) of each school in the district to which an eligible classroom teacher is assigned.

(c) The name of the school principal of each eligible classroom teacher's school if he or she has served as the school's principal for at least 2 consecutive school years including the current school year.

83. Like subsection (3)(c), subsection (4) is written entirely in the present tense. On each December 1, a school district must submit to the Department the number of eligible classroom teachers who qualify for the scholarship, the name and identifying number of each school to which an eligible classroom teacher is assigned, and the name of the principal of the eligible classroom teacher's school. None of these items references previous years and all of them carry the implication that an "eligible classroom teacher" is one who is teaching in the classroom on December 1 of the current school year.

84. Having determined that section 1012.731(3)(c) requires that eligibility for a \$1,200 scholarship requires that the awardee be a classroom teacher at the time of the award, the undersigned must resolve the second question: whether any or all of Petitioners were classroom teachers during the 2017-2018 school year.

85. To reiterate, section 1012.01(2)(a) provides:

(a) Classroom teachers.--Classroom teachers are staff members assigned the professional activity of instructing students in courses in classroom situations, including basic instruction, exceptional student education, career education, and adult education, including substitute teachers.

86. Classroom teachers are assigned to instruct students in "courses" in "classroom situations." The term "course" is not defined as such, but section 1003.01(14) and (15), Florida Statutes (2018), provide the essential list of what constitutes a "course" for purposes of public K-12 education:

(14) "Core-curricula courses" means:

(a) Courses in language arts/reading, mathematics, social studies, and science in prekindergarten through grade 3, excluding extracurricular courses pursuant to subsection (15);

(b) Courses in grades 4 through 8 in subjects that are measured by state assessment at any grade level and courses required for middle school promotion, excluding extracurricular courses pursuant to subsection (15);

(c) Courses in grades 9 through 12 in subjects that are measured by state assessment at any grade level and courses that are specifically identified by name in statute as required for high school graduation and that are not measured by state assessment, excluding extracurricular courses pursuant to subsection (15);

(d) Exceptional student education courses; and

(e) English for Speakers of Other Languages courses.

The term is limited in meaning and used for the sole purpose of designating classes that are subject to the maximum class size requirements established in s. 1, Art. IX of the State Constitution. This term does not include courses offered under ss. 1002.321(4)(e), 1002.33(7)(a)2.b., 1002.37, 1002.45, and 1003.499.^[5/]

(15) "Extracurricular courses" means all courses that are not defined as "core-curricula courses," which may include, but are not limited to, physical education, fine arts, performing fine arts, career education, and courses that may result in college credit. The term is limited in meaning and used for the sole purpose of designating classes that are not subject to the maximum class size requirements established in s. 1, Art. IX of the State Constitution.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Clay County School Board enter a final order:

1. Finding that Petitioners Abbie Andrews, Cherry Deaton, and Donna Foster were not eligible for a \$1,200 scholarship under the 2017 Florida Best and Brightest Teacher Scholarship Program because they were not classroom teachers during the 2017-2018 school year; and

2. Finding that Petitioners Easter Brown and Danielle Perricelli were eligible for a \$1,200 scholarship under the 2017 Florida Best and Brightest Teacher Scholarship Program because they were classroom teachers during the 2017-2018 school year, and directing staff to take all practicable measures to secure the scholarship monies for Ms. Brown and Ms. Perricelli.

DONE AND ENTERED this 18th day of March, 2019, in Tallahassee, Leon County, Florida.



LAWRENCE P. STEVENSON
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of March, 2019.

ENDNOTES

1/ The line item provided as follows:

99A SPECIAL CATEGORIES GRANTS AND AIDS--THE
FLORIDA BEST AND BRIGHTEST TEACHER
SCHOLARSHIP PROGRAM FROM GENERAL REVENUE
FUND 44,022,483

Funds in Specific Appropriation 99A are provided to implement Florida's Best and Brightest Teacher Scholarship Program. The funds shall be used to award a maximum of 4,402 teachers with a \$10,000 scholarship based on high academic achievement on the SAT or ACT. To be eligible for a scholarship, a teacher must have scored at or above the 80th percentile on either the SAT or the ACT based upon the percentile ranks in effect when the teacher took the assessment and have been evaluated as highly effective pursuant to section 1012.34, Florida Statutes, or if the teacher is a first-year teacher who has not been evaluated pursuant to section 1012.34, Florida Statutes, must have scored at or above the 80th percentile on either the SAT or the ACT based upon the percentile ranks in effect when the teacher took the assessment. In order to demonstrate eligibility for an award, an eligible teacher must submit to the school district, no later than October 1, 2015, an official record of his or her SAT or ACT score demonstrating that the teacher scored at or above the 80th percentile based upon the percentile ranks in effect when the teacher took the assessment. By December 1, 2015, each school district, charter school governing board, and the Florida School for the Deaf and the Blind shall submit to the department the number of eligible teachers who qualify for the scholarship. By February 1, 2016, the department shall disburse scholarship funds to each school district for each eligible teacher to receive a scholarship. By April 1, 2016,

each school district, charter school governing board, and the Florida School for the Deaf and the Blind shall provide payment of the scholarship to each eligible teacher. If the number of eligible teachers exceeds the total the department shall prorate the per teacher scholarship amount.

^{2/} The 2016 appropriations bill provided:

103 SPECIAL CATEGORIES GRANTS AND AIDS--THE
FLORIDA BEST AND BRIGHTEST TEACHER
SCHOLARSHIP PROGRAM FROM GENERAL REVENUE
FUND . . . 49,000,000

Funds in Specific Appropriation 103 are provided to implement Florida's Best and Brightest Teacher Scholarship Program as provided in House Bill 5003, or similar legislation. The amount disbursed shall include a scholarship in the amount of up to \$10,000 to be awarded to every eligible classroom teacher. If the number of eligible classroom teachers exceeds the total appropriation, the department shall prorate the per-teacher scholarship amount.

Ch. 2016-66, § 2, line item 103, Laws of Fla.

^{3/} A "co-teacher" shares responsibility for the instruction and grading of all the students in a class, not just the ESE students.

^{4/} Consejo de Desarrollo Economico de Mexicali is extensively quoted with approval in Miccosukee Tribe of Indians of Florida v. United States Army Corp of Engineers, 619 F.3d 1289, 1298 (11th Cir. 2010).

The undersigned is mindful that the cited Federal cases deal with "notwithstanding" clauses that arguably operate as "general repealing clauses," Miccosukee Tribe, 619 F.3d at 1297, but finds their analysis useful in the situation presented by the instant case.

^{5/} The cited statutes all have to do with virtual and online courses, which would not implicate the maximum class size

requirements established in s. 1, Art. IX of the State Constitution.

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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.