

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LEE COUNTY SCHOOL BOARD,

Petitioner,

vs.

Case No. 18-3302TTS

PHYLLIS MILLER,

Respondent.

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RECOMMENDED ORDER

Administrative Law Judge D. R. Alexander conducted a hearing in this case by video teleconference on January 16, 17, and 25, 2019, at sites in Fort Myers and Tallahassee, Florida.

APPEARANCES

For Petitioner: Brian Anthony Williams, Esquire
The School District of Lee County
2855 Colonial Boulevard
Fort Myers, Florida 33966-1012

For Respondent: Robert J. Coleman, Esquire
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Post Office Box 2089
Fort Myers, Florida 33902-2089

STATEMENT OF THE ISSUE

The issue is whether just cause exists for Petitioner, Lee County School Board (School Board), to terminate Respondent's employment as a classroom teacher on the ground she is incompetent and did not satisfactorily correct performance deficiencies.

PRELIMINARY STATEMENT

In a Petition for Termination dated May 29, 2018, the School Board informed Respondent, a classroom teacher, that a recommendation would be made by the superintendent to terminate her employment for failing to adequately perform her educational duties. Respondent timely requested a hearing, and the matter was referred by the School Board to the Division of Administrative Hearings on June 26, 2018, to conduct a formal hearing. By agreement of counsel, the final hearing was continued twice because of substitution of School Board counsel.

At the final hearing, the School Board presented the testimony of seven witnesses. School Board Exhibits 1, 8, 9, 12 through 23, and 26 through 28 were accepted in evidence. Respondent testified on her own behalf and presented one witness. Respondent's Exhibits 1 through 10 were accepted in evidence.

A five-volume Transcript of the hearing has been prepared. The parties timely submitted proposed recommended orders on March 8, 2019, which have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

A. The Parties

1. The School Board is charged with the duty to operate, control, and supervise public schools in Lee County. This includes the power to discipline instructional staff, such as

classroom teachers. §§ 1012.22(1)(f) and 1012.33, Fla. Stat. (2018).

2. Respondent began her teaching career in Dunnellon, Florida, and has been certified as an educator since 1997. She has been employed by the School Board as a classroom teacher since 2001 and is certified in five areas, including exceptional student education (ESE). She currently holds a professional service contract, which is governed by the Collective Bargaining Agreement between the School Board and the Teachers Association of Lee County (TALC Agreement).

3. Beginning in school year 2014-2015, Respondent was assigned as a classroom teacher at Cypress Lake Middle School (Cypress Lake) where she remained for three years. In school year 2017-2018, Respondent was reassigned to Royal Palm Exceptional Center (Royal Palm) as an ESE teacher.

B. The Intensive Assistance Program (IAP) Process

4. A performance evaluation must be conducted for each employee at least once each year. § 1012.34(3)(a), Fla. Stat. The annual evaluation is found in the Annual Performance Evaluation Form, which identifies the evaluation areas and assigns to each area a "grade" of unsatisfactory, needs improvement/developing, effective, or highly effective. Sch. Bd. Ex. 17. A final performance rating also is given the employee. If an employee is not performing his or her duties in a

satisfactory manner, section 1012.34(4) establishes a process for addressing the performance deficiencies.

5. Under this process, the evaluator first must notify the employee in writing that the employee is not performing her duties in a satisfactory manner. The notice must include a description of the unsatisfactory performance areas, make recommendations with respect to the specific areas of unsatisfactory performance, and offer assistance to the employee to correct those deficiencies within a prescribed period of time. The employee then is placed on "performance probation" for 90 calendar days (excluding school holidays and vacation periods) following the receipt of the notice, during which time the employee is "evaluated periodically and apprised of progress achieved." Also, the employee is provided assistance and in-service training opportunities to help correct the noted performance deficiencies. Within 14 days after the close of the 90-day period, the evaluator must decide whether the performance deficiencies have been corrected and forward a recommendation to the superintendent. Within 14 days after receiving the recommendation, the superintendent must decide whether to continue or terminate the employment contract.

6. To implement the foregoing statute, and to ensure that employees who are not meeting professional standards are given an opportunity to be successful, the School Board has created a

process known as the IAP, which provides more detail than the statute itself. Sch. Bd. Ex. 26. The IAP is the School Board's version of "performance probation."

7. According to the School Board's IAP Manual (Manual), the assistance program is designed to "provide intensive direction and support to employees who seem to be experiencing serious difficulty in meeting professional performance standards." Id. The School Board also has created a two-page outline of the IAP process, which reiterates the steps to be followed when using the process. Resp. Ex. 2. Notably, the goal of the process is not to get rid of a teacher, but rather to make him or her successful, especially at a time when the Lee County School District is facing a teacher shortage.

8. Once a decision is made to initiate the IAP process for a teacher, an IAP team is picked by the superintendent or his designee. The team consists of a "team coordinator," the "immediate supervisor" of the employee being reviewed, another "site administrator or manager," a "job-related coordinator or supervisor," and "others, as may be appointed by the Superintendent." Sch. Bd. Ex. 26. The teacher's union representative also is invited to attend the meetings on behalf of the teacher. And, of course, the affected employee attends all meetings.

9. The Manual (but not the statute) calls for "not more than eight meetings" of the IAP team, "typically scheduled biweekly," during a 90-day period. Id. An initial team meeting, also known as an "orientation meeting," is conducted at the school site to review the areas of concern, identify the areas needing improvement, and outline the IAP process. A binder is given to each participant, which contains the IAP Manual and outline. Written minutes of each meeting are prepared, typically by the principal's secretary. The process is intended to be confidential, with discussions of the observations to occur only in team meetings. However, other persons may be called to a meeting to "share information that might be relevant, or if the teacher in question wants to bring somebody in."

10. During the IAP process, the teacher meets with team members individually and as a group and receives feedback, coaching, and suggestions. In addition, formal classroom observations are made by team members so that they can address any perceived deficiencies. The focus of the observations is in the areas noted as "needs improvement" or "unsatisfactory." In Respondent's case, the process was concerned not only with classroom skills, but also with the preparation of individualized education plans (IEPs) and how to properly conduct teacher/parent IEP meetings, all deficient areas.

11. After the last meeting, the "[a]ssistance team meets with [the] Executive Director of Human Resources to determine [a] recommendation to [the] Superintendent." Sch. Bd. Ex. 26. The Manual provides that after receiving the recommendation, the superintendent shall take one of the following steps:

Performance meets standards - plan follow-up review;

Performance below standards - continued assistance;

Reassignment to more appropriate position;

Withhold recommendation for reappointment;

Performance unacceptable file charges for dismissal; or

Recommend employee's resignation be accepted.

12. The establishment of an IAP team is not a regular occurrence, and, in this case, was the first and only time that the principals (and team members) at Cypress Lake and Royal Palm participated in such a process.

13. Although Respondent denies that her performance warrants termination, and she presented extenuating circumstances to justify her lack of progress, the focus of her challenge is a contention that in numerous respects, the Royal Palm IAP team and school administrators (and to a lesser degree the Cypress Lake team) did not follow strictly to the letter the process described by the statute, Manual, and IAP outline.

C. Cypress Lake

i. Performance Issues

14. Respondent began teaching at Cypress Lake during school year 2014-2015. Besides teaching language arts/reading, she also was a support facilitator and a self-contained ESE teacher for the sixth grade. Ms. Maniscalco was the principal. Following her first year, Respondent received an overall "Needs Improvement" on her annual performance evaluation. In her year-end conference with the principal, Respondent did not object or otherwise complain that the evaluation was incorrect.

15. Ms. Maniscalco's evaluation noted a variety of areas where Respondent needed to improve or was unsatisfactory, including: Demonstrating Knowledge of Resources and Technology; Creating an Environment of Respect; Establishes a Culture for Learning; Stops Misconduct by Using Effective Appropriate Techniques; Using Questioning and Discussion Techniques; Engaging Students in Learning; Showing Professionalism; Maintaining Accurate Records; and Participating in a Professional Community. Sch. Bd. Ex. 17.

16. Following her second year, school year 2015-2016, Respondent again received a "Needs Improvement" on her annual evaluation. Ms. Maniscalco cited numerous areas where Respondent needed to improve or was unsatisfactory, including: Designing Student Assessment; Setting Instructional Outcomes; Demonstrating

Knowledge of Resources and Technology; Establishes and Manages Classroom Procedures; Stops Misconduct by Using Effective Appropriate Techniques; Communicating with Students; Using Questioning and Discussion Techniques; Engaging Students in Learning; Using Assessment in Instruction; Demonstrating Flexibility and Responsiveness; Showing Professionalism; and Maintaining Accurate Records. Sch. Bd. Ex. 17.

17. Based on formal observations of Respondent that year, Ms. Maniscalco noted that Respondent failed to do "individualized assessments" or "modified assessments" for her ESE students. Also, after a year of working at Cypress Lake, Respondent still did not know how to utilize the interactive SMART board in her classroom or the District's Outlook email system, even though training in both programs was provided. She observed that none of the classroom guidance that Respondent received was being utilized, and none of the children in Respondent's classroom were "working." Rather, they were simply sitting there "playing when [Ms. Maniscalco] would come in." On days when Respondent was scheduled to have IEP meetings with students and parents, Respondent sometimes would call in sick, and her IEP plans either were not written or were completely wrong. Ms. Maniscalco then would have to call in a substitute ESE teacher who would be forced to write a new plan in front of the parents.

18. During school year 2015-2016, Respondent had numerous meetings with the principal; the head of the ESE department worked with Respondent "on paperwork"; she was sent to "quality writing IEP" with another teacher; and Ms. Maniscalco conducted a number of formal observations and provided feedback after those observations. At the year-end conference with the principal, except for stating that she was under a great deal of pressure, Respondent did not provide a satisfactory response for her continued deficiencies.

19. On May 18, 2016, Ms. Maniscalco wrote a letter to the superintendent recommending that Respondent be placed in an IAP program for the following school year. Sch. Bd. Ex. 27. The letter reads as follows:

During her two years at Cypress Lake Middle School she has received additional support from administration, reading coach, select faculty members and the staffing specialist. Her struggles with correct completion of ESE documentation, instructional strategies, and classroom management have prevented her from being an effective teacher. She was cooperative and always attempted to implement what she learned. However, she was unable to sustain and implement this knowledge in ESE required documents, future lessons and her teaching lacked depth and vigor.

Mrs. Miller's classes during the 2016/2017 school year was [sic] of great concern. As evident by the documentation on PeopleSoft and my personal notes, her classroom management and lack of vigor was [sic] of particular concern. Despite having classes of no more than 13 students, Mrs. Miller was

unable to maintain classroom control throughout the entire school year even with the added support of an ESE paraprofessional. Students were up and out of their seats, off task, talking over her or simply ignoring her. Often she was [missing text from exhibit] interventions or she would make comments such as "Please do your work. Stop bothering the other students. I asked you to sit down[,]" without follow through when students did not change their behavior.

Mrs. Miller has struggled with the proper completion of IEP paperwork, manifestation processes and parent contact for the documentation needed on ESE paperwork. This is of great concern due to the legal implications that could result.

Throughout the school year, Mrs. Miller was always cooperative and understanding of our concerns regarding her ineffectiveness as a classroom teacher, continued errors on ESE students' paperwork, and ESE processes. She was receptive to our suggestions and assistance. However, in May of 2016, when I notified her I was going to refer her to the Intensive Assistance Program, she became upset and stated I had no idea what pressure was put on her.

For the sake of our students and their learning, I respectfully request immediate intervention with Mrs. Miller. She needs additional help learning the pedagogical processes of effective teaching. Pleading with middle school age students is highly ineffective. Students need an orderly, safe environment, where skills and concepts are scaffold, differentiated, and rigorous. Proper completion of ESE paperwork is imperative as it relates to individual students['] IEPs. I would like to discuss my concerns further with you and answer any questions you may have pertaining to this request.

20. On August 2, 2016, the superintendent informed Respondent by letter that he was accepting Ms. Maniscalco's recommendation that she be placed in a Plan of Assistance. He added that an IAP team would be formed immediately, and her union representative was invited to accompany her to the meetings. Sch. Bd. Ex. 1.

ii. The IAP Process Used by Cypress Lake

21. A Cypress Lake IAP team was established consisting of the principal, the TALC representative, the district administrator, the assistant principal, and the chief human resources officer, Dr. Pruitt. An initial meeting was held on September 12, 2016. At that meeting, the team reviewed Respondent's areas of concern, identified areas requiring improvement, and reviewed the IAP outline. The deficient areas identified by the team included preparation of IEPs, classroom teaching methods, and student engagement. The team was "extremely specific" and "very, very detailed" in identifying the specific areas that would be addressed. The team agreed that each member would formally observe Respondent two times during the IAP process.

22. No written minutes of the orientation meeting were prepared, as Ms. Maniscalco did not know at that time that written minutes were required. Respondent contends that without written minutes, there is no way to prove that she was told which

performance areas would be reviewed during the IAP process, or even if the team members understood the areas of concern. On this issue, the undersigned has accepted the testimony of Ms. Maniscalco and Dr. Pruitt that these areas were discussed in detail at the orientation meeting. In fact, Ms. Maniscalco testified that she could "guarantee 100 percent that we talked about IEPs and classroom management, and I would swear to that."

23. Additional team meetings were conducted on September 26, October 17, October 31, November 14, and December 12, 2016, and March 30, 2017. Respondent and her representative attended all meetings. At no time during the process did Respondent or her representative object to the process, file a grievance with respect to a misapplication of the process, or complain that she was not getting enough support.

24. The team provided Respondent with the opportunity to observe other teachers, shared best practices, recommended behavioral management techniques, gave advice on student engagement strategies, and offered advice on managing and completing IEPs. At each meeting, the team reviewed Respondent's strengths, opportunities for growth, and suggestions for improvement. The results of each member's observations also were discussed. Although Respondent testified that during the process she encountered a number of problems which prevented her from adequately resolving her performance issues, she never raised

that subject with any team member. In fact, only once during the entire IAP process did Respondent ask for assistance (through a colleague, and not the principal), and after doing so, she was assigned a paraprofessional.

25. After the final team meeting on March 30, 2017, on April 17, 2017, Dr. Pruitt informed Respondent by certified mail that the IAP team "had determined that her performance was not at an acceptable level." Sch. Bd. Ex. 8. The letter noted that the areas requiring improvement were planning; human development and learning; learning environments; critical thinking; student achievement and continuous improvement; and state, school, and district requirements.

26. Dr. Pruitt believed that a new location and a new administration could raise Respondent's level of proficiency. Therefore, she recommended that Respondent "be placed at another work location for the 2017/2018 school year and continue to receive assistance." Id. This course of action is authorized by the IAP Manual, which allows "continued assistance" for an employee when deficiencies are not remediated during the IAP process. Otherwise, given her lack of progress, Respondent's termination would be the only logical outcome. The letter added that the second IAP process would begin approximately three weeks after the beginning of the new school year. The recommendation was accepted by the superintendent.

D. Royal Palm

27. On July 13, 2017, Respondent was notified by certified mail that she was being reassigned to Royal Palm, a much smaller school than Cypress Lake. Sch. Bd. Ex. 9. Unlike Cypress Lake, which had a mix of mainstream students and ESE students, Royal Palm's enrollment was 100 percent exceptional students, none of whom could function in a "gen ed setting." However, Dr. Pruitt believed that Respondent would be a good match for the school because it had no more than eight students in a classroom, and she had an ESE background. Dr. Pruitt testified that it was the "easiest teaching assignment [she] could find to help [Respondent] be successful." Respondent was told that a new period of performance probation would commence after the beginning of the school year 2017-2018.

28. When Respondent reported to duty in August 2017, the principal, Mr. Moretti, welcomed her and told her, "You'll have a ton of support here," which turned out to be true. He especially was glad to have her on the faculty because he had no reading teachers with ESE certification.

i. The Royal Palm IAP Process

29. On October 2, 2017, Dr. Pruitt assembled a new Royal Palm IAP team comprised of the facilitator, Ms. Freeman; principal, Mr. Moretti; assistant principal, Ms. Wilson; and district administrator, Ms. Taylor. None had ever been involved

in the IAP process. Mr. Moretti acknowledged that he did not familiarize himself with the IAP process and instead relied on Dr. Pruitt (a non-member) and Ms. Freeman, the facilitator, to provide advice on how the process would work. Respondent and her union representative, Dr. Fazzone, also attended the meetings, which were overseen by Ms. Freeman.

30. An initial team meeting was conducted the same day. Dr. Pruitt, who attended the first meeting only, told the team that the focus areas for improvement consisted of completing IEPs, progress reports, and interims; classroom management issues; and active engagement of students. Sch. Bd. Ex. 28. The areas of concern were the same as those identified in her April 19, 2017, letter and tracked the performance areas that were addressed unsuccessfully at Cypress Lake.

31. During the meeting, the team was introduced to the IAP process and given a binder with the IAP outline. Dates for formal observations were also set, including one the following day by Ms. Taylor, the district administrator.

32. Notably, Ms. Taylor pointed out that the team knew that this was Respondent's second time in the process, and they "wanted to provide all the resources that we could for her, ensuring that she had the tools that she needed to, also looking at how she was utilizing the information, based on the daily

teaching in her classroom, and how that was going to be best used outside of administrative assistance, through the IAP process."

33. After the orientation meeting, Mr. Moretti decided to include Ms. Allbritten, the instructional coach for the school district, in the IAP process. He chose her because she would be performing formal observations on Respondent in lesson development, and she could give Respondent first-hand feedback. Respondent contends the inclusion of Ms. Allbritten at team meetings "contaminat[ed] the clearly defined process" and violated the "confidential nature of the process." This contention is rejected.

34. Additional IAP team meetings were conducted on October 30, November 20, and December 5, 2017, and January 22, February 5, February 26, and April 9, 2018.

35. During the first few months of the process, the team noticed "a great deal of improvement" on the part of Respondent. Mr. Moretti was "very pleased" with her progress. By that time, the team had helped her prepare lesson plans, restructured the physical classroom, reviewed IEPs, allowed her to visit other classrooms, and assisted her in revising her teaching strategies for different students. When asked at the December 5, 2017, meeting if her caseload was manageable, Respondent answered "yes."

36. Despite the early improvement, a formal observation by Ms. Taylor on January 22, 2018, showed otherwise. Only one student was in the classroom on time and two more came in late. Their behavior was "terrible," and one student was not engaged the entire period.

37. During the process, Ms. Taylor attempted to provide Respondent with additional training on the Language Live Academic Plan (Language Live), a reader intervention program for struggling students. The program was utilized as the primary teaching tool in Respondent's classroom. Although the program was used at other schools in the district, this was the first year that it was used at Royal Palm. In an effort to improve Respondent's use of the tool, Ms. Taylor arranged for her to visit Gulf Middle School to observe the program being utilized by another teacher. Ms. Taylor reported that Respondent was not engaged and appeared to be disinterested in learning how to utilize the program. Also, even though Language Live was Respondent's primary teaching tool, the team learned that Respondent was not even logging into the program and had gone a significant time period without utilizing and/or accessing it as an instructional tool. Sch. Bd. Ex. 14.

38. At the team meeting on February 5, 2018, it was noted that Respondent's students were well below the district expectations of three activities and 100 minutes per week online;

the most time spent online by any student was 78 minutes by one and the student was a self-motivated gifted student; there were numerous students who had not logged into the program; and Respondent did not log into the program for the week of January 29 through February 2, 2018. Sch. Bd. Ex. 14.

39. According to Ms. Allbritten, who provided Respondent with extensive assistance and training, Respondent's failure to utilize the Language Live program had a detrimental effect on the students at Royal Palm who were transitioning back into general education classes. She added that Respondent was not always receptive to her assistance and training.

40. The reading coach, Ms. Meltzer, was asked to attend the February 5, 2018, meeting so she could present the results of the Language Live data for the team to examine. The data showed "very little to no progress for the majority of the kids" in Respondent's classes. The undersigned has rejected Respondent's contention that the inclusion of Ms. Meltzer for the meeting tainted the process.

41. For a teacher to actively engage the students, lesson plans are required. This is a basic requirement for a teacher. At the February 5, 2018, meeting, the team learned that no lesson plans had been turned in by Respondent since November 13, 2017. In fact, she had prepared only four out of 16 to 18 that were due. In response, Respondent contended that all were prepared,

but she needed to "adjust" them. However, later on, she turned in one lesson plan, with multiple dates on that plan, which was intended to satisfy the requirement for the next six or seven weeks.

42. During the February 26, 2018, meeting, the team noted that the following interventions on behalf of Respondent had been performed: (a) she visited Gulf Middle School to observe a reading class using the Language Live program; (b) steps were taken to ensure Respondent's classroom had all necessary materials; (c) Respondent's lesson plans and template were designed; (d) she was provided with the Language Live Academic Plan and all necessary material; (e) she was given assistance in preparing IEPs and attending IEP meetings; (f) a team member sat with her during the first IEP meeting so she would be familiar with the process; (g) a Language Live training session was established every other week for Royal Palm reading teachers; and (h) data was examined to ascertain student success and areas of improvement. Sch. Bd. Ex. 14.

43. At the meeting on February 26, 2018, Respondent was directed to have all lesson plans for the last half of November, December, January, February, and March prepared and submitted before the next meeting. Also, it was noted that Respondent's IEPs were not always prepared for parent meetings, and this placed the school's receipt of federal funds in jeopardy.

44. During the meeting, Dr. Fazzone, Respondent's union representative, questioned why the reading coach was in the room. He was told that Ms. Meltzer is Respondent's immediate supervisor and an instructional coach in reading, and she could provide feedback regarding how effective Respondent was in using the Language Live program to teach reading. This was one of the very few criticisms made by Respondent during the entire process. Dr. Fazzone testified that he did not know he could grieve a part of the process, or otherwise object, but never inquired if he had such a right.

45. A final team meeting was conducted on April 9, 2018. Principal Moretti was unable to physically attend due to medical issues, but he spoke with Ms. Freeman regarding the team's concerns. Also, he discussed Respondent's progress in numerous conversations with team members throughout the school year.

46. The team reviewed the minutes of the prior meeting and the performance deficiencies that were to be corrected. Although Respondent had made progress in some areas during the early part of the process, the members noted that her lesson plans were still incomplete, a "behavior" plan was inadequate, and based on a number of formal observations, there was a "lack of instruction" in her classroom. Respondent was told that the intervention program would be ended. Mr. Moretti testified that even though it would "make [his] life a whole lot easier" if he

could keep a certified ESE reading teacher, it was in the school's best interest to find another teacher.

47. At the end of the meeting, when asked if she had been given support during the preceding months, Respondent answered, "Absolutely," and said the school had a "wonderful support system."

48. The team consensus was that Respondent had not corrected her deficiencies. However, the final recommendation was made by Dr. Pruitt. On May 1, 2018, Dr. Pruitt informed Respondent by certified mail that the team had recommended that her contract not be renewed at the close of the school year. Resp. Ex. 4. On May 7, 2018, Dr. Pruitt sent a second letter, correcting the first letter, in which she advised Respondent that her performance was not at an acceptable standard and that she (Dr. Pruitt) would be recommending that the superintendent terminate her employment. Sch. Bd. Ex. 12. Respondent contends that the IAP Manual was violated because Dr. Pruitt made her recommendation without input from the team. But the team discussed the results of the process amongst themselves and with Mr. Moretti, who then conveyed his thoughts to Dr. Pruitt.

49. Dr. Pruitt's recommendation was accepted by the superintendent. On May 29, 2018, a Petition for Termination informed Respondent that the matter of her termination would be taken up by the School Board on June 26, 2018. As grounds for

termination, the Petition for Termination alleged that Respondent was incompetent within the meaning of section 1012.33, as further defined by Florida Administrative Code Rule 6A-5.056(3), and she failed to adequately perform her educational duties. Respondent has been suspended without pay since that date.

E. Other Procedural Objections Raised by Respondent

50. Beside the procedural issues addressed in the prior findings, Respondent contends that the School Board's failure to strictly follow the statute and IAP process resulted in "multiple errors" that render the process void. Notably, during the process itself, neither Respondent nor her union representative filed a grievance or otherwise contended that the teams had violated, misapplied, or misinterpreted any provision. And they have not complained that either school failed to provide adequate assistance to Respondent to correct the deficiencies.

51. Respondent points out that even though the Manual (but not the statute) provides that team meetings be held "biweekly," and the process be completed within 90 days, the Cypress Lake process began in September 2016 and ended in March 2017, while the Royal Palm process stretched out from October 2017 until April 2018. Also, meetings were staggered and not conducted on a biweekly basis.

52. Ms. Pruitt responded that the requirement for biweekly meetings and a 90-day probation period is only a guide, and the

primary goal of the process is to assist the employee, rather than meet hard and fast deadlines. She testified that many factors cause these requirements to be adjusted. For example, Respondent had "attendance issues" and was not available at all times, a disciplinary issue required that she be reassigned to a different department for several weeks, there are intervening school holidays and statewide testing, team members may be absent or tied up with other school duties, and there are days when formal observations cannot be conducted. The overall goal is to help the teacher, rather than forcing a meeting every two weeks and ending the process based on an arbitrary deadline, regardless of other circumstances. For the same reasons, a final evaluation cannot always be made within 14 days after the final meeting.

53. In the same vein, Respondent contends that the lengthy process, especially by the spring of 2018, wore her down to the point she gave up. But here the whole purpose of allowing the process to continue as it did was to give Respondent more assistance and time to show progress.

54. Respondent contends that no evidence was presented regarding the performance of the students during the IAP process, as required by section 1012.34(3). At the meeting on February 5, 2018, however, Language Live data reviewed by the team showed that Respondent's students were well below the district expectations of three activities and 100 minutes per week online.

Formal observations reflected also that "numerous" students did not log into Language Live, which tracks data to measure a student's progress. Ms. Allbritten testified that Respondent's failure to use the program had a "detrimental effect" on her students who were transitioning back into general education classes. Finally, at the last Royal Palm meeting, it was noted that the students simply were not receiving "instruction."

55. Respondent contends she was never fully informed at the outset regarding which performance areas would be reviewed, and they changed throughout the Royal Palm IAP process leaving her to chase a moving target. The only mention of this concern was at the February 26, 2018, meeting, when her union representative, Dr. Fazzone, asked what the goals of the team were, the initial reason for the IAP, and the plan of action that was given to the team at the beginning of the process. In response to those questions, Ms. Freeman reviewed again the process and the expectations with the team and reaffirmed that these were exactly what the team was doing. At no other time during the year did Respondent or her representative raise the issue. The accepted testimony of School Board witnesses confirms that Respondent was apprised of performance issues at every step in the process.

56. Admittedly, there were minor deviations from the Manual. However, the two teams substantially conformed to the process. To the extent there were deviations, they did not

affect the overriding goal of making Respondent a better teacher and correcting the performance deficiencies noted by the evaluators. While Respondent suggests otherwise, the overwhelming evidence shows that both schools devoted extensive manpower and resources in an effort to make her successful.

CONCLUSIONS OF LAW

57. Respondent is a classroom teacher and her employment with the School Board is governed by an instructional staff contract. §§ 1012.01(2)(a) and 1012.33, Fla. Stat. The terms of her employment also are governed by the TALC Agreement.

58. A teacher with a professional service contract "can only be terminated for just cause pursuant to section 1012.33, Florida Statutes, or based upon uncorrected performance deficiencies pursuant to section 1012.34, Florida Statutes." Orange Cnty. Sch. Bd. v. Rachman, 87 So. 3d 48, 49 n.1 (Fla. 5th DCA 2012).

59. The School Board bears the burden of proving by a preponderance of the evidence that it has just cause to terminate Respondent for the reasons alleged in the Petition for Termination. Cropsey v. Sch. Bd. of Manatee Cnty., 19 So. 3d 351, 355 (Fla. 2d DCA 2009).

60. Pursuant to section 1012.33(1) and (6)(a), the School Board may dismiss Respondent during the term of her employment contract only for "just cause."

61. Pursuant to section 1001.02(1), the State Board of Education has adopted rule 6A-5.056 setting forth instances of "just cause" to suspend or dismiss specified school personnel. The rule defines "just cause" as "cause that is legally sufficient" and provides the following relevant definition:

"Just cause" means cause that is legally sufficient. Each of the charges upon which just cause for a dismissal action against specified school personnel may be pursued is set forth in section 1012.33 and 1012.335, F.S. In fulfillment of these laws, the basis for each such charge is hereby defined:

* * *

(3) "Incompetency" means the inability, failure or lack of fitness to discharge the required duty as a result of inefficiency or incapacity.

(a) "Inefficiency" means one or more of the following:

1. Failure to perform duties prescribed by law;
2. Failure to communicate appropriately with and relate to students;
3. Failure to communicate appropriately with and relate to colleagues, administrators, subordinates, or parents;
4. Disorganization of his or her classroom to such an extent that the health, safety or welfare of the students is diminished; or
5. Excessive absences or tardiness.

(b) "Incapacity" means one or more of the following:

1. Lack of emotional stability;
2. Lack of adequate physical ability;
3. Lack of general educational background;
or
4. Lack of adequate command of his or her area of specialization.

62. Based on the foregoing findings of fact, it is concluded that just cause exists to terminate Respondent as a teacher on the ground she is incompetent, that is, she failed to discharge her duties as a teacher because of inefficiency. The primary duty of a teacher is to work diligently and faithfully to help students meet or exceed annual learning goals, to meet state and local achievement requirements, and in this case, to master the skills required to transition from ESE to general education classes. § 1012.53(1), Fla. Stat. The evidence here establishes that Respondent was unable to help her students meet learning goals due to inefficiency. This was caused in part by a failure to communicate and relate to students, and a failure to communicate appropriately with and relate to colleagues, administrators, and parents. Despite the School Board's best efforts during school years 2016-2017 and 2017-2018, there was no marked improvement of her teaching skills. Her performance as a teacher continued to be deficient, thus justifying the termination of her employment by the School Board.

RECOMMENDATION

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

RECOMMENDED that the Lee County School Board enter a final order terminating Respondent's employment as a teacher.

DONE AND ENTERED this 22nd day of March, 2019, in Tallahassee, Leon County, Florida.



D. R. ALEXANDER
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
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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.